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# 2024 Intensive Conference

**BRINGING THE BALANCE**

13 – 14 MARCH 2024 | NOVOTEL CANBERRA



# Fair Work Act Update

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# Agenda

- 01 Overview
- 02 *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*
- 03 *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*
- 04 *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023*
- 05 *Fair Work Amendment (Right to Disconnect) Bill 2023*
- 06 Q&A

**Disclaimer:**

*The contents of this presentation do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.*

# Overview of Key Changes

## Changes already in effect

- *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*
- *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*

## Changes to come:

- *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2024*
  - *Note: This Bill passed through the House of Representatives on 12 February 2024 following its passage through the Senate on 8 February*



# SECURE JOBS BETTER PAY

## key start dates

### 2022

#### 7 December

- ✓ Changing the objectives in the Fair Work Act to include promoting:
  - job security
  - gender equality
- ✓ Prohibiting pay secrecy
- ✓ New protected attributes under the Fair Work Act:
  - breastfeeding
  - gender identity
  - intersex status
- ✓ Sunsetting of 'zombie' agreements
- ✓ Fair Work Commission has powers to correct errors in enterprise agreements
- ✓ Changes to how bargaining can be started through the Fair Work Commission
- ✓ Updates to rules for agreements to allow the Fair Work Commission to terminate an agreement after its nominal expiry date

### 2023

#### 7 January

- ✓ Job advertisements can't include pay rates that would breach:
  - the Fair Work Act, or
  - a fair work instrument (such as an award or enterprise agreement)

#### 6 February

- ✓ Abolition of the Australian Building and Construction Commission (ABCC)

#### 6 March

- ✓ Prohibition of sexual harassment in the workplace
- ✓ Creation of expert panels at the Fair Work Commission to focus on pay equity and the care and community sector
- ✓ Transfer of the Registered Organisations Commission's functions to the Fair Work Commission

#### 6 June

- ✓ Changes to agreement making
- ✓ Increased access to multi-employer bargaining through:
  - single-interest bargaining
  - supported bargaining
  - cooperative bargaining
- ✓ Changes to extending unpaid parental leave, including giving the Fair Work Commission the power to deal with disputes
- ✓ More employees being able to access flexible working arrangements

#### 1 July

- ✓ Creation of the National Construction Industry Forum
- ✓ Increase in monetary cap for recovering unpaid entitlements via the small claims process

#### 6 December

- ✓ Limiting the length of fixed term contracts, with the Fair Work Commission having powers to deal with disputes
- ✓ Requirement to give Fixed Term Contract Information Statement



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For more information and details about these changes, including transitional arrangements, visit [fairwork.gov.au/sjbp](https://fairwork.gov.au/sjbp)

Last updated 7 March 2023

# Fair Work Legislation Amendment (Closing Loopholes) Act 2023

## Key dates for changes affecting the Fair Work Commission

### 15 December

- 2023**
- **Small business redundancy exemption** provisions commence
  - **Regulated labour hire arrangement** jurisdiction commences
  - **Workplace delegates' rights** provisions commence
  - Protections for those **subject to family and domestic violence** commence
  - Amendments to **compulsory conciliation conferences** in protected action ballot matters commence
  - Amendments to **Right of entry** – assisting health and safety representatives commence

### 1 July

- 2024**
- Determinations varying **modern awards** to include a **delegates' rights term** come into operation
  - **Delegates' rights term** must be included in a **workplace determination** made on or after 1 July 2024
  - **Delegates' rights term** must be included in an **enterprise agreement** approved by vote on or after 1 July 2024

### 1 November

- **Regulated labour hire arrangement orders** can commence operation

### 1 January

- 2025**
- **Wage theft** provisions apply\*
- \* The later of 1 January 2025; and the day after the Minister declares a Voluntary Small Business Wage Compliance Code

Amended 15 December 2023



Fair Work  
Commission

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

**Key dates for 2023**, that commenced from 15 December:

- **Small business redundancy exemption** provisions commence.
- **Regulated labour hire arrangement** jurisdiction commences.
- **Workplace delegates' rights** provision commence
- Protection for those **subject to family and domestic violence** commence.
- Amendments to **compulsory conciliation conferences** in protected action ballot matters commence
- Amendments to **Right of entry** – assisting health and safety representatives commence



