GUIDE TO THE *FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) ACT 2023* (Cth)

Australian Industry Group Guide for AFRA

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1. INTRODUCTION

On 4 September 2023, the Australian Government introduced the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Closing Loopholes Bill**) into Parliament.

A surprise deal was reached in the Senate on 7 December 2023 which resulted in the Bill being effectively split and a pared down version of the Closing Loopholes Bill being passed by the Parliament later that day. This became the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* received Royal Assent on 14 December 2023 (**Closing Loopholes Act**).

The provisions that were not included in Bill which passed were moved to the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (**Closing Loopholes No.2 Bill**). Following a Senate Inquiry a range of amendments were proposed by the Government, the cross-bench (including the right to the Greens' right to disconnect proposal) and the Opposition. On 12 February 2024 the Closing Loopholes No.2 Bill was passed by both Houses of Parliament. Information about the Bill can be accessed here. AFRA members will be provided with a detailed guide to the Closing Loopholes No.2 Bill shortly.

On 20 December 2023, Justice Hatcher issued a statement setting out how the Fair Work Commission (**FWC**) will implement changes to its functions arising from the Closing Loopholes Act. Relevantly, Justice Hatcher indicated the FWC's commitment to engaging with stakeholders, including Peak Councils such as Ai Group, regarding the implementation of the changes, and we expect to be heavily involved.

What is covered in this Guide?

The Executive Summary (section 2) of this Guide provides a high-level outline of the changes introduced by the Closing Loopholes. Such changes are explained in further detail in the body of the Guide (sections 3 to 9).

The final section of this Guide sets out the commencement dates for each area of legislative change. The commencement date for many of the key provisions is 15 December 2023.

2. EXECUTIVE SUMMARY

Small business redundancy exemption in winding up scenarios

The Closing Loopholes Act alters the small business redundancy exemptions in the FW Act in the context of winding up scenarios.

This change removes the exemption in certain circumstances where a business becomes a small business through a downsizing process in connection with insolvency. This is intended to avoid employees losing their entitlement to statutory redundancy under the National Employment Standards (**NES**) contained in the FW Act.

Further information is here.

"Closing the Labour Hire Loophole" - regulated labour hire arrangement orders

The Closing Loopholes Act empowers the FWC to make a 'regulated labour hire arrangement order' upon application by an eligible person (which can include a union or employee). If such an order comes into force and covers an employer or employers who supply labour to a host business, it triggers the application of new legislative provisions directed at ensuring the employees of such 'labour hire' employers are not being paid less than the amount that a host's directly employed staff would be entitled to receive under the host's enterprise agreement.

However, the FWC is prohibited from making a 'regulated labour hire arrangement order' unless it is satisfied the performance of work is not or will not be for the provision of a service, rather than the supply of labour, having regard to specified matters. This is intended to address industry concern that the new legislative scheme could interfere with contracting arrangements beyond the provision of traditional labour hire services.

The FWC must not make the order if it is satisfied that it is not 'fair and reasonable' to make it. There are various matters that the FWC must take into account in making such an assessment if a party addresses them in their submissions. In practical terms, this will place the onus on a party opposing an application for an order to make submissions against it to the FWC.

If the FWC makes a regulated labour hire arrangement order, the covered labour hire provider must essentially pay its employees no less than what they would be entitled to be paid under the host business's enterprise agreement if the host directly employed the employee. The amount they must be paid in connection with work is the 'protected rate of pay'. The Closing Loopholes Act stipulates how this must be calculated in some contexts. The employer must continue to comply with applicable fair work instruments (such as any applicable award or enterprise agreement) but must top up any remuneration paid to an employee to ensure they receive the protected rate of pay.

The FWC may determine an 'alternative protected rate of pay' for a labour hire employee in certain circumstances. This will require the employer to pay such employees a minimum rate based on an alternative employment instrument

A regulated host will also be subject to obligations. Notably, if the labour hire provider requests it, a host business must provide it with information to assist it in calculating its payment obligations under an order. A regulated host also has obligations to notify labour hire providers covered by an order if it becomes subject to a new employment instrument (typically a new enterprise agreement) as this instrument will be the reference point for the calculation of the protected rate of pay.

There are also mechanisms in place to provide for a regulated labour hire arrangement order covering a host employer and labour hire provider to be extended to include other labour hire employers that may be engaged by a host to supply labour to perform the same kind of work. This includes a requirement to make an application to the FWC seeking an extension of the order to cover a new labour hire employer that it engages in relation to such work. A host that is covered by a regulated labour hire arrangement order and implements a tender process relating to the potential engagement of a new labour hire provider must advise all prospective tenderers about the potential that they may become covered by any relevant order that is in place and other related matters.

There are exemptions to the requirement to pay the protected rate of pay, including where a labour hire employee is engaged for a short-term period (i.e., usually three months) or where a training arrangement applies to the employee. If the host is a small business employer, it is not covered by this new regime.

Anti-avoidance provisions prevent businesses from setting up commercial and other arrangements which are intended to avoid these obligations. The anti-avoidance provisions apply from the date the Bill was introduced **(4 September 2023).**

The FWC may resolve disputes, including by mandatory arbitration. For example, where there is a dispute over how to calculate the protected rate of pay, the FWC may make an arbitrated protected rate of pay order.

Further information is here.

Wage theft

The Closing Loopholes Act introduces a new criminal offence for wage theft (including 'related offence provisions' that deal with ancillary liability') which applies to intentional conduct.

It provides for safe harbour measures and requires the Fair Work Ombudsman (**FWO**) to publish a compliance and enforcement policy and guidelines on circumstances when the FWO will accept (or not accept) undertakings. The Minister must declare a Voluntary Small Business Wage Compliance Code before the criminal offence can commence.

Further information is here.

Workplace delegates' rights

Workplace delegates (i.e. union delegates) are provided with a right to represent the industrial interests of their union's members, or eligible members, who work in a particular enterprise.

Delegates are also provided a right to communicate with such workers in relation to their industrial interests and a right to reasonable access to the workplace and workplace facilities. Delegates employed by businesses which are not small business employers, are also entitled to reasonable access to paid time during normal work hours for related training.

There are also new protections for workplace delegates that prohibit employers from unreasonably refusing to dealing with them; misleading them or unreasonably interfering with the delegate's exercise of their rights.

Workplace delegate rights for regulated workers (i.e., employee-like workers and workers in the road transport industry) are dealt with in the Closing Loopholes No.2 Bill which has not yet passed.

The FWC must vary modern awards to include a delegates' rights term from 1 July 2024. A delegates' rights term will also be required to be included in enterprise agreements approved by vote after 1 July 2024.

Further information is here.

Family and domestic violence discrimination

The Government has created a new protected attribute under the FW Act to protect employees who have been or continue to be subjected to family and domestic violence (**FDV**), from discrimination in the workplace.

This means an employer must not take adverse action against an employee or prospective employee on that basis. Section 772 of the FW Act has also been amended to clarify that it is unlawful to terminate an employee's employment because of subjection to family and domestic violence.

Modern awards and enterprise agreements must not contain terms which discriminate against employees because of (or for reasons including) this new FDV protected attribute.

Further information is here.

Amendments relating to mediation and conciliation conferences for protected action ballot orders

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**) introduced a new requirement that when making a protected action ballot order (**PABO**), the FWC must also make an order directing the bargaining representatives for the agreement to attend a compulsory conciliation/mediation conference on or before the day on which voting in the protected action ballot closes.

The Closing Loopholes Act has clarified that it is only the bargaining representative(s) who applied for the PAB order who must now attend the conciliation conference for the subsequent employee claim action to be protected. Although all bargaining representatives will still be required to attend the conference, non-compliance with the attendance requirement by non-applicant bargaining representatives will not affect whether any subsequent industrial action authorised by the PABO is protected industrial action.

Further information is here.

Right of entry changes

The Closing Loopholes Act amends the right of entry framework in the FW Act when union officials enter a workplace to assist a health and safety representative (**HSR**) to perform a function under s.68(2)(g) of the *Work Health and Safety Act 2011* (Cth) and state and territory equivalents. Under the new legislative scheme, the right of entry framework is amended so that union officials are not required to hold an entry permit under the FW Act when they seek to enter the workplace on this basis, among other changes.

Further information is here.

WHS, workers compensation and silica-related diseases

In relation to employers covered by the Commonwealth *Work Health and Safety Act 2011* (**WHS Act**), the Closing Loopholes Act introduced a new offence of industrial manslaughter and aligned the offence framework with recent changes to the model WHS laws.

The Closing Loopholes Act also introduced a presumption that a diagnosis of post-traumatic stress disorder is work-related for first responders covered by the Commonwealth *Safety, Rehabilitation and Compensation Act 1988*.

In addition, the functions of the Asbestos Safety and Eradication Agency were extended to address silica-related diseases.

Further information is here.

Proposed commencement dates

Some of the changes commence on 15 December 2023, the day after Royal Assent. Different commencement dates apply in relation to other aspects of the Bill, including the wage theft provisions and discrete aspects of the Closing the Labour Hire Loopholes provisions.

Further information is here.

DETAILED EXPLATION OF THE CHANGES

3. SMALL BUSINESS REDUNDANCY EXEMPTION IN WINDING UP SCENARIOS

Previous eligibility for exemption

The FW Act generally excludes small business employers (i.e., employers with fewer than 15 employees) from the requirement to pay redundancy pay under the NES.

Previously, an employer's eligibility to pay statutory redundancy pay under the NES was assessed immediately before the termination of the employee's employment or when they were given notice of the termination (whichever is earlier). If at that time an employer had fewer than 15 employees (i.e., it was a small business employer), it did not need to provide statutory redundancy pay.

