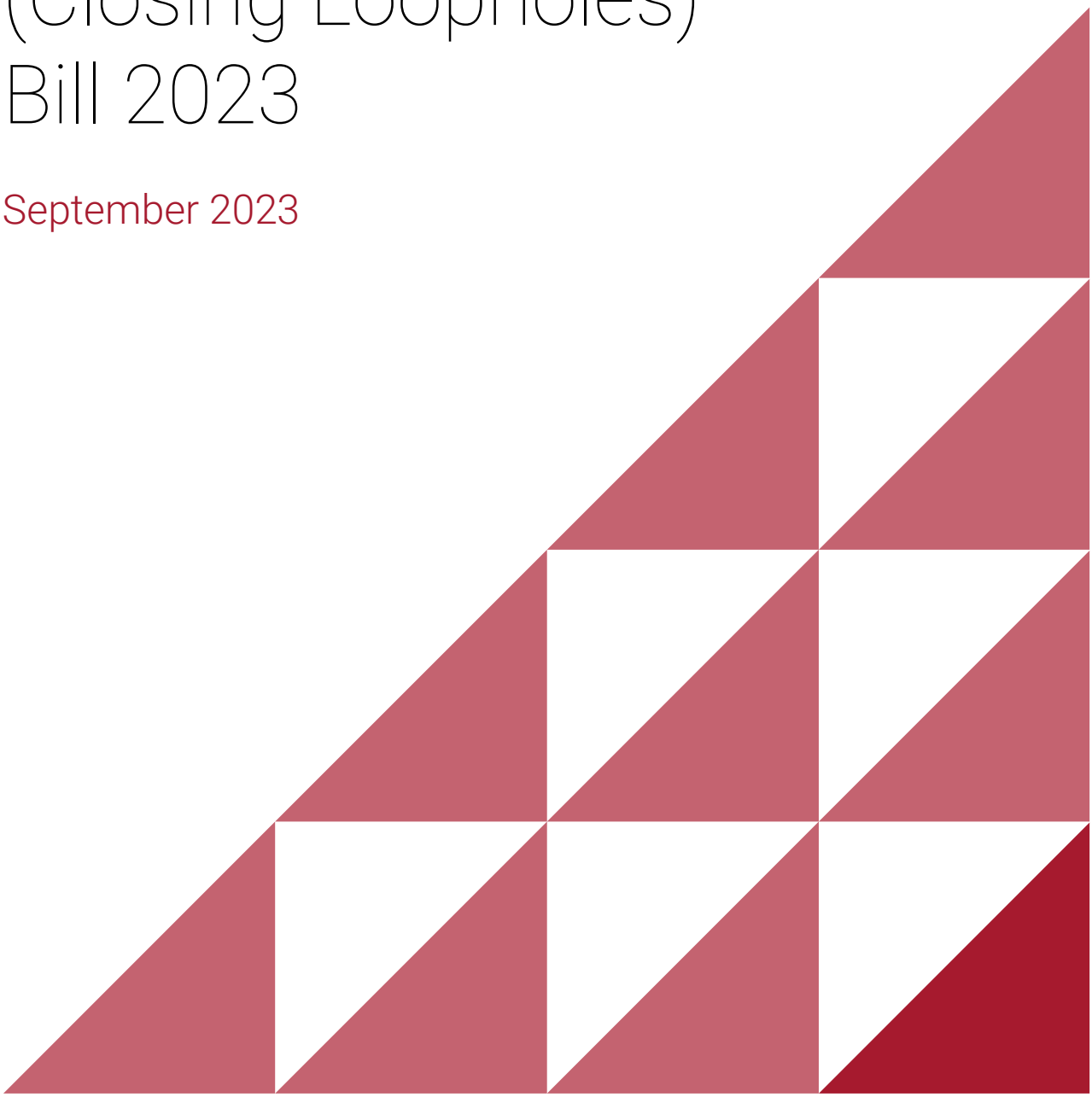
AiGROUP | Workplace Relations Assist

Helping employers comply with changes to Fair Work Laws

Guide to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

September 2023



Productivity, Education and Training Fund
An Australian Government Initiative

This guide has been funded by the Australian Government Department of Employment and Workplace Relations through the Productivity, Education and Training Fund grant program.

