



Australian Government

Australian Government response to the Education and
Employment Legislation Committee report:

Fair Work Legislation Amendment (Closing Loopholes No.2)
Bill 2023 [Provisions]

MAY 2024

Recommendation 1

The committee recommends that the bill be passed, subject to the amendments that follow.

The Government notes this recommendation.

Recommendation 2

The committee recommends that an amendment be made to the bill to legislate a ‘right to disconnect’ in the Fair Work Act, supporting the development of clear expectations about contact and availability in workplaces. Modern Awards and enterprise agreements should incorporate a compliant right to disconnect term, and the FWC should be empowered to make ‘stop orders’ if a dispute cannot be resolved at the workplace level.

The Government supports this recommendation.

The Government supported an amendment moved by the Australian Greens to introduce an employee right to disconnect into Part 2-9 of the *Fair Work Act 2009* which makes clear that employees are not required to monitor, read, or respond to employer or work-related contact outside of their regular working hours, unless refusing to do so is unreasonable. The amendment also requires modern awards to include right to disconnect terms and enables the Fair Work Commission to deal with disputes between an employer and an employee about the right to disconnect, including by making orders to stop an employee from refusing contact or to stop an employer from taking certain actions.

Recommendation 3

The committee recommends that Government considers amendments to ensure that parties are not subject to duplicative and overlapping regulation between the Commonwealth, and State and Territory jurisdictions.

The Government supports this recommendation.

The Government moved an amendment to ensure that once an employee-like minimum standards order has been made and applies to a worker in respect of a particular services contract, it applies to the exclusion of specified state or territory laws to the extent those laws would affect the rights, obligations, liabilities or entitlements of the employee-like worker or digital labour platform operator in relation to that services contract.

This reduces the potential for complexity and overlap across federal and state/territory laws or instruments.

Road transport minimum standards orders and road transport contractual chain orders will prevail over state and territory laws or instruments to the extent of any inconsistency.

Recommendation 4

The committee recommends that the bill be amended to insert restrictions on multiple actions being taken by employee-like and road transport workers with respect to the same conduct or circumstances.

The Government supports this recommendation.

The Government moved an amendment to provide that employee-like or road transport workers cannot make multiple proceedings in relation to the deactivation of a person from a digital labour platform or termination of a road transport services contract. The provisions would still permit someone to commence proceedings so long as the other relevant proceedings have been discontinued by the applicant or failed for want of jurisdiction.

This is consistent with the approach to multiple actions in other parts of the *Fair Work Act 2009* and with the Government's policy intent to provide a new right under Commonwealth law, but not open an additional avenue for workers to seek a remedy for the same conduct when they have already sought a remedy elsewhere.

Recommendation 5

The committee recommends that amendments be made to the bill to empower the FWC to make orders in relation to contractual chains in the road transport industry, and consequential amendments required to give effect to the principle of contractual chain accountability.

The Government supports this recommendation.

The Government moved an amendment to provide a power for the Fair Work Commission to set standards for persons in road transport contractual chains, replacing a regulation making power in relation to the making of road transport contractual chain orders.

The Government has worked with road transport industry stakeholders and unions to support amendments that ensure the Fair Work Commission sets standards for a safe, sustainable, and viable road transport industry. Directly empowering the Fair Work Commission to make road transport contractual chain orders delivers the approach sought by stakeholders and is appropriate given the importance of this aspect of the Fair Work Commission's powers for the Government's reforms in this area.

Recommendation 6

The committee recommends that an amendment be made to s536JF, reducing the 24 months' notice period for a road transport minimum standards order to 12 months.

The Government supports this recommendation.

The Government moved an amendment which reduces the mandatory minimum period before a road transport minimum standards order can commence operation once the Fair Work Commission has issued a notice of intent and draft order from 24 months to 12 months.

The Government considers a minimum 12-month period is an appropriate and balanced timeframe, particularly where the content of an order is non-controversial or largely agreed by the parties. The Fair Work Commission retains the flexibility to provide for a longer period where appropriate.

Recommendation 7

The committee recommends that a new failsafe mechanism be introduced, by which the Minister, or the FWC on application, may defer or suspend all or part of a road transport or employee-like minimum standards order, while the FWC conducts a review to consider whether to vary or revoke its terms.

The Government supports this recommendation.

The Government moved an amendment to introduce a failsafe mechanism for employee-like minimum standards orders, road transport minimum standards orders and road transport contractual chains orders, replacing a regulation making power that provided for the creation of failsafe mechanisms.

