"CLOSING LOOPHOLES"- CHANGES TO FAIR WORK LAWS
SUMMARY OF KEY CHANGES FOR BUILDING AND CONSTRUCTION

This Member Alert provides a general summary of changes to the Fair Work Act arising from the passage of the *Fair Work Legislation Amendment (Closing Loopholes) Bill No.1 2023 and the Fair Work Legislation Amendment (Closing Loopholes) No.2 2023* as relevant to the building and construction industry.

More detailed information will be provided once key detail has been confirmed by Government.

NOTE

Many provisions of the new laws are subject to regulations that have yet to be made and will include things such as the contractor high-income threshold, the Small Business Wage Compliance Code and other matters to be considered in determining sham contract matters.

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1. ADDITIONAL WORKPLACE RIGHTS FOR UNION DELEGATES

- There are new workplace rights for union delegates, along with several new offences for employers when dealing with delegates.
- A workplace delegate is defined as "*a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise*".
- The new right of a workplace delegate is described as "*The workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer."*
- Union workplace delegates are entitled to:
    - reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and
    - for the purpose of representing those interests:
        - reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
        - unless the employer of the workplace delegate is a small business—reasonable access to paid time, during normal working hours, for the purposes of related training.
- Employers are prohibited 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.
- In determining what is reasonable, regard will be had to the size and nature of enterprise, the resources of employer and workplace delegate and facilities available at the enterprise.
- The regime will also apply to 'employee-like' workers not just employees.
- The Fair Work Commission has been tasked with writing 'delegates rights' terms that will be inserted into all Modern Awards, and all new enterprise agreements will need to contain a 'delegates right' clause that operates in a way that is no less favourable than the relevant underpinning Award. This process has just commenced and will be finalised by the end of June 2024.

What employers need to know:

- This change is effective now.
- None of this requires you to have a union delegate. The laws rather concern circumstances where a union has members in your business and has authorised one of your employees to be a union delegate.

2. SHAM CONTRACTING – CHANGE TO DEFINITION

- The new laws have changed the definition of what constitutes 'sham contracting'.
- Sham contracting involves employers deliberately misrepresenting a relationship to be one of 'independent contractor' when they know it should be an employment relationship, as a means to avoid taking on someone as an employee and being obliged to pay employment entitlements.
- The changes mean that the existing defence for employers to sham contracting is watered down by removing the element of 'recklessness' such that it will only involve a 'reasonable belief' element requiring an assessment of an employer's behaviour according to what the employer reasonably believed.
- This means that employers will only be able to successfully establish the defence if they can show that they reasonably believed the contract was a contract for services. This is a lower test than the current defence, which is that the employer did not know and was not reckless as to whether the contract was for employment rather than services.

What employers need to know:

- This change is effective now.
- Employers who have allegedly misrepresented employment as an independent contractor arrangement will now need to show that they reasonably believed they were correct in classifying a worker as an independent contractor. An employer's ignorance or unreasonable mistake will no longer allow them to make out the defence and avoid liability for sham contracting.

3. UNION RIGHT OF ENTRY FOR SAFETY PURPOSES

- The laws have changed to make it easier for union officials to enter workplaces under safety grounds.
    - Currently, under state and territory work health and safety (WHS) laws, Health and Safety Representatives (HSRs) may request the assistance of any person to perform their role in the workplace (an HSR assistant), and employers must provide the HSR assistant access to the workplace if it is necessary to enable the assistance to be provided.
    - However, if the workplace is covered by the Commonwealth jurisdiction and the HSR assistant is an official of a registered organisation, they must hold an entry permit under the Fair Work Act.
- The changes made by the Loophole laws means that a union official who is invited into a workplace by an elected HSR no longer needs to have a valid right of entry permit under the Fair Work Act.
- This means that even though a union official does not have a valid right of entry permit under the Fair Work Act, they can still enter a workplace if they have been invited by a properly elected HSR.

What employers need to know:

- This change is effective now.
- Employers should be aware that entry under these new laws only applies in situations where the official has been invited into a workplace by an elected HSR. They do not apply to situations where the official has initiated entry at their own initiative.
- For most other situations involving entry to workplaces, an official must hold an entry permit under the Act.

4. UNION RIGHT OF ENTRY FOR INVESTIGATING ALLEGED UNDERPAYMENT OF WAGES

- The Loopholes laws have made changes that make it easier for union officials to enter a workplace to investigate suspected wage underpayments concerning a member.
- This will significantly increase the likelihood that unions will exercise right of entry onsite without notice. Currently, entry without notice to investigate a suspected breach is only allowed where notice might result in the destruction, concealment or alteration of relevant evidence.
- Under the new changes, union officials will be able to apply to the Commission for an exemption certificate which would waive the usual 24-hours' notice period for entry to workplaces.
- The Commission will be required to issue the exemption certificate if it is:
    - satisfied that a suspected contravention involves the underpayment of wages affecting a member of the registered organisation; and
    - the provision of the usual 24-hours' notice would hinder an effective investigation into the alleged underpayment of wages.

