

Guide to the Fair Work Legislation Amendment (Closing Loopholes) Act 2023

21 December 2023



Closing Loopholes Act

The [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#) passed Parliament on 7 December 2023 and was given Royal Assent on 14 December 2023.

The [Fair Work Legislation Amendment \(Closing Loopholes\) Act 2023](#) amends the *Fair Work Act 2009* (**FW Act**) and other legislation.

The key amendments to the FW Act are summarised out in this Guide.

The legislative process

The [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#) (**Closing Loopholes Bill**), incorporating a range of amendments, was passed by the House of Representatives on 29 November and was introduced to the Senate on 4 December 2023.

On 7 December, the Senate agreed with Government amendments to split the Closing Loopholes Bill and divide it into two parts. Certain provisions were relocated into a separate bill, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (**Closing Loopholes No. 2 Bill**) which will be considered by the Senate early next year.

The pared down version of the Closing Loopholes Bill passed Parliament on 7 December 2023 and was given Royal Assent on 14 December 2023: [Fair Work Legislation Amendment \(Closing Loopholes\) Act 2023](#) (**Closing Loopholes Act**).

The Closing Loopholes Bill (in its original form and including the provisions relocated into the Closing Loopholes No. 2 Bill) was referred to a Senate Committee [inquiry](#) which is scheduled to report to Parliament by 1 February 2024. The inquiry is now restricting its consideration to the provisions in the Closing Loopholes No. 2 Bill.

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 has indicated he is committed to engaging with stakeholders, including Peak Councils such as Ai Group, regarding the implementation of the changes, and we expect to be heavily involved.

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.

"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 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 (i.e., 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.

Wage theft offence

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.

There are safe harbour measures and the Fair Work Ombudsman (**FWO**) must 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.

Workplace delegates' rights

Workplace delegates (i.e. union delegates) now have 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.

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.

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

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* 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.

Union officials assisting health and safety representatives

The Closing Loopholes Act amends the FW Act where union officials enter a workplace to assist a health and safety representative 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, union officials are not required to hold an entry permit under the FW Act when they seek to enter the workplace on this basis.

WHS, workers compensation and silica-related diseases

In relation to employers covered by the Commonwealth *Work Health and Safety Act 2011*, 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.

Commencement dates

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

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

Part	Commencement
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 compliance and enforcement policy	14 June 2024 (six months after the date of 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 <i>Work Health and Safety Amendment Act 2023</i> .

NATIONAL WORKPLACE RELATIONS POLICY AND ADVOCACY TEAM

This report has been prepared by Ai Group's National Workplace Relations Policy and Advocacy Team. The Team represents the interests of Ai Group Members through:

- Protecting and representing the interests of Ai Group Members in relation to workplace relations matters.
- Leading and influencing the workplace relations policy agenda.
- In collaboration with Members, developing policy proposals for worthwhile reforms to workplace relations laws.
- Making representations to Government and Opposition parties in support of a more productive and flexible workplace relations system.
- Writing submissions, preparing evidence and appearing in major cases in the Fair Work Commission (FWC).
- Representing Members' interests in modern award cases and reviews.
- Representing Ai Group Members collective interests in significant cases in Courts.
- Representing individual Ai Group Members in significant cases in the FWC and Courts.
- Keeping Ai Group Members informed and involved in workplace relations developments.
- Providing forums for Ai Group Members to share information on best practice workplace relations approaches, and to influence policy developments, e.g. through Ai Group's PIR (Policy-Influence-Reform) Forum and PIR Diversity and Inclusion Forum.
- Liaising with regulators including the Fair Work Ombudsman and Departmental officials.
- Writing submissions and appearing in numerous inquiries and reviews carried out by a wide range of bodies including Parliamentary Committees, Royal Commissions, the Productivity Commission, the Australian Human Rights Commission, the Australian Law Reform Commission, and others.
- Opposing union campaigns on issues which would be damaging to competitiveness and productivity.

Disclaimer to this Guide

The information in this publication is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, we do not guarantee that the information in this article is accurate at the date it is received or that it will continue to be accurate in the future.

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