Table of Contents

Use this link to return to the Table of Contents

1. NEW DEFINITION OF 'EMPLOYEE' AND 'EMPLOYER'

The Bill would implement a new definition requiring the ordinary meaning of 'employee' and 'employer' to be determined by reference to the "*real substance, practical reality and true nature of relationship*" between the parties for the purposes of the FW Act.

Currently, "employment" relationships are defined by common law. In deciding whether a relationship is one of employment or of independent contracting, the terms of any contract between the parties are determinative (unless the contract is a sham). Unless the parties have made changes to their contract, the nature and terms of the contract are assessed at a point-in-time when the relationship begins.

This point-in-time contractual approach has no regard to the subsequent conduct of the parties, including how work is performed[1].

Unfortunately, the proposed definition returns to the uncertain 'multi-factorial' approach previously applied by courts and tribunals. The courts are now able to look beyond the agreed contractual terms to consider conduct at the beginning and throughout the relationship. Historically, this has created significant difficulties, including major costs risks for businesses, class actions and inconsistent case law.

The definition applies to relationships which start before and after the definition commences. It also applies to employee and employer definitions in modern awards, enterprise agreements and workplace determinations.

2. EMPLOYMENT - DEFENCE FOR SHAM CONTRACTOR ARRANGEMENTS

Part-3-1 of the FW Act prohibits sham contracting, where an employment arrangement is disguised as an independent contractor relationship.

Employers engage in sham contracting when they mischaracterise or misrepresent an employment relationship as an independent contracting arrangement. The purpose of doing this may be to avoid legal entitlements paid to employees under the FW Act, modern awards, enterprise agreements or workplace determinations.

The Bill would amend the defence to an allegation an employer has misrepresented employment as independent contracting.

Currently, the employer is not liable if it did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services. However, the Government is proposing that an employer should have at least a "*reasonable belief*" that the contract was a contract for services.

An employer wishing to rely on this defence must be able to prove they had a *'reasonable belief'* when they made the representation.

[1] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

Use this link to return to the Table of Contents

3. CASUAL EMPLOYMENT - AMENDED STATUTORY DEFINITION

The Bill would amend the meaning of a 'casual employee'.

Current definition - point in time - contract-based

Currently, under s.15A of the FW Act, a person is a casual employee if the employer makes no "*firm advance commitment to continuing and indefinite work according to an agreed pattern of work*" for the person.

Whether there is a "*firm advance commitment to continuing and indefinite work according to an agreed pattern of work*" is assessed at a point-in-time when the relationship commenced, with reference to the offer, acceptance and the basis upon which the person commenced work. In deciding whether a firm advance commitment exists, a Court can only look at the following four factors:

(a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;

(b) whether the person will work as required according to the needs of the employer;

(c) whether the employment is described as casual employment; and

(d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

How the relationship operates in practice after commencement is not relevant to the definition. It is the offer and acceptance which characterises the relationship, which is usually contained in a written contract of employment.

Proposed definition - not time restricted - both contract and conduct-based

The Bill would amend s.15A of the FW Act to implement "*an objective definition*" of 'casual employee' to determine when an employee is a casual employee.

However, this would lead to significant uncertainty. Firstly, the new definition is no longer interpreted at a point-in-time (i.e., at the outset) and secondly, it now considers surrounding conduct after the relationship commences.

Two conditions must be satisfied:

- the employment relationship is characterised by an "*absence of a firm advance commitment to continuing and indefinite work*"; and
- the employee is entitled to a casual loading, or a specific rate of pay.

When determining if there is "*an absence of a firm advance commitment to continuing and indefinite work*" the court must:

- assess the relationship based on the "*real substance, practical reality and true nature of the employment relationship*" - i.e., how the person works in practice;
- consider if there is a "*mutually agreed term*" in a contract of employment - i.e., what the contract says is still relevant;
- consider if there is a "*mutual understanding or expectation*" between an employer and employee which may be inferred from the conduct of the employer and employee after they enter into the employment contract - i.e., how the person works in practice;
- consider all these potential (non-exhaustive) indicators:
    - whether there is an inability of the employer to **elect** to offer work and/or an inability of the employee to **elect** to accept or reject work;
    - whether there is likely to be **continuing work** of the kind performed by the employee, in the employer's enterprise, in the **future** - i.e., importing consideration of whether there is justification at the outset for the employment to be on a part-time or full-time ongoing basis;
    - whether there are full-time or part-time employees in the employer's enterprise performing the **same kind of work** usually performed by the employee - i.e., if a casual is engaged to work in the same way as colleagues who are part-time or full-time ongoing employees; and
    - whether there is a **regular pattern of work** for the employee.