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

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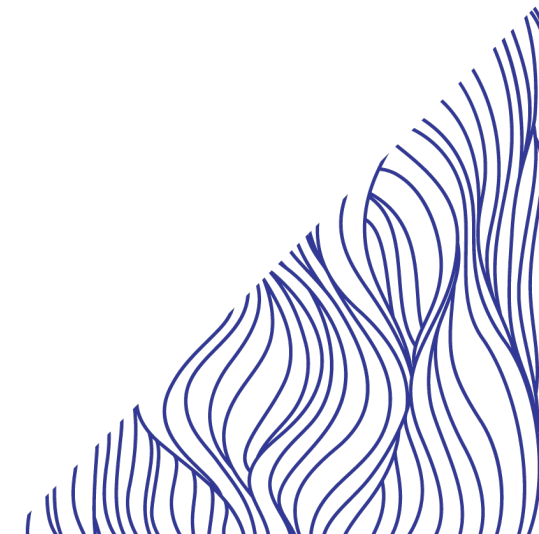




# *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*

**Key dates for 2025**, commencing from 1 January:

- Wage theft provisions apply
  - The later of 1 January 2025; and the day after the Minister declares a Voluntary Small Business Wage Compliance Code.



# Small Business Redundancy Exemptions

- Amendment commenced on **15 December 2023**.
- Small business employers usually are not required to pay redundancy pay.
  - *This has previously meant that a non-small business which has become a small business as part of a process of downsizing its workforce (e.g. due to insolvency) no longer needed to pay redundancy pay to employees made redundant after the business has fewer than 15 employees left.*
  - Under the new laws, non-small business employers that become small business employers in these circumstances may still be required to pay their employees redundancy pay.



# Labour Hire

- The new labour hire arrangement commences operation on **1 November 2024**.
- Under this new arrangement, employees, unions and host employees can apply to the FWC for an order requiring labour hire employees to be paid at least what they would receive under an enterprise agreement or equivalent public sector determination.
- However, the FWC cannot make an order if it is not fair and reasonable in the circumstances.
  - *Fair and reasonable in the circumstances may include where work for a host is the provision of a service (including consideration of whether the work is specialist or expert work) rather than an arrangement only for the supply of labour.*



