Independent Contracting

Business Guide

Australian Chamber of Commerce and Industry

Canberra BUSINESS CHAMBER



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1. Introduction

1.1 The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* includes changes to contracting arrangements. The amendments will introduce a new definition of employee into the *Fair Work Act 2009* and a new jurisdiction allowing the Fair Work Commission to vary contract terms.

1.2 These changes include the following:

a. a new definition of "employee" for the purposes of the *Fair Work Act 2009* (**FW Act**)

b. a new jurisdiction enabling the Fair Work Commission to review and vary "unfair" contract terms.

c. new provisions broadening the offence of "sham contracting", which broadly involves unreasonably mischaracterising the relationship of employment as one of contracting.

1.3 This guide is intended to help businesses navigate these changes. It is important that businesses and employers are familiarised with these changes. These changes will affect a wide range of businesses across different sectors.

1.4 The guide should serve as a starting point for understanding new obligations and considering potential vulnerabilities for individual businesses. It does not cover every single aspect of the legislative changes, but rather the substantive provisions. Further advice should always be sought for the resolution of specific issues.

1.5 When reading the guide, it is important to check the commencement date under the title at the top of each section or in the table below. The footnotes throughout this guide assume that the provisions have commenced and reference the resulting section of the FW Act.

1.6 The guidance in this document was finalised on 6 August 2024 and may be subject to future revision.

Summary of Advice and Commencement

Topic	Change	Commencement	Advice	Page
Defining an employee	A definition of employment has been introduced into the FW Act for the first time, changing the ordinary approach under the 'common law'	26 August 2024	Review existing contractor arrangements to determine if any could be considered employment and consider taking steps to address any mischaracterisation (which might also include using notices to 'opt-out' of the laws for certain higher income earners).	4
Unfair contract terms	A new jurisdiction allowing the FWC to vary contract terms that are unfair in certain specified "services contracts"	1 July 2024	Review existing contractor engagement terms to assess any exposure. Revise any contractor templates used in your business.	9
Sham contracting	Offence of sham contracting extended to scenarios where a business did not hold a reasonable belief that the worker was a contractor	27 February 2024	Review existing contractor arrangements to determine if any could be considered employment and consider taking steps to address any mischaracterisation	14

* These commencement dates could commence earlier on a date fixed by proclamation, although it is unlikely that this will occur. The Federal Government has given no indication for the possibility of early commencement.

Terms used

Term	Meaning
Bill	Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023
Closing Loopholes	The name of new legislation (laws) introducing changes to the Fair Work Act and other workplace laws
FW Act	Fair Work Act 2009
FWC	Fair Work Commission
Minister	Minister for Employment and Workplace Relations

2. New definition of employee

Commencement: 26 August 2024

What to do next: Review existing contractor arrangements to determine if any could be more appropriately categorised as employees under the new definition and consider taking steps to address any mischaracterisation.

Highlights

- A new definition of employment has been introduced into the FW Act.
- The definition requires greater focus on how the relationship between a principal and the worker operates in practice as opposed to solely focusing on the terms of the contract between the parties.
- However, the terms of a contract will still remain influential and for persons engaging contractors it will be important that they review both the contract terms and the key features of the relationship in practice to determine whether the worker should be characterised as an employee.
- A failure to correctly characterise the relationship could give rise to a range of unintended liabilities, including:
  - Liability for annual leave and personal leave
  - Liability for notice or redundancy payments
  - Liability for underpayment if award penalties or loadings have not been satisfied by the pay rate provided to a contractor
  - An opt-out regime has been introduced for certain contractors earning above the "contractor high income threshold" (the threshold is yet to be specified).

Changes

What is the new definition?

2.1 Section 15AA of the FW Act provides that, to determine whether a person falls within the ordinary meaning of the expression *"employee"*, one must ascertain:
"the real substance, practical reality and true nature of the relationship between the individual and the person [engaging them]*"*

2.2 The FW Act then provides guidance as to how to determine the real substance, practical reality and true nature of the relationship by providing that:1

a. the totality of the relationship between the individual and the person must be considered; and

b. in considering the totality of the relationship between the individual and the person, regard must be had to not only the terms of any contract but also other factors relating to the totality of the relationship, including how the contract is performed in practice.

