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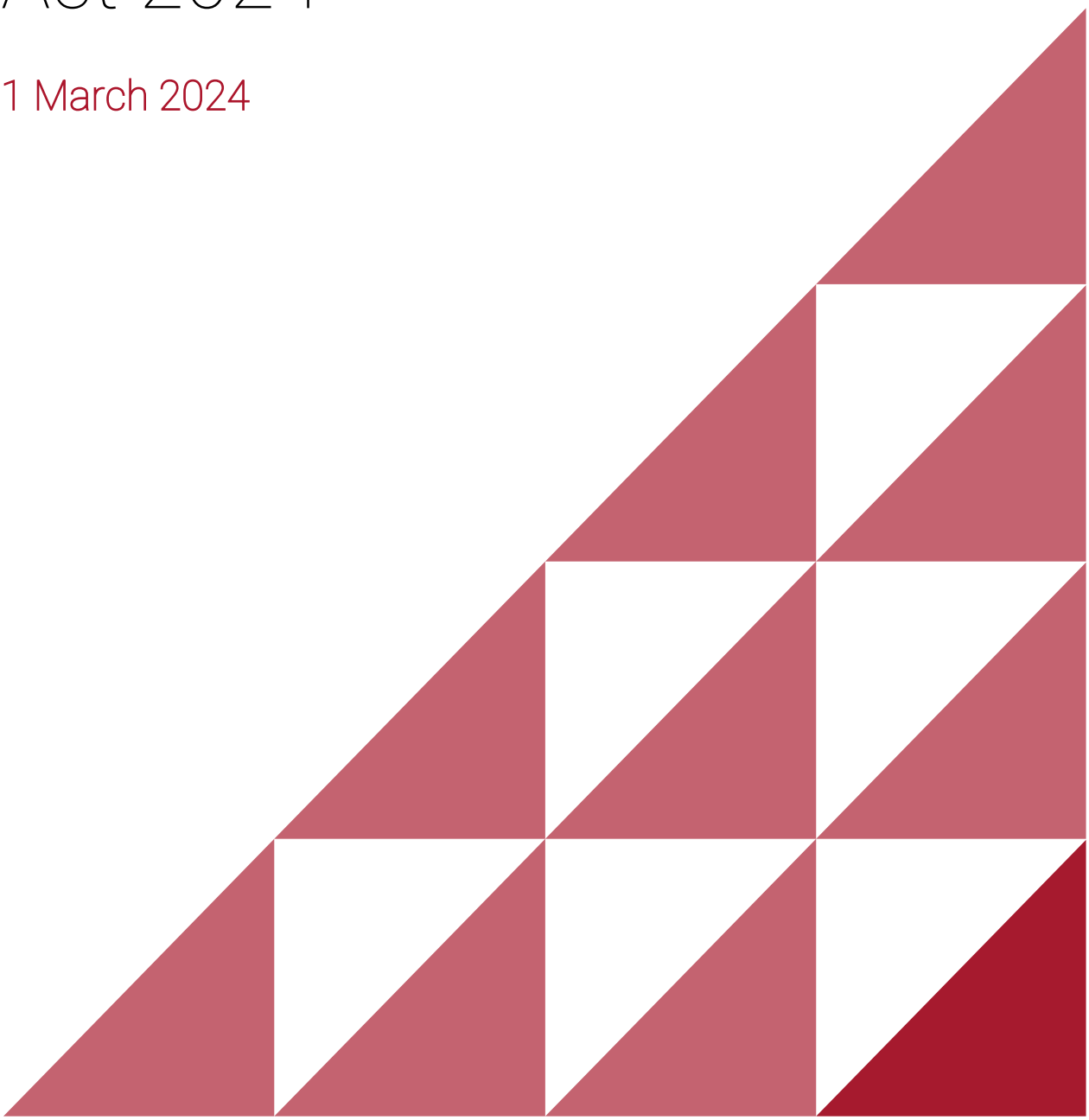
Helping employers comply with changes to Fair Work Laws

Guide to the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024

1 March 2024



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Closing Loopholes No. 2 Act

The *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (**Closing Loopholes No.2 Act**) received Royal Assent on 26 February 2024. This is the final element of the Government's controversial 'third tranche' of changes to workplace relations laws.

