CIRCULAR NO.	GEN/183/NAT/183/24
DATE:	16 February 2024
SUBJECT:	Closing Loopholes No. 2 Bill Passed through Parliament
ATTENTION:	Chief Executive Officer

On 12 February 2024 the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* passed through both houses of Parliament. This is the Labor Government's third tranche of IR law reform in the last 14 months. The first being the "Secure Jobs, Better Pay" Legislation passed in Dec 2022, the second being the "Closing Loopholes" Legislation which, having been split, had its first round of provisions passed in December 2023.

The key provisions of this third tranche cover changes around sham arrangements, intractable bargaining workplace determinations, enabling multiple franchisees to access the single-enterprise stream, casual employment, the definition of an employee, the right to disconnect, gig economy workers and model terms. These changes have been summarised below.

Upon Royal Assent

1. *Sham Arrangements*

   Under the Fair Work Act (FW Act), it is prohibited for an employer to falsely represent to an employee that they are an independent contractor. However, if an employer reasonably believes that an employee is an independent contractor, then making such a representation is not penalised. In determining whether a false representation was made under a reasonable belief, the Fair Work Commission (FWC) will look to the size and nature of the employer's enterprise and any other relevant matters.

From the Day after Royal Assent

1. *Intractable Bargaining Workplace Determinations*

   Intractable Bargaining Declarations were first introduced in the 'Secure Jobs, Better Pay' Amendment to enable parties to gain further assistance in resolving bargaining disputes. Where the parties have been bargaining for at least 9 months and have reached an impasse, a party may apply to the FWC to make an intractable bargaining declaration.

   If the parties are still unable to reach agreement, then the FWC may make a further intractable bargaining workplace determination, in which the FWC will determine the terms and conditions of employment that were not able to be agreed upon by the parties.

   The current amendments have altered the FW Act to ensure that an intractable bargaining workplace determination is unable to settle a disputed term in a way that is less favourable to employees than the corresponding term in a previous agreement.

   However, this requirement does not apply for terms that stipulate increases to wages. As such, increases to wages do not need to be equal to or greater than the wage increases that were agreed to in a previous agreement. Wage rates, however, must not be reduced from what they were in a previous agreement.

2. *Enabling multiple franchisees to access the single-enterprise stream*

Franchisees of the same franchisor will now be able to negotiate a single-enterprise agreement together. They will also retain their ability to enter into a multi-enterprise agreement.

From 1 July 2024

1. *Casual Employment (s 15A)*

From 1 July 2024, an employee relationship will now be deemed 'casual' where there is no firm advance commitment to continuing indefinite work and the employee is entitled to a casual loading.

In assessing whether there is no firm advance commitment, courts may consider the actual terms of the employment contract, as well as the "real substance", "practical reality" and "true nature" of the relationship. In relation to the true nature of the employment, a firm advance commitment will be more likely to exist where:

- The employer is relatively unable to offer work or the employee is relatively unable to accept or reject work;
- It is likely that there will be future work of the same nature in the enterprise performed by the employee;
- There are full- or part-time employees in the enterprise performing the same kind of work as the employee; or
- Where is a regular pattern of work by the employee.

Following this new characterisation of casual employment, employees may now notify an employer if:

- They believe they are no longer a casual;
- They have been employed for 12 months at a small business or 6 months, if employed at an enterprise which is not a small business;
- They are not already involved in a dispute over their status, including if they have received a rejection or dispute resolution process for casual conversion; and
- They have not been involved in such a dispute for at least 6 months.

If given such a notification, an employer must respond within 21 days. The employer must consult with the employee, and, if the employer wishes to accept the notification, they must discuss whether the employee will be changing to full time or part-time employment, the employee's new hours of work and the day that the change will come into effect.

The employer must provide a written response indicating either acceptance or rejection of the request. If the employer accepts, they must include the details discussed in their initial consultation.

If the employer decides to reject the request, they must provide detailed reasons for their decision and attempt to resolve the dispute through either pathway prescribed in section 66M or 66MA(1) of the FW Act.

2. *Definition of Employee (s 15AA)*

The bill inserts new definitions of 'employee' and 'employer'. The meaning of employee and employer under the new definition is to be determined by 'ascertaining the real substance, practical reality and true nature of the relationship' between the parties.

These provisions serve to override the High Court decisions in *Personnel Contracting* and *Jamsek* which gave primacy to the terms of a contract in a determination of whether an individual was an employee or a contractor and restore the multi-factorial analysis which previously applied in the courts.

From 6 Months after Royal Assent

1. *Right to Disconnect*

The right to disconnect protects employees for declining contact by their employer outside of work hours. This may be in the form of refusing to monitor, read, or respond to outside of hours contact, unless the refusal is unreasonable.

In determining whether a refusal is unreasonable, the FWC will consider:

- The reason for the contact or attempted contact;
- How the contact was made, and the level of disruption caused to the employee;
- The extent to which the employee is compensated either to remain available or for additional hours;
- The nature of the role and its according responsibilities; and
- The employee's personal circumstances.

The FWC will also have the jurisdiction to resolve disputes relating to the right to disconnect. This includes 'stop' orders, which may be directed to the employee (to stop refusing contact) or the employer (to stop making contact).

Modern Awards must also include a term providing for the exercise of an employee's right to disconnect. As for enterprise agreements, any term covering an employee's right to disconnect must be more favourable than the Award to continue to apply.

However, these provisions are likely to have a lesser impact on those employed in management or professional roles where out-of-hours contact may be more reasonable.

2. *Gig Economy Workers*

New provisions generally applying to 'employee-like' gig workers who perform work through digital platforms will now allow Unions or gig workers to apply to the FWC to set minimum pay rates and conditions. However, when making such determinations, the FWC cannot disrupt the worker's flexibility to work when they want.

To qualify under the provisions, workers must fulfil two of the three following characteristics:

- Paid at the same or less than an employee doing comparable work;
- Low authority over work; or
- Low bargaining power.

From a Day to be Proclaimed / 12 months after Royal Assent

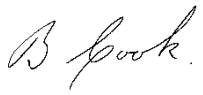
1. *Model Terms*

Previously, model terms were contained within various schedules of the Fair Work Regulations. The FWC has been given the ability to establish model flexibility and consultation terms. These model terms for enterprise agreements will be determined by having regard to:

- Comparable terms in modern awards;
- The best practice for workplace relations, as determined by the FWC;

- Whether all bodies have had an opportunity to make submissions to the FWC in determining the model term;
- The objects of the Act;
- Any other matters considered relevant by the FWC; and
- For consultation terms only: whether the model term is deemed an objectionable emergency management term per any of the paragraphs set out in 195A(1).

If you have any questions or if you require further information, please contact the SIAG National Advisory Service on 03 9644 1400 or 1300 (SIAG HR) / 1300 742 447.



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