



President's statement

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

Justice Hatcher, President

Sydney, 27 February 2024

Introduction

[1] The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes No. 2 Act) received Royal Assent on 26 February 2024. The Closing Loopholes No. 2 Act amends the *Fair Work Act 2009* (FW Act) and confers new functions on the Fair Work Commission (Commission).

[2] This Statement outlines the Closing Loopholes No. 2 Act amendments that affect the Commission's functions and processes and outlines the approach the Commission will take to implement these changes.

Approach to implementation

Organisation capability

[3] The last 14 months have seen a significant expansion of the Commission's functions by legislative amendment. You can view information about changes made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay Act) 2022* (Secure Jobs Better Pay Act) and the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Closing Loopholes Act) in my previous Statements.¹

[4] In two operational Statements issued on 2 August 2023 and 22 December 2023, I outlined the significant work undertaken to implement the Commission's new statutory functions whilst continuing to provide a high level of service to the Australian community across all case categories. The Commission has undertaken over 50 projects to support commencement of the reforms, to ensure the community can understand the changes to its functions and to ensure that the Commission continues to deliver services efficiently and effectively. These projects have included:

- extensive information materials to support parties to bargain and make agreements following amendments effective from 6 June 2023, and to clearly explain new multi-enterprise agreement types, including videos and online information packs,
- an external review of registered organisations governance and compliance, along with practical action on recommendations,

¹ President's Statement [20 December 2023](#); President's Statement [8 December 2022](#).

- engagement with new working and advisory groups, such as the Sexual Harassment Working Group and the Enterprise Agreement and Bargaining Working Group, to meaningfully inform our service delivery, and
- practical tools and resources such as updates to our date calculators and online learning modules, and our written notice template and guides relating to the sunseting of ‘zombie’ agreements.

[5] Our strong operational performance puts us in a solid position to implement the changes which will flow from the commencement of the measures in the Closing Loopholes No. 2 Act. During the period 1 July 2023–31 January 2024, our members and staff have dealt with approximately 22,000 cases, with:

- 50% of all cases finalised within 5 weeks of lodgment
- 90% of all cases finalised within 11 weeks of lodgment
- 87.8% positive user experience.²

[6] The Closing Loopholes No. 2 Act reforms are significant, and the successful implementation of these reforms will require extensive consultation with diverse stakeholders, subject matter experts and interested persons. It will be our priority to establish case management processes that are easy for users to understand and navigate, are clearly communicated, minimise the regulatory burden and are fit for purpose.

[7] As highlighted in my previous Statements, the Commission remains steadfast in its commitment to implementing the changes in an open and transparent way and with the needs of our users at the heart of the design of our services.

Implementation of changes to FW Act

[8] A number of the measures in the Closing Loopholes No. 2 Act that affect Commission functions and operations commence today, 27 February 2024, being the day after Royal Assent. These include:

- measures to enable multiple franchisees to access the single-enterprise stream
- measures to provide for transition from a multi-enterprise agreement to a single-enterprise agreement in some circumstances
- changes to intractable bargaining workplace determinations, and
- changes to withdrawal from amalgamations.

[9] Some changes commence on 1 July 2024:

- exemption certificates for suspected underpayment, and
- conditions on entry permits.

² The Commission administers user surveys through three different channels: unfair dismissal conciliation survey, general protections staff conference survey and WAS user survey. Most users report a positive experience when interacting with our service: 87.8% in 2023-24 YTD.

[10] Further changes will commence on 26 August 2024 (6 months after Royal Assent):

- changes to the definition of casual employee
- changes to the process for a casual employee to become a full-time or part-time employee
- introduction of the right to disconnect (noting that provisions do not apply to a small business employer, or an employee of a small business until 12 months after commencement of the provisions).

[11] Some changes will commence by proclamation:

- model terms for enterprise agreements (to commence by proclamation or **12 months** after Royal Assent)
- workplace delegates' rights relating to regulated workers (to commence by proclamation or **6 months** after Royal Assent)³
- amendments related to determining whether a relationship is employment (to commence by proclamation or **6 months** after Royal Assent)
- provisions relating to regulated workers (to commence by proclamation or **6 months** after Royal Assent).

[12] We have a [dedicated section](#) on the Commission's website to share information about implementation of the Closing Loopholes No. 2 Act changes. This section will be updated regularly and will include statements and information about the legislative changes, links to content relating to each of the measures, opportunities for comment and an email address for feedback.

[13] The website content has been updated today and interested parties will be notified by subscriber email that the [Form F1 – Application \(no specific form provided\)](#) general application form may be used to lodge an application while new forms are developed.