The exemption previously applied in some circumstances where an employer progressively downsized from being a larger business to a small business employer before being wound up due to insolvency. Consequently, employees whose employment was ultimately terminated due to redundancy at the point that their employer had shrunk to employing fewer than 15 employees lost any entitlement to statutory redundancy pay under s.119 of the FW Act.

Changes made by the Closing Loopholes Act

The Closing Loopholes Act provides for an exception to the operation of the small business redundancy exemption in downsizing contexts but only in circumstances of employers that are bankrupt or in liquidation due to insolvency.

Specifically, it amended s.121 of the FW Act so that the statutory redundancy exemption for small business employers does not apply if:

- at the time the employee's employment terminates the employer is a small business employer; and
- the employer is bankrupt or in liquidation (except as a result of a members' voluntary winding up); and
- the employer is a small business because the employment of one or more employees was terminated; and
- the terminations occurred:
    - on or after the day that is six months before the employer became bankrupt or went into liquidation; or
    - if there was an insolvency practitioner for the employer on the business day before the employer became bankrupt or went into liquidation – on or after the day that is six months before the insolvency practitioner was appointed; or
    - if, before the last insolvency practitioner was appointed, other insolvency practitioners for the employer were appointed without any intervening business days between any of those appointments – on or after the day that is six months before the first of those insolvency practitioners was appointed; or

- due to the insolvency of the employer.

The exception only applies in the context of employees of employers that are bankrupt or in liquidation due to insolvency. It does not affect ongoing, solvent businesses.

If the small business is a partnership, each of the partners need to be bankrupt or in liquidation (as the case may be) for this carve-out to apply.

Consequential definitions have been included in s.12 of the FW Act, including "*Bankruptcy Act 1966*", "*bankruptcy trustee*", "*Corporations Act 2001*", "*insolvency practitioner*", "*liquidator*" and "*members*".

Commencement

See here for commencement dates.

To go back to this section in the Executive Summary, click here.

4. "CLOSING THE LABOUR HIRE LOOPHOLE" - REGULATED LABOUR HIRE ARRANGEMENT ORDERS

Overview of the 'closing the labour hire loophole' provisions

The Closing Loopholes Act adds new provisions to the FW Act which relate to various labour hire arrangements.

The new provisions are intended to provide access to a mechanism for ensuring that employees of a labour hire employer receive at least equal remuneration to that which directly employed employees of a host business (a regulated host) would receive under certain industrial instruments (primarily enterprise agreements). The changes give effect to the Government's policy objective of preventing bargained for wage rates in such agreements being undercut by the use of labour hire.

Most notably, the provisions enable the FWC to make orders, known as 'regulated labour hire arrangement orders' (**RLHA orders**). Once a RLHA order is in force, employers that supply labour to a regulated host and are covered by the order would generally be required to ensure that employees working as part of the arrangement are paid no less than the rate at which they would be paid under the hosts enterprise agreement if they were directly employed by the host.

RLHA orders can be made on application by various parties. There is a capacity for such applications to be opposed and the FWC will not be permitted to make RLHA orders if satisfied that it would not be fair and reasonable to do so. The FWC will also not be permitted to make a RLHA order if the work undertaken for the host is or will be for the provision of a service, rather than the supply of labour. This is intended to address widespread concern that the new provisions would disturb contracting arrangements well beyond traditional labour hire. The RLHA orders will also not be able to cover regulated hosts that are small business employers. There are also exemptions included in the legislative scheme related to short term arrangements and training arrangements.

There will be significant obligations imposed upon hosts that are covered by RLHA orders. These include obligations to provide information to a labour hire employer to enable the calculation of the protected rate of pay; obligations to potentially make an application to the FWC to extend the order to cover other labour hire employers that may be engaged to perform the same kind of work and additional notification requirements that will apply if they become subject to a new enterprise agreement or implement a tender process related to the engagement of other labour hire providers.

The FWC will also be given significant dispute resolution powers and there are anti-avoidance provisions that are already in place.

This part of guide explains these elements of the new provisions related to regulated labour hire arrangements in detail.

There are various defined terms relevant to these provisions that are referred to in the FW Act and this Guide, including 'host employment instrument', 'covered employment instrument', 'regulated employee' and 'regulated host'. These are set out in this part. For an explanation of these terms go here.

In his 20 December statement, Justice Hatcher indicated the FWC will commence a consultation process in the new year to develop guidelines in relation to the operation of the new Part 2-7A. Any such guidelines are required to be made by 1 November 2024.

Part A - FWC may make a regulated labour hire arrangement order

Who can apply for a regulated labour hire arrangement order?

Applicants

Applications for RLHA orders may be made by:

- a regulated employee;
- an employee of the regulated host;
- an industrial association that is entitled to represent the industrial interests of either of those classes of employees; or
- the regulated host.

What will the RLHA order specify?

A RLHA order **must** specify:

- The day the order comes into force, which must be;
    - if the order is made before 1 November 2024 – that day or a later day; or
    - otherwise – the day the order is made or a later day;
- The regulated host covered by the order;
- The employer covered by the order;

- The regulated employees covered by the order; and
- the host employment instrument covered by the order.

A RLHA order **may** specify when the order ceases to be in force.

When must the FWC make a RLHA order?

If an application is made, the FWC must make a RLHA order if it is satisfied of the following three matters:

1. **An employer supplies or will supply, either directly or indirectly, one or more employees of the employer to a regulated host; and**

   Note 1: This provides that the supply of employees to the regulated host can be the result of one or more agreements, and that those agreements can be between parties that are not the regulated host or the employer. This would recognise that RLHA orders can cover complex arrangements with multiple participating parties and agreements. Labour hire workers can be supplied directly from the employer to the regulated host or indirectly through multiple agreements and entities. Where the result of those agreements is that an employer provides employees to perform labour for the regulated host, the arrangement would satisfy the criterion.

   Note 2: The employer and the regulated host may be related bodies corporate. This would capture circumstances where, for example, a company is established to employ employees and provide them to a related body corporate host business under a labour hire arrangement where there is a covered employment instrument applying to the regulated host. However, where related bodies corporate with different branding do not provide labour to one another it would not be covered.

2. **A covered employment instrument that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind; and**

   Note 1: The new s.306D clarifies that "kinds of work" - includes work which is "substantially of that kind" so that it is not limited to a specific kind of work in a narrow sense.

   Note 2: The basis upon which the employees are employed is not relevant. For example, where employees are or would be employed as casual employees and the covered employment instrument that applies to the regulated host does not provide for casual employment but the instrument applies to work of the kind to be undertaken by the employees as part of the labour hire arrangement, a RLHA order may be made.

3. **The regulated host is not a small business employer**

   A small business employer is defined in s.23 of the FW Act as being a national system employer that employs fewer than 15 employees at a particular time.

   When calculating the number of employees at a particular time:

   - a casual employee is not counted unless, at that time, they are a regular casual employee of the employer; and
   - associated entities are taken to be part of the one entity.

When is the FWC prohibited from making a RLHA order?

An order cannot be made if the performance of work is for the provision of a service

The FWC must not make a RLHA order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters set out below:

- the involvement of the employer in matters relating to the performance of the work;
- the extent to which, in practice, the employer or a person acting on behalf of the employer directs, supervises or controls (or will direct, supervise or control) the regulated employees when they perform the work, including by managing rosters, assigning tasks or review the quality of the work;
- the extent to which the regulated employees use, or will use, systems, plant or structures of the employer to perform the work;
- the extent to which either the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees; and
- the extent to which the work is of a specialist or expert nature.

The FWC is required to consider each of these factors, but not all factors need to be satisfied in order for it to find that the arrangement is for the provision of a service. Rather, the FWC will consider the reality of the arrangement in each case before deciding as a jurisdictional question whether or not it can proceed to make a RLHA order.

The Revised Explanatory Memorandum clarifies that higher education qualifications would not be required for work to be considered specialist or expert in nature, and that specialist or expert work may also be established where the host's employment instrument provides for the performance of work of the type being supplied.

To the extent that any of the factors are established based on submissions and evidence, this would weigh in favour of making an order. If there are no relevant submissions or evidence about a particular factor, the FWC may note this as part of its consideration of this issue.

If the FWC is satisfied it is not fair and reasonable to make the RLHA order it must not be made

The FWC must not make a RLHA order if is satisfied it is not *'fair and reasonable*' having regard to a range of matters listed in the legislation. Such matters include pay arrangements, the performance of work, the history of industrial arrangements, the relationship between the regulated host and the employer, the terms and nature of the arrangement under which the work will be performed and any other matters considered relevant by the FWC.

It is important to appreciate that such matters will only be required to be considered if a party has made submissions about them.

The matters to potentially be considered by the Commission are summarised below.

Pay arrangements

The FWC will consider the pay arrangements that apply to employees of the regulated host (or related bodies corporate of the regulated host) and the regulated employees, including in relation to:

- whether the host employment instrument applies only to a particular class of employees, and whether there would be employees of that class performing work as part of the regulated labour hire arrangement; and
- whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employees; and
- the rate of pay that would apply if the order were made.

History of industrial arrangements

The FWC may consider the history of industrial arrangements applying to the regulated host and the employer.

Relationship between regulated host and the employer

The FWC may consider the relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture of common enterprise.

Whether the performance of work is or will be wholly or principally for the benefit a joint venture or common enterprise

If the performance of the work is or will be wholly or principally for the benefit of a joint venture or common enterprise engaged in by the regulated host and one or more other persons, the FWC may consider:

- the nature of the regulated host's interests in the joint venture or common enterprise; and
- the pay arrangements that apply to employees of any of the other persons engaged in the joint venture of common enterprise (or related bodies corporate of those other persons).

