New Powers for the Fair Work Commission: Commercial Contracts in Play

Richard Calver, a paper for the Law Society of the ACT's Intensive Conference March 2024

Summary:

*Currently, contractors may challenge alleged unfair contractual terms (UCTs) under either Part 2-3 of the Australian Consumer Law (**ACL**), or Part 3 of the Independent Contractors Act 2006 (**IC Act**). Substantial amendments to the ACL came into effect on 9 November 2023 but the cause of action is fraught because it is likely to be costly to challenge the drafter of the contract.[1] The second is unduly expensive to run and little used.[2] A new statute, the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024, now provides a third option, one that blurs the distinction between employees and contractors. This remedy would facilitate an application to the Fair Work Commission (FWC) to obtain an order relating to the finding that there are UCTs in a contractor's contract with a principal or head contractor where the contractor is an individual.[3]*

Introduction

On 7 December 2023 the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 was divided into two bills: the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023; and the Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023. On 14 December 2023, *the Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (the Amending Act) received royal assent following its passage in the Parliament with the support of cross bench senators. This legislation adds to the increasing burden on employment lawyers in understanding the mounting changes to workplace laws introduced by the Albanese Government. The changes in the Amending Act cover regulated labour hire, increased rights for workplace delegates, criminalising so-called wage theft, the introduction of an offence for industrial manslaughter, and family and domestic violence discrimination.

This paper looks at a change that is to be introduced by the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (the 2 Act) that was passed by both Houses of Parliament on 12 February 2024. The Bill received Royal Assent on 26 February 2024.[4] The focus is narrow: I mention only the provisions of new Part 3A-5 unfair contract terms of services contracts and some of the implications posed by the new jurisdiction created which will come into effect on a day fixed by proclamation or the day after six months from Royal Assent.

The intent and design of the provisions is summarised succinctly in the recent Senate Committee report on the original Bill:

> *The bill would allow independent contractors earning below a specified income threshold to apply to the FWC for dispute resolution in relation to unfair terms in services contracts to*

[1] See https://www.accc.gov.au/media-release/businesses-urged-to-remove-unfair-contract-terms-ahead-of-law-changes for a helpful guide for steps to take in reviewing contracts

[2] But see Keldote Pty Ltd & Ors v Riteway Transport Pty Ltd [2010] FMCA 394 (16 June 2010)

[3] S15H definition of "services contract" inserted by *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024*

[4] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7134

which they are a party. This provision is designed to provide a flexible, low-cost means of resolving disputes between independent contractors and principals.[5]

As mentioned in the summary of this paper, there are currently two means by which a contractor may seek to set aside terms which are alleged to be unfair: via the use of the now strengthened provisions of Part 2-3 of the ACL, or Part 3 of the IC Act. The former remedy could also see penalties imposed on a party seeking to use a UCT but for party to party action requires an application to a court. The second remedy is now modified so that only those who earn above the contractor high income threshold, discussed below, will be able to make the relevant application.[6]

It is clear from the objects of Part 3A-5 that alternative, "simple" procedures are to be put in place so that the FWC rather than a court may provide a remedy where it is found that UCTs are in a commercial contract, albeit with some limitations, discussed below, on the nature of that contract. It is clear that this process will occur through a much less formal process than an application before a court with the objects of the Part expressed to include per proposed s536N(1)(b) to establish procedures for dealing with unfair contract terms that are "quick, flexible and informal." To this end, s536N(2) says:

> *The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the principals and independent contractors concerned.*[7]

Threshold Issues and Uncertainty

The jurisdiction created by Part 3A-5 would enable an application to the FWC to be made by independent contractors who are individuals earning below the contractor high income threshold, principal contractors, or an organisation entitled to represent the interests of a party to the services contract. The FWC may make an order about an unfair contract term if it is satisfied that the services contract includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters. If the FWC finds that a term is unfair, it may set aside all or part of a services contract or amend or vary a part of a services contract.

Uncertainties relate to the fact that the "high income threshold" is not yet established. The high income threshold is to be set by Regulations per s536ND(2). Plus the FWC in determining what is an unfair term must take into account per s536NB whether the services contract as a whole provides for a total remuneration for performing work that is:

(i) less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or

(ii) less than employees performing the same or similar work would receive.

