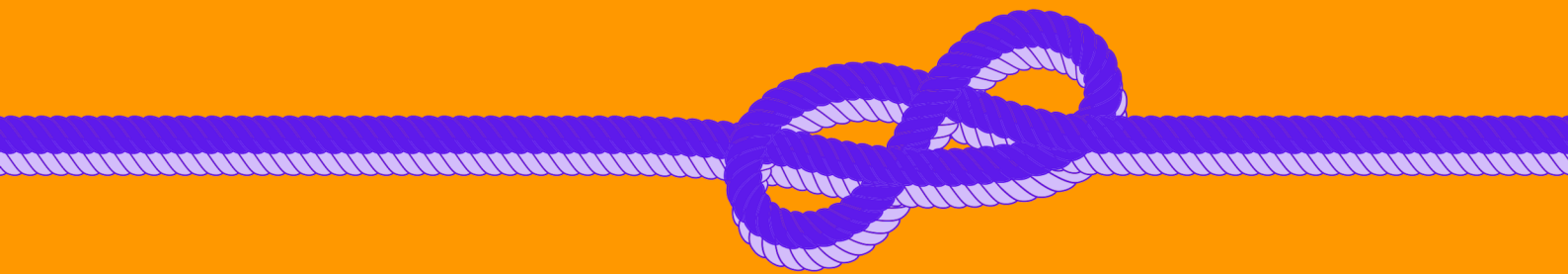


The Closing Loopholes Bill

**How it affects
businesses hiring
contractors.**



Summary

The Closing Loopholes Bill is a new set of laws that have significant effects on workplace laws across Australia. This factsheet has been created to assist you in understanding how the new laws will affect the engagement of independent contractors exclusively. This factsheet does not deal with the areas of the new laws that affect employment or labour hire situations.

The Closing Loopholes Bill has been split into two parts:

- Closing Loopholes Bill No. 1 was passed on 7 December 2023. Officially known as the 'Fair Work Legislation Amendment (Closing Loopholes) Bill 2023'.
- Closing Loopholes Bill No. 2 was passed on 12 February 2024. Formally, the 'Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023'.

Key Takeaways



The distinction between contractor and employee returns to a multi-factorial approach with the introduction of a new statutory definition of employment.

The Fair Work Commission can now issue minimum standard orders for 'employee-like' contractors working in the gig economy and transport industries.

The standard for establishing 'Sham Contracting' under the Fair Work Act has been lowered from a test of 'recklessness' to a test of 'unreasonableness'.

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Key changes and their implications for contractors and hirers

The sweeping new legislation will require businesses to reassess how they engage and manage independent contractors to ensure they satisfy all new and existing requirements. Below is a summary of the five key areas of the Closing Loopholes Bill that small businesses hiring contractors need to understand.

1

Contractor or employee? A new legal definition

(Commencing 6 months after Royal Ascent or earlier by proclamation)

For many years the definition of employment vs contracting has relied on a multi-factor test that takes into account the 'totality of the relationship' to determine a result. Over time, courts have developed a series of 'indicia' or legal tests to apply to any given scenario. These tests include indicators that relate to control, payment methods, tools & equipment, rectification, delegation and more.

In December 2022, the High Court changed the courts approach by placing much greater emphasis on the written agreement between a Hirer and Contractor. The two High Court cases of CFMEU v Personnel Contracting Pty Ltd and ZG Operations Australia Pty Ltd v Jamsek, meant that the substance of the engagement was looked at secondary to the contract itself.

What's changing?

Under the governments new legislation 'Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023', the current test for determining a contracting relationship, established in the 2022 High Court cases will be replaced with a new statutory test.

The proposed statutory test will seek to implement a multi-factorial test that looks at the "real substance, practical reality and true nature of the relationship between the individual and the person." The overall effect of these changes will approximate the legal landscape prior to the 2022 High Court cases by considering the 'totality of the relationship' once again.



2

Gig economy and employee-like arrangements

(Commencing 6 months after Royal Ascent or earlier by proclamation)

For the first time, the Closing Loopholes Bill No.2 is going to create a new class of worker that exhibits 'employee-like' characteristics. This new class of worker will capture contractors working in the gig economy and transport industries in-particular.

The initial proposals allow for the Fair Work Commission to be given the power to make binding orders for minimum standards that apply to a class/group of 'employee-like' contractors e.g. Uber Drivers. These orders can affect a wide range of typically employment-based entitlements such as payment terms, unfair terminations, working arrangements, record-keeping and more.



3

Test for sham contracting

(Commencing the day after Royal Ascent)

The Fair Work Act currently has protections against 'sham contracting' where an employer incorrectly classifies an employee as a contractor. The existing defence requires that the employer was not 'reckless' by engaging the employee as a contractor. While it has now changed to lower the threshold to a standard of 'unreasonableness', whereby the employer has unreasonably engaged the employee as a contractor.



4

Criminalisation of wage theft

(Commencing 1 January 2025 - pending introduction of FWC compliance code)

The Closing Loopholes Bill creates a criminal offence for employers who intentionally underpay entitlements owed to their employees. The criminal offence must be initiated by the Director of Public Prosecutions or the Australian Federal Police within 6 years of the offence. This carries a maximum 10-year prison sentence and \$7.8m fine for a body corporate or \$1.56m for an individual.

5

Contractor protections

(Commencing the day after Royal Ascent)

- a)** Independent contractors who earn above a high-income (yet to be confirmed) threshold and who are already engaged, will be able to 'opt-out' of the new definition of employment and remain contractors. They will also have the right to revoke the 'opt-out' at a later date.
- b)** Unfair contracts - for contractors above the high-income threshold, will continue to be regulated by the Independent Contractors Act 2006.
- c)** Unfair contracts - for contractors below the high-income threshold can now be brought before the Fair Work Commission rather than being required to go to court.

What to do next

The Closing Loopholes Bill contains a large and detailed list of amendments which represent a fundamental shift in the way the government is regulating the workforce. To put your business in the best position for the new legal landscape, there are a few key actions that will set you on the right path:

1. Run a review of your existing arrangements to identify any areas of concern.
2. Identify any new or existing requirements that need to be satisfied and the documentation you need to support compliance.
3. These laws are complicated and detailed, we recommend seeking independent legal advice to identify any compliance risks.

**Contact SubbieHub for your
risk-free business audit**

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