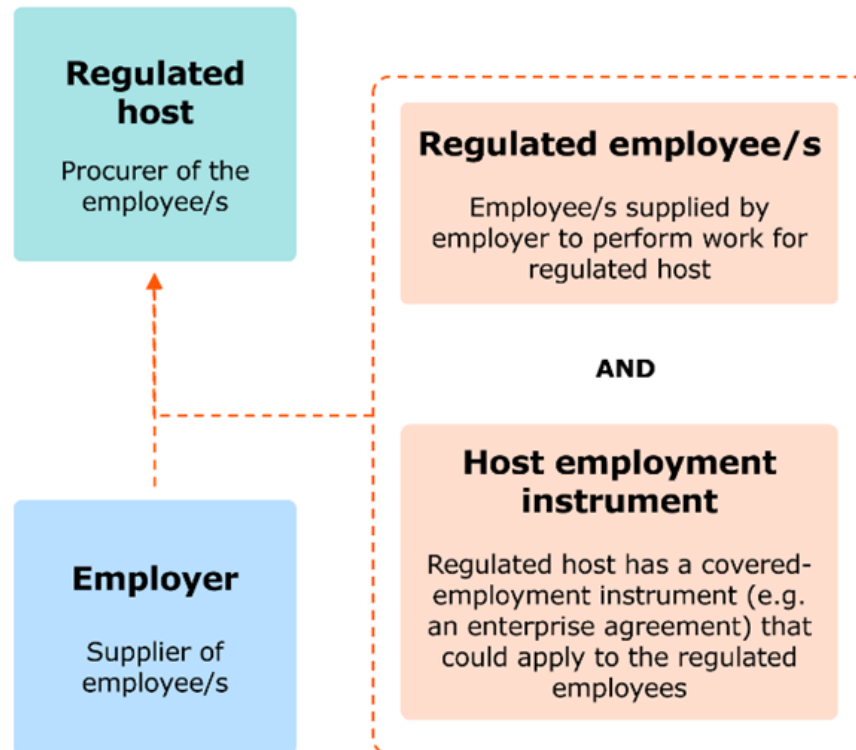
# The Labour Hire Arrangement

- An order by the FWC to pay the protected rate of pay will not apply where:
  - a) Employees are working for a host business under a training arrangement;*
  - b) the host is a small business employer (employing fewer than 15 employees); or*
  - c) the employee performs work for the host business for a period of three months or less, unless the FWC extends, shortens or removes this time period.*
- The FWC is empowered to resolve disputes in relation to labour hire arrangements orders if it cannot be resolved at the workplace level.



# Labour Hire

- Diagram illustrating relationship in which Regulated Labour Hire Arrangement Orders are made:



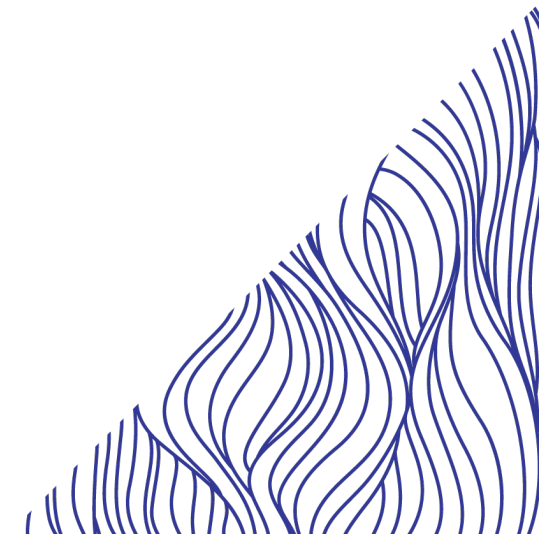
# Workplace delegates' rights

- Amendment commenced on **15 December 2023**.
- Rights and protections for a **workplace delegate** include being entitled to:
  - a) Represent the industrial interests of the members and potential of the organisation who work in a particular enterprise*
  - b) reasonable communication with those and potential members in relation to their industrial interests*
  - c) reasonable access to the workplace and facilities where the enterprise is being carried on; and*
  - d) unless the employer of the workplace delegate is a small business employer, reasonable access to paid time, during normal working hours, for the purposes of related training.*



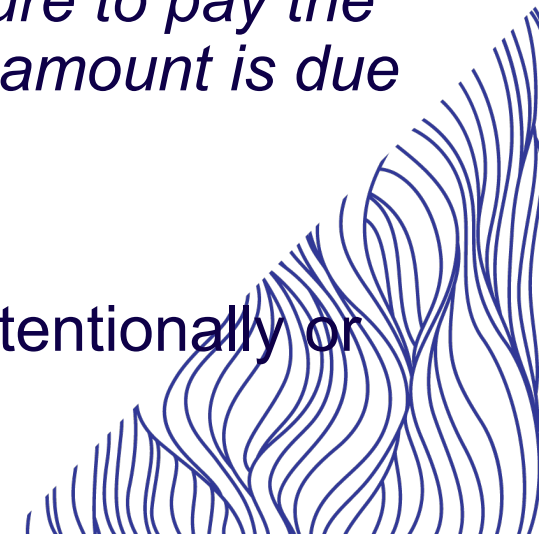
# Family and Domestic Violence

- Amendment commenced on **15 December 2023**.
- The Act inserted 'subjection to family and domestic violence' as a protected attribute.
  - *This applies to ss 153, 172A, 195 and 351 of the FWA.*
  - This means that it is unlawful for an employer to take adverse action (including dismissal) against an employee because the employee is (or has been) experiencing family domestic violence.



# Criminalising Intentional Wage Theft

- Amendment commences on **1 January 2025**.
  - a) *Employers are said to have committed an offence if:*
    - i. *They are required to pay an amount to an employee (such as wages), or on behalf of or for the benefit of an employee (for example, superannuation) under the FWA, or any other relevant industrial instrument; and*
    - ii. *They intentionally engage in conduct that results in a failure to pay the required amount on or before the day when the required amount is due for payment.*
- b) *Penalties will apply to both individuals and corporations.*
- There are various exceptions to this amendment, including unintentionally or mistakenly underpaying employees.





