



## President's statement

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### *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*

Justice Hatcher, President

Sydney, 20 December 2023

#### Introduction

[1] The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Closing Loopholes Act) received Royal Assent on 14 December 2023. The Closing Loopholes Act amends the *Fair Work Act 2009* (FW Act) and confers new functions on the Fair Work Commission (Commission).

[2] This Statement gives a brief overview of the Closing Loopholes 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] On 2 August 2023, I issued a [Statement about implementation of the changes](#) to the Commission's functions arising from the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs Better Pay Act).

[4] In that [Statement](#), I noted the Commission's strong operational performance through a period of significant change. The [Statement](#) highlighted the work undertaken to prepare for and implement the Secure Jobs, Better Pay Act changes while noting that the Commission also met or exceeded its key performance indicators over that period.

[5] I intend to issue an update to our operational performance later this week. The update supports my view that the Commission remains in a strong position to continue to deliver our core services in a timely manner, whilst also implementing legislative reform and continuing to innovate to ensure we continue to meet the expectations of the Australian community that we serve.

[6] I have allocated additional responsibility to Vice President Asbury to assist with the implementation of legislative change and to monitor those which remain before the Parliament in the form of the *Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023*.

##### *Working closely with stakeholders*

[7] In my [Statement of 8 December 2022](#), I committed to implement the Secure Jobs, Better Pay Act changes in an open and transparent way, with the needs of our users front of

mind. I am committed to continuing our established approaches in implementing the Closing Loopholes Act changes.

[8] The Commission is committed to engaging with a wide range of stakeholders about the implementation of the changes to our functions, including registered organisations, Peak Councils, community organisations, subject matter experts and our existing reference groups.

### **Implementation of changes to FW Act**

[9] Most of the measures in the Closing Loopholes Act that affect Commission functions and processes commenced on 15 December 2023. These include:

- small business redundancy exemption
- regulated labour hire arrangement jurisdiction
- workplace delegates' rights
- protections for those subject to family and domestic violence
- amendments in relation to compulsory conciliation conferences in protected action ballot matters
- right of entry – assisting health and safety representatives.

[10] Other key dates for commencement of the measures in the Closing Loopholes Act which change the FW Act are:

#### **1 July 2024**

- Determinations varying modern awards to include a delegates' rights term come into operation on 1 July 2024 (the Commission must make these determinations by 30 June 2024)
- A delegates' rights term must be included in workplace determinations made on or after 1 July 2024
- A delegates' rights term must be included in enterprise agreements approved by vote on or after 1 July 2024.

#### **1 November 2024**

- The earliest date for a regulated labour hire arrangement orders to come into force is 1 November 2024
- Guidelines in relation to operation of new regulated labour hire arrangement jurisdiction are to be in force by 1 November 2024.

#### **Later of 1 January 2024 and the day after the Minister first declares a Voluntary Small Business Wage Compliance Code**

- Wage theft provisions apply.

[11] We have established a dedicated section on the Commission’s website to share [information about implementation of the Closing Loopholes 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.

[12] The website content was published on 15 December 2023 and interested parties were notified by subscriber email that the [Form F1 – Application \(no specific form provided\)](#) general application form may be used to lodge an application under any of the new provisions.

## **Closing Loopholes Act changes relevant to Commission functions and processes**

### ***Small business redundancy exemption***

[13] Part 2 of Schedule 1 to the Closing Loopholes Act commenced on 15 December 2023. It amends the exclusions from the obligation to pay redundancy pay in s 121 of the FW Act. The changes mean that the small business redundancy exemption does not apply where the employer has only become a small business employer due to the employment of one or more employees being terminated in certain circumstances in the context of bankruptcy or liquidation (other than a members voluntary winding up).

[14] This change may have a small impact on applications to the Commission to vary redundancy pay. The Commission will also be required to review statutory references in modern awards to ensure that they are consistent with the amendments.

[15] Further information about a review of statutory references in modern awards will be published over the coming weeks.

### ***Regulated labour hire arrangement jurisdiction***

[16] Part 6 of Schedule 1 to the Closing Loopholes Act commenced on 15 December 2023. It inserts a new Part 7-2A into the FW Act. The new part empowers the Commission to make orders relating to labour hire arrangements.

[17] The amendments provide for the Commission, on application, to make a ‘regulated labour hire arrangement order’ in relation to employees supplied by their employer to a ‘regulated host’ employer (other than a small business employer), where the regulated host has a ‘host employment instrument’ that would apply to the employees if they were employed by the regulated host. When such an order is in force, subject to certain exemptions, the employees being supplied to the regulated host (the ‘regulated employees’) must generally be paid no less than the ‘protected rate of pay’. The earliest date a regulated labour hire arrangement order can come into force is 1 November 2024.

[18] There are some exemptions from the requirement to pay no less than the protected rate of pay, and the Commission, on application, can determine exemption periods.

[19] The Commission may also, on application, make an ‘alternative protected rate of pay order’ that requires the employer to pay its regulated employees a minimum rate based on an alternative employment instrument.

[20] The Commission may, on its own initiative or on application, determine that an application for a regulated labour hire arrangement order should be extended to include ‘additional employers’ and their regulated employees.

[21] The Commission may also, on application, vary a regulated labour hire arrangement order to cover a new employer that supplies employees to the regulated host to perform work of the same kind and the new employer’s regulated employees.

[22] The Commission can resolve disputes about the operation of Part 2-7A in circumstances where a regulated labour hire arrangement order is in force, or has been made but is not yet in force. If a dispute is not resolved by means other than arbitration, the Commission can arbitrate, including by making an ‘arbitrated protected rate of pay order’.

