MASTER ELECTRICIANS AUSTRALIA

Lead.Connect.

Closing Loopholes Bill 2023.

Creating loopholes & uncertainty.

Jordon Carlisle & Chris Lehmann
20th September 2023

Introduction

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is www.masterelectricians.com.au

MEA believe that it is ironic that the Bill is named *Closing Loopholes* as it appears to be creating new loopholes at the same time as attempting to fix the current ones. In this short submission we provide a high-level analysis of the issues we are concerned with throughout the Bill. MEA believe that these attempts at regulating the gig-economy through legislation has been approached far too broadly and will lead to negative unintended consequences.

MEA supports gig-economy workers receiving fair treatment for pay and rights. However, it is vital that the parliament slows down to properly assess the new definitions and identify their limitations. The current interpretation of the Bill has a wide reach and likely to include industries beyond its intended scope of workers. MEA believes the current wording has the ability to include licenced occupational workers within its scope, which is inconsistent with the nature of work performed within the electrical industry.

MEA'S Position

Labour Hire Loophole Comments

- The explanatory memorandum comments are insufficient and hold limited weight.
- Proprietary companies with sole directors providing a service contract, like a maintenance contract, should be excluded. This would be like the test applied in QLD *Labour Hire Licencing Regulations 2018*[1]:

> **4 Individuals who are not workers—Act, s 8**
>
> (1) For *section 8 (2)* of the *Act* , the following individuals are prescribed—
>
> (a) an individual employed by a provider—
>
> (i) whose annual wages are equal to or more than the amount of the high income threshold under the *Fair Work Act 2009 (Cwlth) , section 333* ; and
>
> (ii) other than under an industrial instrument under the *Industrial Relations Act 2016* or a modern award or enterprise agreement under the *Fair Work Act 2009 (Cwlth)* ;
>
> (b) for a provider who is a corporation—an individual who is an executive officer of the corporation and the only individual the provider supplies, in the course of carrying on a business, to another person to do work;

- MEA agrees that where labour hire is engaged, the appropriate test should fall to the engaging business being covered by an EBA that has an appropriate classification in their Enterprise Agreement.

[1] *Labour Hire Licensing Regulation* 2018 (Qld) reg 4.

Employee Definition

In our view, 'employee' cannot be confined solely to the contractual terms as was determined in the *ZG Operations & Anor v Jamsek & Ors*[2] High Court (HC) ruling, but rather requires a holistic assessment of the overall worker-employer relationship. MEA agrees that the old common law approach is necessary and the legislative response to defining an employee was necessary. Our below explanation of contract for a result -vs- contract for labour provides further explanation as to why the entirety of a working relationship is necessary to consider:

Contract for a result -vs- contract for labour:

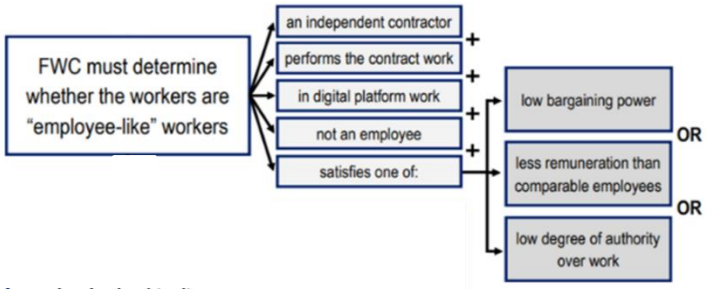
- A contract for the production of a given result is different from a contract for a worker's labour. Even if the worker does perform laborious work, they do this for to achieve the result that the contract is for.
- Determining the difference between "for a given result" and "for labour" can be difficult and often subjective.
- A contract is more likely to be "for a given result" if the service to be rendered involves significant equipment/materials, or if other people will perform the services on behalf of the worker. However, this situation is likely to already fall outside the scope of s 12(3) due to the other two tests in SGR 2005/1.
- Where a contract has an identified "end product" that completes the contract and gives rise to the payment, it is more likely to be "for a given result".
    - Contracts may still be "for a given result" even if the actual amount of payment has been quoted and negotiated based on an estimated time required to complete this task.
        - For example: if a worker has been contracted to build a shed, and payment is provided upon completion of that shed.
    - A contract will not be "for a given result" just because the mode of remuneration is "piece rate"/"task based"/"output base", instead of hourly.
        - For example: Delivery workers paid a flag fall rate per delivery.
        - For example: Land agents paid by commission.

