VMA MEMBER ADVISORY: FAIR WORK AMENDMENTS PASS THIS WEEK

13 February 2024

BACKGROUND

Further to our ongoing communications to members, for over the last twelve months the federal government has been attempting to legislate across various aspects of workplace relations law. This week parliament finalised and passed the most recent tranche of the Albanese governments workplace relations Bills – the Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023

On 7 September 2023, the Senate referred the provisions of the original and massive Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 to the Education and Employment Legislation Committee for inquiry and report by 1 February 2024. However, and due to the unworkable nature of such a massive single Bill, on 7 December 2023 the Bill was divided into two - the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023; and the Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023.

The passing of the No.2 Bill makes further amendments across a range of issues in the Fair Work Act and related legislative system. Some of these amendments are minor, whereas others have more significance and create further administrative burdens for workplaces in our industry.

Given the breadth and scope of the amendments, and given the convoluted approach of the associated parliamentary process for reviewing and passing these amendments, it will not be until all recent amendments are interleaved into the Fair Work Act, and not until the Fair Work Commission determine its approach to numerous of the issues contained within the Bill, that will we be able to say with certainty their full practical implications and impact on the membership and industry.

Across the following pages we provide an immediate synopsis of the primary amendments from the No.2 Bill that will have impacts on members and the industry generally.

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THE AMENDMENTS

DEFINITION OF EMPLOYMENT
The amendments include a new 'ordinary meaning' definition of employee and employer being inserted into the Fair Work Act. This new statutory definition reverts the current law back to the 'totality of the relationship' and the old multi-factorial test of yesteryear.

The "multi-factorial" test looks at several indicia regarding whether a person is an employee or an independent contractor. This will include the real substance, practical reality and the true nature of the relationship. The terms of a written contract will no longer be given primacy when determining whether an individual is an employee or contractor.

Further, related amendments to the Fair Work Act relating to "sham contracting" arrangements will occur. The amendments to the civil liability offence of sham contracting is made harder for alleged offenders, by requiring principals to prove their belief that the contractor they had engaged was in fact a contractor, and that such a belief was objectively reasonable. An employer's ignorance or unreasonable mistake will no longer be a defence to a sham contracting claim.

Commencement – 1 July 2024 or 6 months after Royal Assent, with the revised "sham contracting" terms taking effect the day after Royal Assent.

Commentary – While this amendment is intended to create flexibility in the application of the law, there is also the potential for uncertainty between businesses and their independent contractors given the diverse nature in the way independent contractor relationships can occur in practice.

Members will need to be mindful that if a dispute arises over the status of an employee or contractor, the conduct of the parties during the entire relationship will be considered by the Commission in determining the true nature of the relationship.

These amendments will require members that engage contractors to review those engagements to ensure they are not in fact 'employment relationships' and consistently and clearly operate on a 'principal and contractor' basis. If challenged, members who have allegedly misrepresented employment as an independent contractor arrangement would need to evidence that they reasonably believed they were correct in classifying a worker as an independent contractor.

Effect on our industry – Limited, but will require members who engage contractors to be able to clearly and practically evidence such a relationship is one of principal/contractor if the contractor disputes the relationship at a later time.

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CASUAL EMPLOYMENT
The Bill has made numerous amendments to casual employee related issues.

Defining a casual employee
The definition of casual employee in the Fair Work Act has been amended. Effectively, casual employment will be held where there is no advance commitment to continuing and indefinite work and the employee is entitled to a casual loading under a workplace instrument such as an Award or contract.

Similarly, to defining an 'employee' the real substance, the practical reality and the true nature of the employment will be relevant in determining whether it is a casual employee relationship, not just the way the employment is described in a contract. No single consideration will be determinative of whether an employee is casual or permanent and that an employee who has a regular pattern of work may still be a casual employee if there is no firm advance commitment to continuing and indefinite work. Despite this amendment, it is likely that a regular pattern of work would generally be a factor weighing in favour of the employment being permanent, not casual.

Misclassification as a casual employee
The amendments also remove the proposed offence for misrepresenting permanent employment as casual. However, a casual employee may bring a claim against their employer for unpaid permanent employment entitlements (such as annual leave and redundancy pay) on the basis that they have been mischaracterised as a casual employee, although any claim is reducible by an amount equal to the casual loading received by the employee.

Casual conversion
Another related amendment includes attempting to simplify the conversion process of casual employees to permanent status. The existing provisions regarding employee requests for casual conversion will be removed for employees engaged after the laws come into effect and replaced with an employee-driven approach.

The new conversion pathway will be employee-driven, meaning that it will be the employee's responsibility to initiate the process. The onus will be on the casual employee to make a request to change their employment status once certain thresholds are met including that the employee has been employed for at least 6 months, or 12 months for small business employers.

