

***Fair Work Legislation Amendment  
(Closing Loopholes) Bill 2023***

NECA SUBMISSION – CONSULTATION DRAFT

---

September 2023

## Table of Contents

|   |    |
|---|----|
| <b>Introduction</b> .....   | 3  |
| <b>Casual Employment</b> .....  | 5  |
| <b>Small Business Redundancy Exemption</b> .....                                | 7  |
| <b>Closing the labour hire loophole</b> .....                                   | 8  |
| <b>Bargaining Framework</b> .....   | 10 |
| <b>Workplace Delegates Rights</b> .....   | 12 |
| <b>Exemption Certificates for Suspected Underpayment (Right of Entry)</b> ..... | 16 |
| <b>Additional Amendments</b> .....  | 17 |

## Introduction

On 4 September 2023, the Federal Government introduced the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* to Parliament, and with it introduced a range of proposed legislative amendments, including:

- Part 1—Casual employment
- Part 2—Small business redundancy exemption
- Part 3—Enabling multiple franchisees to access the single enterprise stream
- Part 4—Transitioning from multi-enterprise agreements
- Part 5—Model terms
- Part 6—Closing the labour hire loophole
- Part 7—Workplace delegates’ rights
- Part 8—Strengthening protections against discrimination
- Part 9—Sham arrangements
- Part 10—Exemption certificates for suspected underpayment
- Part 11—Penalties for civil remedy provisions
- Part 12—Compliance notice measures
- Part 13—Withdrawal from amalgamations
- Part 14—Wage theft
- Part 15—Definition of employment
- Part 16—Provisions relating to regulated workers
- Part 17—Technical amendment

Broadly, the amendments follow the Same Jobs, Better Pay legislation introduced in late 2022, and are primarily focused on the gig-economy, criminalising wage theft / intentional underpayments and industrial manslaughter, and new obligations around casuals and labour hire.

While small businesses (with less than 15 employees) will be exempt from the proposed changes, not all amendments affect the electrotechnology sector.

The National Electrical and Communications Association (NECA) has identified the key proposed elements of the reform that could potentially affect NECA’s members.

On 7 September 2023, the Senate referred the provisions of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* to the Education and Employment Legislation Committee for inquiry and report by 1 February 2024, with submissions requested by 29 September 2023.

Based on member feedback, this paper will take the form of NECA's submission to the Senate to inform the inquiry into the proposed bill.

This document references the following Federal Government information:

- Closing Loopholes Bill: [23105b01.pdf;fileType=application/pdf \(aph.gov.au\)](#)
- Explanatory Memorandum to the Bill: [ParlInfo - Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023 \(aph.gov.au\)](#)
- Education and Employment Legislation Committee Senate Inquiry: [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023 – Parliament of Australia \(aph.gov.au\)](#)
- Fact Sheets: [Further safeguards for fair pay and security for employees and employee-like workers - Department of Employment and Workplace Relations, Australian Government \(dewr.gov.au\)](#)

The Minister for Employment and Workplace Relations, the Honourable Tony Burke has on a number of occasions publicly stated that tradies and contractors on building sites will not be affected by the gig economy laws.

Minister Burke also confirmed that the proposed changes will in no way affect independent contractors who have a high degree of control and autonomy over their work, such as skilled tradespeople. While we have acknowledged to the Government, we welcome this, we are proposing through this submission we are emphasising for clarity and surety that this exemption or exclusion must be clarified further to explicitly exclude the possible impacts of the legislation on independent contractor.

The amendments that are likely to have an impact on the sector are listed out in detail, including NECA's position and recommendation to government, with an additional section on the remaining amendments, including NECA's position.

While NECA has made every effort to identify elements of the bill that could potentially impact member businesses, NECA still encourages members to carefully consider the proposed amendments and to direct any specific questions to NECA for further support.

# Casual Employment

|                               |        |
|-------------------------------|--------|
| <b>Bill reference</b>         | Part 1 |
| <b>Impact on NECA members</b> | Low    |

## Overview

The intent of the proposed legislation is to replace the existing definition of ‘casual employee’ with a definition that considers not only the terms of the contract but also the “real substance, practical reality and true nature of the employment relationship”; and to introduce a new employee choice pathway for eligible employees to change to permanent employment if they wish to do so.