2.3 Importantly, the label parties apply to their relationship (ie. employee/employer or principal/contractor) does not determine how the relationship is characterised. In fact, it has little to no influence over the correct characterisation of the relationship at all.2

1 S15AA(2)
2 *CFMMEU v Personnel Contracting* [2022] HCA 1 at [63] - [67]

How is the new definition likely to operate?

2.4 There is no one test for identifying whether the real substance of a relationship is that of employment or contracting. The Courts have expressed the considerations for determining a worker's true status in a variety of ways.

2.5 However, the most common is to assess a "central question" or "focal point", which is as follows:3

> Viewed as a practical matter:
>
> 1. Is the person performing the work as an entrepreneur who owns and operates a business; and
> 2. In performing the work, is the worker working in and for the worker's own business as a representative of that business and not a representative of the business receiving the work?
>
> If the answer to these questions is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.

2.6 In order to answer the above question, the courts have traditionally outlined a multitude of features or 'indicia' that will help assess the relationship and determine how to answer the above question. The types of features commonly considered are as follows:4

Indicative of employment	Indicative of contracting relationship
Employer exercises, or has the right to exercise, control over the manner in which work is performed, the location and the hours of work etc.	Worker controls how work is performed.
Remunerated by reference to time worked or on salary.	Remunerated for goods/product delivered or paid based on results.
Employee works solely for the employer.	Worker performs work for others or is genuinely entitled to do so.
Employer advertises the goods or services of its business.	Worker has a separate place of work and/or advertises his or her services to the world at large.
Employer provides and maintains significant tools or equipment.	Worker provides and maintains significant tools or equipment.
Insurance is provided by the principal	Worker is required to obtain own insurances.
Employer can determine what work can be delegated or sub-contracted out and to whom.	Worker can delegate or sub-contract any work to other persons to complete.
Employer has the right to suspend or dismiss the worker.	Contract may be terminated for breach.
Employer provides a uniform or business cards.	Worker wears their own uniform or other clothing of their choice. Worker has own business cards.
Employer deducts income tax from remuneration paid.	Worker responsible for own tax affairs.
Employee is paid by periodic wage or salary.	Worker provides invoices after the completion of tasks.
Employer provides paid holidays or sick leave to employees.	Worker does not receive paid holidays or sick leave.
The work does not involve a profession, trade or distinct calling on the part of the employee.	The work involves a profession, trade or distinct calling on the part of the worker.
The work of the employee creates goodwill or saleable assets for the employer's business.	The worker creates goodwill or saleable assets for their own business.
The employee does not spend a significant portion of their pay on business expenses.	The worker spends a significant portion of their remuneration on business expenses.

3 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (No 3) [2011] FCA 366 at [208]

4 *Hollis v Vabu Pty Ltd (2001) 207 CLR 2, Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 122 IR 215 at [34]; *Jiang Shen Cai trading as French Accent v Do Rozario* [2011] FWAFB 8307), *CFMMEU v Personnel Contracting* [2022] HCA 1

C ontrol

2.7 Of all of the above indicia, the degree of control exercised by a principal over how work is performed by the other party is often given particular consideration (*Ace Insurance v Trifunovski* [2013] FCAFC 3 at [103], *Personnel Contracting* at [89]).

Subcontracting

2.8 The right of a worker to subcontract is identified in the table above as indicative of a contracting relationship.

2.9 However, in practice, principals often put conditions on subcontracting, such as allowing subcontracting but only where the subcontractor is approved by the principal.

2.10 The Courts have dealt with these matters in the following way:

a. an absolute right to subcontract (ie. without requiring any approval from the principal engaging the worker) is clearly indicative of contracting.

b. a qualified right to subcontract (ie. a right to subcontract that is contingent on approval by the principal) still tends against a finding of employment where it is indicative of a desire by the principal to ensure the work remains to a particular quality or safety standard.5

Example

Wei is a cleaner and works via a cleaning agency to clean commercial offices in Melbourne's Central Business District. She works five nights per week and is told which offices to clean among the agency's list of clients. Wei signed a services agreement with the cleaning agency, which describes her as an independent contractor and specifies a rate of $90 per office, which can take anywhere from three to six hours in the evening. The services agreement also specifies that she is responsible for travel to and from worksites, and able to delegate work to others as required.