What employers need to know:

- This change takes effect from 1 July 2024.
- Exemption certificates will only be available for circumstances involving investigations into alleged underpayment of wages.
- Entry for other purposes will still require the conventional 24-hours' notice period to be provided.

5. FWC MAY HEAR DISPUTES ABOUT UNFAIR CONTRACTS

- The Fair Work Commission has received new powers in relation to unfair contract terms of services contracts.
- This jurisdiction will only include contractors earning below a contractor high-income threshold (yet to be determined).
- The Fair Work Commission will be able to conciliate, mediate and arbitrate on a compulsory basis disputes relating to 'unfair contract terms' in services contracts.
- The remedies of the Fair Work Commission do not include compensation but the Commission will be able to set aside, void, amend or vary services contracts of contractors when they are deemed unfair.
- In determining whether a contract term is unfair, the Fair Work Commission may take into account:
    - the relative bargaining power of the parties to the services contract;
    - whether the contract term is reasonably necessary to protect the legitimate interests of a party to the contract;
    - whether the contract term imposes a harsh, unjust or unreasonable requirement on a party to the contract;
    - whether the services contract as a whole provides total remuneration for performing work less than that earned by employees or regulated workers under a Minimum Standards Order or Minimum Standards Guideline; and
    - any other matter the Fair Work Commission considers relevant.

What employers need to know:

- This change takes effect from 1 July 2024.
- The contractor high-income threshold has yet to be set by the regulations and is still not known.

6. CHANGES TO CASUAL EMPLOYMENT - DEFINITION

- The definition of casual employment has changed.
- Under the new definition, an employee will only be considered a casual employee if:
    - The employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and
    - The employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.
- For the purposes of determining whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work, the new laws say that this will require a consideration of the "*real substance, practical reality and true nature of the employment relationship."*
- In assessing whether there is a firm advance commitment, the commitment can be derived from the terms of any contract of employment between the employer and the employee, or irrespective of the terms of that contract, in the form of a non-contractual mutual understanding or expectation between the employer and the employee.
- A mutual understanding or expectation may be inferred from conduct of the employer and employee after entering into the contract of employment or from how the contract is performed.
- To assess this, regard should be had to:
    - whether there is an inability of the employer to elect to offer work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);
    - whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;
    - whether there are full time employees or part time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee; and
    - whether there is a regular pattern of work for the employee (although this doesn't have to be "absolutely uniform" and may include some fluctuation or variation over time, including for reasonable absences such as illness, injury or recreation).
- Notably, none of the abovementioned considerations will be determinative and all considerations need not necessarily be satisfied for an employee to be considered a permanent employee.
- This definition does not include a requirement for an agreed regular pattern of work. Accordingly, an employee who has a regular pattern of work may still be a casual employee if there is no firm advance commitment to continuing and indefinite work.
- However, an employee will not be a casual employee if they are engaged on a fixed term contract which is not for a specified season.

What employers need to know:

- The new definition will only take effect from September 2024.
- The new definition means that parties will need to look beyond the written terms of engagement or contract to determine whether an employee is truly a casual and must make an assessment having regard to the 'real substance, practical reality and true nature of the employment relationship'.

7. CHANGES TO CASUAL EMPLOYMENT – CASUAL CONVERSION

- The Loopholes laws contain new rules that introduce a new 'casual conversion' process. They replace existing casual conversion laws which require employers to notify employees of their rights to convert.
- The new process revolves around what is known as a 'specified event' and means that workers engaged as casual employees remain casual until their employment status is changed or converted to permanent employment at the employee's election.
- Accordingly, casual employees have a new right to effectively tell their employer that they believe they are no longer casual, and that they will become permanent employees.
- This is done by the casual employee giving written notification that they believe they no longer meet the requirements set out in the casual employment definition (see above).
    - For employees in a small business, this notification can be given after 12 months of casual engagement, and for employees in other businesses, this notification can be given after 6 months.
    - The notification can only be given if they have not previously refused an offer to convert and meet other eligibility criteria (see further below for these).
- Within 21 days after receiving the written notification from an employee, an employer must consult with the employee, and respond in writing as to whether they accept the employee's notification.
- If the employer accepts the notification, the employer will need to notify the employee
    - whether the employee is changing to full or part time;
    - their hours of work after the change; and
    - the day of the change, which must be the beginning of the first pay period after the employer's response unless otherwise agreed between the employer and the employee.
- If the employer does not accept the notification, they will need to provide a written response that contains:
    - The reasons for declining.
    - a statement that the employee may dispute the decision; and
    - a statement that if a dispute is not resolved, the employee may apply to the Fair Work Commission.
- Grounds for an employer to refuse the request include:
    - that the employee still meets the definition of casual employment;
    - it would be impractical and require substantial changes to the employee's terms and conditions
    - that accepting the notification would affect compliance with a recruitment or selection process required under a law of the Commonwealth, a State or Territory
    - that substantial changes would be required to the way in the employer's enterprise is organised;
    - there would be significant impacts on the employer's enterprise; and
    - that substantial changes to the employee's terms and conditions would be reasonably necessary.
- If there is a dispute between the employee and employer about a decision regarding the casual notification, they will first need to attempt to resolve it at the workplace level.
- If no resolution is reached, they may apply to the Fair Work Commission to have the dispute mediated/conciliated, or in some circumstances, arbitrated.
- Where the Commission has been unsuccessful in mediating/conciliating the dispute (or there are exceptional circumstances), arbitration can occur with respect to employee choice or casual conversion and the Fair Work Commission may make any order it considers appropriate, including:
    - An employee to continue to be casual or
    - An employee to become full time or part time.