[23] The amendments also provide for the Commission to make written guidelines in relation to the operation of Part 2-7A. Any guidelines made must be made by 1 November 2024.

[24] New forms for the new types of applications will be published on the Commission’s website shortly. In the interim, applications can be made using the [Form F1 – Application \(no specific form provided\)](#).

[25] I anticipate that early applications in this new jurisdiction will be allocated to a Full Bench and will be treated as major cases. Information about these cases will be published on the Commission’s website so interested parties can participate.

[26] A consultation process around the creation of the guidelines will be announced in the new year. This is expected to be an iterative process which will consider any early decisions of the Commission. Stakeholders who are interested in participating in this consultation are encouraged to subscribe to our Announcements subscription service.

### ***Workplace delegates’ rights and delegates’ rights terms***

[27] Part 7, Division 1 of the Closing Loopholes Act commenced on 15 December 2023. It introduces specific rights of workplace delegates and new general protections for workplace delegates. It also requires that, from 1 July 2024, modern awards, enterprise agreements and workplace determinations must include a delegates’ rights term.

## **Workplace delegates' rights**

[28] New s 350C defines 'workplace delegate' and introduces workplace delegates' rights for the purposes of the FW Act. New s 350A introduces a new general protection for workplace delegates.

[29] We will update our website content and forms to include the new general protection.

[30] The General Protections Benchbook will be updated to address the new provisions. Draft amendments to the benchbook will be published for comment in the new year.

## **Modern awards delegates' rights terms**

[31] The Closing Loopholes Act requires that, by 30 June 2024, the Commission make determinations varying modern awards so that they include a delegates' rights term. The new terms will come into operation on 1 July 2024.

[32] The creation of delegates' rights terms for modern awards will require significant consultation and engagement with stakeholders. In early January 2024, a major case webpage will be published alongside a Statement about this process. The Statement will include information about how to engage in the consultation process and a draft timetable to meet the legislative deadline.

## **Enterprise agreement and workplace determination delegates' rights terms**

[33] New s 205A requires an enterprise agreement to include a delegates' rights term for workplace delegates to whom the agreement applies. This applies to agreements made after 1 July 2024.<sup>1</sup>

[34] If, at the time an enterprise agreement is approved, the delegates' rights term in the enterprise agreement is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates, then:

- the term in the enterprise agreement has no effect and
- the most favourable term of those in the modern awards is taken to be a term of the enterprise agreement.

[35] In that case, the Commission must note this in the decision to approve the enterprise agreement.

[36] Implementation of these changes will occur in consultation with our established Enterprise Agreements and Bargaining Advisory Group in the new year.

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<sup>1</sup> New s 205A does not apply in relation to an enterprise agreement if: the employer requested that employees vote on the agreement before 1 July 2024, the vote approved the agreement and the Commission approves the agreement.

[37] A workplace determination made by the Commission on or after 1 July 2024 must also include a delegates' rights term.

### ***Protections against discrimination for those subjected to family and domestic violence***

[38] The Closing Loopholes Act adds 'subjection to family and domestic violence' as a new protected attribute for the purposes of the anti-discrimination provisions in the FW Act.

[39] The new protected attribute is added to the prohibitions of:

- 'discriminatory terms' in modern awards and enterprise agreements
- an employer taking adverse action on specified discriminatory grounds, and
- an employer terminating employment on specified discriminatory grounds.

[40] The new protected attribute is also added to s 578(c), which provision requires the Commission, in performing its functions and exercising its powers, to take into account 'the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination' on specified grounds.

[41] We will update our general protections website content and forms to include the new protected attribute.

[42] The Commission understands that persons seeking information about or making applications relating to the new protected attribute may be particularly vulnerable. The Commission will consult with stakeholders in the new year to look at ways in which we can provide support and tailored information to such persons.

### ***Amendments in relation to compulsory conciliation conferences in protected action ballot matters***

[43] Part 14A of Schedule 1 to the Closing Loopholes Act amends provisions of the FW Act relating to protected industrial action. The amendments are to the effect that each employee bargaining representative that applied for the protected action ballot order must attend the Commission conference in relation to the protected action ballot order (in accordance with any Commission order under s 448A) for the industrial action to be protected action. Other employee bargaining representatives will also be required to attend the Commission conference, but non-compliance with that requirement will not affect whether industrial action authorised by the ballot is protected industrial action. Similarly, for industrial action by an employer to be protected, the employer and any bargaining representative of the employer must attend the conference in accordance with any order under s 448A.

[44] The Commission does not expect these amendments to result in changes to its processes and procedures.

### ***Right of entry – assisting health and safety representatives***

[45] Part 16A of Schedule 1 to the Closing Loopholes Act amends provisions relating to entry permits in Part 3-4 of the FW Act. The amendments exempt an official of an organisation who is entering a workplace to assist a health and safety representative from the requirement under s 494 of the FW Act to hold an entry permit and from related permit requirements.

[46] The Commission does not expect these amendments to result in changes to its processes or procedures.

### **Conclusion**

[47] In 2022–23, the Commission undertook significant projects to support business, employees and the community with the Secure Jobs, Better Pay Act changes, through proactive, targeted education and communication activities.

[48] The changes were integrated into our existing performance framework, embedded into existing operational teams where appropriate and new operational teams were also established to support new functions arising from the Secure Jobs, Better Pay Act.

[49] 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.

[50] Given our experience and success in implementing the Secure Jobs, Better Pay Act, I consider that we are exceedingly well placed to deliver the amendments contained in the Closing Loopholes Act.

**PRESIDENT**