[14] The Commission encourages active involvement from all interested parties. Feedback relating to documents published on the Commission's website can be sent to consultation@fwc.gov.au.

Closing Loopholes No. 2 Act changes relevant to Commission functions and operations

Definitions

[15] A number of the amendments made to the FW Act by the Closing Loopholes No. 2 Act require the insertion of new terminology into the FW Act. New terms include 'regulated worker', 'regulated business', 'minimum standards orders', 'employee-like worker' and

³ These changes extend amendments made by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* in relation to workplace delegates who are regulated workers.

‘regulated road transport contractor’ amongst others. This Statement will use those new terms and definitions as set out in the amendments.

Changes to casual employment

[16] Part 1 of Schedule 1 to the Closing Loopholes No. 2 Act repeals and replaces section 15A of the FW Act and amends Division 4A of Part 2-2 of the FW Act, ‘Casual employment’. These changes commence on 26 August 2024.

[17] In summary, the changes:

- repeal the definition of casual employee at section 15A, inserting a new definition
- replace the current casual conversion arrangements with new ‘employee choice about casual employment’ arrangements
- provide for resolution of disputes about the operation of the employee choice arrangements, including by compulsory Commission arbitration and
- introduce new general protections in relation to some actions.

[18] The changes to the definition of casual employee and changes to the process by which a casual employee can convert to permanent employment, impact a number of areas of the work of the Commission. We intend to prepare information materials and guidance about changes to Commission processes prior to commencement of the provisions. The preparation of these materials will be considered in consultation with our relevant stakeholder groups, including the Small Business Reference Group and the Fair Work Ombudsman.

Measure to enable multiple franchisees to access single-enterprise agreement making

[19] Part 3 of Schedule 1 to the Closing Loopholes No. 2 Act amends section 172 of the FW Act, and commences operation today, 27 February 2024.

[20] These changes restore the capacity of multiple franchisees of the same franchisor to voluntarily bargain together for a single-enterprise agreement, as an alternative to making a multi-enterprise agreement. Franchisees remain able to make a single-enterprise agreement alone or make a multi-enterprise agreement, provided they meet the statutory requirements.

[21] These changes will have a very minor impact on the Commission’s processes to facilitate multiple franchisees making an application for a single-enterprise agreement and changes to the Enterprise Agreements Benchbook. Those changes will be made as soon as practicable in consultation with the National Practice Lead for Enterprise Agreements, Deputy President Masson.

Transitioning from multi-enterprise agreements

[22] Part 4 of Schedule 1 to the Closing Loopholes No. 2 Act amends the FW Act to provide for circumstances in which a new single-enterprise agreement may replace a (multi-enterprise) single interest employer agreement or supported bargaining agreement which has

not passed its nominal expiry date. These changes commence today, 27 February 2024.

[23] Under the new provisions, an employer will only be able to put a single-enterprise agreement to a vote with the agreement of each employee organisation to which the multi-enterprise agreement applies, or if the Commission has issued a voting request order.

[24] Consequential changes are also made to provisions dealing with:

- The genuine agreement requirements for an enterprise agreement
- The better off overall test (BOOT) and the application of the BOOT
- Reconsideration of the BOOT
- Majority support determinations
- Scope orders
- Voting request orders; and
- Variation of supported bargaining authorisations.

[25] These changes will have an impact on the Commission's approval of enterprise agreement processes. New processes will be required and changes will need to be made to forms for various matter types. Updated guidance for parties seeking to utilise these provisions will be provided and the Enterprise Agreements Benchbook updated. These changes will be made as soon as practicable in consultation with the National Practice Lead for Enterprise Agreements, Deputy President Masson.

Model terms — model flexibility term, model consultation term and model term for dealing with disputes in enterprise agreements

[26] Part 5 of Schedule 1 to the Closing Loopholes No. 2 Act amends the FW Act to confer new functions on the Commission to make new model terms for enterprise agreements and the copied State instrument model term for settling disputes. These provisions commence by proclamation (or 12 months after Royal Assent).

[27] Pursuant to sections 202, 205 and 737 of the FW Act as amended, the Commission must make, for enterprise agreements, a model:

- flexibility term (section 202(5)),
- consultation term (section 205(3)), and
- term for dealing with disputes (section 737).

[28] These matters will require the constitution of a Full Bench to consider the content of the new model terms and this process will require extensive consultation with stakeholders.

[29] Given the broad considerations the Commission must take into account to determine the model terms, these matters will be dealt with as a major case. I will issue an initial Statement with a draft timetable and discussion paper in due course. At this stage, the Commission envisages that this consultation process will require the full 12 months contemplated by the commencement date.

