



EMPLOYMENT | OCTOBER 2023

FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023 (CTH) (FW CLH BILL)

The Commonwealth Government has tabled its *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) (FW CLH Bill)*. The FW CLH Bill is the third instalment of the Government's industrial relations reforms, and like the earlier reforms proposes significant changes to the *Fair Work Act 2009 (Cth) (FW Act)*.

The FW CLH Bill has been referred to the Senate Education and Employment Legislation Committee, which is due to report back on 1 February 2024. There is some uncertainty as to whether the FW CLH Bill will pass parliament in its current form, however given the significance of the changes, employers should consider how the proposed changes could impact their operations.

In the first of a series of updates on the proposed changes, **Sean D'Almada-Remedios** considers the proposed reforms to casual employment.

Current position

Presently, the FW Act defines an employee as a casual employee if:

- an offer of employment is made to a person with no firm advance commitment to continuing and indefinite work according to an agreed pattern;
- the offer is accepted; and
- the person becomes an employee because of that acceptance.

The FW Act also provides:

- that only certain prescribed factors are relevant in considering whether there is a firm advance commitment to continuing and indefinite work according to an agreed pattern;
- a regular pattern of hours does not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work;
- any assessment of whether an employee is casual turns on the offer that was made and accepted and not based on subsequent conduct; and
- a person who commences as a casual remains a casual employee until their employment is converted to permanent.

The FW Act also provides for a process of casual conversion, where employers are required to offer permanent employment to casual employees who have 12 months service and have for at least the last 6 months worked a regular pattern of work (that could, without significant adjustment be performed on a part time or full time basis) unless there are reasonable business grounds not to do so. Employees also have a residual right to request casual conversion in certain circumstances.

The Fair Work Commission (**FWC**) has the power to hear disputes in relation to casual conversion, however the FWC can only deal with the dispute by arbitration with agreement of both parties, or if an applicable enterprise agreement provides for the arbitration of such a dispute.

What will change?

The proposed changes to casual employment under the FW CLH Bill relate to three broad matters:

- amending the definition of casual employment;
- providing a new pathway for a casual employee to be converted to a permanent employee; and
- introducing three new civil remedy provisions in relation to employer conduct in engaging casual employees or making representations about casual employment.

Definition of casual employment

The FW CLH Bill repeals the current definition of casual employment, and replaces it with a new "General Rule", that an employee is a casual employee, only if:

- the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and
 - the employee would be entitled to a casual loading or specific rate of casual pay.

Unlike the current definition's focus on assessing the nature of the employment based on the offer made and accepted, the new definition would permit, and indeed require a consideration of the parties' subsequent conduct after entering into the contract. This would mean that notwithstanding an offer of employment did not indicate a firm advance commitment to work, the employment could later be found to be something other than casual employment if the conduct of the parties indicated so (e.g., such conduct could include if the employer did not permit a casual employee to reject offers of scheduled work).

Casual conversion

The FW CLH Bill's retains the existing provisions around casual conversion. However, it adds another pathway to conversion in the form of an employee notification (Employee Notification) that a casual employee may issue to their employer if they believe that their employment no longer meets the definition of casual employment. The Employee Notification process differs from the existing residual conversion request rights as it could be advanced (except for in the case of a small business) after 6 months of employment and does not necessarily require a regular pattern of work to be set out.

The existing casual conversion dispute provisions would be repealed under the FW CLH Bill, replaced with a new mechanism that strengthens the FWC's ability to hear, and make orders concerning casual conversion disputes. Perhaps of most significance, the FWC could, if attempts to deal with the dispute by other means failed, or exceptional circumstances warranted so, arbitrate a casual conversion dispute, without needing the agreement of all parties.

In arbitrating Employee Notification disputes, the FWC would be empowered to make orders that an employee should be treated as a casual employee, or that from a future date, the employee must be treated as a full time or part time employee. In relation to disputes around conversion offers or requests, the FWC could make orders that an employer must make an offer of permanent employment, or accept a request made by an employee.

New civil remedy provisions

The FW CLH Bill introduces three new civil remedy provisions in respect of casual employment. These are prohibitions on an employer from:

- misrepresenting to an employee or a prospective employee, that a contract of employment is a contract for casual employment, where the work the employee will perform under it is in a capacity other than casual;
- dismissing, or threatening to dismiss an employee, to engage them to perform the same or substantially the same work as a casual employee; and
- making statements to an employee that are known by the employer to be false, that are made to persuade or influence the employee to enter into a contract for casual employment under which the employee will perform the same or substantially the same work.

As civil remedy provisions, contraventions of these terms would be open to prosecution by employees, unions or the Fair Work Ombudsman.

Key take aways

Whilst the final form of the FW CLH Bill's amendments will not be known until their passage in 2024, employers should consider:

- whether they are complying with their existing casual conversion obligations;
- whether their casual employment contracts, policies and practices would require updating considering the proposed changes including the new definition of casual employment;
- how they will respond to the Employee Notifications process; and
- their overall IR strategy in relation to maintaining an appropriate mix of permanent/casual employees to meet their operational requirements.

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