Terms and nature of the arrangement under which the work will be performed

The FWC may consider the terms and nature of the arrangement under which the work will be performed, including:

- the period for which the arrangement operates or will operate; and
- the location of the work being performed or to be performed under the arrangement; and
- the industry in which the regulated host and the employer operate; and
- the number of employees of the employer performing work, or who are to perform work, for the regulated host under the arrangement.

Any other matter

The FWC may consider any other matter it considers relevant.

To go back to the overview go here.

Adding other employers to an application

If an application for a RLHA order is made, the FWC may determine the application relates to one or more additional employers if it is satisfied the employer/s supply or will supply one

or more employees in the prescribed manner to perform work for the regulated host of the kind in relation to which the application was made.

The FWC may make this determination on its own initiative or on application by any of the following persons:

- the applicant for the order or any other person who could have applied for the order;
- an employer who supplies or will supply, either directly or indirectly, one or more employees to perform work for a regulated host or their employee/s; or
- a union entitled to represent the industrial interest of such employees.

The FWC will not make a determination adding another employer unless it is satisfied of the relevant criteria, including that it the performance of work of the additional regulated employees is not or will not be for the provision of a service.

The FWC must not add an employer or employee if it is satisfied it is not fair and reasonable in all the circumstances to do so, having regard to:

- the views (if any) of persons in the original application; and
- submissions to the extent they relate to the additional employer/employees.

If a determination is made, the order must state the RLHA order covers the relevant additional employees and additional regulated employees.

B. Obligations once a RLHA order is made

Employer must not pay less than protected rate of pay

An employer must pay the regulated employee no less than the protected rate of pay for the employee in connection with the work performed by the employee for the regulated host.

However, the employer does not contravene this requirement if the employer pays the regulated employee less than the protected rate of pay because:

- the regulated host provides information about the protected rate of pay in accordance with requirements of the Act; and
- the employer reasonably relies on the information for the purposes of working out the protected rate of pay of the regulated employee; and
- the information is incorrect.

The obligation to pay no less than the protected rate of pay requires employers to ensure that the total overall amount paid to the regulated employee is no less than the protected rate of pay. However, it does not:

- require a strict line-by-line comparison of entitlements;
- require the application of non-monetary entitlements from the host instrument to the regulated employees; or
- prevent the regulated employee being paid more than the protected rate of pay, if, for example, their employer's enterprise agreement is more generous than the host's agreement.

For example, if the full rate of pay that would have been payable to the regulated employee if they were directly employed by a host for a particular period is $1,000, the employer is only obliged to pay that employee at least $1,000.

A maximum civil penalty of 60 penalty units applies if the labour hire employer fails to pay the protected rate of pay (currently $93,900 for an individual and $469,500 for a corporation, as of 1 July 2023), and, for a serious contravention, 600 penalty units (currently $939,000 for an individual and $4,695,000 for a corporation, as at 1 July 2023).

According to the Explanatory Memorandum, the obligation to pay the protected rate of pay extends to periods of leave a regulated employee takes during a placement with a regulated host covered by a regulated labour hire arrangement order.'

What is the protected rate of pay?

The general requirement

The **protected rate of pay** for the regulated employee is the **full rate of pay** that would be payable to the employee if the host employment instrument covered by the RLHA order were to apply to the employee.

The 'full rate of pay' is defined in s.18 of the FW Act and includes incentive-based payments and bonuses, loadings, monetary allowances, overtime rates, penalty rates, and any other separately identifiable amount.

Special meaning in the context of some casual employees & pieceworkers

The Closing Loopholes Act provides for a special approach to be taken in relation to calculation of the protected rate of pay in the context of some casual employees and pieceworkers.

If the regulated employee is a **casual employee**, and there is no covered employment instrument (i.e. enterprise agreement) that applies to the regulated host and provides for work of the kind to be performed by casual employees, the protected rate of pay for the regulated employee:

- is the **full rate of pay** that would be payable to the regulated employee if:
    - the employee was an employee other than a casual employee and the host employment instrument covered by the RLHA order were to apply to the employee; and
    - the **base rate of pay** that would be payable to the employee were **increased by 25%**.

This addresses circumstances where a host's enterprise agreement does not provide for casual employment.

How do I calculate the protected rate of pay in the context of termination pay?

If a regulated employee's employment is, or is to be, terminated and the employee is or has been covered by a RLHA order then termination payments are calculated as set out below:

- Where an employee has only performed work for one regulated host during their employment, termination payments will be calculated with reference to the protected rate of pay if that rate is higher than what they would otherwise be paid.
- Where an employee has performed work for more than one regulated host, termination payments will be calculated with reference to the terms of the employer's enterprise agreement or other applicable employment instrument.
- However, where an employee is or will be covered by a RLHA order in force in relation to work performed by the employee for a regulated host, payment in lieu of notice will be payable at the protected rate of pay where that rate is higher than what the employee would otherwise be paid.

To go back to the overview go here.

Obligation to pay no less than protected rate of pay applies despite other fair work instruments.

The obligation to pay no less than the protected rate of pay applies despite any provision of:

- a fair work instrument (other than an instrument made by the FWC under new Part 2-7A which relates to RLHA orders) that applies in relation to the regulated employee; or
- a covered employment instrument (other than a fair work instrument) that applies in relation to the regulated employee; or
- the employee's contract of employment,

that provides for a rate of pay for the regulated employee that is less than the protected rate of pay for the regulated employee.

This means employers must ensure they continue to comply with these instruments.

What obligations does a regulated host have to provide information to enable calculation of the protected rate of pay?

The employer may request information

If an employer reasonably considers it does not have all the information it needs regarding the protected rate of pay for one or more covered regulated employees, it may request this information in writing from the regulated host.

For example, such information could include any of the following:

- documents, policies, emails or records detailing how a regulated host applies the terms of the host employment instrument to certain classes of employee (whether in practice, or in theory if the regulated host has not previously engaged employees under a certain classification);
- a copy of the host employment instrument that covers the class of work or class of employees covered by a RLHA order;
- information about how a regulated host calculates, or would calculate, certain entitlements under the relevant host employment instrument, or how it determines, or would determine, an employee's classification and rate of pay for certain work based on their previous level of experience; and

- the creation of documents that detail how the protected rate of pay should be calculated, if no documents to this effect were available, or if the relevant documents were considered commercially sensitive.

How quickly does the information need to be provided?

The regulated host must comply with the employer's request for information:

- as soon as reasonably practicable; and
- in any event, within such a period as would reasonably enable the employer to comply with its obligations to pay at least the protected rate of pay.

What is the maximum civil penalty amount?

60 penalty units, or 600 penalty units for a serious contravention.

Are there exceptions to the requirement to pay a protected rate of pay?

Training arrangements

The requirement to pay a protected rate of pay does not apply to a regulated employee if a **training arrangement** (i.e. a formal apprenticeship or traineeship) applies to the employee in respect of the work performed for the regulated host

Short-term arrangements

Short-term arrangements are excepted from the requirement to pay a protected rate of pay to a regulated employee if:

- the FWC has not determined that no exemption period applies to the employee in respect of the work performed for the regulated host is in force; and
- the employee performs, or is to perform, the work for the regulated host during:
    - a period of no longer than **three months**; or
    - if an exemption period applies, a period no longer than the **specified period** (i.e., which may be greater or less than three months);
    - if work commences during a recurring extended exemption for work of the kind performed by the employee for the regulated host – a period of no longer than the remainder of the extended exemption period, or a period of no longer than three months, whichever ends later.

However, if the regulated employee does in fact perform the work for longer than the applicable maximum period, as a result of a variation to the making of one or more agreements under which the employee is engaged to work, the obligation to pay the protected rate of pay applies to the regulated employee on and after the day the agreements are varied or made.

The FWC may change exemption periods for short-term arrangements

The following persons may apply to the FWC for a determination which alters an exemption period for a short-term arrangement:

- the regulated host, the employer or a regulated employee of the employer who is performing or is to perform work for the regulated host; or
- the regulated host, the employer or a regulated employee of the employer who is performing or is to perform work for the regulated host; or
- any industrial association entitled to represent the interests of any of those persons.

The FWC may **alter** exemption periods for short-term arrangements by determining:

- there is no exemption period;
- a specified period of less than three months is the exemption period; or
- a specified period of more than three months is the exemption period.

It may do this if:

- a RLHA order is **in force** that covers a regulated host, an employer and one or more regulated employees performing work for the regulated host; or
- a RLHA order has been made but is **not yet in force** that covers a regulated host, an employer and one or more regulated employees performing work for the regulated host; or
- an application for a RLHA order that would cover a regulated host, an employer and one or more regulated employees performing work for the regulated host has been made to the FWC under s.306E but has **not been finally determined**.

Recurring extended exemption periods

The FWC may determine a **recurring** extended exemption period if:

- a RLHA order is **in force** that covers a regulated host, an employer and one or more regulated employees performing work for the regulated host; or
- a RLHA order has been made but is **not yet in force** that covers a regulated host, an employer and one or more regulated employees performing work for the regulated host; or

  an application for a RLHA order that would cover a regulated host, an employer and one or more regulated employees performing work for the regulated host has been made to the FWC under s.306E but has **not been finally determined**.

A recurring extended exemption period may be more than three months and may start on a specified day of the year in specified consecutive years for the regulated host in relation to a specified kind of work to which the RLHA order relates. For example, this could enable the Commission to grant an extended exemption that covers a particular seasonal surge that reoccurs every year.

The FWC must decide whether or not to make the determination as quickly as possible after the application is made.

Before deciding, the FWC must seek the views of any person or industrial association who, apart from the applicant, could have applied for the determination.