The key amendments made to the *Fair Work Act 2009* (**FW Act**) by the Closing Loopholes No.2 Act are summarised 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 divided it into two parts. Certain provisions were relocated into a separate bill, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2024* (**Closing Loopholes No. 2 Bill**).

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**). Our Guide to the Fair Work Legislation Amendment (Closing Loopholes) Act explains the changes implemented by the Closing Loopholes Act.

The Closing Loopholes Bill (in its original form and including the provisions now in the Closing Loopholes No.2 Bill) was referred to a Senate Committee inquiry which was scheduled to report to Parliament by 1 February 2024. On 7 December 2023, the inquiry was restricted to consider only the provisions in the Closing Loopholes No. 2 Bill which are the subject of this Guide.

On 1 February the Senate Committee reported back to Government on the Closing Loopholes No.2 Bill and recommended it be passed, subject to some amendments. On 8 February 2024, the Closing Loopholes No.2 Bill passed the Senate. On 26 February 2024 it received Royal Assent: *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024.*

On 15 February 2024, the Government introduced the Fair Work Amendment Bill 2024 to Parliament which proposes to amend the FW Act to clarify that criminal penalties will not be imposed for a breach of an order dealing with the right to disconnect.

Changes to employment

New statutory meaning of 'employee' and 'employer'

The Closing Loopholes No.2 Act introduced a new 'ordinary meaning' for the terms '*employee'* and '*employer*,*'* which is determined by reference to the "*real substance, practical reality and true nature of relationship"* between the parties.

This reverses the common law approach[1] to characterising employment versus contractor arrangements. At common law, where a comprehensive written contract is in place, courts and tribunals must give primacy to the terms of the written contract rather than applying a multi-factorial analysis, unless the contract is a sham, has been varied or rendered unenforceable or is subject to an estoppel.

The new meaning of 'employee' and 'employer' applies to relationships entered into before this provision commences if those relationships continue on that date, as well as those entered into on or after commencement. This means that if a person becomes an employee because of the new meaning under the FW Act, their employment and service before this provision commences does not count for the purposes of entitlements under the FW Act. Contractors can 'opt-out' of the application of the statutory meaning before it commences.

The new statutory meaning applies only to the FW Act and is limited to workers who are engaged by national system employers. It applies to relationships which start before and after the definition commences and to employee and employer definitions in modern awards, enterprise agreements and workplace determinations.

The common law approach otherwise continues to apply to entitlements and obligations under other Federal, State or Territory laws – for example, taxation, superannuation, workers' compensation and long service leave.

Narrowing of defence to disguising an employment relationship as a contractor relationship – sham contracting

Part-3-1 of the FW Act prohibits sham contracting, where an employment arrangement is disguised as an independent contractor relationship so an 'employer' avoids legal entitlements paid to employees under the FW Act, modern awards, enterprise agreements or workplace determinations.

The Closing Loopholes No.2 Act amends the defence to an allegation an employer has misrepresented employment as independent contracting. Previously an employer would not be liable if it did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services. However, now an employer must have at least a "*reasonable belief*" that the contract was a contract for services to mount a defence.

Engaging casual employees

A new casual employment definition under the FW Act

The Closing Loopholes No.2 Act introduces a new "*objective definition*" of 'casual employee' under the FW Act.

A person will be a casual employee if two conditions are satisfied:

- the employment relationship is characterised by an "*absence of a firm advance commitment to continuing and indefinite work*"; and
- the employee must be entitled to a casual loading, or a specific rate of pay.

The new statutory definition is not confined to a consideration of the offer of employment or the contract of employment or offer. However, the terms of the contract of employment are

[1] As determined in *CFMMEU v Personnel Contracting Pty Ltd* [2022] and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

relevant to a consideration of whether there is a "*firm advance commitment to continuing and indefinite work*".

