MCA COMMENTS ON KEY AMENDMENTS TO THE 'CLOSING LOOPHOLES NO. 2' BILL 2023 MADE IN THE SENATE ON 8 FEBRUARY 2024

Parliament passed the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 on 12 February 2024. This note sets out the MCA's comments on key amendments to the Bill made in the Senate on 8 February 2024.[1]

The key senate amendments include:

- Minor amendments to the **casual employment and conversion measures** and commencement date. (Pocock/JLN)
- Creating a **'Right to disconnect'** – commencing 6 months after Royal Assent, whereby employees will have an enforceable right to refuse contact from their employer out of hours unless that refusal is unreasonable. (Greens)
- A limit on union **right of entry** without notice in cases of suspected underpayment where advance notice would not 'hinder an investigation'. (Pocock/JLN)
- Prescriptive detail of the FWC's powers to make **road transport contractual chain orders** to regulate commercial contract terms in road transport and related areas. (Government)
- Slightly reducing the scope of workers who would otherwise be caught under the new **'employee-like'** provisions. (Government)
- Allowing workers to 'opt out' of the bill's new definition of employment if they earn above the high-income threshold (currently $167,500). (Pocock/JLN)

These changes add to widely criticised Greens/government amendments to the bill made in December last year, under which **intractable bargaining** arbitration processes cannot result in 'less favourable' employee conditions.[2]

Amendments jointly made by Senator David Pocock and the Jacqui Lambie Network which purportedly make the bill 'simpler and fairer' merely tinker with unworkable reforms, while delivering little for businesses who will soon be subjected to these highly interventionist new laws.

Overall, these amendments make no real improvements to the bill, but have introduced further untested measures that will create more complexity, uncertainty and risk for businesses.

[1] Of the amendments made: 108 were by the Government; 79 were by the Jacqui Lambie Network and Senator David Pocock jointly; 5 were by Senator Thorpe; 3 were by the Australian Greens and 1 was by the Jacqui Lambie Network.
[2] Australian Financial Review, 'Burke's workplace changes will undercut bargaining', 8 February 2024.

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Senator David Pocock and JLN amendments – causal employment

Amendment[3]	***Comments***
Delay commencement of all casual conversion amendments (including new definition and conversion regime) by six months from the date of royal assent "to give stakeholders time to prepare for the new arrangements.	• A 'stay of execution' for many casuals, who will no longer be able to work predictable hours that they have chosen. • A 6-month delay in commencement is a frank admission by the Government that the provisions involve very significant complexity for which businesses are not prepared.
Make sure the employment contract can still be considered by the FWC in determining whether an employee is casual or not.	• No practical change because the previously proposed section 15A(4) already directed the FWC to have regard to the contract of employment. • The contract is still one of 15 factors for consideration in the test to determine whether an employee is in fact casual. The test is still inordinately complex and weighted against a finding that an employee is a 'casual'. • The will of the parties, as expressed in the contract, is but one (subordinate) factor in this 15-factor test.
Ensure that a single indicia should not establish a firm advance commitment to continuing and indefinite work.	• It was never the case that the Bill enabled a single factor (or indicia) to establish a 'firm advance commitment', consistent with the underpinning purpose of the multi-factor test. There is nothing in the amendments altering that fact. • The practical effect of the provisions is that those who wish to remain casual are deprived of any reliable or firm indication from their employer as to the availability of future work, given the incentive for businesses to avoid providing a 'firm advance commitment'. • The fundamental problem with the definition remains – an employee is not a casual if they have a 'firm advance commitment' (which is still equally difficult to determine).
Clarify that an employer may be able to offer or refuse to offer work to a casual employee	• This has always been the case, given that the very nature of casual employment has always involved an ability for an employer to offer and an employee to refuse work on a shift-by-shift basis. It should not need to be 'clarified', and doing so does not alter the operation of the Bill.
Broaden the capacity for employees to enter into fixed term contracts as casual employees. The amendment would ensure all other employees may be engaged on fixed term contracts as casual; except for academics covered by certain modern awards in the higher education sector. This largely resolves concerns raised by	• Intended to address a 'problem' that should never have been a 'problem' with the Bill in the first place. • Legislation which includes a separate set of rules for one industry (in this case universities) is seldom good policy. • Contrary to Senator Pocock's broad brush statement, this change has a very limited practical impact, not just because it is confined to the higher education sector but also because the circumstances where businesses use casual employees on a fixed-term basis is negligible.