Are there any exceptions to this general rule?

A casual employee cannot be engaged on a fixed term contract, even if there is a provision for early termination of employment (i.e., a maximum duration contract) unless it is for a specified season or the completion of a shift.

For example, it is still acceptable to engage a Christmas casual.

What if an employee is mischaracterised as a casual employee?

A casual employee will be able to seek a court declaration they were mischaracterised, including through the small claims process. This order may declare the casual employee was a part-time or full-time employee from when they started work.

If a declaration backdates the employee's status the employer will be required to backpay (or otherwise recognise) the entitlements of a permanent employee that the employee has not received as a casual, but the employer is likely to be able to offset the amount of any casual loading paid to the employee as a result of s.545A of the FW Act. It is possible that penalties may also be imposed for the failure to pay (or otherwise recognise) NES or fair work instrument entitlements .

If the casual employment is found to be a sham because of the employer's misrepresentation or behaviour in dismissing and re-engaging the employee, significant penalties may be imposed up to a maximum of 300 penalty units.

Casual employees may also be eligible to change their employment status to part-time or full-time employment through the employee choice process after 6 months employment (12 months for small business) or the casual conversion process.

Casuals employed prior to 1 July 2024 (Continuing casual employees)

For casuals who were employed prior to 1 July 2024, the following transitional provision in the Bill is relevant:

> ***Continuing casual employees***
>
> *(3) For the purposes of subclause (1), an employee who was, immediately before commencement, a casual employee of an employer within the meaning of section 15A as in force at that time, is taken to be a casual employee of the employer within the meaning of section 15A of the amended Act on and after commencement.*

The above provision would deem all existing casual employees on 1 July 2024 to be casual employees within the meaning of the new definition of a 'casual employee', even though the employment arrangements of a very large number of these 'Continuing casual employees' are likely to be inconsistent with the new definition (e.g. because they have worked regular hours for an extended period).

A casual employee employed prior to 1 July 2024 would continue to be a 'casual employee' unless the employee converts to (or is reclassified as) permanent employment through one of the pathways in the legislation. Service accrued by a casual employee prior to 1 July 2024 is not recognised for the purposes of eligibility to participate in the employee choice pathway.

4. CASUAL EMPLOYEE CHOICE NOTIFICATIONS

The Bill would introduce an employee choice notification process.

This will provide casual employees with two pathways to change their employment status. Casual employees will be able to use the new employee choice notification procedure or, alternatively, choose to use the existing casual conversion process. However, there is no obligation on an employee to change from casual to part-time or full-time employment.

An employee must have 6 months' eligible service to use the new employee choice notification procedure. If the employer is a small business, they must have 12 months' qualifying service. As noted above, service accrued by a casual employee prior to 1 July 2024 is not recognised for the purposes of eligibility to participate in the employee choice pathway.

An employer must consult with the employee about the notification and respond in writing within 21 days.

An employer can refuse the notification if it believes the notifying employee is a casual employee in accordance with the definition in s.15A of the Act. It may also refuse the

notification if it would be impractical to convert the employee to permanent employment because the change would require substantial changes to the employee's terms and conditions to comply with a term of a modern award, enterprise agreement or workplace determination.

Anti-avoidance provisions prohibit an employer reducing/varying the employee's hours of work, changing their pattern of work or terminating their employment.

The Fair Work Commission (**FWC**) may deal with a dispute about employee choice notifications or casual conversion, including by arbitration in exceptional circumstances.

5. CASUAL EMPLOYEE - SHAM ARRANGEMENTS

If a person is a casual employee instead of a part-time or full-time employee, they will not be entitled to many paid legal entitlements under the FW Act.