This will allow for the commencement of an order to be deferred, or for an order to temporarily cease to have effect, while the Fair Work Commission considers whether to vary or revoke the order.

The amendment provides for the Minister for Employment and Workplace Relations to make a declaration deferring or suspending an order. For road transport minimum standards orders and road transport contractual chain orders only, eligible parties will also be able to apply to the Fair Work Commission to make a determination to defer or suspend these orders.

Recommendation 8

The committee recommends the Government examines the merits of a proposal to amend the bill to require owner drivers, or representatives of owner drivers, to be included on a road transport advisory group subcommittee when minimum standards orders covering owner drivers are being considered.

The Government supports this recommendation.

The Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network to require the Road Transport Advisory Group to form a subcommittee with a majority of the members who are owner drivers or representatives of owner drivers:

- if the Fair Work Commission is making or varying road transport minimum standards orders or road transport contractual chain orders that will affect owner drivers, or
- if the Fair Work Commission proposes to perform a function or exercise a power in relation to these orders that has, or may have, an effect upon owner drivers that is more than minor or technical.

This amendment will supplement the extensive guardrails and consultation included in the road transport jurisdiction to ensure the interests of owner drivers are taken into account at each stage of the standard setting process.

Recommendation 9

The committee recommends that an amendment be made to the bill to clarify that the casual employees' rights created by this bill are workplace rights for the purpose of the general protections provisions.

The Government supports this recommendation.

The Government supported an amendment moved by Senator Lidia Thorpe to insert new subsection 66L(3) which clarifies that an employee who participates in a process to change from casual to permanent employment is protected by the general protections provisions in Part 3-1 of the *Fair Work Act 2009*. This will encourage employees who are thinking of changing to permanent employment to feel confident about exercising their workplace rights knowing that the law protects them throughout that process.

New subsection 66L(3) lists the casual employment provisions in Division 4A which create a workplace right. These include:

- giving an employer a notification about a change in employment status
- receiving a response to a notification
- becoming a full-time or part-time employee
- participating in a dispute about the operation of the casual conversion provisions.

Recommendation 10

The committee recommends that the interactions between the *Public Service Act 1999* and *Australian Public Service Commissioner's Directions 2022* and *Fair Work Act 2009* are examined to ensure that casual employees in the Australian Public Service have equitable access to the bill's casual conversion provisions, while upholding the integrity of the APS merit principle.

The Government supports this recommendation.

The Government agrees that casuals in the Australian Public Service (APS) should have equitable access to the casual conversion mechanism. The Government moved an amendment to insert a second legislative note after paragraph 66AAC(4)(c) drawing attention to the APS Employment Principle at paragraph 10A(1)(c) of the *Public Service Act 1999* (which requires APS engagement and recruitment decisions to be based on merit) and any directions made under subsection 11A(2) of that Act in relation to that principle.

The note is designed to prompt APS employers to consider their obligations under public sector legislation when determining whether to accept or refuse an employee's notification to change from casual to permanent employment.

The Australian Public Service Commission will also amend the *Australian Public Service Commissioner's Directions 2022* to clarify the process where a casual APS employee seeks to convert to permanent employment. An APS employer would be required to run a merit-based selection process where an employee otherwise meets the criteria for casual conversion. The Directions allow employees who have successfully undergone merit assessment for an equivalent position in the previous 18 months to be eligible for conversion without the need to undertake a further merit assessment.

Recommendation 11

The committee recommends that an amendment be made to the bill to change the commencement dates for Part 15, and Part 16, from 1 July 2024, to 6 months after Royal Assent.

The Government supports this recommendation.

The Government moved an amendment to provide for Part 15 and Part 16 to commence 6 months after Royal Assent, or sooner by proclamation.

This change will provide businesses and workers with additional time to prepare for the commencement of these important reforms. It will also provide additional time for the Fair Work Commission to prepare for its new functions.

Coalition Senators' dissenting report

Recommendation 12

That the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 not be passed by the Senate.

The Government does not support this recommendation.

Jacqui Lambie Network dissenting report

The Government notes this dissenting report.

Australian Greens Senators' additional comments

The Government notes these additional comments.

Senator David Pocock's additional comments

Recommendation 1

Ensure casual employees in the APS are not excluded from the casual conversion process.

The Government supports this recommendation.