[3] Senator David Pocock, media release, 'Simpler, fairer IR bill will preserve flexibility', 7 February 2024.

on-hire companies offering temp contracts.	
Make it simpler for business, especially small business, to refuse casual conversion by removing the requirement to provide a 'detailed' statement of reasons	• This amendment involves the mere deletion of the adjective 'detailed'. • A 'statement of reasons' is an absurd over-reach. However, a universal right to arbitration remains, which means employers can still be required to provide detailed reasons in Fair Work Commission litigation. • Given the prescriptive process of making and responding to requests remains unaltered, in particular that the employer's response must be in writing (and is confined to the prescribed grounds). • Given that the dispute resolution provisions hinge upon the employer's refusal, there is no practical change from the mere removal of the world 'detailed'. Certainly, this technical change does not justify the description provided in the press release.
Allow employers to refuse an employee request for conversion on "fair and reasonable operational grounds"	• Does no more than attempt to preserve the 'reasonable business grounds' provisions already in the Act. • It is still a subjective formula, which is now easier to challenge in FWC litigation.
Repeal the existing requirement on businesses to offer conversion, which would provide for a single legislated pathway for casual conversion (i.e. the employee choice pathway). This will relieve the existing administrative burden on employers and make the process by which an employee can seek to convert to permanency simpler.	• Removes the existing 12-month conversion regime, in favour of the new 6-month regime. • The existing regime was much simpler and more balanced than the new regime in the Bill. The regime had a 'bilateral' operation, where each party had a right to instigate conversion. Now, a 'unilateral' regime will limit the right to instigate conversion to one party only. • Further, the conversion regime revolves around a much more complex multi-factor test to determine who is in fact a casual, making the regime less accessible to employees. • Whilst there will not be two parallel regimes, the government and Senator Pocock have opted for the worse option of the two.

Senator David Pocock and JLN amendments – 'Employee-like' workers

Amendment	***Comments***
Limit the FWC to considering only the class or classes of regulated businesses to be covered by proposed minimum standards orders or guidelines, rather than naming individual businesses	• Individual businesses may still be named in the FWC order; the only change is that any named business must fall within the 'class of business' specified in the order. There is no substantial change to the coverage of the order. • Will make no difference in practice for those business who are captured by 'Minimum Standards Orders' (MSOs). • This is no more than 'common rule' MSOs, as opposed to 'named respondent' MSOs.
Increase from one to two (out of three) the number of criteria someone needs to meet to be defined as employee-like	• An improvement, which may restrict the scope of MSOs to businesses whom the government intended to capture. • However, the fundamental problem remains – the definition of 'digital platform' is still unqualified, which means 'horizontal' platforms such as Airtasker and Mable could still be captured.

Senator David Pocock and JLN amendments – Right of entry

Amendment	***Comments***
Insert an additional guardrail such that the Fair Work Commission, prior to issuing a certificate, must be satisfied that advance notice of entry into a workplace would hinder an effective investigation into suspected underpayments.	• A substantive change, which provides some check and balance against abuse, when the original Bill contained none. • Unlike the original Bill, the Commission now has some discretion to refuse an exemption, whereas previously a union need only assert an underpayment and the Commission was a 'rubber stamp'.