## Other changes

- Right of entry
  - *The requirement for officials assisting a state or territory work health and safety representative to hold an entry permit has been removed.*
- Compulsory conciliation conferences in protection action ballot matters
  - *Where the Commission has made a protected action ballot order in relation to a proposed enterprise agreement, they're required to order all bargaining representatives, as well as any employer, to attend a mediation or conciliation conference.*



## Other changes

- Changes to workplace health and safety and workers compensation:
  - *Expanding function of Asbestos Safety and Eradication Agency to include silica*
  - *Streamlining Comcare workers comp claim process for first responders who sustain PTSD.*
  - *Introducing a new guide for arranging rehab assessment and requiring examination to be prepared by Comcare*
  - *Amending Cth WHS Act to introduce new criminal offence for industrial manslaughter and significantly increasing other penalties.*



# *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023*

- There are some big changes to the **FWA** that we will see in 2024, including:
  - **Changes to casual employment**
    - A new casual employee definition which will consider the totality of the employment relationship
  - **Definition of employment**
    - A new ordinary meaning definition of employee and employer, designed to revert the employee vs independent contractor characterisation to the multi-factorial test
  - **Sham contracting arrangements**
    - An amendment to the defence that is available to an employer who misrepresents employment as an independent contracting arrangement.



# *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023*

- Big changes (continued):
  - **Underpayments, compliance and enforcement**
    - Higher civil penalties, lowering of the bar for what constitutes a serious contravention and allowing snap rights of entry for underpayments matters.
  - **Road transport and employee-like worker conditions/unfair contracts**
    - Introducing minimum conditions, collective agreements and rights to challenge termination/deactivation, for certain non-employee gig economy workers and road transport contractors, and a new FWC unfair contracts jurisdiction for services contracts.
  - **Enterprise bargaining changes**
    - Empowering the FWC to determine certain model terms for enterprise agreements, changing the interaction rules between new single-enterprise agreements and limiting the ability for the FWC to wind conditions backwards in intractable bargaining.



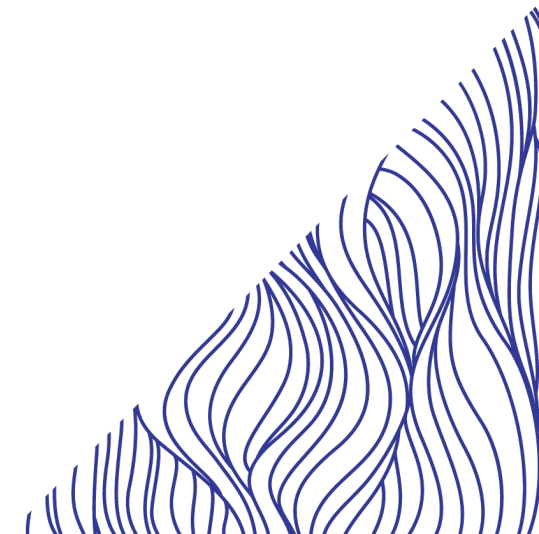
# *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023*

- *Big Changes Continued:*
  - **Withdrawal from registered organisation amalgamations**
    - Limiting the FWC's capacity to accept applications for a ballot of members of constituent part of a union to withdraw from the union (i.e. unwinding recent amendments to these rules)
  - **Workplace delegates rights**
    - New requirements on employers to allow workplace delegates paid time to attend training and reasonable time and facilities at the workplace to communicate with non-employee regulated workers who are current or prospective union members.
  - **Right to Disconnect**



# Changes to Casual Employment Provisions

- New definition of a “casual employee”
  - Under the new definition, an employee will only be considered a casual employee when:
    - 1) *The employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and*
    - 2) *The employee would be entitled to a casual loading.*
  - Even where a contract provides that there is no firm advance commitment to ongoing and indefinite work, this commitment may be inferred from the conduct of the employer and employee



# Changes to Casual Employment Provisions

- Factors to be considered when deciding whether there is to be a firm advance commitment:
  - the “real substance, practical reality and true nature of the employment relationship;
  - whether firm advance commitment exists, which may be found in a contract of employment, or in a mutual understanding or expectation (regardless of the terms of a contract);
  - an inability of the employer to elect to offer work or of the employee to accept or reject work (and whether this practically occurs);
  - whether there are permanent employees performing the same kind of work at the workplace; and
  - whether there is a regular pattern of work for the employee.



