Business Savvy Risk Management
ABN 51 121 504 827
Level 11, 65 York Street
Sydney, NSW 2000
P 02 8076 6067
E info@businesssavvy.com.au
www.businesssavvy.com.au

Loopholes legislation: Which ones were closed, which are next and what does it all mean for employers?

A discussion of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth)

Background

In December 2023, following debate and by agreement of both Houses, a few things occurred to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023. Firstly, it was amended, divided into two, and the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 was born. Secondly, the amended Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 passed both houses and received royal assent on 14 December 2023.

This means the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) has now passed into law. Consequently, many amendments to workplace relations laws commenced on 15 December 2023. This paper will clarify and explain exactly what this legislative change means for the current Australian industrial relations landscape.

But more change is imminent. In early 2024, Parliament is expected to consider and pass further changes to employment laws within the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023. A separate paper will individually describe those expected changes but they are listed at the end of this paper for your assistance.

Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Cth)

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Loopholes Act**), which amends the *Fair Work Act 2009* (Cth) (**FW Act**) and other workplace health and safety legislation, has introduced a range of changes from 15 December 2023. The key changes relate to the following areas:

- Criminalising wage theft
- Closing the labour hire loophole
- Enhancing workplace delegates rights
- Stronger protections against discrimination, adverse action and harassment
- Conciliation conference orders
- Entry to assist Health and Safety Representatives
- Amendments to the Asbestos Safety and Eradication Agency Act 2013
- Amendments to the Safety Rehabilitation and Compensation Act 1988
- New offence of industrial manslaughter and other work, health and safety reforms.

Each key change will be individually unpacked below including its commencement date (which varies); implications for employers and small businesses; and the enhanced protections it affords employees.

Criminalising wage theft

The criminal offence of 'wage theft' has been introduced which will apply to intentional underpayment of employees' wages and certain entitlements.

Commencement date: 1 January 2024 for employers (other than small businesses). For small businesses the later of 1 January 2025, or the day after the Voluntary Small Business Wage Compliance Code (VSBWCC) is first declared by the relevant Minister.

What are the changes?

New wage theft offence: The offence of 'wage theft' will apply to employers who *intentionally* engage in conduct that results in the underpayment of their employees. It will cover amounts due under the FW Act and fair work instruments (i.e. modern awards or enterprise agreements) including superannuation contributions required by either. However, it will *not* apply to underpayments due solely under contractual (employment) entitlements.

Significant criminal penalties:

- Individuals face a potential maximum of 10 years' imprisonment and/or a fine for the greater of $1.565m or three times the underpayment.
- Companies face a maximum monetary penalty of the greater of either three times the underpayment or $7.825m.

The Fair Work Ombudsman (FWO) will be responsible for investigating the new criminal offence. There is a 6 year time limit on the commencement of a prosecution and it must be brought by either the AFP or the Commonwealth Director of Public Prosecutions.

What do the changes mean for employers?

It is important for employers to be assured that only *intentional* underpayments will be caught by the wage theft offence. This means honest mistakes; and accidental or inadvertent miscalculations will not be captured.

Intentionality: A company can be found to have intentionally committed the new wage theft offence where:

- it is committed by an employee, director or senior executive, acting within the scope of their employment; and
- it intentionally, knowingly, recklessly or negligently allowed, or authorised the conduct that amounted to the commission of the offence.

Safe haven for employers: The amendments include opportunities or pathways for employers to protect themselves by encouraging them to self-disclose conduct to the FWO which may contravene the new criminal offence. These pathways include:

- For small businesses: A Voluntary Small Business Wage Compliance Code will be developed by government in partnership with employer and employee groups. Evidence of compliance with the code will ensure the FWO will not refer conduct for criminal prosecution. Small businesses could be found to have contravened the offence from either 1 January 2025 or the day after the code is declared – whichever is later.
- For other companies: The option for the FWO to enter into a 'cooperation agreement' with an employer, if the employer makes a 'voluntary, frank and complete' disclosure that they have engaged in conduct that may amount to the commission of the wage theft offence. The FWO may agree not to refer the conduct for prosecution, after assessing the employer against a non-exhaustive list of factors.

Closing the labour hire loophole

Labour hire employees must be paid at least what they would receive under a host's industrial instrument or enterprise agreement. Employees, unions and host employers can apply to the FWC for a labour hire arrangement order.