Furthermore, the ATO has not taken the approach that once workers are engaged in a 'contract for service', matters such as superannuation are no longer applicable. They read the HC *Jamsek* ruling closely and decided to continue assessing the relationship between the parties to ensure that they were fully complying with their contract for service and effectively if they tipped over into the 'employment relationship' space that they would assess that they were a worker for the purposes of super. This response from the ATO left *Jamsek's* applicability somewhat displaced.

[2] *ZG Operations & Anor v Jamsek & Ors [2022] HCA 2*

Gig Definition – Employee Like Engagement

Below is a diagram of the current proposed criteria for defining “employee-like”.



Notably, the fifth criteria requires one of three categories to be satisfied instead of all three. The FWC can consider someone being ‘employee like’ as soon as one category is satisfied. This within itself is a very limited test and risks misclassification. To define someone as ‘employee-like’ requires more than one factor to be considered. We believe all three categories need to be satisfied on-balance before a worker can be defined as ‘employee-like’ (i.e. satisfies low bargaining power, less remuneration than comparable employees, **and** low degree of authority over work).

Minister Burke’s comments that the Act is not to impact businesses providing a service contract[3] (i.e. maintenance contract) should be a specified within the Act and have criteria as to how that will be assessed.

It is our position that licenced electrical workers should not be defined as ‘employee like’, however, they are at risk of being included within this definition. We outline the categories raising concern for our industry below:

Platform Work

The criteria for “in digital platform work” can be interpreted very broadly, so as to capture unintended industries. We suggest that this category is better defined to limit it to platforms such as uber.

Low Bargaining Power

The current wording of the criteria can ultimately include licenced electrical workers that are obtaining contracts through platforms such as Gumtree and Hi-vi, yet the gig-economy is not a prevalent means of engagement for licenced electrical workers. The electrical contracting industry relies on traditional subcontracting, labour hire or casual employment arrangements. Even if these types of arrangements are picked up through

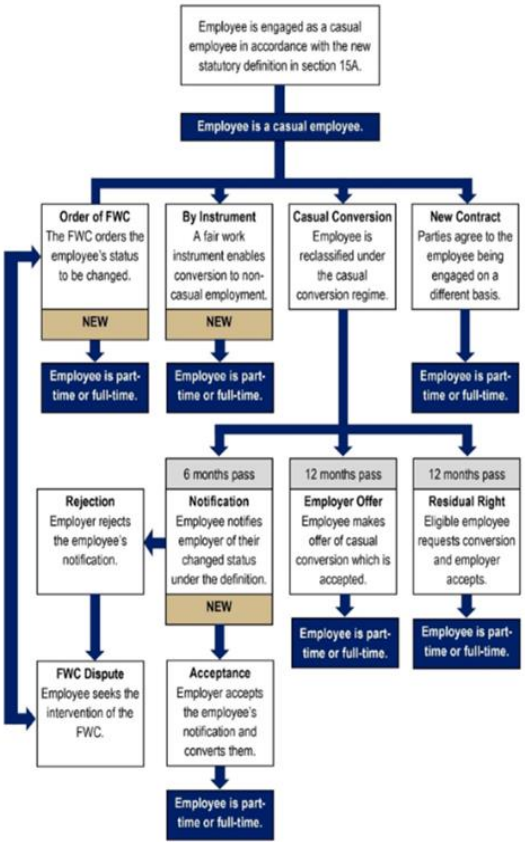
[3] Article, ‘NEW “EMPLOYEE” DEFINITION FOUNDATION FOR GIG POWER: BURKE’ *Workplace Express* [2023]

platforms such as hi-vis or gumtree, this is significantly different to the likes of food delivery services (e.g. ubereats) running around town.