As outlined in response to recommendation 10, the Government moved an amendment to insert a legislative note drawing attention to the APS Employment Principles, and the Australian Public Service Commission will amend the *Australian Public Service Commissioner's Directions 2022* to require an employer to run a merit-based selection process if an employee seeking to convert has not had the opportunity to participate in such a process.

The Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock to remove subsection 66M(2) regarding the Fair Work Commission dispute resolution processes. This ensures that the Fair Work Commission's capacity to deal with disputes about casual employment is not limited in relation to APS employees.

Recommendation 2

Noting the preference from business and their representatives to only have one, yearly casual conversion pathway, the government should at a minimum consider amending the Bill to harmonise the criteria and process for both employee and employer-led casual conversion pathways.

The Government supports this recommendation.

The Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock to remove the existing obligation on employers, other than small business employers, to offer conversion to casual employees at 12 months of employment where they had worked a regular pattern of hours for 6 of the past 12 months.

Having a single legislated pathway for casual employees to change to permanent employment reduces the administrative burden on employers, while ensuring casual employees have a robust pathway to change from casual to permanent employment.

Recommendation 3

Consider amending the Bill to introduce a high-income exclusion from the existing National Employment Standard obligation to notify casuals of their conversion right at the 12-month point.

The Government does not support this recommendation.

As noted above, the Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock to remove the obligation for employers, other than small business employers, to offer conversion to casual employees at 12 months of employment.

Recommendation 4

Include a right to refuse casual conversion on fair and reasonable grounds.

The Government supports this recommendation.

The Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock to enable employers to refuse an employee choice notification where there are 'fair and reasonable operational grounds' to do so.

Fair and reasonable operational grounds include:

- substantial changes would be required to the way in which work in the employer's enterprise is organised
- there would be significant impacts on the operation of the employer's enterprise, or
- substantial changes to an employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time employee or a part-time employee (as the case may be).

Recommendation 5

Amendments to section 15A outlined above [at paragraph 1.38 Senator David Pocock's additional comments]

The Government supports this recommendation.

The Government supported amendments moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock, to section 15A to:

- clarify that the contract of employment is to be considered in addition to mutual understandings and expectations when assessing whether a casual employee has a firm advance commitment to continuing and indefinite work
- insert the word 'may' to read 'which may indicate the presence, rather than an absence, of such a commitment', and

- insert 'or not offer' in paragraph 15A(2)(i) to read 'when there is an inability of the employer to offer or not offer work'.

These amendments clarify the factors for determining whether an employee is a casual and reflect that no single factor will dictate if an employee is a casual.

Recommendation 6

Remove clause 15A(4) or limit its application in such a way as to remove any adverse unintended consequences for recruitment firms offering temporary casual employment contracts with specific end dates.

The Government supports this recommendation.

The Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock, to subsection 15A(4) narrowing the limitation on engaging casual employees on fixed term contracts to apply only to academic and teaching staff in universities covered by specified awards.

The effect of these amendments is to allow casual employees to be engaged on a fixed term basis, except for academic and teaching staff in higher education institutions. Aside from this specific cohort, employers (including recruitment firms) can offer temporary casual employment contracts with specific end dates.

Separately, the Government supported an amendment moved by Senator Lidia Thorpe to clarify casual employees engaged on a shift-by-shift basis are not subject to the limitations on fixed term contracts introduced through the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. The limitations apply to all other casual employees and limit the use of fixed term contracts for the same role beyond 2 years (including renewals) or 2 consecutive contracts – whichever is shorter – unless provided for by limited exceptions that allow fixed term contracts beyond these limits when genuinely necessary and appropriate.

All casual employees, including those who are or have previously been on a fixed term contract with their employer in relation to that employment, will be able to access the new employee choice pathway to notify their employer where they believe they no longer meet the definition of a casual employee.

Recommendation 7

Amend the proposed changes to s.519 of the FW Act (Item 122 of the Bill) to require the FWC to be satisfied that advance notice of entry would preclude an effective investigation and strengthen penalties for misuse.

The Government supports this recommendation in part.

The changes to the right of entry provisions provide a new ground for registered organisations to apply to the Fair Work Commission for an exemption certificate, which waives the usual 24-hours' notice period for entry. These changes are designed to complement the Fair Work Ombudsman's role in detecting and addressing the underpayment of wages.

The Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock to Item 122 of Schedule 1 to the Bill. Under these changes, the Fair Work Commission will be required to issue an exemption certificate if it reasonably believes that advance notice of entry would hinder an effective investigation, in addition to being satisfied that a suspected contravention involves the underpayment of wages affecting a member of the relevant registered organisation.