Commencement date: 15 December 2023 but a labour hire provider cannot be required to pay the 'protected rate of pay' until on, or after, 1 November 2024.

What are the changes?

The changes introduce an obligation on employers/labour hire providers to pay labour hire workers *no less* than what they would be paid (called the 'protected rate of pay') under the host employer's relevant industrial instrument. These are somewhat confusingly referred to as 'employment instruments'.

Why are the changes needed?

Labour hire is popular across sectors where traditionally businesses have negotiated enterprise agreements with their employees to set minimum rates of pay (such as in the transport or manufacturing industries). However, labour hire workers hosted by businesses are frequently not covered by the enterprise agreements, and can therefore be paid less than those they work alongside who are covered. The changes are aimed at preventing that situation from occurring.

Relevant terms explained

Host employment instrument: This is the term used to describe the industrial instrument that covers the host employer or business – such as an enterprise agreement or Award. It contains the rates of pay that would apply to employees that perform similar work. Note: it does *not* include an employment agreement.

Protected rate of pay: This is defined as the 'full rate of pay' that would be payable to a labour hire worker if they were employed directly by the host employer or business, and were therefore, covered by its employment instrument (i.e. enterprise agreement).

Full rate of pay: This is defined as including pay rates; incentive-based payments and bonuses; loadings; monetary allowances; overtime or penalty rates; and any other separately identifiable amounts as outlined in the host employment instrument.

Labour hire arrangement order: From 15 December 2023, employees, unions and host employers can apply to the FWC for an order that labour hire employees must be paid at least what they would receive under a host's employment (or industrial) instrument. The FWC order will be called a 'labour hire arrangement order'.

The FWC can only make a labour hire arrangement order if it is satisfied that the:

- employer will supply one or more workers to perform work for the host employer or business;
- work being performed by those (labour hire) workers is the supply of labour for the host employer or business (and is not the provision of a service as there is a clear exclusion for service contractors);
- host's employment instrument would apply to the (labour hire) worker if they were directly employed by the host; and
- the host is not a small business employer.

What do the changes mean for employers, hosts and labour hire workers?

Employers (labour hire providers): These are the employers or businesses that supply labour hire workers to the host employers or businesses.

- The changes mean they are obliged to pay labour hire workers *not less than* the total amount of 'protected rate of pay' under the host's employment instrument (i.e. enterprise agreement).

- They can request from hosts information about the full rate of pay and what it includes to help with their compliance and hosts must comply with the requests.
- Notably, the new obligation is a minimum requirement. So, satisfying the new obligation would *not* include paying labour hire workers any over-award payments being received by some employees unless mandated under an enterprise agreement.
- The new obligations *only* apply if the FWC has made a labour hire arrangement order that specifies the employers, hosts and labour hire workers it covers.
- Once an order is in place, when calculating termination payments for labour hire workers, the employer is to use the protected rate of pay.

Host employers/businesses (excluding those with fewer than 15 employees): Hosts are the businesses/employers that host the labour hire workers provided by the employers but do *not* include small businesses (fewer than 15 employees) for the purposes of the new orders.

- The changes impose obligations on hosts to provide employers with all the necessary information about the 'protected rate of pay' from its employment instrument (referred to as the 'host employment instrument').
- This means providing to the employers all the information about the 'full rate of pay' in the applicable enterprise agreement which includes any incentive-based payments, bonuses, loadings, allowances, overtime and penalty rates.
- Change in circumstances: Hosts are required to apply to the FWC to vary an existing labour hire arrangement order for variations such as if labour hire employers change, or the relevant employment instrument is replaced.
- Tendering processes: Hosts who are conducting a tender for the provision of labour are required to notify participants in the tender process (and any successful tenderers) about an existing labour hire arrangement order.

Labour hire workers: These are the workers or employees themselves who supply labour to the hosts and whom are set to benefit the most from these amendments.

- The changes mean they are entitled to be paid *no less* than the full rate of pay as set out in the host employment instrument.
- In order for the entitlement to flow, the labour hire worker must apply to the FWC for the labour hire arrangement order.
- However, their wages will not change if they are already receiving *at least* what they would receive under the host's employment instrument.

- The new obligation does not amount to labour hire workers having to be paid at any over-award rates that might be received by other employees not mandated by the enterprise agreement.