The grounds on which an employer can refuse an employee's request have also been broadened to include *'fair and reasonable operational grounds'*. Broadly, it would be fair and reasonable to not accept a conversion request if substantial changes would be required to the way in which work in the employer's enterprise is organised and such changes would be impracticable.

Casual Employment Information Statement
Employers will need to provide the information statement to casual employees at or before commencement of employment, and again after six months (except small businesses), and again at 12 months of employment.

Commencement – 6 months after Royal Assent or by earlier proclamation.

Commentary – Members with casual employees will need to assess whether they are truly casual employees, and be prepared for employees to initiate a request to convert to permanent. Members will need to have defensible reasons for not agreeing to a conversion notification and be aware of the procedural requirements with respect to responding to any conversion notification. Further, members should be aware that the Commission can step in and arbitrate if the matter cannot be resolved at a workplace level.

Effect on our industry – For those members employing casuals, they will need to consider their approach currently being followed as it relates to casual conversion processes.

RIGHT TO DISCONNECT
Effectively, this amendment to the Fair Work Act inserts terms that entitle employees to refuse to monitor, read or respond to contact from their employer, or a related third party such as a client, if that contact is work-related and unless that refusal is unreasonable.

Nonetheless, the amendments do not appear to affect an employer's ability to contact employees over their availability for a shift or in cases of emergency, or otherwise where the inherent requirements or nature of the job requires an employee to be on call or contactable.

If a related dispute cannot be resolved at the workplace level, the Fair Work Commission will be empowered to resolve the dispute. In handing down any order, the Fair Work Commission would consider a non-exhaustive list of factors such as how often the worker was contacted, how they were contacted, the nature of the worker's job description, whether they were being paid or not, and the nature of any family responsibilities.

Commencement – 6 months after Royal Assent, 18 months for small businesses.

Commentary – Given the breadth of pre-existing labour and workplace health and safety laws, the inclusion of these related terms can be seen to be unnecessary and a copycatting of laws from Europe and North America. These amendments were an 11th hour addition, and did not attract adequate consultation before the deal was done.

It would rare for a member to be contacting a production employee outside of work hours without good reason. Further, administration, sales and management employees are likely to have a

reasonable additional hour's requirement contained within their contract of employment and factored into their overall remuneration.

Members that have a need to contact employees out of work hours should assess and determine the need, the frequency, the purpose, and the reasonableness of that contact.

Effect on our industry – Likely to be minor, but watch this space.

UNDERPAYMENT

Beyond the amendments to criminalise intentional wage theft from the Closing the Loopholes Bill No.1 last year, this No.2 Bill significantly increase civil remedy provisions for serious contraventions of the Fair Work Act to at least 5 times the current penalty, lowers the bar for what a 'serious contravention' is to include an element of recklessness, and allow permit holders to exercise a right of entry without notice if they obtain an exemption certificate from the FWC for suspected underpayments (discussed elsewhere).

Previously, a serious contravention occurred if the person knowingly contravened the civil remedy provision and the person's conduct constituting the contravention was part of a systemic pattern of conduct relating to one or more persons. These amendments lower the threshold for the definition of a serious contravention and provides that a serious contravention will occur if the person knowingly contravened the civil remedy provision and the person was 'reckless' as to whether the contravention would occur. A person is reckless if they are aware of a substantial risk that the contravention would occur, and it is unjustifiable to take the risk having regard to the circumstances known to the person. Additionally, there will no longer be a legislative requirement for the breach to be systematic in nature.

Commencement – The day after Royal Assent.

Commentary –Members need to ensure they continue to pay their employees at the appropriate rates.

Effect on our industry – If history is indicative, and given the good corporate citizenry of our industry, the impact of these amendments on our industry will be minimal.

RIGHT OF ENTRY

Under these related amendments to the Fair Work Act and related legislative scheme, the rights of union officials to apply to the Fair Work Commission for an exemption to waive the requirement for providing 24 hours' notice of entry into a worksite have been broadened.

In determining whether to grant an exemption to the 24-hour notice requirement, the Commission must be satisfied that a suspected contravention involves "*the underpayment of wages, or other*

monetary entitlements" or "*reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence*".

Commencement – 1 July 2024.

Commentary – Given our members have historically rarely had any genuine underpayment issues arise, it is unlikely a related application would have genuine basis. Nevertheless, and depending upon how the Commission determine to deal with such applications, a union official may attempt to bypass the usual protocols for gaining entry onto a worksite. Affected members should consider their approach to the issue should it arise.

Effect on our industry – Likely minor, although depending upon the protocols developed by the Commission watch this space.

CONTACT

Any Industrial Relations Member who has a related query should contact the HR Hotline on 1800 835 167 or via email at hrhelp@visualmediassociation.org.au or contact Charles Watson, GM – IR, Policy and Governance via email: charles@visualmediaassociation.org.au

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