The Bill would prohibit sham casual employment arrangements which misclassify part-time or full-time relationships as casual employment.

An employer will be prohibited from proposing to employ, or employing, an individual on a casual employment contract when the person is a part-time or full-time employee. If an employer can prove they reasonably believed the contract was for employment as a casual employee this prohibition will not apply.

Employers will also be prohibited from dismissing (or threaten to dismiss) a part-time or full-time employee to engage them as a casual employee to perform the same or substantially the same work. They must also not make a false statement to persuade or influence an individual to enter into a contract of employment as a casual employee when they will perform the same or substantially the same work as a part-time or full-time employee.

6. FAIR WORK INSTRUMENTS AND THEIR INTERACTION WITH CASUAL EMPLOYEE DEFINITION AND EMPLOYEE CHOICE NOTIFICATIONS

The Bill would empower the FWC to vary fair work instruments to resolve uncertainty or difficulty relating to the interaction between the instrument and the new statutory definition of casual employee and employee choice notifications.

7. WAGE THEFT

The Bill creates a new criminal offence for failing to pay certain required amounts in full on or before the day the payment is due, which applies to intentional conduct (**Wage Theft Offence**).

Similar to the accessorial liability provisions under s 550(1) of the FW Act which apply to contraventions of civil remedy provisions, the Bill includes extensions of liability provisions that apply to a Wage Theft Offence, which could implicate individual employees, officers and agents of employers. This is referred to as a 'related offence'.

For an individual, the punishment for a Wage Theft Offence is up to 10 years' imprisonment and/or a maximum fine of the greater of 5,000 penalty units or 3 times the amount of the underpayment (if the court can determine that amount). Bodies corporate face a maximum fine of 25,000 penalty units.

The Fair Work Ombudsman (**FWO**) can enter into a Cooperation Agreement with persons who have underpaid employees. While it is in place, the FWO must not refer the underpayment to the Commonwealth Director of Public Prosecutions (**CDPP**) or the Australian Federal Police (**AFP**).

The Minister may declare a Voluntary Small Business Wage Compliance Code. If a small business complies with the Code, the FWO must not refer the underpayment to the DPP or AFP and cannot enter into a Cooperation Agreement. This does not prevent the FWO commencing civil proceedings or taking other compliance action.

The FWO will publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the FWO will or will not accept or consider undertakings, or enter or consider entering into cooperation agreements.

8. PENALTIES AND LIABILITIES FOR CIVIL PENALTY PROVISIONS

The Bill:

- increases civil pecuniary penalties that apply to certain contraventions, including serious contraventions;
- enables the maximum penalty for a contravention to be determined by reference to three times the value of the underpayment associated with the contravention in certain circumstances; and
- amends the threshold of what constitutes a 'serious contravention' in s. 57A of the FW Act from one that is done knowingly and systematically, to one that is done either *knowingly* or *recklessly*.

9. RIGHT OF ENTRY CHANGES AND EXEMPTION CERTIFICATES FOR SUSPECTED UNDERPAYMENT

The Bill would 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.

This would enable exemption certificate holders to enter without notice.

This would also protect permit holders who are exercising these rights from improper conduct by others and empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in certain circumstances.

10. COMPLIANCE NOTICE MEASURES

The Bill would amend the FW Act to clarify that:

- a compliance notice issued to a person may require the person to calculate and pay the amount of an underpayment; and
- a court may make an order requiring compliance with a notice (other than an infringement notice) issued by a Fair Work Inspector or the FWO.

11. "SAME JOB SAME PAY" - REGULATED LABOUR HIRE ARRANGEMENT ORDERS

The Government is proposing to introduce provisions empowering the FWC to make regulated labour hire arrangement orders.

Employees and organisations entitled to represent their industrial interests may apply to the FWC for a regulated labour hire arrangement order. However, the FWC will not be required to make the order if it is satisfied that it was not '*fair and reasonable*' based on submissions made by affected businesses and employees. In deciding whether it would be *'fair and reasonable'* to make the order, the FWC is required to consider any submissions made by an employer that the performance of the work is, or will be, wholly or principally for the provision of a service, rather than the supply of labour, to the regulated host. If so, the FWC can decide not to make the order.