# Other Changes to Casual Employment Provisions

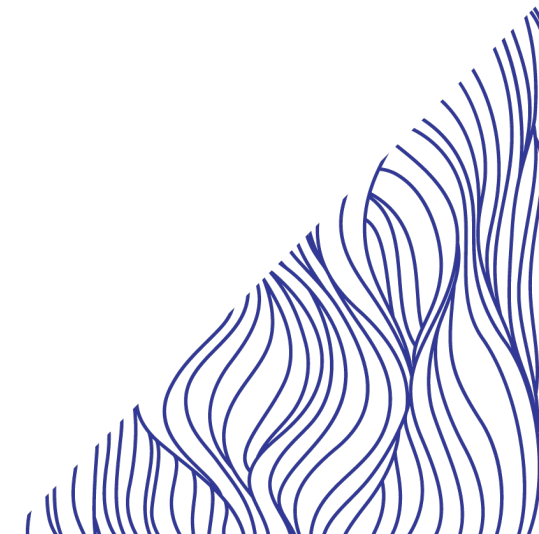
- Right to initiate casual conversion
  - Casual employees will be able to initiate a change to their employment status by providing written notification seeking conversion, provided they meet the stipulated criteria.
- Employer response
  - An employer must provide a written response within 21 days, and can only reject the conversion request if they satisfy the stipulated criteria, and provide this detailed reason for rejection to the employee.





# Other Changes to Casual Employment Provisions

- Civil penalties for misrepresentation of casual employment
  - New provisions prohibiting employers from misrepresenting permanent employment as casual employment or vice-versa, for any reason.
  - Penalties of up to 300 penalty units.



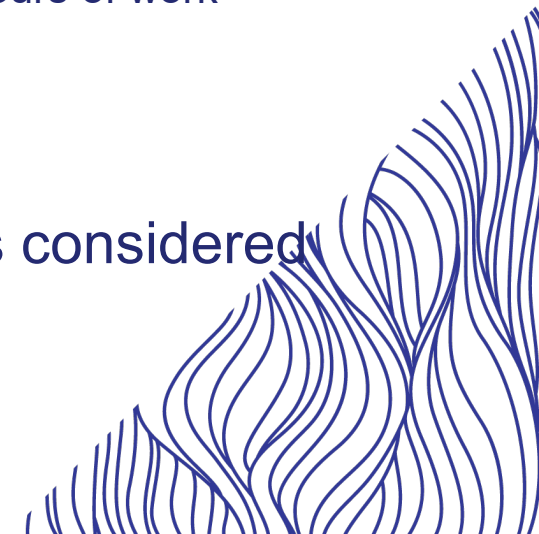
# Employment Definition

- Continuing on from the new definition of casual employment, this Act also introduces a new definition of employment
  - This definition intends to undo the common law tests set out by the High Court in *CFMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations v Jamsek* [2022] HCA 2.
- Whether an individual is an employee, or a person is an employer of an individual, is to be determined by ascertaining the “real substance, practical reality, and true nature of the relationship”.
- In ascertaining this, the Court must consider:
  - a) The totality of the relationship; and
  - b) Have regard not only to the terms of the contract governing the relationship, but also other factors including, but not limited to, how the contract is performed in practice.



# The Right to Disconnect

- This novel workplace right will prevent employees from being punished for refusing to monitor, read or respond to contact (or attempted contact) from their employer or a third party outside of their working hours, unless the refusal is unreasonable.
- Whether refusal is unreasonable will depend upon a range of circumstances including:
  - the reason for the contact or attempted contact
  - how the contact is made and the level of disruption it causes the employee
  - the extent to which an employee's remuneration compensates them to remain available to perform work during the period in which the contact is made or to work additional hours outside their ordinary hours of work
  - nature of the employee's role and their level of responsibility
  - employee's personal circumstances (including family or caring responsibilities)
- Emergency contact or contact regarding a change or work conditions is considered 'reasonable contact.'