Senator David Pocock and JLN amendments – Definition of 'employment'

Amendment	***Comments***
Independent contractors can elect to keep their arrangement unchanged by giving an 'opt-out' notice to their principal.	• The capacity to 'opt out' of the prescriptive effect of the uncertain definition of 'employee' under section 15AA is of limited scope, confined to contractors who were engaged before the commencement of the definition; have been given a notice by their putative employer within 6 months of commencement of the section; and have earnings that exceed the 'high income contractor threshold'. • Indeed, the implementation of a special 'opt out' arrangement seems to recognise that there is otherwise a lack of any freedom for independent contractors to retain their status if they wish to do so. Contractors below the high-income threshold remain at the mercy of the operation of the vague definition of 'employee', limiting their ability to continue to work in a way that suits their circumstances.

Greens amendments – 'Right to Disconnect'

Amendment	***Comments***
Give employees an enforceable right to refuse contact from their employer out of hours unless that refusal is unreasonable. Where the issue cannot be resolved at the workplace, and the behaviour continues, the Fair Work Commission can issue stop orders. If they are breached, the normal civil remedies of the Fair Work system will apply.[4]	• There has been no consultation with business on the many unintended consequences this measure is likely to have, given the variety of work arrangements in the economy. • The changes are likely to have significant, disruptive impacts for businesses operating across multiple time zones or with 24/7 operations, as is common in Australia, particularly across the resources sector. • The introduction of highly prescriptive rules at the granular workplace level runs counter to the government's broader agenda of preserving flexibility for workers, who may wish to work as and when suits them. • Senator David Pocock acknowledged the need to consult on the measure just one week earlier, stating *"…[the proposal] has not yet been publicly released for any form of consultation, or subject to the committee's scrutiny process through this inquiry, and* ***that is of concern****."* He nonetheless voted for the amendment. • More complexity and cost – an impediment to productivity. For example: - The 'right to disconnect' provisions in enterprise agreements must be better than the overarching rights that would be provided under statute, requiring complicated comparisons, and discouraging trade-offs that benefit employers and employees. - FWC can arbitrate disputes about what is an 'unreasonable' refusal which involves consideration of the personal circumstances of individuals. • The test of what constitutes a 'reasonable' refusal of after-hours contact does not balance the requirements of the business with the needs of employees, as the dominant focus of the test is on the employee's circumstances. The operational needs of the business or the inherent requirements of the role do not count as a factor that must be taken into account in deciding if 'disconnecting' is reasonable or unreasonable.

[4] Australian Greens, media release, 'Greens win a right to disconnect in Fair Work bill', 8 February 2024.

Government amendments – Road Transport

Amendment	***Comments***
Ensure a safe, sustainable and viable trucking industry – including for owner drivers.[5] *Remove the contractual chain regulation-making power in the Bill and insert a comprehensive framework that would empower the FWC to make contractual chain orders and guidelines in relation to contractual chains in the road transport industry.*[6]	• The amendment introduces a new regime specific to the road transport industry, empowering the FWC to make road transport contractual chain orders, which set minimum standards to which certain regulated road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain are entitled in relation to certain matters. • The new regime is unnecessarily complex and sits within an already complex broader framework. • Rather than addressing the issues previously raised by the MCA with road transport minimum standards orders – and which plagued the abolished Road Transport Remuneration Tribunal – these changes simply create further opportunity for unprecedented interference with road transport owner-drivers and small businesses. • The amended bill now defines 'road transport contractual chain' so broadly that such orders could also capture any industry that a road transport business provides services to, such as ports, supermarkets, or mining. • The amendments confirm 'anything done' by a person or entity in accordance with a road transport contractual chain order or guideline will be exempt from the effect of most competition laws.[7]

[5] Hon Tony Burke MP, media release, 'Workplace loopholes to be closed' 8 February 2024.

[6] Supplementary Explanatory Memorandum, amendments moved on behalf of the government, 8 February 2024, p. 1.

[7] Ibid, p. 32.