The FWC may make the determination only if satisfied that there are exceptional circumstances that justify making it, having regard to:

- whether the purpose of the proposed exemption period of the recurring extended exemption period relates to satisfying seasonal or short-term need for workers;

- the industry in which the work is performed or is to be performed;
- the circumstances of the regulated host and the employer;
- the views (if any) of persons or industrial associations entitled to represent the interests of any of those persons;
- for a determination made for a recurring exemption period – the principle that the longer the period to be specified in the determination, the greater the justification required;
- for a determination that a period is a recurring extended exemption period for a regulated host for a kind of work – the principle that the longer the period to be specified in the determination, the greater the justification required; and
- and any other matter the FWC considers relevant.

The determination comes into force on the later of the day the RLHA order comes into force, and the following:

- for a determination altering exemption periods for short-term arrangements, that there is no exemption period – the day it is made;
- for a determination altering exemption periods for short-term arrangements that there is an exemption period of more than, or less than, three months – the day it is made or on a later day specified in the determination;
- for a determination dealing with recurring extended exemption periods – the day it is made or on a later day specified in the determination.

Alternative protected rate of pay orders

If an application is made, the FWC may determine an alternative protected rate of pay for an employee supplied to work for a host employer by making an alternative protected rate of pay order. Such orders can be made where there is a RLHA order made, in force or not yet finally determined and the FWC is satisfied that it would be unreasonable for the employer to pay the employee the protected rate of pay and there is an alternate employment instrument that applies to the host employer or a related body corporate of the host employer. The alternate protected rate of pay order can essentially require payment at the rate of pay calculated by reference to the alternate instrument.

When can an application for an alternative protected rate of pay order be made?

An application for an alternative protected rate of pay order may be made if:

- a RLHA order is **in force** that covers a regulated host, an employer and a regulated employee performing work for the regulated host; or
- a RLHA order has been made but is **not yet in force** that covers a regulated host, an employer and a regulated employee performing work for the regulated host; or
- an application for a RLHA order that would cover a regulated host, an employer and a regulated employee performing work for the regulated host has been made to the FWC under s.306E but has **not been finally determined**.

Who may apply?

The FWC may make an alternative protected rate of pay order only on application by the employee, the employer, the regulated host or an industrial association entitled to represent the interests of any of those persons.

What does the order specify?

The FWC may make an alternative protected rate of pay order which specifies:

- how the 'rate of pay' at which the employer must pay the regulated employee in connection with the work is to be worked out; and
- that the employer must pay the rate worked out in that way to the regulated employee in connection with the work.

What is the rate of pay?

The 'rate of pay' must be the protected rate of pay for the regulated employee that would apply if, under the RLHA order, the references to the host employment instrument covered by that order were instead references to a specified covered employment instrument (i.e., the alternative instrument) that:

- applies to a related body corporate of the regulated host and would apply to a person employed by the related body corporate to perform work of that kind; or
- applies to the regulated host and would apply to a person employed by the regulated host to perform work of that kind in circumstances that do not apply in relation to the employee.

How long does the FWC have to make the alternative protected rate of pay order?

The FWC must decide whether or not to make the order as quickly as possible after the application is made.

What criteria are considered?

The FWC must not make alternative protected rate of pay orders unless it is satisfied that:

- it would be unreasonable for the requirement in s.306F that the employer pay the regulated employee at no less than the protected rate of pay, to apply in connection with that work (including, for example, because the rate would be insufficient or excessive); and
- there is a covered employment instrument of required kind.

Before deciding whether to make an alternative protected rate of pay order, the FWC must seek the views of:

- the employer;
- the regulated host;
- the employer to which the alternative covered employment instrument applies (if not the regulated host);
- the employee;

- the employees to whom the alternative covered employment instrument to be specified in the order applies; and
- industrial associations entitled to represent the industrial interests of any of these persons.

In deciding whether to make the order, the FWC must have regard to:

- whether the host employment instrument covered by the RLHA order applies only to a particular class or group of employees; and
- whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employee; and
- the views (if any) of the employer, regulated host, employer to which the alternative covered employment instrument applies (if not the regulated host), the employee, employees to whom the alternative covered employment instrument to be specified in the order applies and any industrial organisation entitled to represent the interests of any of these persons; and
- the rate of pay that would be payable to the regulated employee in connection with the work if the order were made; and
- any other matter the FWC considers relevant.

Exceptions for apprentices, trainees and short-term arrangements also apply to alternative protected rate of pay orders.

When the FWC makes an alternative protected rate of pay order, it must ensure that it applies the exceptions for apprentices, trainees and short-term arrangements in the same manner as for RLHA orders.

When does an alternative protected rate of pay order come into force?

If the order is made before the RLHA order to which it relates comes into force, the alternative protected rate of pay order will come into force on the same day the RLHA order comes into force, or on a later day as specified in the alternative protected rate of pay order. Otherwise, the alternative protected rate of pay order comes into force on the day it is made or the later day specified in the order.

What is the effect of an alternative protected rate of pay order if a RLHA order is in force already?

In circumstances where a RLHA order is already in force at the time the alternative protected rate of pay order is made, the alternative protected rate of pay order will apply to work performed only once the alternative protected rate of pay order comes into force.

That is, where there is a RLHA order already in force when an alternative protected rate of pay order is made, employers are not required to backpay regulated employees for work performed before the alternative protected rate of pay order came into force. Similarly, employers will not be entitled to recover money from employees for wages paid in respect of work undertaken under a RLHA order that is already in force when an alternative protected rate of pay order that contains a lower protected rate of pay is made.

What is the maximum civil penalty amount for a contravening an arbitrated protected rate of pay order?

60 penalty units or 600 penalty units if it is a serious contravention.

C. Operation of RLHA orders in the context of replacement enterprise agreements and engagement of new labour hire employers

What happens if the host has a new covered instrument (enterprise agreement)?

Where an employment instrument (including an enterprise agreement) of a regulated host is referred to as the covered employment instrument for the purposes of a RLHA order, and a new covered employment instrument is made that applies to the host and its employees, the RLHA order will be taken to refer to the new covered employment instrument from the time the new instrument starts to apply to the host's employees.

If the FWC approves an enterprise agreement that replaces a covered instrument listed in a RLHA order in these circumstances, the FWC must as soon as practicable after the approval give written notice to any employers covered by the RLHA order of the approval of the enterprise agreement and its effect in relation to the RLHA order. The FWC is also required to specify in the enterprise agreement approval decision that the RLHA order would apply in relation to the newly approved agreement.

What happens if there is a new labour hire employer engaged?

Where a RLHA order applying to a particular kind of work is in force (or has been made and is not in force) and one or more new employers begin supplying employees to the host to perform the same kind of work, if the new employers are not covered by the RLHA order, the host must apply to the FWC for an order to vary the RLHA order to cover the new employer and the relevant regulated employees. The host must make this application as soon as practicable after becoming aware of these circumstances.

On making the application, the regulated host must notify each new employer in writing of the following matters:

- that the variation application has been made; and
- in the interim, the new employer/s must comply with the RLHA order until the FWC makes a decision on the application.

The FWC must take all reasonable steps to make the decision before the new employees start performing work. The FWC must vary the RLHA order if the regulated host and new employer/s notify the FWC that they agree to making the variation to cover the new employer and its relevant regulated employees.

Otherwise, the FWC must vary the RLHA order to cover the new employer and relevant regulated employees if the FWC is satisfied the requisite matters for a RLHA order are met (as set out above). However, the FWC must not vary the RLHA order if either of the following circumstances apply:

- the FWC is satisfied that the performance of work by the relevant regulated employees is not, or will not be, for the provision of a service rather than the supply of labour having regard to the prescribed criteria (as set out above); or

- if submissions are made, the FWC is satisfied that it is not fair and reasonable to make the variation having regard to the prescribed matters raised in the submissions.

The variation order comes into force on a day specified in the order.

Notification requirements for hosts

Notifying of a new host enterprise agreement and / or company supplying labour

When a regulated host's employment instrument is superseded and replaced in the manner described above, they must notify the employer/s covered by the RLHA order in writing that the new employment instrument has been approved, and inform the employer/s of the effect of the new instrument.

Once a regulated host has applied to the FWC to vary an existing RLHA order to add a new employer or new employers, the host must also notify each new employer of the variation application and that they are required to comply with the RLHA order in the interim.

Notifying tenderers of a RLHA order

If a regulated host is covered by a RLHA order that is in force (or has been made but is not yet in force) and a tender process is conducted for a new supplier of labour by or on behalf of a regulated host, or for the purposes of a joint venture or common enterprise engaged in by the regulated host and one or more other persons, it must potentially comply with certain notice requirements.

First, if it could reasonably be expected that one or more employers would become covered by the RLHA order as a result of the tender process (i.e., because of a variation order), at the start of the tender process the regulated host must advise all prospective tenders in writing that if one or more are successful then:

- one or more employers could become covered by the RLHA order; and
- the employers could be required to pay the relevant employees the protected rate of pay for the performance of work in connection with the RLHA order.

Secondly, if the regulated host is required to apply to the FWC to vary the RLHA order in relation to one or more employers because of the tender process, the regulated host must, as soon as practicable after the tender process concludes, advise the successful tenderer or tenderers (whether or not they are the employers), in writing of the following matters:

- that the regulated host is required to make the application;
- that the RLHA order will apply for the interim period until a decision is made not to vary the RLHA order or an order is made to vary the order; and
- that if the RLHA order is varied, the employers will be required to pay the protected rate of pay in connection with the work.

To go back to the overview go here.

D. Anti-avoidance

Anti-avoidance provisions

The provisions set out an anti-avoidance framework which has retrospective application in relation to:

- conduct engaged in; or
- a scheme that is entered into, begun to be carried out or carried out,

on or after 4 September 2023.