The new interpretive principle to determine the meaning of 'employee' and 'employer' under the FW Act applies when determining whether Wei is an employee of the cleaning agency. The interpretive principle allows an assessment of the arrangement by way of reference to the real substance, practical reality and true nature of the relationship between Wei and the agency, and beyond the terms of the services agreement to which Wei has agreed. For example, a court or a tribunal would take into account a range of factors relating to the totality of the relationship, such as Wei being told where and when she has to work, that she has little control over how she performs the work, the expectation that Wei would dress in attire branded with the logo of the cleaning agency and that her work is judged against the agency's performance standards. It would be relevant that she is able to delegate that work.

Opting-out of the new definition

2.11 An independent contractor may elect that the new definition in the FW Act does not apply to them, only where the contractor earns above the contractor high income threshold (to be set by the Minister).

2.12 This would have the effect that the ordinary 'common law' definition of the FW Act would apply. The common law is the general law that has been developed by the Courts as they determine case after case over the course of time.

5 *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76 at [75]

What is the ordinary common law definition? How does it differ to the new legislation?

2.13 The ordinary common law definition of employment is the same as that outlined earlier above.

2.14 Again, the features/indicia outlined at paragraph 2.6 above apply to answering this question.

2.15 However, under the common law approach, where the contract between the parties is wholly contained in writing, the practical question above and the features/indicia that are used to answer the question are determined only by reference to the promises exchanged in the written contract.6

2.16 That is, the Courts will not look at how the relationship has developed in practice where the relationship is wholly reduced to a written document. The fact that the parties' subsequent conduct may not have precisely aligned with their contractual rights and obligations, or the fact that a particular contractual right may have never been exercised or utilised, will generally be irrelevant when it comes to characterising the relationship.7

2.17 Where the parties have not confined their relationship to a written agreement, then the Courts will still look at how the relationship has developed in practice in order to determine the status of a worker's engagement.

How does a party opt-out?

2.18 A worker may elect to opt out by giving a written notice to their principal stating that that the new definition in the FW Act does not apply to them.

2.19 This opt-out notice can be given:8

a. either before the new laws take effect on 26 August 2024 (for existing/ongoing relationships); or

b. for new relationships entered into after 26 August 2024, before the new relationship commences.

2.20 To give the opt-out notice, a worker must earn more than the contractor high income threshold.

2.21 The contractor high income threshold has not yet been determined.

2.22 A template opt-out notice is attached at Annexure A to this Guide.

Revoking an opt-out notice

2.23 A worker may revoke their opt-out notice at any time and it will take effect on the day the notice of revocation is given, ongoing.

6 *Personnel Contracting* at [43], [44], [47], [59] (Kiefel CJ, Keane and Edelman JJ), [172] (Gordon J, Steward J relevantly agreeing at [203])
7 *Personnel Contracting* at [59] (Kiefel CJ, Keane and Edelman JJ); see also [185]-[189] (Gordon J)
8 FW Act s15AB

3. Unfair contract terms jurisdiction

Commencement: 1 July 2024

What to do next: Review existing contractor engagement terms to assess any exposure. Revise any contractor templates used in your business.

Highlights

- The FWC has received new powers in relation to unfair contract terms of services contracts, commencing 1 July 2024.
- This jurisdiction will only include contractors earning below a contractor high-income threshold.
- The Fair Work Commission will be able to conciliate, mediate and arbitrate on a compulsory basis disputes relating to 'unfair contract terms' in services contracts.
- The remedies of the Fair Work Commission do not include compensation but the Commission will be able to set aside, void, amend or vary services contracts of Contractors when they are deemed unfair.
- In determining whether a contract term is unfair, the Fair Work Commission may take certain specified factors into account along with any other matter the Fair Work Commission considers relevant.

Changes

What has changed?

3.1 The FW Act has been amended to establish a jurisdiction in the Commission for resolving disputes between independent contractors (below a high income threshold) and principals about unfair contract terms in services contracts.

3.2 The objective of these changes is to establish establish a framework for dealing with unfair contract terms of services contracts that:

a. balances the needs of principals and the needs of independent contractors

b. addresses the need for a level playing field between independent contractors and principals through disincentives to the inclusion of unfair contract terms in services contracts

c. recognises and protects the freedom of independent contractors to enter into services contracts

d. establishes procedures for dealing with unfair contract terms that are quick, flexible, informal while still addressing the needs of principals and independent contractors; and

e. provides appropriate remedies if a term of a services contract is found to be unfair.9

9 FW Act s536N

What do these changes mean?