The Bill included specific safeguards to prevent misuse of the new provisions, in addition to the existing safeguards under the right of entry provisions. In the event of misuse, the Fair Work Commission will have the power to ban the issue of, or impose conditions on, exemption certificates relating to suspected underpayments for a specified period.

The Government does not support amending penalties for misuse of the right of entry provisions, given that significant penalties already exist under the *Fair Work Act 2009*. The Fair Work Ombudsman or an affected person can pursue civil penalties for right of entry breaches through the courts, including for hindering, obstructing, acting improperly or making misrepresentations, which carry a maximum penalty of 60 penalty units for an individual or 300 penalty units for an organisation.

Recommendation 8

Amend the Bill as outlined above.

The Government supports this recommendation in part.

The recommendation is to delete new section 15AA, which provides an interpretive principle for determining whether an individual is an employee or a person is an employer. Failing that, the recommendation is to:

- delay the start date section 15AA until 1 July 2025
- provide that section 15AA does not alter existing contractual arrangements
- provide that a regulated worker is not an employee if they are subject to a minimum standards order (be it either an employee-like or road transport contractor) or if they are a contract carrier under Chapter 6 of the *Industrial Relations Act 1996* (NSW).

Deleting the new interpretive principle is not consistent with the Government's policy intent to reinstate the multi-factorial test to determine whether a worker is an employee or an independent contractor.

In relation to the proposal to delay the measure's start date, as noted above, the Government moved an amendment to delay the commencement date for Part 15 of the Bill (which inserts section 15AA) until 6 months after the Bill receives the Royal Assent, or earlier by proclamation.

In relation to the application of the interpretive principle to existing contractual arrangements, the Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock which gives individuals whose earnings exceed the contractor high income threshold (to be set by regulation), and who may become employees when section 15AA commences, the option to 'opt out' of the application of section 15AA. The effect of 'opting out' is that the new interpretive principle in section 15AA will not apply when determining the status of the relationship between the individual and the person who engages them for work. Instead, the nature of the relationship will be determined by the common law approach. An individual who chooses to opt out can later revoke that decision, in which case the new interpretive principle in section 15AA will apply to the relationship.

In relation to workers covered by a minimum standards order, the Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock which ensures that regulated road transport contractors cannot be employees under the new interpretive principle in section 15AA if they are covered by a minimum standards order. An equivalent provision already applies to employee-like workers as a result of amendments moved in the House of Representatives.

The Government does not support the remainder of this recommendation, which would provide a regulated worker is not an employee if they are a contract carrier under Chapter 6 of the *Industrial Relations Act 1996* (NSW). An amendment to this effect would significantly increase complexity and could lead to unintended consequences.

Recommendation 9

Work with state and territory governments to significantly improve and increase investment in dedicated cycleways and other active travel infrastructure, including through the federal budget process.

The Government supports this recommendation in-principle.

The Government works closely with state and territory governments to improve road safety.

The Government has committed to fund both infrastructure and non-infrastructure programs including the Infrastructure Investment Program and the National Road Safety Action Grants Program. The Australian and state and territory governments are also working together to prioritise investment for vulnerable road users, including cyclists, through the National Road Safety Action Plan 2023–25 (Action Plan).

Recommendation 10

Commit to revisiting the National Road Safety Strategy this year to examine what immediate actions and investments need to be made so that jurisdictions hit their targets for reduced road fatalities and urgently implement enhanced data sharing between jurisdictions.

The Government notes this recommendation.

The National Road Safety Strategy 2021–30 sets out the national priorities over the decade to 2030, and is supported by a National Road Safety Action Plan. The current Action Plan is focussed on the road safety priorities agreed through consultation and covers the period 2023–25. The Government will work with state and territory governments and other road safety stakeholders over the next 18 months to develop the next Action Plan covering the period 2026–30, which will reflect and respond to contemporary road safety trends and emerging issues.

An Intergovernmental Road Safety Data Sharing Agreement (DSA) is being progressed with all jurisdictions to enhance data sharing. The DSA will outline clear terms of use, privacy protections and processes for on-sharing road safety data. The DSA is expected to be finalised in 2024.

Recommendation 11

Amendments to Part 16 as outlined above.

The Government supports this recommendation in part.