A "**scheme**" means:

- any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; or
- any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

Schemes

A person is prohibited from entering into, beginning to carry out or carrying out a scheme for the sole or dominant purposes of:

- **preventing** the FWC from making a RLHA order in relation to any person and as a result of the scheme (or part of it), the FWC is prevented from making the order; or
- **avoiding** the application of a RLHA order that has been made (even if it is not in force) and as a result of that scheme (or part of it), a person avoids the application of the RLHA order.

The Explanatory Memorandum states these two prohibitions are intended to operate broadly to avoid the operation of the new provisions. Adopting certain corporate structures with the sole or dominant purpose of avoiding an existing RLHA order (or preventing one being made) is an example of a scheme which might contravene this. For example, adopting a structure which might limit the number of employees to whom the order would apply.

Short-term arrangements – engaging other employees

It is a contravention if an employer covered by a RLHA order:

- engages an employee on an exempted short-term arrangement so that they are not required to pay the protected rate of pay; and
- engages another person to perform the same, or substantially the same, work as that performed by the employee for the regulated host; and
- it could reasonably be concluded that the purpose, or one of the purposes, of engaging the other person is to achieve the result that the employer is not required to pay a regulated employee the protected rate of pay.

The Explanatory Memorandum says this is intended to prevent employers from engaging successive employees for less than three months (or another period determined by the FWC) in order to enliven the short-term arrangement exemption and avoid paying employees the protected rate of pay.

Short-term arrangements – entering into other labour hire arrangements

A regulated host covered by a regulated labour hire arrangement contravenes the legislation if:

- it is not required to pay the protected rate of pay to an employee on an exempted short-term arrangement; and
- it enters into an agreement that has the result that another person is to perform the same, or substantially the same, work as that performed by the regulated employee for the regulated host; and
- it could reasonably be concluded that the purpose, or one of the purposes, of engaging the other person is to achieve the result that the employer is not required to pay a regulated employee at the protected rate of pay.

Engaging independent contractors

It is a contravention if an employer covered by a regulated labour hire arrangement order:

- dismisses an employee who performs, or is to perform, work for a regulated host covered by an order; and
- engages another person as an independent contractor, under a contract for services, to perform that work, or work of that kind, for the regulated host; and
- the result of the employer dismissing the employee and engaging the independent contractor is that the employer is not required to pay a person the protected rate of pay; and
- it could reasonably be concluded that the employer dismissed the employee and engaged the independent contractor for the purpose, or purposes including the purpose, of achieving this result.

To go back to the overview, go here.

E. Fair Work Commission Disputes

What types of disputes can the FWC assist with?

If a RLHA order is made and in force (or made and not yet in force), the parties may seek to resolve disputes about the operation of new Part 2-7A.

For example, parties may have disputes about:

- what the protected rate of pay is and whether the regulated employee has been, or is being, paid less than the protected rate of pay; and
- how to calculate the protected rate of pay.

Dispute resolution process

The process for resolving a dispute requires certain steps.

First, the parties must attempt to resolve the dispute in the workplace by having discussions.

If workplace discussions do not resolve the disputes, a party to that dispute may then apply to the FWC to resolve the dispute.

The FWC may deal with the dispute as it considers appropriate, including mediation, conciliation, making a recommendation or expressing an opinion.

The FWC may also arbitrate the dispute if the dispute is not resolved in one of these ways.

Arbitrated protected rate of pay order

If the FWC arbitrates a dispute about how to calculate the protected rate of pay, it may make an arbitrated protected rate of pay order which determines:

- how the rate of pay at which the employer must pay the employee in connection with the work is to be worked out; and
- that the employer must pay the rate worked out in that way to the employee.

However, the FWC must not make an arbitrated protected rate of pay order unless the FWC considers it would be fair and reasonable to make an order.

When does an arbitrated protected rate of pay order apply?

If the parties have notified the FWC in writing that they agree to the FWC arbitrating the dispute, an arbitrated protected rate of pay order made in relation to the dispute may apply in relation to work performed at any time on or after the day the RLHA order comes into force.

If the parties have **not** notified the FWC that they agree to the FWC arbitrating the dispute, an arbitrated protected rate of pay order made in relation to the dispute may apply only in relation to work performed on or after:

- if the arbitrated protected rate of pay order is made before the RLHA order to which the order relates comes into force – the day the RLHA order comes into force; or
- otherwise – the day the arbitrated protected rate of pay order is made.

What is the effect of an arbitrated protected rate of pay order?

If the FWC makes an arbitrated protected rate of pay order in relation to the dispute, the order has effect despite a RLHA order in relation to the work performed during the period to which the order applies.

The exceptions for apprentices, trainees and short-term arrangements apply similarly to this type of order.

What is the maximum civil penalty amount for contravening an arbitrated protected rate of pay order?

If a party contravenes a term of an arbitrated protected rate of pay order, the maximum civil penalty is 60 penalty units or 600 penalty units if it is a serious contravention.

Representation

A party may appoint a person or organisation entitled to represent the industrial interests of the employer, employee or regulated host (as the case may be) to support or represent them for either of those purposes. This would include Ai Group.

A lawyer or paid agent must seek permission to appear before the FWC, except in the circumstances set out in s.596 of the FW Act.

Joinder

Procedural rules may provide for other employees to join a dispute in relation to which an employee has made an application to the FWC.

To go back to the overview go here.

F. Meaning of terms

Set out below are the definitions of some of the key terms referred to in the new provisions and the summary above.

Regulated host

A **regulated host** is:

- a constitutional corporation;
- the Commonwealth;
- a Commonwealth Authority;
- a person, so far as work is performed for the person in connection with constitutional trade or commerce, and the *work is of a kind* that would ordinarily be performed by a flight crew officer, a maritime employee or a waterside worker;
- a body corporate incorporated in a Territory;
- a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as *work is performed for the person* in connection with the activity carried on in the Territory; or
- a person, so far as *work is performed for the person* in connection with the activity carried on in the Territory.

In the definition for a "regulated host":

- "**kinds of work**" - includes work which is "substantially of that kind" so that it is not limited to a specific kind of work; and
- "**work performed for the person**" - includes work performed wholly or principally for the benefit of the person or an enterprise carried on by the person, irrespective of whether there is or will be any agreement between the person and the employer relating to the performance of work. For example, it is not a requirement there be a direct agreement (or any agreement) between the party receiving the benefit of the work, and the employer employing workers to perform the work.

Regulated employee

A **regulated employee** is a national system employee whom an employer supplies or will supply, either directly or indirectly, to a regulated host.

Anti-avoidance provisions have been included (see below).

Host employment instrument

A **host employment instrument** is a covered employment instrument that applies to the regulated host and which would apply to the employees if the regulated host were to employ the employees to perform work of that kind (or substantially of that kind).

A **covered employment instrument** is:

- an enterprise agreement;
- a workplace determination;
- a determination under s.24 of the *Public Service Act 1999* (Cth) that applies to a class of APS employees in an Agency (within the meaning of that Act);
- an instrument made under any other law of the Commonwealth (other than this Act), or of a State or Territory, that provides for the terms and conditions of employment for a class of national system employees of the Commonwealth or a State or Territory or an authority of the Commonwealth or of a State or Territory; or
- any other instrument relating to the employment of a class of national system employee that is made under a law of the Commonwealth (other than this Act) or a State or Territory and is prescribed by the regulations.

If a host's employment instrument covered by the order is superseded and replaced by a new covered employment instrument, that new instrument is automatically taken to be the relevant instrument for the purposes of the order. When this occurs the regulated host must provide written notice to the employer/s covered by the regulated labour hire arrangement order that the new employment instrument has been approved and inform the employer/s of the effect of the new instrument.

The FWC, on approving an enterprise agreement that will replace a covered employment instrument listed in a RLHA order, must:

- inform the employers covered by the order that the enterprise agreement has been approved and the effect of the approval of the enterprise agreement in relation to the order; and
- specify in its approval decision that the RLHA order would apply in relation to the newly approved enterprise agreement.

To go back to the overview go here.

Commencement

See here for commencement dates.

To go back to this section in the Executive Summary, click here.

5. WORKPLACE DELEGATES' RIGHTS

The Closing Loopholes Act introduced new workplace rights and protections for workplace delegates (i.e. union delegates) who are employees and are appointed or elected under the rules of their employee organisation to represent members in a particular enterprise.

Who is a workplace delegate?

The FW Act now defines a 'workplace delegate' as:

> *"a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or a representative (however described) for members of the organisation who work in a particular enterprise*."

Modern awards, new enterprise agreements and new workplace determinations must include a delegates' rights term

Modern awards

From 1 July 2024 modern awards will be required to include a delegates' rights term, which provides for workplace delegates to be able to exercise their rights. Information about the scope of workplace delegates' rights is set out in further detail below. The transitional provisions of the Closing Loopholes Act state that the FWC must vary existing modern awards to insert such a term so it has effect from 1 July 2024. In his 20 December 2023 statement, Justice Hatcher indicated the FWC will issue a statement about a consultation process to create the delegates' rights terms for awards in early January 2024. We expect to be heavily involved in this process.

Enterprise agreements

Enterprise agreements will also be required to include a delegates' rights term which is at least as favourable as the delegates' rights term of a modern award (or awards) that cover the workplace delegates. However, this requirement only applies to enterprise agreements approved in a vote of employees on or after 1 July 2024.

If an enterprise agreement contains a delegates' rights term which the FWC determines is less favourable than the delegates' rights term included in a modern award(s) that cover the workplace delegates, the term will have no effect and the relevant modern award term will instead be taken to be a term of the agreement. This would also be noted in the FWC's approval decision. If the workplace delegates are covered by multiple modern awards, the FWC will determine the most favourable delegates' rights term for the purposes of its assessment. When a term of a modern award is included in an enterprise agreement it is taken to be the term at that point in time and does not change if the delegates' rights term is later varied in the relevant modern award.