3.3 The changes will mean that independent contractors (who earn below the contractor high income threshold) will be able to apply to the Commission for dispute resolution in relation to unfair terms in a services contract to which they are a party.

3.4 The dispute must be about a term in the contract that, if the relationship were an employment relationship, would be a workplace relations matter.10 The types of terms that are workplace relations matters are set out further at section 3.8 below.

3.5 When considering if a contract term is unfair, the Commission will be able to consider:

a. the relative bargaining power of the parties to the services contract;

b. whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties;

c. whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract;

d. whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract;

e. whether the services contract as a whole provides for total remuneration for performing work that is less than that of comparable employees or independent contractors;

f. any other matters the Fair Work Commission considers relevant.11

3.6 Having regard to unfair contract matters under the *Competition and Consumer Act 2010* as well as other juridictions which have had unfair contract provisions historically, scenarios where the Commission might intervene to address terms that might be considered unfair could include:

a. terms that impose penalties on a party for breach of the contract which are disproportionate to the loss caused by the breach.

b. timeframes for payments for services rendered that are unfairly long for the relevant industry and contractor concerned.

c. remuneration terms that do not allow for fluctuations in variable costs associated with performing services (such as fuel costs, energy costs, repair costs, etc).

d. indeminities that operate too broadly or unnecessarily make a service provider liable for a range of losses that might fall outside of the provider's control.

e. notice of termination provisions that do not provide adequate time for a contracting party to exit the arrnagement (where they have purchased significant assets to perform the work) or adequate time to find alternate work.

Terms that can be challenged — what are workplace relations matters?

3.7 The FW Act sets out the kinds of terms that can be challenged under an unfair contracts dispute.

3.8 The terms that can be challenged are terms about the following 'workplace relations matters':12

a. remuneration, allowances or other amounts payable;

b. leave entitlements;

c. hours of work;

d. enforcing or terminating contracts (both employment contracts or other contracts for service);

e. dealing with disputes between the contractor and the principal;

f. taking of any form of industrial action;

g. any other matter that is the same (or substantially the same) as a matter that is dealt with under the FW Act or under any State or Territory industrial relations laws.

10 FW Act s536NA FW
11 Act s536NB FW Act
12 s 536JQ(1)

3.9 However, the following matters are not workplace relations matters and cannot be the subject of an unfair contract dispute:13

a. prevention of discrimination;

b. superannuation;

c. workers compensation;

d. occupational health and safety;

e. child labour;

f. observance of public holidays — except for the rate of payment for the day;

g. deductions from wages or salaries;

h. industrial action affecting essential services (essential services are services that have been declared as essential for public welfare such as police, fire, ambulance, energy and water services);

i. attendance for jury service;

j. regulation of professions or trades;

k. consumer protection laws;

l. taxation matters.

Remedies available

3.10 If the Commission finds that a contract term is unfair, it will be able to:

a. change the terms of the contract;

b. 'set aside' (make ineffective), all or part of the contract.14

3.11 Based on these types of laws that were widespread in some States historically prior to 2006, the primary types of relief that might be sought under these types of claims might include:

a. claims to change the remuneration payable for certain kinds of work (including profit share arrangements or bonuses); and

b. claims to increase the period of notice that should be applicable before a contract is terminated.

These types of claims were historically common, in addition to the types of claims referred to at paragraph 3.6 above.

3.12 The procedures and remedies for dealing with unfair contract terms of services contracts, and how to decide and work out such remedies, are intended to ensure that a *"fair go all round"* for the principals and conctractors concerned.15

Contractor high income threshold

3.13 The new unfair contracts jurisdiction will only be available to independent contractors that earn below a contractor high income threshold.

3.14 The contractor high income threshold will be set by regulation. The amount has not been established at the time of drafting this Guide.