## Explanatory notes

- The proposed legislation will amend the definition of casual employee in the Fair Work Act, however, it will retain the established concept that a casual employee is someone who has no firm advance commitment to continuing and indefinite work.
- The existing definition explicitly requires the assessment if an employee is casual to be based only on the initial offer of employment.
- The amended definition will allow consideration of the practical reality of what is going on in the workplace, not just what was in the employment contract on day one.
- There will be considerations to help employees and employers assess whether there is no firm advance commitment.
- The new process will enable an employee to notify their employer if they believe they are no longer at that point in time a casual employee within the meaning of the new definition of casual employee.
- The employer would have 21 days to respond, and employers can give grounds for not accepting a notification, for example:
  - if the employer believes the employee is still correctly classified as a casual employee in line with new definitions;
  - if it would be impractical for the employer to accept the notification cause that would result in substantial changes to the employee’s employment terms and conditions;
  - if change of employment status would not comply with a recruitment and selection process.

- Dispute resolution processes are proposed to be strengthened.
- New civil remedy provisions would be included, the general protections provisions, to protect against conduct designed to result in the misclassification of casual employees.
- If an employer is found to have engaged in sham contracting but successfully makes out the defence, the employer would not be liable to a civil penalty, however, the employer may still be liable for other civil contraventions in relation to the misclassification and may be liable to a civil penalty and/or to backpay the unpaid entitlements.

## NECA's position

NECA believes this to be a low-risk amendment for its member businesses, on the basis that:

1. Casual Employment is not a classification of worker that is commonly used amongst member businesses
2. The Modern Award for the Electrical Contracting Industry already has a pathway for casual conversion.

As part of the proposed changes to the definition of Casual Employment, it is important that government ensures the legislation does not result in unintended misclassification, which in turn can result in penalties for the industry.

NECA agrees to the Government's proposal to implement policy changes in a meaningful way and taking into account the importance of raising awareness of the changes to reform with both employers and the employees (through initiatives such as the use of the Casual Employment Information Statement).

In further support of the industry, NECA is also recommending the government explicitly rule out backpay or retrospectivity of legislation, and also provide a clearer definition concerning regular pattern of work.

# Small Business Redundancy Exemption

|                               |        |
|-------------------------------|--------|
| <b>Bill reference</b>         | Part 2 |
| <b>Impact on NECA members</b> | Low    |

## Overview

The intent of the proposed legislation is to address anomalous consequences of the small business redundancy exemption in insolvency contexts by providing an exception to its operation when a larger business downsizes to become a smaller business employer due to insolvency.

## Explanatory notes

- The proposed legislation only applies to employees that are bankrupt or in liquidation due to insolvency, does not affect ongoing, solvent businesses.
- This covers a situation where a larger employer incrementally downsizes due to insolvency, and the number of employees falls below the 15 employee threshold for the small business definition, causing some employees to lose their previous entitlement to redundancy pay.
- At present, the majority of employees would receive their redundancy entitlements, except the employees kept on in order to finalise the winding up would not because the employer would then come within the small business redundancy exemption.
- The amendment would provide an exception to the operation of the small business redundancy exemption in such downsizing contexts.
- It is intended to address inequitable outcomes for employees, including those who remain employed to assist with the orderly wind-down of an insolvent business, and support the more efficient conduct of external administrator, controller and bankruptcy trustee appointments.

## NECA's position

In the unlikely event of insolvencies by NECA members, the new legislation will permit employees of small businesses to be entitled to redundancy pay if prior to the winding down of the business, the business employed greater than 15 workers.

NECA does not intend to take an adverse policy position in relation to this proposed amendment.

# Closing the labour hire loophole

|                               |               |
|-------------------------------|---------------|
| <b>Bill reference</b>         | Part 6        |
| <b>Impact on NECA members</b> | Medium - High |

## Overview

This amendment means that where businesses have enterprise agreements in place, the employer's agreed minimum rates of pay could be made to apply to labour hire workers.