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5 https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000261/toc_pdf/FairWorkLegislationAmendment(ClosingLoopholesNo.2)Bill2023[Provisions].pdf at para 1.23

6 Per s 306

7 A statutory note reminds us that:

> The expression "fair go all round" was used by Sheldon J in *re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

This provision invokes the idea that rates of "employee-like" work undertaken by contractors will have remuneration rates established by orders or guidelines that would be put in place under a further new jurisdiction which covers "employee-like" workers . [8]

Combined, these provisions mean that the setting of a price under a contract with a subcontractor may be challenged even though a principal has relied on it to, for example, submit a tender response to a principal. That turns current practice on its head. It may well lead to a decision by main contractors not to engage contractors who are individuals.

Employers have reacted to the uncertainties and difficulties they perceive. The provisions were not embraced by employers with Master Builders Australia saying:

> *The proposal to give the FWC a new jurisdiction to deal with unfair contracts matters create a plethora of problems, that all mean uncertainty for everyone and opens the door for unions to interfere in, and control, commercial matters between contracting parties. As proposed, the changes will remove several crucial existing protections for independent contractors and expose them to undue pressure, tactics and conduct which the industry already experiences in certain subsectors.*[9]

AiG had other concerns:

> *Given that this new jurisdiction would effectively be a no-cost jurisdiction, there would be no incentive for independent contractors to advance reasonably arguable claims and claims which satisfy the various jurisdictional requirements – such as the fact that only terms relating to 'workplace relations matters' can be reviewed. Claims that are not advanced properly or that are made in circumstances where the claim goes beyond the FWC's jurisdiction, would still put principal contractors to costs that they are unlikely to recover. Principal contractors may also be pressured to settle claims (even those claims that are not reasonably arguable) in favour of being put to the time and expense of having to respond or the uncertainty over what approach a member of the FWC with potentially limited experience dealing with commercial contracting arrangements may take in relation to such matters.*[10]

The Role of Lawyers

As noted in the AiG submission extract, matters in the FWC are in large part a "no cost" jurisdiction. S400A and section 611 provide exceptions, the latter for example where there is a vexatious application. Clients should be made aware of these issues when dealing with any matter in the FWC, something to be reinforced when the new jurisdiction is in place. Secondly, lawyers must seek the permission of the FWC to represent a person in a matter before the FWC and the terms of the relevant provisions should be explained to clients.[11] Clients should be made aware that there is a growing tendency for representation by lawyers to be considered a factor in increasing the level of formality in proceedings, a matter the opposite of what the legislature intended.

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[8] See proposed new s15P

[9] Submission 19 to the Senate Committee at para 10 (c)

[10] Submission 31 to the inquiry page 149

[11] See s 596 FW Act and Fair Work Commission Rules 2013 rule 11–12A

The test for lawyer representation is set out in s596 of the *Fair Work Act, 2009 (Cth).* The nub of the matter is in subsection 2:

1) Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before the FWC (including by making an application or submission to the FWC on behalf of the person) by a lawyer or paid agent only with the permission of the FWC.

(2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:

(a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or

(b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or

(c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

The test is one that applies on a case-by-case basis as follows:

The assessment of whether permission should be granted under s 596 involves a two-step process. The first step is to consider whether one or more of the criteria in s 596(2) is satisfied. The consideration required by this first step 'involves the making of an evaluative judgment akin to the exercise of a discretion'. It is only where the first step is satisfied that the second step arises, which involves a consideration as to whether in all of the circumstances the discretion should be exercised in favour of the party seeking permission.[12]

In the new jurisdiction, the role of lawyers will be integral in establishing the boundaries of the FWC's jurisdiction and in ensuring that the manner in which the laws of contract might be attenuated by the discretion vested in the FWC are explained to clients. This new jurisdiction will create an alternative route to challenging a contract when compared with the other means of confronting UCTs.

[12] *Wellparks Holdings Pty Ltd t/as ERGT Australia v* Govender [2021] FWCFB 268 (20 January 2021) at para 48