Workplace determinations

The FWC must include a delegates' rights term for workplace delegates to whom a workplace determination applies in any workplace determination made on or after 1 July 2024. The term must not be less favourable than a delegates' rights term in any modern award that covers the workplace delegate.

New general protection specific to workplace delegates

The FW Act already provides protections against adverse action taken on the basis of certain industrial activities.

The Closing Loopholes Act introduced further protections which 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; or
- unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.

The protections only apply in relation to the workplace delegate acting in that capacity. The Explanatory Memorandum says that this means employers will still be able to undertake reasonable management action, carried out in a lawful way.

The burden of proving whether the conduct is not unreasonable lies on the employer. This means if a workplace delegate establishes that an employer failed or refused to deal with them, or hindered, obstructed or prevented the exercise of their rights, the burden would be shifted to an employer to demonstrate the reasonableness of their acts or omissions.

These protections do not apply in respect of any conduct required by or under a law of the Commonwealth or a State or a Territory. For example, action taken under relevant work health and safety legislation, to ensure the health and safety of workers while at work.

What rights do workplace delegates have?

The Closing Loopholes Act also sets out the rights of workplace delegates. A workplace delegate is entitled to represent the industrial interests of members and any other persons who are eligible to be members, including in disputes with their employer. This creates an enforceable right for an employee who is a delegate to undertake such activities. However, it does not require or place an obligation on an employee to accept representation from a workplace delegate.

This right to representation is facilitated by the workplace delegate 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 facilities** where the enterprise is being carried on; and
- **reasonable access to paid time**, during normal working hours for the purposes of related training (except for small business employers).

The Closing Loopholes Act requires that when determining what is ‘reasonable’ regard must be had to the size and nature of the relevant enterprise, the resources of the employer and the facilities available at the relevant enterprise.

Where an employer complies with a delegates’ rights term in a fair work instrument (such as an award or enterprise agreement), the employer is taken to have afforded the workplace delegate the rights to communication, access and paid time to attend training set out above. Consequently, such instruments may ultimately provide greater detail or prescription as to an employer’s obligations.

Commencement and transition

See here for commencement dates.

To go back to the section in the Executive Summary, click here.

6. FAMILY AND DOMESTIC VIOLENCE DISCRIMINATION

Under the FW Act, discrimination is unlawful if it relates to certain protected attributes.

Family and domestic violence (**FDV**) is a protected attribute under some State and Territory discrimination laws but not under the FW Act, nor is it specifically singled out under other Commonwealth anti-discrimination laws.

The Closing Loopholes Act has added "subjection to family and domestic violence" as a protected attribute to the following range of protections against discriminatory conduct:

- discriminatory terms in modern awards and enterprise agreements;
- prohibitions on an employer taking discriminatory adverse action against current or prospective employees because of their protected attribute (i.e. subjection to FDV); and
- prohibiting an employer from terminating an employee's employment because of certain protected reasons.

The new protected attribute is also now required to be taken into account by the FWC when performing its functions or exercising powers. Specifically the FWC is required to take into account the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of subjection to family and domestic violence.

The provisions do not apply to perpetrators of FDV.

Commencement

See here for the commencement dates.

To go back to this section in the Executive Summary, click here.

7. WAGE THEFT

What is wage theft?

Wage theft is a term used by certain unions and the media to describe the underpayment by an employer of an amount which was due to an employee in relation to the performance of work.

While the term is often used more broadly to include unintentional underpayment of employees, the criminalisation of wage theft is not intended to punish employers who make genuine mistakes in calculating and paying their employees. At a state level, the wage theft concept requires an element of fault or dishonesty by the employer in respect of an underpayment of wages, rather than simply referring to all underpayments at large.

The Closing Loopholes Act introduces a new criminal offence for wage theft at the federal level, where a person intentionally engages in conduct resulting in failure to pay a required amount to an employee in full on or before the day when the required amount is due to payment. Certain underpayment amounts, which relate to the extended definitions of national system employee and national system employer are excluded from the regime.

The new offence is not intended to capture employers who inadvertently underpay staff – intentional conduct is defined to include where a person means to engage in the conduct.

Criminalising underpayments

Criminal offence - failing to pay certain amounts as required

An employer commits the new offence if the following elements can be established:

- the employer is required to pay a required amount to, on behalf of, or for the benefit of an employee under the FW Act, a fair work instrument or a transitional instrument; and
- the exception in s.327A(2) does not apply (more detail around the scope of this exception is set out below); and
- the employer engages in conduct (that is, it does an act or omits to perform an act); and
- the conduct (that act or omission) results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.

(**Wage Theft Offence**)

If an employer pays what the FW Act requires (subject to the deductions provisions in s.324), they will not contravene the new provisions. For example, if a modern award specifies a weekly base rate of $1,000 for a full-time employee, and the employer has been properly authorised by the employee to deduct $100 per week for parking fees (or salary sacrifice, etc.) then the 'required amount' would be $900.

There is a limited exception from the Wage Theft Offence which applies to particular payments to employees and employers who are only covered because they fall within the extended definition of national system employee / national system employer in the FW Act. These extended definitions include particular state law enforcement officers. The payments to such employees that are covered by the exception include superannuation payments, long service leave payments and certain paid leave including related to being a victim of crime and jury service leave.

What conduct is a Wage Theft Offence?

As above, the Wage Theft Offence is not intended to capture employers who inadvertently underpay staff.

In order for a Wage Theft Offence to be committed, the employer must have engaged in conduct and the conduct must result in the failure to pay the required amount (subject to any lawful authorised deductions) on or before the day it was due to be paid. The term 'engage in conduct' will be defined in s.12 of the FW Act to mean: '*do an act or omit to perform an act.*'

However, for there to be a Wage Theft Offence, the person must intend to bring about the result (that is, a failure to pay the required amount), or be aware that result will occur in the ordinary course of events. It will need to be proved, beyond reasonable doubt, that an employer intentionally engaged in the conduct (the act or omission) and the employer intended that the conduct would result in the failure to pay the required amount on or before the day when it was due for payment. A failure to make a payment, for example, due to a banking error would not be caught by the provision.

Underpayments or a failure to pay required amounts that are accidental, inadvertent or based on a genuine mistake will not be caught by the provision. For example, if an employer genuinely misclassifies an employee and pays them an hourly rate of $25 per hour instead of $30 per hour (for the correct classification), the resulting failure to pay the required amount ($30 per hour) was not intentional and would not be caught by the provision.

If, however, an employer paid an employee $10 per hour, knowing it was below the minimum wage, the resulting failure to pay the required amount (whatever it may be) would be intentional, and caught by the provision.

Exact knowledge of the required amount (to a dollars and cents value) would not be required to establish the offence.

In respect of determining an amount required to be paid, the provision is broadly expressed. It will apply to obvious underpayments where an employer has failed to pay an employee an amount owed under an enterprise agreement or an award. But it may also apply in other broader circumstances. This is because s.327 of the FW Act will also apply to determine whether there has been a failure to pay a required amount. For example, an employee may have been required to pay an amount of their wages back to their employer (or a person nominated by their employer) as 'cashback'. Section 327 of the FW Act would apply so that:

- anything given or provided by the employer contrary to s.323(1)(b) and s.323(3), for example a 'payment in kind', is taken never to have been given or provided to the employee; and

- any 'cashback' or other amount of the employee's money that the employee has been required to spend or pay to the employer where that is directly for the employer's benefit and where the requirement is unreasonable (in contravention of s.325(1) or in accordance with a term to which s.326(3) applies), is taken to be a deduction, from an amount payable to the employee made by the employer.

Any unlawful off-set or requirement to spend would also be treated as an underpayment for the purposes of the new Wage Theft Offence.

What are related offences which could bring about liability?

Similar to the accessorial liability provisions under s.550(1) of the FW Act which provide that a person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision, there are extensions of liability provisions that apply to ancillary offenders of Wage Theft Offences, which could implicate individual employees, officers and agents of employers.

There are various offences in the *Crimes Act 1914* and the *Criminal Code 1995* (**Criminal Code**) that will be taken to be a '*related offence*' under the FW Act (to the extent that they relate to a Wage Theft Offence).

A related offence will be committed by a person if they:

- assist the employer, who has, to their knowledge, committed the Wage Theft Offence, in order to enable them to escape punishment of the Wage Theft Offence (Accessory after the fact);

- attempt/s to commit the Wage Theft Offence (Attempt);

- Aids, abets, counsels or procures the commission of the Wage Theft Offence by the employer (Complicity and Common Purpose);

- enter into an agreement to commit the Wage Theft Offence with the employer and the Wage Theft Offence is committed in accordance with that agreement in certain circumstances (Joint Commission);

- have the relevant intention and procures the conduct of another person that would have constituted the Wage Theft Offence on the part of the procurer if the procurer had engaged in it (Commission by Proxy);

- urges the commission of the Wage Theft Offence (Incitement); and

- conspires with another person to commit the Criminal Offence (and it is as if the Criminal Offence has been committed) (Conspiracy).

For example, an employee or officer of an employer who creates false and misleading employee records or provides false and misleading pay slips to the FWO, may commit a related offence, where they have knowledge that the employer has committed a Wage Theft Offence and in circumstances where such records were created for the purposes/in order to enable the employer to avoid the detection or escape punishment of a Wage Theft Offence.

Corporate criminal responsibility

Section 793 of the FW Act currently provides that any conduct engaged in on behalf of a body corporate by an officer, employee, agent, or any other person with the authority or consent of the body corporate, is taken to have been engaged in also by the body corporate.

Section 793 of the FW Act further provides that Part 2.5 of Chapter 2 of the Criminal Code (which deals with corporate criminal responsibility) does not apply to an offence against the FW Act.