## Explanatory notes

- This part is about: regulated labour hire arrangement orders, the obligations of employers and regulated hosts covered by those orders, the alternative protected rate of pay orders, disputes, anti-avoidance and the requirement for the Fair Work Commission (FWC) to make written guidelines in relation to the operation of amendment.
- Under this amendment, when an employer supplies one or more employees to a host business, employees and unions would be able to apply to the FWC for a regulated labour hire arrangement order.
- The FWC would not be required to make the order if satisfied that it was not fair and reasonable, having regard to submissions from affected businesses and employees, and would be required to consider a range of factors including existing pay.
- Certain exemptions would be built into the framework, including:
  - where an employee supplied under the arrangement is engaged for a short-term period
  - where the host business is a small business employer as per the FW Act
  - where a training arrangement applies in respect of regulated employee, which is intended to apply to all workers employed on an apprentice or trainee contract.

## NECA's position

These changes represent a medium to high issue for NECA members depending on how member businesses are operated. Where Members are engaging Labour Hire to meet the peaks in projects and workers are engaged for a short period of time, the risk will be minimal.



Where labour hire workers are engaged for extended periods of time to supplement their workforce, members will potentially be significantly impacted by these proposed changes.

This impact will be reduced significantly for those larger members that are subject to Electrical Trade Union Enterprise Agreements, particularly in ACT, NSW, QLD & VIC which already feature similar obligations.

To some extent, this legislation could be viewed as creating a more level playing field in those jurisdictions.

The evidence shows that these matters can be negotiated through enterprise agreements and as such it will be NECA position that the Government should leave these matters to discussions between the parties to Enterprise Agreements.

DRAFT

## Bargaining Framework

|                               |   |
|-------------------------------|---|
| <b>Bill reference</b>         | Part 3 – Enabling multiple franchises to access the single enterprise stream<br>Part 4 – Transitioning from multi-enterprise agreements<br>Part 5 – Model terms |
| <b>Impact on NECA members</b> | Low   |

### Overview

The intent of the proposed legislation is to make targeted amendments to the bargaining framework by:

- Enabling multiple franchisees to access the single-enterprise stream, without removing the ability to bargain for multi-enterprise agreement if this is the preferred option of the parties.
- Allowing supported bargaining and single interest employer agreements to be replaced by single-enterprise agreements at any time if certain conditions are met.

### Explanatory notes

- This would amend the FW Act to allow a single-enterprise agreement to replace a single interest employer agreement or supported bargaining agreement that has not passed its nominal expiry date.
- It would require the FWC to determine model flexibility, consultation and dispute resolution terms for enterprise agreements, and the model dispute settlement term for copied State instruments.
- This would commence by Proclamation or the day after a 12 month period commencing on the day the Bill receives Royal Assent, to allow for sufficient time to determine model terms, hear and consider submissions made in relation to the model terms, and make determinations.
- It is intended that the FWC would undertake detailed consultation, including with but not limited to national peak councils during this period.

## NECA's position

Single Interest Employer Agreements are rarely, if ever used in the Electrical Contracting Industry and as such these amendments are likely to have limited or no impact on the NECA membership.

In any event, these provisions provide greater flexibility to the employer to free themselves from a Single Interest Employer Agreement on no lesser terms and as such provides business with greater flexibility.

NECA does not intend to take an adverse policy position in relation to these legislative amendments.

DRAFT

# Workplace Delegates Rights

|                               |        |
|-------------------------------|--------|
| <b>Bill reference</b>         | Part 7 |
| <b>Impact on NECA members</b> | Low    |

## Overview

The intent of the proposed legislation is to provide a framework for delegates' rights and include protections for workplace delegates when seeking to exercise those rights.

## Explanatory notes

- This introduces new workplace rights and protections for workplace delegates.
- The new rights would provide for modern awards and future agreements to provide more detailed rights for specific industries, occupations and workplaces.
- It would also provide a new general protection for workplace delegates to facilitate the exercise of these rights.
- Unions would be able to see leave from the Fair Work Commission remove the requirement for 24 hours' notice to inspect employee wage records if there is reasonable suspicion of an underpayment.
- Employers would be required to pay workplace delegates for training and time for engagement with existing or potential union members.
- A new subsection would provide that an enterprise agreement must include a delegates' rights term.
- This requirement would only apply to enterprise agreements put to a vote by the employer on or after 1 July 2024.

## NECA's position

NECA opposes these new provisions on the following grounds:

1. The right for a workforce to be represented by a delegate is a right that should be determined by the workforce.

It is not reasonable to have a Union Delegate forced into a workforce where most workers do not support such an appointment.