What employers need to know:

- This change will only take effect in September 2024

8. EMPLOYEE-LIKE WORKERS AND THE 'GIG ECONOMY'

- The Loopholes laws create new powers for the Fair Work Commission to regulate Employee-like Workers and the 'Gig Economy'.
- Such workers, who are legally contractors, have not traditionally fallen within the jurisdiction of the Fair Work Commission.
- The new 'Employee-like' jurisdiction will regulate 'Employee-like workers' performing 'services contracts' for 'digital labour platform operators'.
- Employee-like workers are either:
    - Where an individual who is party to a services contract – the individual performing work under the contract.
    - Where a body corporate (i.e.. a Pty Ltd company) is party to a services contract – an individual who is either a director of the company or a family member of the company and who performs work under the contract.
    - Where a trustee of a trust is party to a services contract – an individual who is a trustee of the same trust and performs work under the contract.
    - Where a partner in a partnership is a party to a services contract in their capacity as a partner – an individual who is a partner in the same partnership and performs work under the contract.
- To be covered, the workers must also:
    - personally perform all or a significant majority of the digital platform work performed under the services contract; and
    - satisfy two or more of the following:
        - the person has low bargaining power in negotiations in relation to the services contract under which the work is performed;
        - the person receives remuneration at or below the rate of an employee performing comparable work;
        - the person has a low degree of authority over the performance of the work; or the person has such other characteristics as prescribed by the regulations.
- A 'digital labour platform' has been defined in the legislation to mean an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services where an operator of the application, website or system that:
    - engages independent contractors directly or indirectly; or
    - acts as an intermediary for or on behalf of more than one distinct but interdependent sets of users who interact with the independent contractors or the operator via the application, website or system; or
    - the operator of the application, website or system processes the aggregated payments referable to the work performed by the independent contractors.
- The Fair Work Commission will have three broad powers in relation to Employee-like work:
    - The making of Minimum Standards Orders and Guidelines which apply to digital labour platforms
    - The ratification of consent collective agreements
    - Resolving disputes about 'unfair deactivations'.

What employers need to know:

- This change only takes effect in September 2024.
- While it is unlikely, there remains a potential for tradies engaged through digital labour hire platforms (such as hipages etc) to be captured by FWC's new jurisdiction and be subject to minimum standards order or guidelines.

9. NEW DEFINITIONS - 'EMPLOYMENT' AND 'INDEPENDENT CONTRACTOR'

- The Loopholes laws introduce a new definition of employment into the Fair Work Act.
- The new definition will be inserted into a new section15AA within the Act, and define the ordinary meaning of employee and employer as follows:
    - for the purposes of this Act, whether an individual is an employee of a person within the ordinary meaning of that expression or whether the person is an employer of a person within the ordinary meaning of that expression is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person;
    - for the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:
        - the totality of the relationship between the individual and the person must be considered; and
        - in considering the totality of the relationship between the individual and the person regard must be had not only to the terms of the contract but also to other factors relating to the totality of the relationship including but not limited to how the contract is performed in practice.
- This new definition seeks return to a position where the 'real substance, practical reality and true nature' of the employment relationship is considered rather than simply looking to the terms of a written contract.
- Critically, this means that to determine whether a person is an employee or a contractor, it will no longer be sufficient to simply look to the terms of the written contract. What will be required is an assessment of other factors including how the contract is actually performed.
- This will have the effect of 'reviving' the traditional 'multifactorial' test for determining whether a person is an employee or independent contractor. For example, testing the relationship against 6 indicators: Control; Integration; Mode of remuneration; Ability to subcontract or delegate; Provision of tools; Risk.