This recommendation is to amend Part 16 of the Bill as outlined in the ‘regulating the gig economy’ section of Senator David Pocock’s additional comments. This section outlines stakeholder feedback on the Bill which was to:

- Make the list of terms that may be included in minimum standards orders an exhaustive list and remove certain items (section 536KL).
- Ensure that the Fair Work Commission can only include terms in a minimum standards order to the extent it is necessary to achieve the Minimum Standards Objective.
- Ensure that coverage of a minimum standards order can only apply to classes of businesses rather than individual businesses.
- Amend the list of terms that may be included in a minimum standards order by replacing ‘payment terms’ with ‘payment for the performance of work under a contract for services’ and replacing ‘deductions’ with ‘deductions from amounts payable under a minimum standards order’.
- Include a prohibition on regulated workers or the parties that engage them taking industrial action in support of a proposed new collective agreement or in connection with the making or variation of a minimum standards order.

The Government supported amendments moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock that address parts of this recommendation. These amendments:

- ensure minimum standards orders can only apply to classes of businesses rather than individual businesses
- provide that the Fair Work Commission can only include terms in a minimum standards order to the extent it is necessary to achieve the Minimum Standards Objective.

The Government does not support the remainder of this recommendation, which would move away from the principles-based approach of the employee-like and road transport frameworks. These changes would reduce the capacity of these frameworks to respond to changing circumstances and are unnecessary given the extensive guardrails and consultation requirements included in this Part. The provisions also do not provide the ability for regulated workers to take protected industrial action in support of a collective agreement, so no amendment is required to implement this aspect of the recommendation.

Recommendation 12

Remove all references and comparisons to employment. The Bill should not require the FWC to compare platform workers to employees.

The Government does not support this recommendation.

The objectives, guardrails and processes in the Bill take into account the needs and circumstances of digital platforms and workers and provide an appropriate and balanced framework to guide the Fair Work Commission in exercising its functions under this Part.

Recommendation 13

Exclude livestock transportation.

The Government supports this recommendation and intends to request that the Governor-General make a regulation excluding livestock transportation from provisions relating to regulated workers prior to the commencement of these provisions.

Recommendation 14

The employee-like aspect of these reforms, as drafted, go far beyond the scope of capturing the gig platform courier drivers and would impact sectors like personal and aged-care providers. It is important that the reforms only capture those they intend to. For this reason, section 15P(1)(e) should be amended to require that the person satisfies two or more characteristics in order to be an employee-like worker and should include a general carve out for building and construction contractors (who are not intended to be caught by the changes).

The Government supports this recommendation in part.

The Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock to require a person to satisfy 2 or more employee-like characteristics in order to be classified as an employee-like worker (instead of one).

The Government does not support the second part of the recommendation. A general carve out would be inconsistent with the principles-based approach of the employee-like framework and is unnecessary given the extensive guardrails and consultation requirements in this Part.

Recommendation 15

That the amendment be publicly released for consultation and that it include provisions to guard against vexatious complaints.

The Government notes this recommendation.

The Government supported an amendment moved by Senator Barbara Pocock, on behalf of the Australian Greens, to introduce an employee right to disconnect into the *Fair Work Act 2009*. While the 'right to disconnect' amendment was not publicly released for consultation, the Senate Select Committee on Work and Care extensively engaged with stakeholders on a new right to disconnect.

The right to disconnect provisions expressly provide that the Fair Work Commission may dismiss applications it considers to be frivolous or vexatious.

Recommendation 16

That additional resourcing be allocated to develop and disseminate guidance for small businesses on the right to disconnect.

The Government supports this recommendation.

The right to disconnect provisions provide that the Fair Work Commission must make written guidelines in relation to the operation of the provisions. These guidelines must be published before the provisions commence on 26 August 2024. For small business, the right to disconnect provisions will not commence until 26 August 2025.

The Fair Work Ombudsman is funded to support employees and employers, including small businesses, to understand the requirements of the *Fair Work Act 2009*. The Fair Work Ombudsman will support small businesses to implement the right to disconnect.

Recommendation 17

Include a provision to cause a review of the amendments to the Act as outlined above.

The Government supports this recommendation.

The Government supported an amendment moved by Senator Jacqui Lambie, on behalf of the Jacqui Lambie Network, and Senator David Pocock to provide for a review of the amendments to the *Fair Work Act 2009* made by the Bill to be commenced no later than 2 years after the Bill receives the Royal Assent. The written report of the review must be given to the Minister for Employment and Workplace Relations within 6 months of its commencement and copies of the report must be tabled in each House of Parliament.

A review of this nature is appropriate and consistent with the requirements for statutory reviews included in previous reforms agreed by this Government in the last 2 years.