If a person is genuinely a casual employee at the beginning of the relationship, their status will not change even if over time they no longer satisfy the new statutory definition. A casual employee's status will only change if a specific event occurs. For example, a casual employee's status may change:

- if they exercise rights under the employee choice or transitional casual conversion pathways;
- pursuant to a FWC order made when resolving a dispute about the employee's status (e.g., when their employment has been mischaracterised);
- under a fair work instrument: or
- if the casual employee accepts an offer from their employer to commence work as a part-time or full-time employee.

The FW Act limits the use of terms prescribing an identifiable period in an employment contract (i.e., fixed term limitations). The fixed term limitations have been extended to apply to casual employees. This prevents an employee being engaged on a casual basis under a contract which provides that it will terminate at the end of an identifiable period which extends for more than two years (or which has been renewed or is renewable beyond such a period) or which is entered into in the context of the employee working under more than two consecutive fixed term contracts.

An employee engaged as a casual employee before the commencement of this provision is deemed to be a casual employee within the new definition from the commencement date. This takes effect even if the relevant employment arrangements are inconsistent with the definition of a casual employee.

The timing requirements for an employer to provide the Casual Employment Information Statement to casual employees has changed and it must be provided to casual employees on additional occasions.

Employees with a dispute about the employee choice pathway or their classification can access the small claims jurisdiction for remedies.

The Fair Work Commission (**FWC**) has been empowered to vary fair work instruments to resolve an uncertainty or difficulty relating to the interaction between the instrument and the new statutory definition of casual employee.

New employee choice pathway to change to part-time or full-time employment

The Closing Loopholes No.2 Act introduces a new employee choice notification process.

This replaces the casual conversion pathway, subject to transitional provisions.

An employee must have 6 months' qualifying service to be eligible to use the new employee choice notification procedure. If the employer is a small business, they must have 12 months' qualifying service. Service accrued by a casual employee prior to commencement is not recognised. Transitional arrangements preserve the right to request casual conversion for employees who are engaged as casual employees as at commencement.

An employer must consult with the employee about the employee choice notification and respond in writing within 21 days.

An employer may refuse an 'employee choice notification' on any of the following grounds:

- having regard to the employee's current employment relationship with the employer and the statutory definition of a casual employee, the employee still meets the requirements of the definition and remains a casual employee;
- there are "*fair and reasonable operational grounds*" for not accepting the notification;
- accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

"*Fair and reasonable operational grounds*" for not accepting an employee choice notification include the following:

- that substantial changes would be required to the way in which work in the employer's enterprise is organised;
- that there would be significant impacts on the operation of the employer's enterprise;
- that substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full time employee or part-time employee (as the case may be).

Employees are not required to change or convert (i.e., during the transitional period) to part-time or full-time employment and cannot be compelled to do so by their employer. An employer is also not required to change an employee's hours of work because an employee makes an employee choice notification.

If an employee changes to part-time or full-time employment after an employee choice notification, their previous service accrued as a regular casual employee is recognised when the employee changes to part-time or full-time employment.

The FWC may deal with a dispute about employee choice notifications (or casual conversion, during the transitional period), including by arbitration in exceptional circumstances. The FWC has also been empowered to vary fair work instruments to resolve uncertainties or difficulties relating to the interaction between the instrument and the new statutory definition of casual employee.

Interactions between fair work instruments and the new casual employee definition and employee choice pathway

The FWC has been empowered to resolve uncertainties and difficulties with the interaction between a fair work instrument and the definitions of casual employee and employee choice.

Expanded anti-avoidance provisions for employee choice notifications (and casual conversion during transitional period)

The Closing Loopholes No.2 Act repeals and expands the existing anti-avoidance provision for employee choice notifications.

Employers are prohibited from reducing/varying an employee's hours of work, changing their pattern of work or terminating their employment to avoid rights and obligations in respect of employee choice notifications and transitional casual conversion.