Procedural matters

3.15 A person who is a party to a services contract, or an organisation that represents the industrial interests of aperson who is party to a services contract, may apply to the FWC for an order granting a remedy on the basis that the services contract contains a term that is unfair.16

3.16 An application must not be made unless the independent contractor earns below the contractor high income threshold.17

3.17 An application to the FWC must be accompanied by any fee prescribed by the regulations.18

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13 FW Act s 536JQ(2) FW
14 Act s536NC FW Act
15 s536NB(2) - FW Act*"Fair go all round" was used by Sheldon J in re Loty and Holloway v Australian Workers' Union (1971) AR (NSW) 95.*
16 s536ND FW Act
17 s536ND FW Act
18 s536ND

3.18 Conferences are to be conducted in private. The FWC must take into account any difference in the circumstances and wishes of the parties to the matter, as a way in which the FWC:

a. considers the application; and

b. informs itself in relation to the application.19

3.19 The FWC must not hold a hearing in relation to a matters unless it considers it appropriate, taking into account:

a. the views of the parties to the matters; and

b. whether a hearing would be the most effective and efficient way to resolve the matter.

3.20 The FWC may decide to hold a hearing in relation to parts but not all of the matter.20

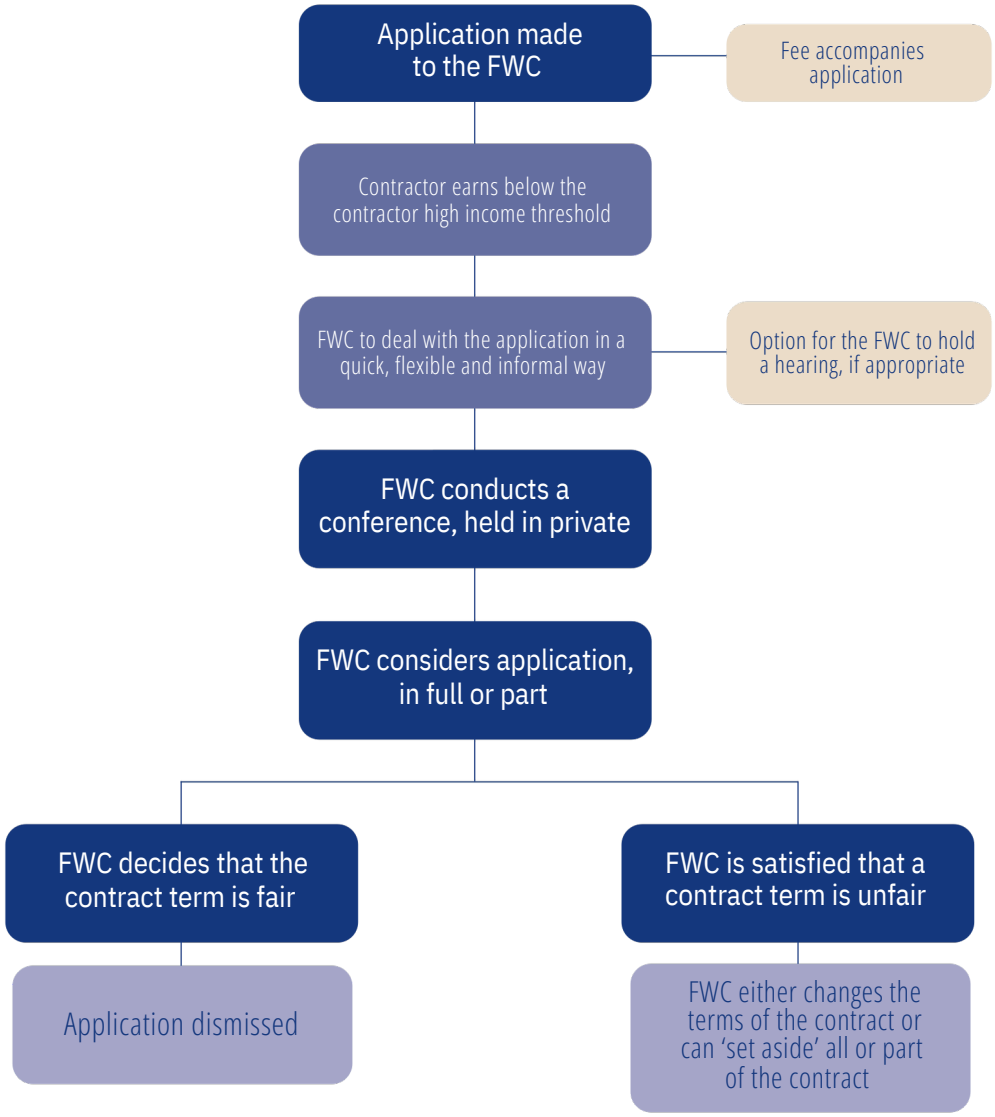
3.21 The FWC may dismiss an application if the FWC is satisfied that the applicant unreasonably failed to:

a. attend a conference or hearing conducted by the FWC;

b. comply with a direction or order of the FWC; or

c. discontinue the application after a settlement agreement has been concluded.21