Can employers avoid the new requirement to pay the protected rate of pay?

Not easily, and potentially not at all. The amendments include specific provisions that prohibit avoidance behaviours by employers. The provisions include prohibiting behaviour intended to prevent the FWC making a labour hire arrangement order, or to avoid existing orders.

Exceptions to paying the protected rate of pay: If the employer is only supplying labour hire workers for a period of less than three months, they are not required to pay the protected rate of pay to the specific labour hire worker.

The changes to labour hire commenced on 15 December 2023 so any business that supplies labour, or has workers engaged through labour hire should be considering how to respond to an application for a labour hire arrangement order. However, businesses can keep in mind that the new labour hire arrangement orders cannot come into force until at least 1 November 2024.

Enhancing workplace delegates rights

There are now specific rights and protections for the work undertaken by workplace delegates in representing and educating employees to allow them to effectively undertake their role.

Commencement date: 15 December 2023

What are the changes?

The changes provide specific rights and protections for workplace delegates to represent the industrial interests of union members and potential members, including in disputes with their employer.

Workplace delegates are employees who are elected or appointed by a union to represent the interests of union members in the workplace under their union's rules.

The changes provide the workplace delegates with:

- rights to talk to members about matters of industrial concern;
- the right to represent the industrial interests of current and potential union members, including in disputes with their employer;
- rights to paid time for training during normal working time (unless they are in a small business); and
- protections when carrying out their role at a workplace.

What do the changes mean for employers?

As a consequence of the strengthening of the rights and protections of workplace delegates when carrying out their role, employers must now:

- provide reasonable access to communicate with members (and potential members) about matters of industrial concern;
- provide reasonable access to workplace facilities; and
- avoid unreasonably refusing to deal with them, misleading them, or hindering and obstructing the exercise of their rights *unless* the employer can demonstrate it was reasonable to do so (i.e. the employer's action was taken lawfully and was reasonable management action).

Consequently, employers should review existing processes for engaging with workplace delegates, and provide information and training to managers regarding the new rights, protections and prohibitions.

Protections for those subjected to family and domestic violence

The changes provide an extension to the protections to benefit employees who have been, or are, subjected to family and domestic violence.

Commencement date: 15 December 2023

What are the changes?

The changes mean that workers cannot be subjected to discrimination, adverse action or harassment by their employer on the basis of being subjected to 'family and domestic violence'.

In other words, being subjected to family and domestic violence is included in the FW Act's list of protected attributes, which also include things like gender, race and family or carer's responsibilities (and many others).

What do the changes mean for employers?

Adverse action: It is now unlawful for an employer to take adverse action against an employee (or potential employee) because they have been, or are being, subjected to family and domestic violence. For example, it would be unlawful if an employer dismissed an employee or refused to hire them (take adverse action) because they have been subjected to family or domestic violence.

Discrimination: The FW Act already includes anti-discrimination protections for workers. These changes strengthen those protections and now include discrimination on the basis of being subjected to family and domestic violence.

It is also prohibited to include any terms in enterprise agreements and modern awards that discriminate against a person on the newly protected basis.

The FWC must also consider the need to prevent and eliminate discrimination on the basis of subjection to family and domestic violence when performing its functions or exercising its powers.

Protected industrial action, bargaining representatives and compulsory attendance at conciliation conferences

In an enterprise agreement, only the bargaining representative who applied for a protected action ballot order must attend a conciliation conference for subsequent employee claim action to be protected.

Commencement date: 15 December 2023

What is protected industrial action?

For industrial action to be 'protected industrial action' it must:

- be action taken by employees (or their bargaining representatives which are usually trade unions) to support claims in relation to a proposed enterprise agreement. This is sometimes referred to as 'employee action'; or
- be action taken by employers or employees in response to industrial action taken by the other party referred to as 'employer or employee response action'; and
- meet other common and additional requirements for protection, such as giving written notice to the other party, or by the FWC authorising a secret ballot (described below).

Once industrial action is classified as 'protected' it gives immunity from civil liability under state or territory law (unless that action is likely to involve personal injury or damage, destruction or taking of property).

When can protected action occur?

Employees and employers can *only* take protected industrial action when they are negotiating on a proposed enterprise agreement. In order to initiate protected industrial action, a bargaining representative for an employee who will be covered by an enterprise agreement must apply to the FWC for a protected action ballot order (PABO).