New sham arrangements provisions relating to engagement of casual employment

The Closing Loopholes No.2 Act amends the existing sham arrangements provisions in Pt 3-1 of the FW Act to include the following two general protections for casual employment.

First, an employer is prohibited from dismissing an employee to re-engage them as a casual employee to perform the same, or substantially the same, work.

Secondly, an employer must not knowingly make a false statement to a current or former employee with the intention of persuading or influencing that employee to become a casual employee to perform the same, or substantially the same, work for the employer.

Regulated worker delegates

The workplace delegates rights and protections introduced by the Closing Loopholes Act for employees have now been extended to regulated workers.

As is the case for employee worker delegates, associated regulated businesses will be 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.

Regulated delegate workers have a right to reasonable access to the workplace or facilities provided by the regulated business. However, they are not entitled to paid time for the purposes of training about their role as a workplace delegate.

New rights and obligations for certain independent contractors

Overview

The FW Act has been amended to increase the regulation of certain independent contractor relationships. Most of the amendments are targeted at independent contractors who are either '*employee-like workers'* performing digital platform work or road transport contractors. However, there are also significant new provisions which seek to regulate those in a road transport contractual chain.

The amendments:

- provide a framework for the FWC to exercise functions and powers that relate to digital platform work, the road transport industry, and road transport contractual chains;
- establish a new jurisdiction for the FWC to set binding minimum standards orders and non-binding guidelines for employee-like workers and road transport contractors;
- introduce new powers for the FWC to make binding road transport contractual chain orders and non-binding guidelines for those in a road transport contractual chain;

- enable digital labour platform operators and road transport businesses to make consent-based collective agreements with unions;
- empower the FWC to deal with unfair deactivation claims by an employee-like worker and unfair termination claims by a road transport contractor;
- enable independent contractors earning below a contractor high income threshold (that is yet to be prescribed) to dispute unfair contract terms in the FWC;
- ensure the *Independent Contractors Act 2006* (Cth) (**IC Act**) continues to apply in respect of independent contractors performing work that is remunerated at an amount that exceeds the contractor high income threshold.

Details on these amendments are summarised below.

Regulation of road transport contractors and employee-like workers

The FWC has been empowered to regulate independent contractors who are either '*employee-like workers*' performing digital platform work or who are engaged in the road transport industry, including the following:

- to set enforceable minimum standards or non-binding guidelines for such workers;
- to grant remedies for unfair deactivation/termination; and
- to register consent collective agreements (struck between a union and business) if they are in the public interest, including a power to deal with disputes related to the making of such agreements, without the parties' consent.

The existing general protections regime under the FW Act now includes '*adverse action*' taken by digital labour platform operators, employee-like workers, and industrial associations. The general protections in the FW Act, as they relate to taking membership action and coverage by industrial instruments, have also been extended to employee-like workers and road transport contractors.

Road transport contractual chain provisions

The FWC will be given very broad powers to make binding road transport contractual chain orders and non-binding guidelines in relation to road transport contractors, road transport employee-like workers and other persons in a '*road transport contractual chain*'. This will potentially have a significant impact on commercial arrangements, including subcontracting arrangements, between businesses in the road transport industry.

A binding road transport contractual chain order must include a coverage, dispute resolution and interaction term. It may deal with a broad range of matters but this is expressly stated to potentially include payment times, fuel levies, rate reviews, termination, and cost recovery.

However, such orders cannot deal with overtime rates, rostering arrangements, or any term which changes the form of the engagement or the status of the worker (including deeming them to be an employee), or various other matters relating to work, health and safety, and the *Heavy Vehicle National Law Act 2012* (Qld).

Regulated workers and industrial action

The FW Act has expanded the definition of industrial action under the FW Act to regulated workers and businesses covered by an MSO (or where there is an application for an MSO).

Examples of industrial action include:

- the performance of work by a regulated worker in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by a regulated worker, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- a ban, limitation or restriction on the performance of work by a regulated worker or on the acceptance of or offering for work by a regulated worker;
- a failure or refusal by regulated worker to attend for work or a failure or refusal to perform any work at all by regulated contractors who attend for work;
- the lockout of regulated worker by the regulated business.