If the FWC makes a regulated labour hire arrangement order, the covered labour hire provider must pay their employees no less than what they would be entitled to be paid under the host business's enterprise agreement (or other employment instrument) if the employee were directly employed by the host. The amount they must be paid is the 'protected rate of pay'. If the labour hire provider requests, the host business must give it information to assist it in meeting its payment obligations.

There are exemptions, including where a labour hire employee is engaged for a short-term period (i.e., usually 3 months) or where a training arrangement applies to the employee. If the host is a small business employer, it is not covered by this new regime.

There are anti-avoidance provisions to prevent businesses from setting up commercial and other arrangements which are intended to avoid these obligations. Some of the anti-avoidance provisions are proposed to apply from the date the Bill was introduced, 4 September 2023.

The FWC may resolve disputes, including by mandatory arbitration. It may also determine an alternative protected rate of pay for a labour hire employee where it would be unreasonable for an employee to pay the employee the protected rate under the order.

12. SMALL BUSINESS REDUNDANCY EXEMPTION IN WINDING UP SCENARIOS

The Bill would amend small business redundancy exemptions in winding up scenarios.

This change removes the exemption for a qualifying large business which become a small business through the winding-up process with the result that its employees lose their entitlement to statutory redundancy pay on termination of employment.

13. ENTERPRISE BARGAINING AND AGREEMENTS

Transitioning from multi-enterprise agreements

The Bill would provide a pathway out of single interest employer and supported bargaining agreements.

Employers may request employees covered by a single interest employer or supported bargaining agreement to approve a single enterprise agreement by voting when certain conditions are satisfied. These qualifying conditions are:

- the applicable single interest employer or supported bargaining agreement has passed its nominal expiry date; and
- each employee organisation to which the old agreement applies has provided the employer with written agreement or an FWC voting request order applies (i.e., where it was unreasonable to refuse and it was consistent with good faith bargaining).

The better off overall test (**BOOT**) is modified in these circumstances. Any employee to whom a single interest employer agreement or supported bargaining agreement applies must be better off under the single-enterprise agreement than the supported bargaining or single interest employer agreement (as the case may be) that applies at the test time.

Enabling multiple franchisees to access the single-enterprise stream

Multiple franchisees of the same franchisor or related bodies corporate of the same franchisor, or any combination of such entities, may make a single-enterprise agreement, while retaining the ability to make a multi-enterprise agreement.

Model terms

Currently, model flexibility, consultation and dispute resolution terms for enterprise agreements and a model term for settling disputes under a copied State instrument are prescribed in the *Fair Work Regulations 2009* (**FW Regulations**).

The proposed amendments replace the existing requirements so that the FWC will determine the model terms.

14. WORKPLACE DELEGATES' RIGHTS

The Bill would require [model] delegates' rights terms to be included in modern awards, enterprise agreements and workplace determinations.

Workplace delegates will have an entitlement to reasonable communication with members and any persons eligible to be members, in relation to their industrial interests. They will also be provided a right to reasonable access to the workplace and, in the context of businesses which are not small business employers, reasonable access to paid time during normal work hours for related training.

The FWC would be required to vary modern awards to include a delegates' rights term by 30 June 2024.

15. EMPLOYEE-LIKE WORK

The Bill would introduce new powers for the FWC to:

- set minimum standards orders and guidelines for employee-like workers performing digital platform work;
- approve, vary and terminate collective agreements between digital platform operators and unions entitled to represent the industrial interests of employee-like workers; and
- deal with an unfair deactivation claim by an employee-like worker (that has performed work through the digital labour platform or under the services contract on a regular basis for at least 6 months) and to order reactivation or payment for lost pay.

The Bill also proposes to expand the existing general protections regime under the FW Act to include '*adverse action'* taken by digital labour platform operators, employee-like workers, and industrial associations.

16. ROAD TRANSPORT

The Bill would introduce new powers for the FWC to:

- set minimum standards orders and guidelines for road transport contractors and road transport businesses;
- approve, vary and terminate collective agreements between road transport businesses and unions entitled to represent the industrial interests of road transport contractors; and
- deal with an unfair termination claim by a road transport contractor (that has performed work for at least 12 months under the services contract) and to order reinstatement of the contract (or compensation in lieu) and payment for lost pay.