What are protected action ballots?

Protected action ballots or secret ballots give employees the chance to vote on whether or not they want to initiate protected industrial action.

What was the situation before the changes?

Previously, if the FWC had made a PABO *all* bargaining representatives for an enterprise agreement had to attend a compulsory conciliation conference during the ballot period. This was to:

- facilitate agreement on any unresolved issues before the industrial action is taken, and
- attendance was required for the industrial employee action that followed to be protected.

Importantly, if any bargaining representative either intentionally or unintentionally failed to attend the compulsory conciliation conference, employees were unable to take protected industrial action.

Non-compliance with an order to attend a conference could render subsequent industrial action unprotected. This is sometimes referred to as an 'unintended consequence'.

What do the changes mean?

Now, *only* the bargaining representative who applied for the PABO must attend the conciliation conference for any subsequent employee action to be protected.

Non-attendance at a conciliation conference by a bargaining representative who *did not* apply for the PABO will no longer result in any subsequent industrial action being unprotected.

However, employees' bargaining representative/s who *applied* for the PABO must attend the conciliation conference in order for them to take the protected industrial action voted for under the secret ballot.

For employers to note

The changes also clarify that employers and their bargaining representatives still need to participate in the compulsory conciliation for any subsequent employer response action to be protected.

Small business redundancy exemption in insolvency contexts

Small businesses that are bankrupt or in liquidation, or that downsize due to insolvency to become a small business (fewer than 15 staff) will still have to provide any employees it makes redundant (when insolvent) with the redundancy payment under the National Employment Standards (NES).

Commencement date: 15 December 2023

What was the situation before the changes?

Before the changes, employers/businesses (with *more* than 15 staff) – that were bankrupt or in liquidation – that reduced its workforce *due to insolvency* to become a small business (with less than 15 staff), were exempt from paying staff who were terminated any redundancy payments under the NES. This is also referred to as a 'small business redundancy exemption'.

In other words, when their employment ended, some employees who would be eligible but for the insolvency of their employer, would miss out on redundancy pay (or an NES entitlement).

What do the changes mean?

For viable small businesses: Nothing changes. There will be no change to how the small business redundancy exemption currently applies to *viable small businesses*, including those that have restructured from a larger employer and are continuing to trade. Viable small businesses will continue being exempt from making redundancy payments to workers terminated on grounds of redundancy.

For insolvent small businesses: The changes mean if you are an employer that becomes insolvent, and terminate some staff immediately, but others continue to work whilst the process of liquidation occurs (or are directed by an insolvency practitioner to assist with the wind up of your insolvent business) and those others are subsequently made redundant, you (as an insolvent small business employer) will still be required to pay to those terminated later, their NES entitlement to redundancy pay.

Put simply, the changes will only impact how the small business redundancy exemption applies to employers that are bankrupt or in liquidation.

Entry to assist health and safety representatives

Health and Safety Assistants who are officials of registered organisations, may enter workplaces to assist Health and Safety representatives without an entry permit.

Commencement date: 15 December 2023

What was the situation before the changes?

Under state and territory work health and safety laws (WHS), Health and Safety Representatives (HSRs) may request the assistance of any person (an HSR assistant) to perform their role in the workplace. Once requested, employers had to provide the HSR assistant with access to the workplace but *only* if the HSR assistant had an entry permit under the FW Act.

In 2018, an independent review of the WHS laws at the time recommended exploring options for union officials (as officials of a registered organisation and acting as an HSR assistant) to be able to access workplaces to help HSRs without holding such an entry permit.

What do the changes mean?

The Loopholes Act responds to the 2018 recommendation and removes the requirement for officials of registered organisations to hold a Fair Work entry permit to assist an HSR.

Impact on HSRs in workplaces: The changes are aimed at assisting HSRs to address WHS issues in the workplace by making sure they have access to the expertise of official HSR assistants.

Impact on official HSR assistants: Those entering premises as official HSR assistants are required to:

- comply with reasonable directions from employers relating to WHS
- not intentionally act improperly by hindering or obstructing any person
- not misrepresent any of its rights as an HSR assistant, and
- not use or disclose information or documents obtained for an unauthorised purpose.