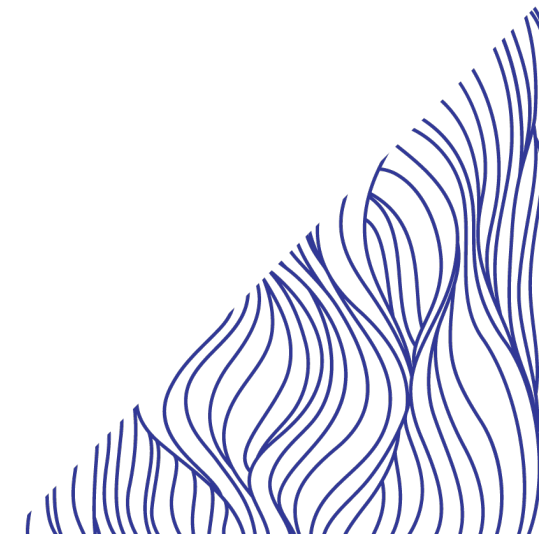
# The Right to Disconnect

- *Remedies:*
  - A workplace right for purposes of general protections provisions
  - Employees can raise a workplace dispute. If the issue is not resolved at the workplace level, either party can apply to the FWC for a Stop Order (operate similar to Stop Bullying Orders). Breaching Stop Order may attract civil penalties, but not criminal penalties.
- This new right applies to all employees.
- This right commences 6 months after Royal Assent (12 month additional exemption for small business employers)



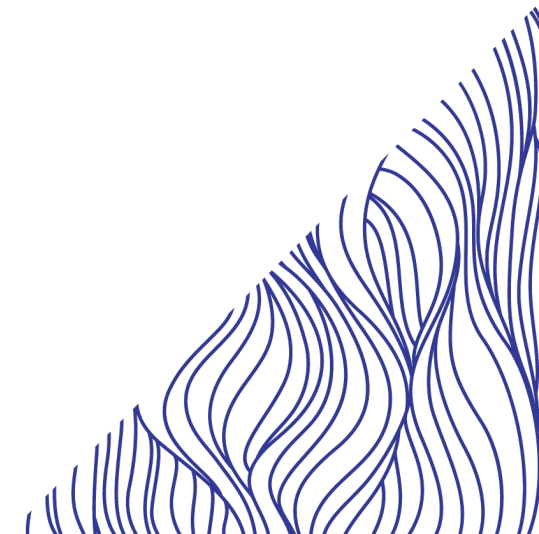
# Regulating the 'Gig Economy'

- The FWC may now make minimum standards guidelines for regulated road transport contractors performing work under a services contract.
- The Bill also establishes a new jurisdiction to provide eligible road transport workers with protection from unfair termination.
- Further protections have been introduced broadly for the gig economy i.e. freelance, digital and side-hustle work, such as Uber and UberEats etc.

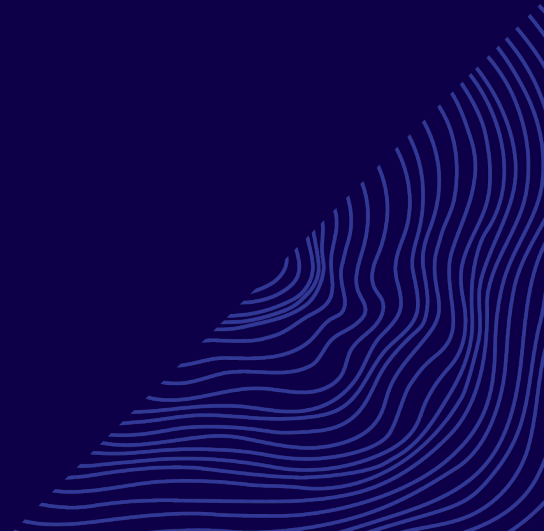


## Other changes

1. Amendments to the defence available to an employer misrepresenting employment as an independent contracting arrangement
2. Limiting FWC's capacity to accept application for a ballot of members of a union to withdraw.
3. The FWC may now also make model terms for enterprise agreements.



Questions?



# Thank you



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