The Bill also introduces new Ministerial powers to make regulations relating to supply chain participants in the road transport industry.

17. EXPANSION OF THE DEFINITION OF INDUSTRIAL ACTION TO EMPLOYEE-LIKE WORK AND THE ROAD TRANSPORT INDUSTRY

The Bill proposes to expand the definition of industrial action under the FW Act to employee-like workers and road transport contractors covered by a minimum standards order (or where there is an application for one). This would have consequences for various provisions in the FW Act and for the proposed unfair contracts terms jurisdiction referred to below.

18. UNFAIR CONTRACT TERMS FOR INDEPENDENT CONTRACTORS

The Government is proposing to create an unfair contracts terms jurisdiction in the FWC for independent contractors who earn less than the contractor high income threshold.

The jurisdiction is intended to be low-cost, and remedies ordered must ensure a 'fair go all round' for both contractors and principals. It provides relief from terms which would be considered unfair if they had been included in an employment relationship.

If the FWC is satisfied there are unfair contract terms relating to workplace relations matters in a contract (including terms about industrial action), it may order the terms or contract to be set aside or amended.

19. FAMILY AND DOMESTIC VIOLENCE DISCRIMINATION

The Government is creating a new protected attribute under the FW Act to protect employees who have been or continue to be subjected to family and domestic violence (**FDV**), from discrimination in the workplace.

This means an employer must not take adverse action against an employee or prospective employee on that basis. Also, for employees who are not are not covered by the general protection provisions in Pt 3-1, it will be unlawful to terminate on this basis.

Modern awards and enterprise agreements must not have terms which discriminate against employees because of (or including) this new FDV protected attribute.

REPEALING DEMERGERS FROM REGISTERED ORGANISATIONS/AMALGAMATION PROVISIONS

The 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) will be repealed.

20. WHS, WORKERS COMPENSATION AND SILICA-RELATED DISEASES

In relation to employers covered by the Commonwealth *Work Health and Safety Act 2011* (**WHS Act**), the Bill would introduce a new offence of industrial manslaughter and align the offence framework with recent changes to the model WHS laws.

The Bill would also introduce a presumption of work-relatedness for first responders covered by the Commonwealth *Safety, Rehabilitation and Compensation Act 1988,* for post-traumatic stress disorder.

In addition, the functions of the Asbestos Safety and Eradication Agency would be extended to address silica related diseases.

Further information on **WHS, workers compensation and silica-related diseases** is here.

NATIONAL WORKPLACE RELATIONS POLICY AND ADVOCACY TEAM

This report has been prepared by Ai Group's National Workplace Relations Policy and Advocacy Team. The Team represents the interests of Ai Group Members through:

- Protecting and representing the interests of Ai Group Members in relation to workplace relations matters.
- Leading and influencing the workplace relations policy agenda.
- In collaboration with Members, developing policy proposals for worthwhile reforms to workplace relations laws.
- Making representations to Government and Opposition parties in support of a more productive and flexible workplace relations system.
- Writing submissions, preparing evidence and appearing in major cases in the Fair Work Commission (FWC).
- Representing Members' interests in modern award cases and reviews.
- Representing Ai Group Members collective interests in significant cases in Courts.
- Representing individual Ai Group Members in significant cases in the FWC and Courts.
- Keeping Ai Group Members informed and involved in workplace relations developments.
- Providing forums for Ai Group Members to share information on best practice workplace relations approaches, and to influence policy developments, e.g. through Ai Group's PIR (Policy-Influence-Reform) Forum and PIR Diversity and Inclusion Forum.
- Liaising with regulators including the Fair Work Ombudsman and Departmental officials.
- Writing submissions and appearing in numerous inquiries and reviews carried out by a wide range of bodies including Parliamentary Committees, Royal Commissions, the Productivity Commission, the Australian Human Rights Commission, the Australian Law Reform Commission, and others.
- Opposing union campaigns on issues which would be damaging to competitiveness and productivity.

Use this link to return to the Table of Contents

CONTACT US

1300 55 66 77

aigroup.com.au

info@aigroup.com.au

linkedin.com/company/australian-industry-group