Changes to intractable bargaining workplace determinations

[30] Part 5A of Schedule 1 to the Closing Loopholes No. 2 Act amends the intractable bargaining workplace determination provisions introduced as part of the Secure Jobs Better Pay Act changes. The amendments commence today, 27 February 2024.

[31] Section 270 of the FW Act sets out the terms that must be included in an intractable bargaining determination. This includes the ‘agreed terms’ and terms that the Commission considers deal with matters that were still at issue. The amendments make changes to the definition of ‘agreed terms.’ New section 270A requires terms of the intractable bargaining declaration dealing with matters still at issue to be not less favourable than the terms of an enterprise agreement applying to one or more employees or to any bargaining representative of any of those employees. This ‘not less favourable’ test does not apply to a term that provides for a wage increase.

[32] These changes will have a minor impact on the Commission’s current processes. Changes to forms and preparation of updated guidance materials and website content will be developed in consultation with the National Practice Lead for Bargaining, Deputy President Hampton.

Right to disconnect

[33] Part 8 of Schedule 1 to the Closing Loopholes No. 2 Act makes changes to the FW Act to insert a right to disconnect. The new provisions add Division 6—Employee right to disconnect to Part 2-9—Other Terms and Conditions of Employment to the FW Act. In summary, the changes insert a new workplace right to disconnect, provide for the resolution of disputes in relation to the exercise of that right (including Commission powers to make stop orders), make provision for right to disconnect terms being added to all modern awards and stipulate that the Commission must make written guidelines about the operation of Division 6. These provisions commence on 26 August 2024, but do not apply to an employer that is a small business employer on commencement, or to an employee of such an employer, until 12 months after commencement.

[34] These amendments confer new functions on the Commission and will require significant case management support to be established prior to implementation. An Implementation Report related to the implementation of the new stop order jurisdiction will be published for comment shortly.

[35] In relation to the right to disconnect modern award term, the provisions provide that the Commission must, by the day before commencement of the Part, make determinations varying modern awards to include a right to disconnect term. As such, before 26 August 2024, the Commission must settle the contents of the term(s).

[36] I will shortly issue a Statement commencing a major case to deal with the creation of the model term and guidelines. I am mindful of the range of modern awards processes already before the Commission including the [Annual Wage Review 2023-24](#), the [Modern Awards Review 2023-24](#) and the [variation of modern awards to include a delegates’ rights](#)

[term process](#), which commenced following the passage of the Closing Loopholes Act. I will consider the timetables for each of these processes when formulating the timetable for the right to disconnect term major case. However, given the strict legislative deadlines, a degree of overlap in the timetables must be expected.

Exemption certificates for entry to investigate suspected underpayment

[37] Part 10 of Schedule 1 to the Closing Loopholes No. 2 Act extends the Commission's powers to provide exemption certificates under section 519 of the FW Act. These provisions commence on 1 July 2024.

[38] This measure amends the FW Act to introduce a new ground on which the Commission must issue an exemption certificate. The amendments also:

- extend the protection given to permit holders exercising rights of entry, by including a new prohibition of acting 'in an improper manner' toward a permit holder
- provide for the Commission to consider conditions on an exemption certificate or banning the issue of exemption certificates to an organisation if rights of entry have been misused, and
- provide that the Commission may impose conditions on an entry permit, as an alternative to revoking or suspending the permit.

[39] These amendments will require changes to the Commission's processes in relation to these matters. These changes will be overseen by Deputy President Gostencnik as National Practice Lead and the Commission will consult with the Registered Organisations Advisory Committee in relation to the changes proposed.

Demerger applications from amalgamated organisations must be made 2 to 5 years after amalgamation occurred

[40] The Closing Loopholes No. 2 Act repeals changes to the *Fair Work (Registered Organisations) Act 2009* brought in by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020*, which allowed the Commission to accept de-merger applications made more than 5 years after the relevant amalgamation occurred. These changes commence today, 27 February 2024.

[41] These changes will have an impact on the Commission's processes, requiring updates to guidance materials. They will be overseen by Deputy President Gostencnik as National Practice Lead and the Commission will consult with the Registered Organisations Advisory Committee.

Regulated worker jurisdictions

[42] Parts 7, 16 and 16A of Schedule 1 to the Closing Loopholes No. 2 Act contain amendments to the FW Act that can be generally referred to as regulated worker amendments. New provisions insert the concepts relevant to adding regulated workers to the

FW Act and others amend existing provisions to allow incorporation of regulated worker provisions. These Parts commence operation on a day fixed by proclamation or 26 August 2024.