When holding themselves out for business, electrical workers do not have low bargaining power. The electrical industry has a high-entry barrier including:

- A four-year apprenticeship;
- Post trade qualifications;
- Relevant licensing and insurance requirements; and
- Inspection reporting and auditing regimes.

Casual Employee Definition



MEA is broadly supportive of the proposed definition where defining a casual employee requires consideration of not only the contract, but also “the real substance, practical reality and true nature” of the employment relationship.

We do, however, have concerns that employers may misclassify casual workers as employees. Legislation must respond to this as if it were a regular occurrence. This situation could arise from an employer offering a worker to convert to employment because they tick all the criteria (pattern of work etc) but the worker rejects the status-change offer.

Wage Theft

MEA advocates there should not be a State and Federal jurisdiction for National System Employers. Furthermore, an employer categorised as a constitutional corporation or a Div 2B employer under the *Fair Work Act* cannot be subject to both claims in the State jurisdiction.

Delegates Rights

MEA supports the additional remarks about General Protections. These arguably already exist but clarity in the legislation is informative and appropriate on the types of conduct that should be included in the assessment of what is considered 'adverse action'.

However, we find the provisions regarding 'paid-time-off' as unacceptable due to associated costs and lack of clarity. Access to paid-time-off cannot be a blank cheque to the employer's time. It could, however, entitle workers to access their available annual leave balance or unpaid leave (e.g. the Community Service provisions of the NES). Furthermore, there is no limitation on the amount of time a worker can take-off or a 'reasonableness test' to the request for that time.

There is no limit to the reasonable delegates in the workplace, nor is there a 'reasonableness test' to that. There ought to be a mechanism for the FWC to consider disputes, conciliate and even arbitrate on these types of issues – unless they are articulated in an Enterprise Agreement.

Conclusion

Changes to the current laws need to be based on merit, address the issues appropriately, and be practically workable. The parties need to know the rules and where they can play within them. The Bill does not currently achieve this. Definitions and criteria are too broad, creating more problems without any solutions.

MEA supports the inevitable legislative response to the *Jamesek* HC ruling. Identifying someone as an employee requires a holistic assessment beyond the contractual terms. The true nature of a working relationship cannot be identified through a stringent criterion; doing so risks misclassification of the true nature of a worker's status. Differentiating between a contract for a given result and a contract for labour is often circumstantial, subjective and hard to determine.

We advocate for more focus to be given towards tightening the wording of 'employee-like worker' thereby limiting its exposure to limited group of gig-economy on-demand workers. We are concerned the current scope of 'employee-like' unintentionally captures licenced electrical workers who are winning contracts through platforms such as gumtree, despite the gig-economy not being their predominant source of engagement. We recommend including provisions to echo the Hon. Minister Burke's commentary that the definition will not impact such industries.

The casual employee definition is to be broadly supported, however, does require more substance within the Bill. There is a reasonably predictable risk of employers misclassifying their workers under the proposed definition without any legislative response to this dilemma. MEA advocates more attention be given towards the risks arising from implementing the proposed definition of 'casual employee'.

The provisions entitling workers to paid-time-off beyond annual leave are unacceptable and unworkable for employers. At most, time away from work should be covered by annual leave entitlements or leave-without-pay. It is financially unsustainable to expect employers, especially SMEs, to continue paying workers for not performing work or without it being earned (i.e. employees work to earn time off/annual leave in arrears).

Overall, MEA supports the legislative move towards providing protection for gig-economy workers. They are at risk of working under unfair terms and conditions and deserve to be legislatively protected against big multi-national platforms. However, this is where the Bill needs to stop. It's current reach into industries such as the electrical sector is unacceptable and forces the industry to fit into a regime it does not operate within. Licenced electrical workers (and other such associated industries) are skilled workers, engaging in work under traditional means such as sub-contracting. We stress that definitions and criteria within the Bill need to be refined so as to avoid inappropriately sweeping skilled labour industries into a regime that is not designed to reflect the true nature of their engagements.