The Closing Loopholes Act amends s.793 of the FW Act so that Part 2.5 of Chapter 2 of the Criminal Code will apply in relation to a Wage Theft Offence and a related offence (but not for other offences against the FW Act), which imputes the actions and state of mind of officers to the body corporate itself.

A body corporate employer can be held liable for the conduct of its employees, agents or officers that amounts to a Wage Theft Offence and a related offence, in certain circumstances under Part 2.5 of Chapter 2 of the Criminal Code. This includes:

- if a physical element of the Wage Theft Offence (i.e., the conduct of failing to pay a required amount) is committed by an employee, agent or officer of an employer acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element is also attributed to the employer; and

- intention can be attributed to an employer that expressly, tacitly or impliedly authorised or permitted the commission of the Wage Theft Offence or related offence by an employee, agent or officer of a body corporate.

Privilege against self-incrimination in proceedings – Employee records and pay slips are admissible

The FW Act currently abrogates the common law privilege against self-incrimination in certain circumstances where the individual provides documents or information.

With some exceptions, s.713(2) and s.713A of the FW Act generally provide that if an individual produces a document or record in compliance with specified provisions, that record or document, and any evidence obtained as a direct or indirect consequence of inspecting that document or record, is not admissible as evidence against them in criminal proceedings.

The Closing Loopholes Act creates an exemption to the above immunities in relation to two classes of documents:

- an employee record required to be made and kept under s.535 of the FW Act; and
- a copy of a pay slip created in relation to an employee (see s.536 of the FW Act).

This means that employee records and copies of pay slips may be used in evidence against the person who produced the information.

The intention of these provisions is that employee records that are required to be kept under the FW Act or copies of payslips that are required to be issued under the FW Act should be able to be tendered as evidence before a court, including in criminal proceedings. These records are said to be central to being able to prove the Wage Theft Offence.

In other words, a prosecutor would not be prevented from tendering evidence of employee records or pay slips against an individual, just because they were produced by notice or other coercive process. Further, as the FWO will be undertaking criminal investigations, and these records will be central to being able to prove the Wage Theft Offence, providing immunity would mean the regulator is unable to properly discharge its function in respect of criminal underpayments, and impair Fair Work Inspectors' ability to effectively investigate potential breaches of the Wage Theft Offences.

Commencement of proceedings

Although the FWO will be responsible for investigating potential contraventions of Wage Theft Offence/s, criminal proceedings may only be commenced by the Commonwealth Director of Public Prosecutions (**CDPP**) or the Australian Federal Police (**AFP**).

Proceedings must be commenced within six years after the commission of the offence.

A Wage Theft Offence is an offence triable in the Federal Court (which is a rarity for criminal offences).

Punishment for conviction

A Wage Theft Offence or a related offence is punishable by imprisonment and / or a fine:

- If an **individual** is convicted of the offence, punishment is by a term of imprisonment of not more than 10 years or a fine of not more than the maximum fine.
- If a **body corporate** is convicted of an offence, punishment may be no more than the maximum fine.

In respect of the maximum fine, a sentencing court is enabled to impose a fine based on the underpayment amount.

Determining the maximum fine

If the court can determine the underpayment amount for the offence, the maximum fine for an **individual** is the greater of three times the underpayment amount and 5,000 penalty units ($1,565,000). If the Court cannot determine the underpayment amount, the maximum penalty is 5,000 penalty units ($1,565,000).

If the court can determine the underpayment amount, the maximum fine for a **body corporate** is the greater of three times the underpayment amount and 25,000 penalty units ($7,825,000). If the Court cannot determine the underpayment amount, the maximum penalty is 25,000 penalty units ($7,825,000).

The **underpayment amount** is the difference between:

- the required amount (i.e. the amount the employer was required to pay to the employee); and
- the amount (including a nil amount) the employer actually paid to, on behalf of, or for the benefit of, the employee on account of the required amount.

Penalty for courses of conduct

The Closing Loopholes Act establishes a '*course of conduct*' sentencing rule for the Wage Theft Offence, which is based on a similar rule provided for under s.557 of the FW Act which applies in the context of sentencing for contraventions of civil remedy provisions.

If a person is found guilty of committing two or more offences (the aggregated offences) and the aggregated offences arose out of one course of conduct, then the person is taken for sentencing purposes to have been found guilty of a single offence.

If multiple offences are grouped and penalised as a single offence under this course of conduct sentencing rule, then the corresponding underpayments are also aggregated (that is, added up together) for purposes of applying penalties based on the underpayment amount.

The Voluntary Small Business Wage Compliance Code

Declaration of a Voluntary Small Business Wage Compliance Code

The Minister can declare a Voluntary Small Business Wage Compliance Code (**Voluntary Code**). The wage theft provisions will not commence until the later of the Voluntary Code being declared and 1 January 2025. If no Voluntary Code is declared, some wage theft provisions in the Closing Loopholes Act will not commence at all. This is set out in further detail in the table at the end of this guide.

Compliance with the Voluntary Code is intended to provide assurance to small business employers (as defined by the Voluntary Code) that they will not be referred for criminal prosecution in relation to a failure to pay an amount to, on behalf of, or for the benefit of, an employee.

A similar approach has been taken for small business in relation to unfair dismissals with the Small Business Fair Dismissal Code, which applies to small businesses with fewer than 15 employees.

Effect of complying with the Voluntary Small Business Wage Compliance Code

If a Voluntary Code is declared and if a small business complies with it, it will influence the way the FWO approaches the Wage Theft Offence.

Where the FWO is satisfied the small business has complied with the Voluntary Code in relation to a failure to pay a required amount, the FWO must not:

- refer the conduct which resulted in the failure to the CDPP or the AFP for action in relation to a possible wage theft offence; or
- enter into a cooperation agreement with the employer that covers any conduct that resulted in the failure.

If a small business employer has underpaid an employee and wishes to seek assurance from the FWO under these provisions, the small business employer will need to satisfy the FWO that it has complied with the Voluntary Code in relation to that underpayment. For example, this could include providing evidence that the small business employer has rectified any systemic issue that contributed to underpaying affected employees, and that required payments have been made to those employees.

The FWO must give written notice to the small business employer of its decision as to whether it has complied (or not complied) with the Voluntary Code.

However, compliance with the Voluntary Code does not affect:

- the power of an inspector to commence or continue civil proceedings in relation to the conduct or
- the power of the FWO to accept an enforceable undertaking under s.715 of the FW Act in relation to the conduct; or
- the power of an inspector to give a compliance notice in relation to the conduct; or
- any other applicable power of function of the FWO or an inspector.

Cooperation Agreements

The Closing Loopholes Act establishes a framework in the FW Act for the making of cooperation agreements between the FWO and a person that has self-reported to the FWO the possible commission of a Wage Theft Offence or a related offence.

The cooperation agreement framework is intended to provide a person with the opportunity to access 'safe harbour' from potential criminal prosecution if they have engaged in conduct that amounts to the possible commission of a Wage Theft Offence or related offence and self-report their conduct to the FWO.

What is a cooperation agreement?

A cooperation agreement is a written agreement between a person and the FWO which covers specified conduct engaged in by that person which they have self-reported to the FWO.

The specified conduct is conduct that amounts to the possible commission of an offence, or at least the physical elements of an offence, against either or both of the following:

- a Wage Theft Offence (failing to pay the amounts as required);
- a related offence, to the extent that the offence created by the provision relates to a Wage Theft Offence.

Effect of cooperation agreement

While a cooperation agreement is in force between the FWO and a person, the FWO must not refer to conduct engaged in by the person that is covered by the agreement to the CDPP or the AFP for action in relation to a possible offence.

What will the FWO consider when deciding to enter into a cooperation agreement?

The FWO must have regard to these criteria when deciding to enter into a cooperation agreement:

- whether in the FWO's view the person has made a voluntary, frank and complete disclosure of the conduct and the nature and level of detail of the disclosure;
- whether in the FWO's view the person has cooperated with the FWO in relation to the conduct;
- the FWO's assessment of the person's commitment to continued cooperation in relation to the conduct including by way of providing the FWO with comprehensive information to enable the effectiveness of the person's actions and approach to remedying the effect of the conduct to be assessed;

- the nature and gravity of the conduct;
- the circumstances in which the conduct occurred;
- the person's history of compliance with the FW Act; and
- any other matters prescribed by the regulations.

The Closing Loopholes Act also provides that the *Fair Work Regulations 2009* may prescribe matters in relation to the content of cooperation agreements.

When is the cooperation agreement in force?

A cooperation agreement is in force:

- from the time it is entered into, or any later time specified in the agreement; and
- until the earliest of the following:
    - the FWO terminates the agreement;
    - the person withdraws from the agreement; or
    - the expiry date (if any) specified in the agreement.

When will a cooperation agreement be terminated?

The FWO may terminate a cooperation agreement with a person at any time by providing written notice to the person if the FWO is satisfied any of these grounds exist:

- the person has contravened a term of the agreement;
- the person has given the FWO or an inspector a false or misleading document or omits a matter or thing in provided information which makes the information false or misleading (whether provided before or since the cooperation agreement was in place); or
- another ground prescribed by the regulations.

Alternatively, if the FWO is satisfied it has a ground to terminate the agreement, it may apply to the Federal Court, the Federal Circuit and Family Court of Australia (Div 2) or an eligible State or Territory court for one of these orders:

- an order directing the person to comply with a term of the cooperation agreement or to give or produce correct and complete information or documents;
- an order awarding compensation for loss that a person has suffered because of the matters constituting the ground for terminating the agreement; or
- any other order that the court considers appropriate.

Can a person withdraw from a cooperation agreement?

If the FWO consents, a person that is a party to a cooperation agreement with the FWO may withdraw from the agreement.

How can a cooperation agreement be varied?