"OPT OUT" NOTICES

- One key change made during debate on the new laws was to create the ability for a business and independent contractor to opt out from being covered by the new definition of employment.
- This option creates two pathways for a business and independent contractor to voluntarily agree that the new definition will not apply to them.
- For independent contractors, this means that they won't have the risk that they could be treated as employees. For businesses that use independent contractors, this means they can reduce the risk of any independent contractors they engage being determined to be employees.
- This option will only be available for independent contractors who earn above the 'contractor high-income threshold'. This threshold will be set by regulations and is yet to be determined, but is expected to be approximately $160k gross per annum or above.
- For <u>businesses,</u> the pathway is as follows:
    - They can give an independent contractor notification stating that:
        - due to the commencement of the new definition under section 15AA, that the relationship may become one in which the independent contractor may be considered an employee of the business instead of an independent contractor; and
        - that the independent contractor may give the business a notification that they wish to 'opt out' of being covered by the new definition at section 15AA; and
        - that the independent contractor has 21 days to provide the 'opt out' notice.

- For independent contractors, the pathway is as follows:
    - They can give a business an 'opt out' notification stating that:
        - due to the commencement of the new definition under section 15AA, the relationship may become one in which the independent contractor may be considered an employee of the business instead of an independent contractor; and
        - that the independent contractor does not want to be considered an employee and therefore wants to 'opt out' of being covered by the new definition at section 15AA; and
        - that the independent contractor's individual earnings for work performed under the relationship exceed the contractor high income threshold earnings for work performed under the relationship when the opt out notice is given.
- A business or an independent contractor can provide the 'opt out' notifications to each other at any time – however the independent contractor can only provide an 'opt out' notification once throughout the relationship.
- An independent contractor may revoke any 'opt out' notice they give to a business. However, as stated above, the independent contractor cannot later decide to 'opt out' again.
- The effect of the 'opt out' notice is to opt out from coverage of section 15AA – being the revised definition of employment.
- If an independent contractor does not provide an 'opt-out' notice, it does not necessarily mean that they are considered to be an employee. It simply means that revised definition may apply to them – but until this is determined by a Court or tribunal, the relationship remains one of independent contractor.

What employers need to know:

- The new definition of employment only takes effect in September 2024 – however, a business or an independent contractor can (in theory) give each other 'opt out' notifications at any point from now onwards.
- However, the contractor high-income threshold is not yet set as this will be determined in the regulations.
- Until this threshold is known, independent contractors and businesses should not give each other 'opt-out' notices and await further advice from Master Builders.

10. NEW 'RIGHT TO DISCONNECT' FOR EMPLOYEES

- The Loopholes laws create a new workplace right for workers to refuse to connect with employers after hours.
- This is done by creating a legal right for employees to refuse to monitor, read or respond to contact or attempted contact from their employer outside of their working hours unless the refusal is unreasonable.
- The new right to disconnect covers contact from the employer, including calls, emails, texts, MS Teams messages and any other contact by an employer after hours that is not reasonable.
- If there is a dispute in relation to whether an employees refusal to connect is unreasonable, the Fair Work Commission will be able to hear disputes and make orders to apply in the future.
- In determining what is reasonable, FWC will consider things like:
    - the reason for the contact or attempted contact;
    - how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
    - the extent to which the employee is compensated:
        - to remain available to perform work during the period in which the contact or attempted contact is made; or
        - for working additional hours outside of the employee's ordinary hours of work;
    - the nature of the employee's role and the employee's level of responsibility; and
    - the employee's personal circumstances (including family or caring responsibilities).

What employers need to know:

- The new right to disconnect only takes effect in September 2024.
- This is a new employee right and there are many elements about how it will operate that remain to be determined by the Fair Work Commission.
- Master Builders will provide further information once more detail has been provided.

11. NEW CRIMINAL PENALTIES - UNDERPAYMENT OF WAGES

- A new criminal offence will exist for employers who intentionally engage in conduct that results in the underpayment of their employees.
- The criminal offence also extends potential criminal liability to others, such as the body corporate (directors) and ancillary officers as accessories.
- The Fair Work Ombudsman will have responsibility for referring employers to prosecuting authorities who will have final decision as to whether a prosecution will occur and be responsible for running such cases in court.
- There are some limited exceptions from criminal penalties – such as small business employers who comply with a "*Voluntary Small Business Wage Compliance Code*" or employers with whom the FWO have allowed to enter a "*Cooperation agreement*".
- The new offence will carry a maximum of 10 years' imprisonment, and/or a maximum fine of the greater of:
    - 3 times the amount of the underpayment, if the court can determine that amount, or
    - for an individual: 5,000 penalty units ($1,565,000); or for a body corporate: 25,000 penalty units ($7,825,000).

What employers need to know:
This change will be relevant to all building and construction employers and commences operation on 1 January 2025.