Minerals Council of Australia

FAIR WORK LEGISLATION (CLOSING LOOPHOLES) BILL 2023

PROPOSED GOVERNMENT AMENDMENTS

3 November 2023

CASUAL EMPLOYMENT

The government has indicated that it will amend the Bill in three ways:[1]

1. Remove section 359A of the Bill – the "misrepresentation" penalty provision.
2. Amend the definition of casual at section 15(3)(b) to provide that no one factor in paragraph 15A(2)(c) is determinative of status
3. Add a note explicitly stating that it is possible under the provisions to be a casual with a wholly regular pattern of work; and also no firm advance commitment to continuing or indefinite work.

Each of these proposals is considered below.

1. Remove the "misrepresentation" provision

This amendment will remove a punitive penalty ($93,000 maximum), but does not address the underlying issue, which is the complexity of the definition.

- It removes the penalty for "unreasonable" misrepresentation of casual status, but all other restrictions in the Bill on casual employment remain, including those that apply to "accidental" mis-classification.
- The complex, 3-page, 15-factor definition of "casual employee" still remains.
- There is no reason to change the existing definition, which was introduced in 2021. The proposed new definition is inordinately more complex and will restrict the ability for business and workers to continue with their existing casual arrangements.

Even if penalties do not apply to "misrepresenting" a relationship as "casual", an employer will still be in breach of the legislation (and exposed to penalties) in the event they misclassify employees under the new definition (even if the employee wants to be casual). No responsible business would intentionally do this.

- First, any failure to provide benefits of permanent employment to a misclassified employee (e.g. annual leave, notice of termination and redundancy pay) will enliven the risk of an underpayment (particularly on termination of employment). Under the Bill's compliance and enforcement provisions, civil penalties for a breach of the NES would be increased fivefold to $93,900 per contravention (or $939,000 for a 'serious contravention', the test for which has been lowered by the Bill to one of mere 'recklessness').[2] In addition, if the contravention is associated with an underpayment, the pecuniary penalty could be increased fivefold again (i.e. $469,500, or $4,695,0000 for a serious contravention) or to three time the underpayment amount, whichever is greater.
- Second, employers may incur penalties for accidentally misapplying the unworkable definition even if no underpayment arises. This is because the general protections already provide that

[1] Email from Minister's Office, 30 October 2023
[2] *Fair Work Act 2009* (Cth), s 44; proposed new section 539(2), item 1 of the table.

Level 3, 44 Sydney Avenue
Forrest ACT, 2603
PO BOX 4497
Kingston ACT 2604
Telephone: + 61 2 6233 0600
Email: info@minerals.org.au
Web: www.minerals.org.au
ABN: 21 191 309 229

a person must not make false or misleading representations about the workplace rights of another person (e.g. the fact that the person is a casual employee and does not receive certain entitlements as a result).[3]

- Third, under the new definition, employers may be exposed to claims that they misclassified employees as 'casuals' in order to prevent the exercise of workplace rights available to permanent employees, in breach of the general protections.[4] Perversely, it would be nearly impossible for employers to discharge the reverse onus of proof and rebut this claim. This is because, invariably, it will always be the case that a reason for classifying someone as a casual is to "prevent" them being treated as permanent.

The section of the Bill that will be removed is as follows:

> ***359A Misrepresenting employment as casual employment***
>
> *(1) A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for casual employment under which the individual performs, or would perform, work other than as a casual employee.*
>
> *Note: This subsection is a civil remedy provision (see Part 4-1).*
>
> *(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer reasonably believed that the contract was a contract for employment as a casual employee.*
>
> *(3) In determining, for the purpose of subsection (2), whether the employer's belief was reasonable:*
>
> *(a) regard must be had to the size and nature of the employer's enterprise; and*
>
> *(b) regard may be had to any other relevant matters.*

2. Amend the definition of casual at section 15A(3)(b) to provide that no one factor in paragraph 15A(2)(c) is determinative of status

- This amendment changes nothing. Section 15A(3)(b) of the Bill already states that:

> *"the conditions referred to in paragraph (2)(c) must all be considered but do not necessaily all need to be satisfied for an employee to be considered as other than a casual employee…"*

- The amendment therefore serves no purpose. The Department of Employment and Workplace Relations confirmed at Senate Estimates on 25 October 2023 that: [5]

> *"… at the end of the day the question really is: did you have a firm advance commitment? That isn't going to be answered by any one of these factors in (2)(c) individually, which is why I should note that paragraph (3)(b), on its present drafting, does say that* ***not all of the factors need to be satisfied****."* (emphasis added)

- In other words, the Bill already does what the amendment purports to do. The amendment is pointless.

3. Add a note explicitly stating that it is possible under the provisions to be a casual with a wholly regular pattern of work, and also no firm advance commitment to continuing or indefinite work.

- We understand that the "note" will simply be a legislative note in the Bill to this effect. Regardless of what the note says, it will be of no practical effect.

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[3] *Fair Work Act 2009* (Cth), s 345.
[4] *Fair Work Act 2009* (Cth), s 340(1)(b).
[5] Stephen Still, Department of Employment and Workplace Relations, Senate Education and Employment Legislation Committee, 25 October 2023

- A legislative note is not actually part of the substantive provisions of legislation. The Office of Parliamentary Counsel states that: [6]

> *"Notes…. can be used to explain the purpose, origin or operation of a provision, or to refer the reader to related provisions or to definitions of terms used in the provision."*

- It is well-established that notes cannot change the substance of the legislation itself. If they contradict the legislation, the legislation must always prevail. For example, the Supreme Court of Victoria has said:[7]

> Although a note such as this forms part of the Act, it is subordinate to the substantive provisions, of which it is merely explanatory or illustrative.
>
> In some circumstances, a note such as this may be used as an aid to the construction of the substantive provision to which it relates. Thus, if two interpretations are open on the text of the substantive provision, a note might assist in determining which of the two interpretations was to be preferred. As observed earlier, however, if there is conflict between the substantive provision and the note, the note must give way.

- Further, a Full Bench of the Federal Court, in the context of the Fair Work Act, has said:[8]

> "… the fact that a note is part of the Act does not mean that it can govern the meaning of the Act. "

- As such, the note will only have any work to do if the definition in section 15A is ambiguous or if multiple interpretations are available.
- However, section 15A unambiguously provides that the presence of a regular pattern of work (even if it is not uniform and includes fluctuations) indicates the presence of a firm advance commitment. There is no ambiguity. There are no competing interpretations. So the note has no work to do. The note is an entirely redundant, token 'amendment' that changes nothing.
- This means that, under the Bill, it remains the case that *"an employee is a casual employee **only if**"* they meet the 15-factor test.[9] (emphasis added).
- If an employee does not meet that test then they are not a casual, regardless of what any legislative note says. The note does not change anything.
- The definition in the Bill will still mean that an employee **cannot** be a casual with a *"wholly regular pattern of work"*:[10]

> *(1) An employee is a casual employee only if:*
>
> *(a) The employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work …*
>
> *(2) For the purposes of paragraph (1)(a), whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work is to be assessed:*
>
> *(c) having regard to, but not limited to the following considerations (which indicate the presence, rather than the absence, of such a commitment)…*
>
> *(iv) whether there is a regular pattern of work for the employee*
>
> *(3) To avoid doubt:*

[6] https://www.opc.gov.au/sites/default/files/2023-01/s13ag320.v55.pdf, page 33
[7] *Director of Public Prosecutions v Walters* [2015] VSCA 303 at [50]-[51]
[8] *CFMEU v BHP Coal Pty Ltd* [2015] FCAFC 25 at [118]
[9] section 15A(1)
[10] section 15A

(c) "A pattern of work is regular for the purposes of subparagraph (2)(c)(iv) even if it is not absolutely uniform and includes some fluctuation of various over time…"

- Further, a Full Bench of the Federal Court, in the context of the Fair Work Act, has
- In other words, an employee is a casual only if they **do not** have a "firm advance commitment" that can include regular hours. Once they do have regular hours they have a firm advance commitment and will fall outside of the definition. Because the definition of casual is defined negatively - an *"absence of a firm advance commitment"* – then the presence of any such commitment (such as regular hours) is contrary to the definition.