Unfair contract terms

The FWC will be given new powers to deal with unfair terms in services contracts to which an independent contractor is a party, where the services contract contains terms which, in an employment relationship, would relate to 'workplace relations matters' as defined under the FW Act. This will be subject to the sum of the contractor's annual rate of earnings (and such other amounts as prescribed) being less than the specified contractor high income threshold in the year the application is made. This threshold has not been set at the date of this guide's release.

The FWC will be able to issue orders that change or set aside all or part of the services contract (including terms which do not relate to 'workplace relations matters'). The provisions do not empower the FWC to award financial compensation. However, if a person contravenes an order, they may be liable for a civil penalty of up to 60 penalty units.

The *Independent Contractors Act 2006* will continue to apply for contactors not eligible to make an application under the unfair contracts jurisdiction in the FW Act.

Underpayments measures and serious contraventions

Exemption certificates for suspected underpayments

This change enables officers of a registered organisation (i.e., a union) to obtain an exemption certificate from the FWC to waive the 24 hours' advance notice required for entry to an employer's premises if they suspect a member of their organisation has been or is being underpaid.

However, the FWC must reasonably believe that advance notice would hinder an effective investigation into the suspected contravention (or contravention) to be able to grant an exemption certificate.

Compliance notice measures

Section 716 of the FW Act which deals with compliance notices has been amended to clarify that:

- a compliance notice issued to a person may require the person to calculate and pay the amount of an underpayment; and

- a court may make an order requiring compliance with a notice (other than an infringement notice) issued by a Fair Work Inspector or the FWO.

Civil penalties and serious contraventions

These changes:

- increase maximum penalty amounts for underpayment contraventions for medium and large body corporate employers by five for specific underpayment contraventions that are known as 'selected civil remedy provisions' (this does not apply to small business employers);
- in certain circumstances and if an application is made, permits penalties to be alternatively awarded on the basis of 3 x the quantum of the relevant underpayment for medium and large body corporate employers if that amount is larger than the maximum penalty amount (this does not apply to small business employers);
- increases the penalty for contravening a compliance notice from 30 to 300 penalty units (and to 1,500 penalty units for medium and large body corporate employers); and
- alters the current threshold for a 'serious contravention' of a civil remedy provision.

Enterprise agreements, bargaining, franchises, model terms and unions

Transitioning from multi-enterprise agreements

This change gives employers the new ability to transition out of coverage under multi-enterprise agreements by making a single enterprise agreement.

However, if employers wish to transition out during the nominal term of a multi-enterprise agreement, they will need the written agreement of each of the unions to whom the multi-enterprise agreement applies before putting the new single enterprise agreement to a vote. If the relevant unions do not provide written agreement, the employer will need to apply to the FWC for a voting request order. The FWC must make a voting request order if the unions' failure to agree was unreasonable in the circumstances and it is satisfied the order would not undermine good faith bargaining for the agreement.

When the FWC applies the better off overall test to the proposed new single enterprise agreement, it is applied by reference to the old multi-enterprise agreement instead of the modern award.

Changes to intractable bargaining workplace determinations

The *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* introduced provisions enabling the FWC to make intractable bargaining declarations and intractable bargaining workplace determinations if bargaining stalls and certain criteria are met.

This change:

- clarifies what constitutes 'agreed terms,' which are terms included in an intractable bargaining workplace determination as agreed by the bargaining representatives and which are not subject to arbitration by the FWC; and

- prohibits the FWC from making a determination that includes terms which are less favourable to employees or their bargaining representatives as compared to the particular term in the enterprise agreement dealing with that matter.

Enabling multiple franchisees to access the single-enterprise stream

The amendments enable franchisees of a common franchisor to bargain together for a single-enterprise agreement as 'related employers'.

An amendment has also been made to enable those franchisees to alternatively make a multi-enterprise agreement, despite now falling within the definition of 'related employers'.