2. For the reasons stated above, it is NECA's position that the correct place to determine Delegates Rights is within Enterprise Agreements, which are negotiated with and agreed by a majority of workers in any particular workplace.
3. In the alternative, where the Government is determined to insert delegates rights into modern awards and enterprise agreements, there need to be some clearly defined limitations on the powers and numbers of delegates that are available in any workplace to ensure that the powers are not abused.

DRAFT

# Sham Arrangements

|                        |        |
|------------------------|--------|
| Bill reference         | Part 9 |
| Impact on NECA members | Low    |

## Overview

Current laws prohibit employers from misrepresenting an employment contract as an independent contracting arrangement ('sham contracting'), if the employer can prove that they **did not know, and were not reckless** as to whether the contract was a contract of employment rather than a contract for services.

## Explanatory notes

- The proposed amendment would provide defence to sham contracting if the employer reasonably believed that the contract was a contract for services, and would change the defence to misrepresenting employment as sham contracting from a test of '**recklessness**' to one of '**reasonableness**'.
- In determining whether employer's belief was reasonable the following is taken into account (not an exhaustive list):
  - the employer's size and nature of enterprise
  - range of other matters such as the employer's skills and experience
  - industry in which the employer operates
  - how long the employer has been operating
  - the presence of a dedicated HR management specialist or expertise
  - whether the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association, and if so, acted in accordance with that advice.
- Under the proposed changes, employers will only be able to successfully establish the defence if they can show that they reasonably believed the contract was a contract for services.
- General protections would extend to casual employment arrangements too.

## NECA's position

NECA notes that under the new legislation if an employer for example has not paid correct entitlements to an employee as a result of misclassification of an employee as an independent contractor, the employer may be liable to a civil penalty and / or to backpay the unpaid entitlements.

NECA will be opposing this legislative amendment on the basis that it does not give any consideration to the wishes of the parties to the agreement.

In other words, where a worker expressly requests to be engaged as a contractor, the contractor is being paid commensurate with the skills and expertise that they contribute and the parties agree, then primacy of contract should stand.

DRAFT

# Exemption Certificates for Suspected Underpayment (Right of Entry)

|                               |         |
|-------------------------------|---------|
| <b>Bill reference</b>         | Part 10 |
| <b>Impact on NECA members</b> | Low     |

## Overview

The intent of the proposed legislation is to enable better representation for safety and compliance issues in the workplace, including expanding the powers of the Fair Work Commission to permit right of entry to investigate suspected underpayments.

## Explanatory notes

- This would amend the Right of Entry of the FW Act to enable an organisation to obtain an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid.
- It would also empower the FWC to take action in relation to the future issue of such exemption certificates if those rights are misused (for example, by imposing conditions, or banning their issue for a specified period).
- FWC must issue an exemption certificate to an organisation for an entry which deals with entry to investigate suspected contraventions, if the organisation has applied for the certificate and the FWC reasonably believes that the advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence.

## NECA's position

NECA opposes this amendment on the basis, the question of whether a worker is being underpaid is a factual matter. Having the ability to enter a site without notice will not alter the facts in any particular case.

Further, it is unreasonable to assume, particularly on a construction site that time and wages records will be available upon demand in the location that work is being conducted.

24 hours' notice provides a reasonable amount of time to ensure that the request to inspect time and wages records can be met.



# Additional Amendments

## Summary and NECA's position

- **Introducing a new criminal offence for wage theft, which applies to intentional conduct.**

The new offence for intentional underpayment has potential penalties of 10 years imprisonment and fines of up to \$7.825 million.

The intention is to increase maximum penalties for underpayments by amending the civil penalties and serious civil contravention frameworks, and adjusting the threshold for what will constitute a serious contravention.

A Voluntary Small Business Wage Compliance Code is proposed to be developed in consultation with both employee and employer organisations to ensure small businesses that comply with the code are not prosecuted.

The Bill provides for liability for the wage theft offence to be extended to the Commonwealth Government in its role as an employer (but not other state and territory Governments).