Implications

The complex and restrictive definition of "casual employee" will remain and will be no different in practice.

- The definition in the Bill already has 15 separate factors. It is extremely unclear. All the amendment does is "clarify" that it is unclear.
- The legislative note makes it more complex by contradicting the definition – no business or worker will be able to rely on the note – it will simply create confusion.

The status of casual employees can still be changed:

- The Fair Work Commission will still have the power to arbitrate disputes. Because the definition is weighted in favour of permanent employment (a worker is a casual "only if" they meet the multi-factor test), the Commission will invariably convert more casuals to pemanent, as the legislation will require it to do so. This will mean that casuals will lose their 25% loading.

Existing casual arrangements will no longer be possible:

- A range of existing arrangements in which casual employees work "regular" hours with a "firm advance commitment" will no longer be possible. They will be in breach of the Act if they continue to be classified as "casuals".
- This will also have flow-through impacts on enteprise bargaining – no responsible business or union would agree to an agreement that allows for casual employment that is technically in breach of the definition.
- The Fair Work Commission could also not technically approve such an agreement. The restrictive nature of the definition means that thousands of existing casual arrangements will be rendered impossible. This will especially impact the Retail and Hospitality sectors.

SERVICE CONTRACTORS

Media report on 31 October

- No information has been provided by the government in relation to this purported amendment. All that is available is a media report in 'The Australian' on 31 October, which included the following comments by Minister Burke:

> *"The government made a clear policy decision that we did not want service contractors who were providing a service other than effective labour hire to be captured by the labour hire loophole sections of the Act."*
>
> *"There have been some constructive recommendations – in particular from West Australians companies and organisations – suggesting how the language of the bill might be further refined. I've been very grateful for those contributions. This doesn't change the government's objective; it simply makes sure that the objective is met without unintended consequences."*[11]

Government's position

- In the absence of any detail on the amendments, it could be assumed that the government's proposed amendments will not be an express exclusion but amendments to the discretionary factors in the "fair and reasonable" multi-factor test, which has 12 elements, one of which is whether a business is a service contractor.[12]
- The government's position was stated in Senate Estimates on 25 October:

> ***Senator Watt:*** *We would say they are excluded via the commission having the power to consider those matters.*
>
> ***Senator CASH:*** *So there is no strict provision is the answer to the question, though?*
>
> ***Senator Watt:*** *No, but they are excluded because of the matters that have just been explained.*
>
> ***Senator CASH:*** *No, they are not, because that is obviously a decision for the Fair Work Commission. There is no strict provision is the answer to the question. There is no specific exclusion, because, if there was, we would be currently working through a particular section of the bill.*
>
> ***Senator Watt:*** *Yes, but the intent is to exclude those types of businesses via the Fair Work Commission's discretion.*[13]

Implications

- An amendment to the discretionary factors in the "fair and reasonable" test is not a genuine exclusion. The key problems will still remain:
  1. "Labour hire" is not defined in the Bill, so service contractors are still treated the same as labour hire; and
  2. Service contractors will still be captured by "Same Job, Same Pay" unless they can litigate their way out.
- The only genuine exemption is one that defines what is – and isn't – "labour hire" and makes it clear that service contractors (businesses engaged to provide a service, rather than workers) are clearly not "labour hire". This is the only way they can avoid being trapped in FWC litigation through union applications to rope them into "Same Job, Same Pay" orders.

[11] "*Back-off Burke: bid for IR truce*", The Australian, 31 October 2023: https://www.theaustralian.com.au/nation/politics/back-off-tony-burke-employers-launch-bid-for-a-truce/news-story/20f688e05680924dfeb473d2eb0ec816
[12] section 306E(8)
[13] Minister Watt, Department of Employment and Workplace Relations, Senate Education and Employment Legislation Committee, 25 October 2023