Model terms

This change gives the Full Bench of the FWC the power to determine 'model terms' concerning flexibility, consultation and dispute resolution in relation to enterprise agreements. Currently, these model terms are prescribed in regulations.

The model terms would not override terms agreed to between the parties to an agreement or instrument where the terms meet the requirements of the FW Act.

Demergers

This change prevents a de-merger ballot being made more than five years after a union amalgamation has occurred.

Right to disconnect

A new right to disconnect has been inserted into the FW Act.

The new provisions:

- allow an employee to refuse to monitor, read or respond to contact or attempted contact from their employer or a third party (e.g., a client) outside of the employee's working hours unless the refusal is unreasonable.
- empower the FWC to resolve disputes by making stop orders – a breach of which may result in a civil penalty of up to 60 penalty units.
- require that modern awards be varied to include a 'right to disconnect term'.
- require the FWC to make written guidelines in relation to how this new right operates.
- clarify that the right is also a 'workplace right' within the meaning of Pt 3-1 of the FW Act (i.e., the general protections provisions).

Statutory review

The Minister must cause a review of the Closing Loopholes No.2 Act to be conducted no later than 2 years after the day on which the Act receives Royal Assent. This review will cover all amendments, including but not limited to the new jurisdiction relating to regulated workers and the right to disconnect.

The review must:

- consider whether the operation of the amendments are effective and appropriate;

- identify any unintended consequences of the amendments; and
- consider whether further amendments are necessary to improve the operation of the amendments or to rectify any unintended consequences.

Commencement dates

Part	Commencement
Part 1 - Casual employment (definition, choice notification and sham arrangements)	26 August 2024
Part 3 - Enabling multiple franchisees to access the single-enterprise stream	27 February 2024
Part 4 - Transitioning from multi-enterprise agreements	27 February 2024
Part 5 - Model terms	The date on which a proclamation is issued or 26 February 2025, whichever is earlier
Part 5A – Changes to intractable bargaining workplace determinations	27 February 2024
Part 7(2) - Workplace delegates' rights (application to regulated workers)	The date on which a proclamation is issued or 26 August 2024, whichever is earlier
Part 8 – Right to disconnect	26 August 2024 - medium and large employers 26 August 2025 - small business employers
Part 9 - Sham arrangements (employment - changed to 'reasonable belief')	27 February 2024
Part 10 - Right of entry - exemption certificates for suspected underpayment	1 July 2024
Part 11(1) - Penalties for civil remedy provision - penalties	27 February 2024
Part 11(2) - Penalties for civil remedy provision - contingent amendments	27 February 2024
Part 11(3) - Penalties for civil remedy provisions – determining the maximum penalty for a contravention to 3 x the value of an underpayment	The later of 1 January 2025 or the day the Minister prescribes a Voluntary Small Business Wage Compliance Code under s.327B(1) of the FW Act. Note the amendment will not commence if the Code is not prescribed.

Part	Commencement
Part 12 - Compliance notices	27 February 2024
Part 13 - Withdrawal from amalgamations	27 February 2024
Part 15 - Definition of employment	The date on which a proclamation is issued or 26 August 2024, whichever is earlier (Opt-out commences 27 February 2024. However, it is subject to the contractor high income threshold being prescribed.)
Part 16 - Provisions relating to regulated workers: road transport, expert panel for road transport, minimum standards for regulated workers	The date on which a proclamation is issued or 26 August 2024, whichever is earlier
Part 17 - Technical amendment	27 February 2024
Part 18 - Application and transitional provisions	27 February 2024
Schedule 5 – Amendment of the Coal Mining Industry (Long Service Leave) Administration Act 1992	The later of 27 February 2024 and the day the withdrawal of the Mining and Energy Division of the CFMMEU from that union takes effect, as determined by the Federal Court of Australia under paragraph 109(1)(a) of the *Fair Work (Registered Organisations) Act 2009*.

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.

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.

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CONTACT US


1300 55 66 77


aigroup.com.au


info@aigroup.com.au


linkedin.com/company/australian-industry-group