*NECA understands that the introduction of a criminal offence of wage theft is intended to supplement laws already existing in some states, and not override them.*

*NECA agrees with this amendment in principle and supports the introduction of the Voluntary Small Business Wage Code, while emphasising the need for industry consultation and consideration of existing state laws in Queensland and Victoria, and those of states currently in the process of drafting their wage theft legislation.*

*NECA will be advocating for the removal of the State based offences.*

- **Expanding the functions of the Asbestos Safety and Eradication Agency to include silica safety and silica-related diseases.**

*When working with products that contain crystalline silica the dust particles that are generated can be small enough and lodge deep in the lungs and cause serious illness or disease including silicosis.*

*NECA supports this amendment but requests significant research into causes, exposure limits, product types and mitigation measures to assist the Asbestos Safety and Eradication Agency to address health issues, inform the industry and be researched based in its application of its function.*

- **Continuing to implement the Boland Review to introducing an offence for industrial manslaughter and increasing penalties.**

Introducing a new offence of industrial manslaughter in the Work Health and Safety Act 2011, reflecting recommendations 23b of the Review of the Model Work Health and Safety Laws – Final Report (Boland Review) and 13 of the They Never Came Home Report (Senate Inquiry), and significantly increasing the penalties for the existing Category 1 offence.

The model Act does not prescribe the exact provisions of the model offence to enable each jurisdiction to implement (or maintain) an offence tailored to the criminal law framework of the jurisdiction.

However, the model Act provides for an industrial manslaughter offence via a jurisdictional note and accompanying model penalties for the offence.

*NECA notes this amendment.*

- New section in the Fair Work Act that would require that the ordinary meanings of ‘employee’ and ‘employer’ be determined by reference to the real substance, practical reality and true nature of the relationship between the parties.

This would require the totality of the relationship between the parties, including not only the terms of the contract governing the relationship but also the manner of performance of the contract, to be considered in characterising a relationship as one of employment or one of principal and contractor.

The intention of the amendments is to facilitate a return to the multi-factorial test previously applied by courts and tribunals in characterising a relationship as one of employment and principal contractor.

*NECA notes this amendment.*

- It is proposed the FW Act and associated legislation are amended to ensure that certain independent contractors are entitled to greater workplace protections.

Amendments are targeted at independent workers who are either employee-like workers performing digital platform work or engaged in the road transport industry.

The amendments would insert a new jurisdiction enabling the FWC to set minimum standards orders and minimum standards digital guidelines in relation to employee-like workers performing digital platform work and regulated road transport industry contractors.

Meaning of employee-like worker: A person will be an employee-like worker if they are any of the following:

- an individual who is a party to a services contract in their capacity as an individual (other than a principal) and performs work under the contract
- (other definitions apply for body corporates, trustees and partners)

Additionally, section 1087 of the Explanatory Memorandum notes that:

“... the intended effect of these provisions is not to capture persons that have a high degree of bargaining power, are comparatively well paid and have a significant degree of authority of their work, regardless of whether they perform work on a digital platform. It is intended, for example, that skilled tradespeople would not be captured even if they work on a digital platform. “

*NECA notes this amendment and numerous statements made by the government, including the Explanatory Memorandum, that tradespeople are not captured under the employee-like definitions.*

*NECA is of the opinion that the Government has made it clear subcontractors are excluded, and therefore NECA would request the legislation and amendments explicitly state this as a clear exemption.*

- Repealing amendments made by the Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020, relating to the withdrawal of parts of amalgamated organisations (de-merger).

*NECA notes this amendment.*

- Stronger workplace protections for survivors of family or domestic violence.

Establishing a new protected attribute in the FW Act to improve workplace protections against discrimination for employees who have been, or continue to be, subjected to family and domestic violence.

*NECA notes this amendment.*

- Allowing the FWC to set fair minimum standards to ensure the Road Transport Industry is safe, sustainable and viable.

*NECA notes this amendment.*

- Repealing a sunsetted clause regarding applications to vary modern awards if already being dealt with in a four yearly review.

*NECA notes this amendment.*

- Aligning the WHS Act offence framework with recent changes to the Model WHS Law by indexing the penalties for existing offences to the Consumer Price Index.

*NECA notes this amendment.*

- Introducing a presumption according to which first responders covered by the Safety, Rehabilitation and Compensation Act 1988 (SRC Act) who sustain posttraumatic stress disorder (PTSD) will not have to prove their employment significantly contributed to their PTSD for the purpose of their workers' compensation claim.

*NECA notes this amendment.*

DRAFT