[43] Under the amendments, a person is a regulated worker if:

- the person is an employee-like worker (see section 15P of the FW Act for the definition of this term); or
- the person is a regulated road transport contractor (see section 15Q of the FW Act for the definition of this term).

[44] The Revised Explanatory Memorandum at [1095]–[1096] explains the purpose of the amendments as follows:

... The majority of the amendments are targeted at independent contractors who are either:

- employee-like workers performing digital platform work; or
- engaged in the road transport industry.

The amendments would:

- provide a framework for the FWC to exercise functions and powers that relate to the road transport industry;
- insert a new jurisdiction enabling the FWC to set minimum standards orders and minimum standards guidelines in relation to employee-like workers performing digital platform work and regulated road transport industry contractors;
- enable digital labour platform operators and road transport businesses to make consent-based collective agreements with registered employee organisations;
- empower the FWC to deal with disputes over an employee-like worker's unfair deactivation from a digital labour platform, or the unfair termination of a road transport contractor's services contract by a road transport business;
- enable independent contractors earning below a specified contractor high income threshold to dispute unfair contract terms in the FWC.

[45] In addition to the changes discussed above, the amendments also include:

- provisions introducing workplace delegates' rights for regulated workers,
- in relation to minimum standards orders (MSOs) and guidelines powers:
 - introduction of a new 'minimum standards objective' to which the Commission must have regard when exercising MSO powers,
 - introduction of notice of intent process for MSOs and consultation requirements, and
 - introduction of deferral and suspension powers for MSOs,
- introduction of a new Expert Panel for Road Transport relating to road transport matters under these new parts and in relation to modern award powers,
- introduction of a new 'road transport objective' relating to road transport matters under these new parts and modern award powers,

- introduction of a Road Transport Advisory Group, separate to the Commission, to advise the Commission in relation to specified matters that relate to the road transport industry, and
- powers for the Commission to issue road transport contractual chain orders.

[46] The amendments described above are significant for the workers and workplaces to be regulated from commencement, as well as for the functions of the Commission. Implementation will involve a number of work areas within the Commission and require extensive consultation with impacted members of the community and the Commission's existing and new stakeholder groups. While not an exhaustive list of the work ahead, some parts will require major cases and associated administrative support to be established while matter types, such as the individual rights-based and collective agreement matter types, will require case management processes to be established. All changes will require significant community consultation and collaborative work with the Fair Work Ombudsman.

[47] As these changes are significant, the Commission will shortly publish an Implementation Report supporting engagement and consultation including on proposed procedural matters and draft materials. Vice President Asbury will oversee the implementation of changes in this jurisdiction. It is expected that some of the changes will flow into existing operational areas across the Commission and relevant National Practice Leads will be consulted in this instance.

Determining if a relationship is employment

[48] Part 15 of Schedule 1 to the Closing Loopholes No. 2 Act relates to the determination of whether a relationship is an employment relationship for the purposes of the FW Act (with some exceptions). Part 15 of Schedule 1 to the Closing Loopholes No. 2 Act operates subject to Part 15A of Schedule 1 to the Closing Loopholes Act, which relates to opt out notice arrangements. Part 15 commences on a day fixed by proclamation or 26 August 2024 and Part 15A commences today, 27 February 2024.

[49] It is expected that these changes will impact Commission functions wherever employment status may be at issue. Early cases which relate to the new definition may be referred to a Full Bench for determination. Further information about changes arising from these amendments will be communicated in due course.

Technical change to the Fair Work Act

[50] Part 17 of Schedule 1 to the Closing Loopholes No. 2 Act repeals clause 27 of Schedule 1 to the FW Act, a provision which has ceased to have effect. This technical change will have no impact on the work of the Commission.

Conclusion

[51] From late 2022 and throughout 2023 and 2024 to date, the Commission has undertaken significant projects to support business, employees and the community with the

Secure Jobs Better Pay Act and Closing Loopholes Act changes, through proactive, targeted education and communication activities.

[52] The changes were integrated into our existing performance framework, embedded into existing operational teams where appropriate and new operational teams were established to support new functions where required.

[53] Alongside the implementation of these significant changes to our functions, the Commission continued to deliver efficient, timely and quality dispute resolution services in all areas.

[54] Given the Commission's experience and success in implementing the Secure Jobs Better Pay and Closing Loopholes Act, I consider that the Commission is well-placed to implement the changes to functions contained in the Closing Loopholes No. 2 Act in an efficient and transparent way.

PRESIDENT