Flowchart 1 — Process for resolving unfair contracts disputes



19 FW Act s536NF
20 FW Act s536NG
21 FW Act s536NH

4. Sham contracting laws

Commencement: These changes started on 27 February 2024

Transitional arrangements: Review existing contractor arrangements to determine if any could be considered employment and consider taking steps to address any mischaracterisation.

Highlights

- The *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* reforms the existing defence to "sham contracting".
- Sham contracting was an existing offence which involved knowingly or recklessly misrepresenting an employment arrangement as an independent contractor arrangement. Businesses who engage in sham contracting can be penalised.
- The previous defence to sham contracting claims (known as the 'recklessness' test) has been changed to a 'reasonableness' test.
- Now, where a business has misrepresented an employment relationship as a contracting relationship, they will be guilty of sham contracting unless they can prove that at the time the representation was made they reasonably believed the worker was engaged as a contractor.

Changes

What is sham contracting?

4.1 Sham contracting occurs when a business misrepresents an employment relationship as an independent contacting arrangement.

4.2 That is, although the relationship between the two parties is at law an employment relationship, the principal/employer has described the relationship as one of two contracting parties. This might be done:

a. in the contract exchanged between the parties;

b. in advertisements for the work to be performed;

c. in payroll or tax documentation; or

d. in conversations or correspondence the principal/employer has with the worker.

4.3 The misrepresentation of a relationship might arise for several reasons. For instance:

a. it could be intentional - ie. the principal does not want the relationship to be an employment one (even thought it is) and so disguises the true nature of the relationship;

b. it could occur due to a misunderstanding of the law or misunderstanding as to certain facets of the relationship (i.e. whether the worker would work for others or delegate some of their work);

c. it could occur because the principal/employer has been recklessly indifferent to the question of the worker's true status.

Businesses who are found to have breached the FW Act may be ordered to pay significant fines, including per breach, as well as the ability for workers to seek compensation for any loss suffered as a result of the misrepresentation.

What has changed?

4.4 The amendment will change the defence to sham contracting. It does not change any other elements of the offence.

4.5 Businesses will be now only be able to successfully establish the defence if they can show that they *"reasonably believed"* the contract was a contract for services (i.e. a contractor relationship and not an employment relationship).

4.6 This change increases the threshold for establishing the defence.

4.7 Previously, a business had to show that was that:

a. they did not know the worker was an employee; and

b. they were not reckless as to whether the relationship was one of employment.

4.8 Now, the business will need to demonstrate that their belief was reasonable, having regard to:22

a. the size and nature of the business' enterprise; and

b. any other matters the Court considers relevant. These other factors might include:

- the business' skills and experience;
- the industry in which the business operates;
- how long the business has been operating;
- the presence or absence of dedicated human resource management specialists or expertise in the business' enterprise; and
- whether the business 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.

4.9 The burden of proof rests with the party who made the representation, which remains unchanged.

What do these changes mean?

4.10 Reckless civil breaches of prescribed provisions may be treated as serious contraventions, with increased maximum penalties.

4.11 Maximum penalties for these provisions for companies will be the greater of:

a. 1,500 penalty units ($469,500); or

b. three times the amount of the underpayment.

4.12 For serious contraventions (which are knowing or reckless), maximum penalties for companies which are not small businesses will increase to the greater of:

a. 15,000 penalty units ($4,695,000); or

b. three times the amount of any associated underpayment.

4.13 Please note that these figures are accurate at the time of publishing this Guide.

When will or did these changes come into effect?