Impact on employers/occupiers: Employers and occupiers are now required to:

- not refuse or unduly delay entry onto premises by an official HSR assistant, and
- not intentionally hinder or obstruct an official HSR assistant who is assisting an HSR.

Amendments to the Asbestos Safety and Eradication Agency Act 2013

Changes to the Asbestos Safety and Eradication Agency Act 2013 to expand the functions of the Asbestos Safety and Eradication Agency to include matters relating to respirable crystalline silica and silica-related diseases.

Commencement date: 15 December 2023

What are the changes?

The Loopholes Act changes the Asbestos Safety and Eradication Agency's functions to include those related to silica and not only asbestos. To reflect its broadened functions, the agency will be renamed the 'Asbestos and Silica Safety and Eradication Agency'.

What do the changes mean?

The changes ensure the Asbestos and Silica Safety and Eradication Agency has a central role in coordinating, monitoring and reporting on national efforts to eliminate silica-related diseases in addition to asbestos-related diseases in Australia, and support those affected by both of these diseases. The agency can now leverage its experience with asbestos to aid its efforts against silica.

An example of national efforts to eliminate silica-related diseases, such as silicosis, is the Silica National Strategic Plan, that will be administered by the agency. Like its asbestos counter-part, the new Silica National Strategic Plan will be reported on annually so that progress can be measured.

The membership of the Asbestos and Silica Safety and Eradication Council will be expanded (by three members) providing one additional member:

- to represent workers
- to represent employers
- with expertise in relation to asbestos safety, asbestos-related diseases, silica safety or silica-related diseases.

Eligibility for appointment to the Asbestos and Silica Safety and Eradication Council will also change so that those with direct or lived experience of an asbestos or silica-related disease may be appointed.

Amendments to the Safety Rehabilitation and Compensation Act 1988

Amends the Safety, Rehabilitation and Compensation Act 1988 to introduce provisions that presume liability for first responders. Changes will streamline the workers' compensation claims process for first responders covered by the Act who sustain post-traumatic stress disorder.

Commencement date: 15 December 2023

What are the changes?

The changes provide that if a first responder (that is covered by the legislation) is diagnosed with post-traumatic stress disorder (PTSD) by a legally qualified medical practitioner or psychologist, they

will not be required to prove that their employment significantly contributed to their condition when making a workers' compensation claim.

What is the intention of the changes?

The changes are intended to provide a faster and more streamlined claims process which may reduce stress and trauma for first responders when making a workers' compensation claim in relation to PTSD.

Industrial manslaughter and other work, health and safety reforms

Amends the Work Health and Safety Act 2011 (WHS Act) by introducing an industrial manslaughter offence, increasing penalties and providing new criminal responsibility provisions for companies and the Commonwealth.

Commencement date: Most provisions – 15 December 2023
Industrial manslaughter offence – 1 July 2024

What are the changes?

The changes amend the WHS Act to strengthen the work health and safety offences and penalties regime including the introduction of the new criminal offence of industrial manslaughter which carries a penalty of a maximum fine of $18M for a body corporate and 25 years imprisonment for an individual. The maximum penalty for other offences have been increase.

(Note: this only applies to the Commonwealth, public authorities and limited Commonwealth companies.)

Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (Cth)

Once considered and passed as expected when Parliament resumes for 2024, the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 also signifies significant changes which employers should anticipate. A separate paper will provide more detail but the changes include:

- Extending the powers of the FWC to set minimum standards for 'employee-like' workers
- Allowing the FWC to set minimum standards to ensure the road transport industry is safe, sustainable and viable
- Giving workers the right to challenge unfair contractual terms
- Standing up for casual workers
- Civil penalties and sham contracting
- Meaning of 'employee' and 'employer' in the FW Act
- Enabling multiple franchisees to access the single-enterprise stream
- Strengthening rights of entry to investigate underpayments
- FWC preparing enterprise agreement model terms
- Transitioning from multi-enterprise agreements
- Repeal demerger from registered organisations amalgamation provisions

- Workplace determinations.

Prepared by our Legal Team:

Leisa Driscoll-Hayward

Senior Associate

ldh@hilliardandberry.com.au

Simon Berry

Partner

sberry@hilliardandberry.com.au

If you require any further information, please do not hesitate to Business Savvy Risk Management on (02) 8076 6067.