If the parties agree, a cooperation agreement may be varied in writing.

How does a cooperation agreement affect other powers?

While a cooperation agreement is in force, a Fair Work Inspector will not be prevented from commencing or continuing civil proceedings in relation to the conduct, or conduct engaged in

by any other person (not party to a cooperation agreement) from being referred to the CDPP or the AFP for action in relation to a possible offence.

A cooperation agreement also will not affect the power of an inspector to give a compliance notice (s.716 of the FW Act) in relation to the conduct, or the power of the FWO to accept an enforceable undertaking in relation to the conduct (s.715 of the FW Act), or any other power or function of the FWO or a Fair Work Inspector.

However, an enforceable undertaking or a compliance notice has no effect to the extent of inconsistency with a cooperation agreement, regardless of whether the undertaking or notice was given before or after the cooperation agreement comes into force.

FWO to issue compliance and enforcement policy and guidelines

The FW Act currently sets out the functions of the FWO.

The Closing Loopholes Act adds an additional function of the FWO to include the publication of a compliance enforcement policy, including guidelines relating to circumstances in which the FWO will or will not:

- accept or consider accepting undertakings under s.715; or
- enter or consider entering into cooperation agreements.

Before publishing the compliance and enforcement policy, the FWO will be required to consult with the National Workplace Relations Consultative Council (of which Ai Group is a member) about the guidelines referred to above.

Commencement

The new criminal offence for wage theft will not commence before 1 January 2025. It will commence at the later of 1 January 2025 and the date that the Minister declares a Voluntary Small Business Wage Compliance Code under s 327B(1) of the FW Act.

The provisions relating to the FWO's compliance and enforcement policy commence on 14 June 2024 which is the day after the end of the period of 6 months beginning on the day of Royal Assent.

See here for the commencement dates.

Transitional provisions

The Wage Theft Offence will apply in relation to conduct that occurs after commencement. If part of a single course of conduct occurs before, and some after, commencement, only conduct that occurs afterwards may be subject to prosecution.

To go back to this section in the Executive Summary, click here.

8. AMENDMENTS RELATING TO MEDIATION AND CONCILIATION ORDERS IN CONNECTION WITH A 'PABO'

The SJBP Act introduced a new requirement that when making a protected action ballot Order (**PABO**), the FWC must also make an order directing the bargaining representatives for the agreement to attend a compulsory conciliation/mediation conference on or before the day on which voting in the protected action ballot closes.

This was intended to provide an opportunity for bargaining parties to further negotiate and potentially reach agreement, or at least confine disputed issues, before industrial action.

A decision of a Full Bench of the FWC (*CEPU v Nilsen (NSW) Pty Ltd* [2023] FWCFB 134) noted this new requirement meant that if one or more bargaining representatives did not attend the compulsory conference, the subsequent employee action would be unprotected even if those non-attending representatives were not applicants for the PABO. If the industrial action then proceeded it would be unprotected for both those represented by the non-complying bargaining representative and for others participating in the industrial action.

To address this, the Closing Loopholes Act amended the provisions relating to protected industrial action. The amendments mean that each bargaining representative that applied for a PABO must attend the FWC conference in relation to the PABO in order for any subsequent industrial action to be protected industrial action. While other bargaining representatives will still be required to attend the FWC conference, non-compliance with this attendance requirement will not affect whether any subsequent industrial action taken under the PABO is protected.

To go back to this section in the Executive Summary, click here.

9. RIGHT OF ENTRY

The Closing Loopholes Act amends the right of entry framework in the FW Act when union officials have been requested by a health and safety representative (**HSR**) to assist them in performing their functions. The amendments modify parts of the existing right of entry framework to either exempt the union official from the framework, or apply as though the union official were a permit holder under the framework.

When will the amended right of entry framework apply?

The modifications to the right of entry framework in the FW Act will apply in circumstances where a union official has been requested to assist a HSR to perform their functions under s.68(2)(g) of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) (or equivalent state or territory act). Section 68(2)(g) of the WHS Act confers a broad power on a HSR to request the assistance of any person '*wherever necessary*'. The amended right of entry framework will apply to union officials invited to assist a HSR regardless of whether or not the union official separately holds an entry permit under the FW Act.

What parts of the right of entry framework are modified?

The amendments mean that when a union official enters for the purposes of assisting a HSR, some parts of the FW Act right of entry scheme do not apply. This includes the following:

- The requirement to hold an entry permit under the FW Act does not apply (s.494(1));
- The requirement to give notice of entry under s.495 does not apply;
- The requirement not to contravene any conditions on the individual's entry permit does not apply (s.496);
- They are not required to produce an entry permit on request (s.497); and

- The requirement to only exercise a State or Territory OHS right during working hours does not apply (s.498).

Some parts of the existing FW Act right of entry framework are extended and will apply to union officials assisting HSRs as though they were a permit holder. This includes the requirements that:

- a permit holder comply with any occupational health and safety requirements that exist at the premises (s.499);
- a permit holder not intentionally hinder or obstruct any person or otherwise act in an improper manner (s.502);
- a person must not intentionally or recklessly make a false representation that particular action is authorised under the right of entry framework (s.503); and
- a person must not use or disclose a document other than for a purpose related to the HSR's powers or functions subject to the exceptions set out in s.504.

The amendments also extend the application of some obligations on other persons in the right of entry framework to apply as though the union official were a permit holder. This includes the requirement not to refuse or unduly delay entry and the requirement not to intentionally hinder or obstruct the permit holder.

Commencement

See here for commencement dates.

To go back to this section in the Executive Summary, click here.

10. WHS, WORKERS COMPENSATION AND SILICA-RELATED DISEASES

The Closing Loopholes Act implements the following changes:

- Amends the Commonwealth *Work Health and Safety Act 2011* as follows:
    - Introduces a new offence of industrial manslaughter into the Commonwealth WHS Act, consistently with the model Act (which was recently amended to provide for industrial manslaughter within the model framework).
    - Repeals and replaces provisions dealing with criminal liability for bodies corporate, the Commonwealth and public authorities. These amendments reflect recent changes to the model WHS Act.
    - Significantly increases Category 1 penalties.
    - Clarifies that the Category 1 offence applies to officers of a person conducting a business or undertaking (PCBU).
    - Increases all penalties in the WHS Act by 39.03 per cent and provides for future indexing (giving effect to the recommendation 22 of the Boland Review).
- Introduces a presumption that a diagnosis of post-traumatic stress disorder is work related for first responders covered by the Commonwealth *Safety, Rehabilitation and*

Compensation Act 1988. This means first responders will not have to prove their employment significantly contributed to the disorder for the purpose of a workers' compensation claim unless the contrary is established. Additional categories of first responder may be declared.

- Expands the functions of the Asbestos Safety and Eradication Agency to address silica-related diseases.

To go back to this **WHS, workers compensation and silica-related diseases section** in the Executive Summary, click here.

11. COMMENCEMENT DATES

The commencement dates for the key elements of the Closing Loopholes Act are set out below:

Part	**Commencement**
Schedule 1, Part 2 – Small business statutory redundancy exemption	15 December 2023
Schedule 1, Part 6 - Closing the labour hire loophole	15 December 2023. However, the requirement to pay the protected rate of pay commences on or after 1 November 2024. Anti-avoidance commence retrospectively from 4 September 2023.
Schedule 1, Part 7 - Workplace delegates' rights (delegates rights term)	15 December 2023, but the transitional provisions apply to require the following: The FWC must vary awards to include a delegates' rights term by 1 July 2024. Enterprise agreements approved in a vote on or after 1 July 2024 must include a delegates' rights term. Workplace Determinations made on or after this date must include a delegates' rights term.
Schedule 1, Part 7 – Workplace delegates' rights (protection for workplace delegates)	15 December 2023
Schedule 1, Part 8 - Strengthening protections against discrimination (FDV)	15 December 2023
Schedule 1, Part 14 - Wage theft definitions and offences – Voluntary Small Business Wage Compliance Code	The later of 1 January 2025 and the day the Minister for Employment and Industrial Relations declares a Voluntary Small Business Wage Compliance Code. However, if the Minister for Employment and Industrial Relations does not declare the Voluntary Small Business Wage Compliance Code, these provisions will not commence.
Schedule 1, Part 14 - Wage theft - FWO	14 June 2024 (six months after the date of

Part	Commencement
compliance and enforcement policy	royal assent)
Schedule 1, Part 14 - Wage theft - Cooperation agreements and liability of the Commonwealth	The later of 1 January 2025 and the declaration of the Voluntary Small Business Wage Compliance Code (as set out above).
Schedule 1, Part 14A – Amendments relating to mediation and conciliation conference orders made under s. 448A of the FW Act	15 December 2023
Schedule 1, Part 16A – Right of entry amendments (assisting HSRs)	15 December 2023
Schedule 1, Part 18 - Application and transitional provisions	15 December 2023
Schedule 2 – Amendment of the Asbestos Safety and Eradication Agency Act 2013	15 December 2023
Schedule 3, Part 1 – Amendment of the Safety, Rehabilitation and Compensation Act 1988 (Post-traumatic stress disorder)	15 December 2023
Schedule 4, Part 1 – Amendment of the WHS Act - Industrial manslaughter	1 July 2024
Schedule 4, Parts 2 – 6 - Amendment of the WHS Act - Change to Category 1 offence, Corporate criminal liability, Commonwealth criminal liability, Criminal liability of public authorities and WHS penalty changes.	15 December 2023
Schedule 4, Part 7 - Amendment of the WHS Act - Tied amendments	The later of 15 December 2023 and immediately after the commencement of the *Work Health and Safety Amendment Act 2023*.

To go back to this **commencement dates section** in the Executive Summary, click here.

12. DISCLAIMER

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