4.14 The changes to the defence to sham contracting commenced on 27 February 2024.

22 FW Act s357(2)

5. FAQs

5.1 **Does the change in law make independent contractors employees?**

No, however, the label parties apply to their relationship (i.e. employee/employer or principal/contractor) does not necessarily determine how the relationship is characterised. The terms of a contract will still remain influential and for persons engaging contractors it will be important that they review both the contract terms and the key features of the relationship in practice to determine whether the worker should instead be characterised as an employee. A failure to correctly characterise the relationship could give rise to a range of unintended liabilities. Contractors earning above the "contractor high income threshold" may instead wish to participate in a opt-out regime.

5.2 **What about other areas of law apart from the FW Act?**

These changes only affect the definition of the word "employee" for the purposes of the FW Act. This means that other areas of law are not affected by the changes. For instance, the definition of "employee" in payroll tax statutes, superannuation law or for the purposes of determining whether employers are "vicariously liable" for the acts of their employees under negligence suits brought under the common law, the traditional definition of employment will remain (see paragraphs 2.13 to 2.17 above).

5.3 **Can the Commission deal with unfair contract terms for contractors earning above the "contractor high income threshold"?**

No, the Commission will be able to conciliate, mediate and arbitrate on a compulsory basis disputes relating to 'unfair contract terms' in services contracts for contractors earning below a contractor high-income threshold.

5.4 **If a business knew that a contractor should have been an employee, can they defend a sham contracting claim?**

No, to defend a sham contracting claim, a business must now prove that at the time the representation was made they reasonably believed the worker was engaged as a contractor.

5.5 **If a business genuinely believed that a worker was a contractor will this establish the defence?**

Not necessarily. The question is about whether the belief was "reasonable". That is, was there a reasonable foundation for a business to assume the worker was a contractor. This question will likely be partly answered by the level of genuineness of a business' belief, but also other matters such as:

a. the business' skills and experience;

b. the industry in which the business operates;

c. how long the business has been operating;

d. the presence or absence of dedicated human resource management specialists or expertise in the business' enterprise; and

e. whether the business 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.

5.6 **What are the penalties for engaging in sham contracting?**

Maximum penalties for these provisions for companies will be the greater of:

- 1,500 penalty units ($469,500); or
- three times the amount of the underpayment.

For serious contraventions (which are knowing or reckless), maximum penalties for companies which are not small businesses will increase to the greater of:

- 15,000 penalty units ($4,695,000); or
- three times the amount of any associated underpayment.

Please note that these figures are accurate at the time of publication of this Guide.

6. General Advice

Review existing contractor arrangements to determine if any could be considered employment.	Businesses should consider taking steps to address any mischaracterisation occurring within their businesses. Where this is occurring, businesses should consider using notices to 'opt-out' of the laws for certain higher income earners. An example of this is shown in Annexure A. Where businesses are uncertain if these changes apply to their business, they should seek further legal advice.
Review existing contractor engagement terms to assess any exposure. Revise any contractor templates used in your business.	Citing the objective of generating a 'quick, flexible and informal' procedure for dealing with unfair contract terms, this new jurisdiction to resolve 'unfair contract' disputes between principals and independent contractors earning below the high-income threshold may lead to more litigation in this area. For businesses, it is important that your services contracts with independent contractors are reviewed periodically and amended where necessary to mitigate the risk of 'unfair contract' disputes. If you are unsure of whether your services contracts contain unfair contract terms, now is the opportune time to undertake a legal review of those contracts.
Inform managerial employees and educate them in relation to the new standards.	Businesses should familiarise managerial employees with the new obligations, particularly those who are responsible for engaging independent contractors.

Further Guidance

6.1 The Fair Work Ombudsman provides some advice relating to independent contractors.

6.2 The Department of Employment and Workplace Relations (DEWR) has a factsheet on the definition of 'employee' and 'employer', a factsheet on unfair contract terms, and a factsheet on sham contracting.

6.3 The FWC has extensive advice relating to adverse action and workplace rights in its general protections benchbook.

7. Annexure A — Template opt out notice

I <insert name> have elected that section 15AA of the Fair Work Act 2024 should not apply to my engagement or the engagement of my business <insert business name / entity name> by <insert name of principal engaging the person>.

I consider that the earnings I receive in my engagement with <insert name of principal engaging the person> exceeds $X <insert high income threshold>.

I intend this notice to take effect from:

26 August 2024 *[for opt outs given before 26 August 2024]* OR

The date this notice is signed *[for opt outs given after 26 August 2024]*

_____

Signature of individual giving the opt-out notice

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