

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment and Workplace Relations

Fair Work Amendment (Contractor High Income Threshold) Regulations 2024

AUTHORITY

The *Fair Work Amendment (Contractor High Income Threshold) Regulations 2024* (Instrument) are made under the *Fair Work Act 2009*.

Fair Work Act 2009

The *Fair Work Act 2009* (FW Act) provides a framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion. The *Fair Work Regulations 2009* (FW Regulations) support matters of detail within the framework established by the FW Act.

Subsection 796(1) of the FW Act provides that the Governor-General may make regulations prescribing matters required or permitted by the FW Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the FW Act.

The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (the Amendment Act) received Royal Assent on 26 February 2024.

Part 15 of Schedule 1 to the Amendment Act amends the FW Act to insert an interpretive principle for determining the ordinary meanings of ‘employee’ and ‘employer’ for the purposes of the FW Act. This would require that the ordinary meanings of ‘employee’ and ‘employer’ be determined by ascertaining the real substance, practical reality and true nature of the relationship between the parties. Part 15A of Schedule 1 to the Amendment Act amends the FW Act to permit an independent contractor earning over the contractor high income threshold to ‘opt out’ from the application of the interpretive principle, remaining a contractor rather than converting to an employment relationship.

Part 16 of Schedule 1 to the Amendment Act amends the FW Act to empower the Fair Work Commission (FWC) to exercise functions and powers that relate to regulated road transport contractors performing work in the road transport industry and employee-like workers performing digital platform work (together known as ‘regulated workers’) and the ability to resolve disputes in relation to services contracts. This will create new frameworks to protect independent contractors in these industries. It also makes amendments to the *Independent Contractors Act 2006*, to provide that an application to the federal courts must not be made in relation to a services contract unless the independent contractor’s annual rate of earnings is over the contractor high income threshold within the meaning of the FW Act. These amendments commence on 26 August 2024.

The new provisions inserted by Part 15A and Part 16 of Schedule 1 to the Amendment Act provide for the regulations to prescribe a range of matters to support this new framework, as described at Attachment A.

The FW Act specifies no conditions that need to be satisfied before the powers to make the proposed regulations may be exercised.

Acts Interpretation Act 1901

Some of the items in the Instrument are made in contemplation of the commencement of the provision conferring the power to make the regulations. In these circumstances, the Instrument relies on section 4 of the *Acts Interpretation Act 1901* (AI Act).

Further, where the Instrument amends another instrument, and there no express power in the enabling legislation to do so, subsection 33(3) of the AI Act is relied upon to amend or modify the instrument.

EXEMPTIONS FROM SUNSETTING

The regulations amended and inserted by the Instrument are not subject to ordinary sunseting processes, pursuant to item 27(e) of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. Regulations made under the FW Act are exempt from sunseting because they form part of an intergovernmental scheme.

PURPOSE AND OPERATION

The Instrument amends and inserts new provisions into the FW Regulations to prescribe the amount of the contractor high income threshold for the current year and set out the manner in which the contractor high income threshold is to be worked out for a later year.

Details of the Instrument are set out in Attachment A.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

REGULATORY IMPACT

The Office of Impact Analysis has advised that an Impact Analysis is not required for this Instrument. The amendments to the FW Regulations are covered by the Impact Analysis Equivalent: Minimum standards and increased access to dispute resolution for independent contractors (OBPR22-02873).

COMMENCEMENT

The Instrument commences on the later of the day after the registration on the Federal Register of Legislation or and immediately after the commencement of Schedule 1 to the *Fair Work Amendment (Closing Loopholes) Regulations 2024*.

CONSULTATION

The Department of Employment and Workplace Relations (department) consulted with all states and territories (except Tasmania, which declined to participate in the consultation) under the *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*. The department also consulted with the Committee on Industrial Legislation (a subcommittee of the National Workplace Relations Consultative Council, established under the *National Workplace Relations Consultative Act 2002*).

The department also conducted targeted consultations with a range of stakeholders, including unions, employer peaks, digital labour platforms, road transport organisations and the FWC.

Note: throughout this Explanatory Statement references to the FW Act are a reference to the FW Act as amended by the Amendment Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny Act 2011)

Fair Work Amendment (Contractor High Income Threshold) Regulations 2024

The *Fair Work Amendment (Contractor High Income Threshold) Regulations 2024* (the Instrument) is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The *Fair Work Act 2009* (FW Act) provides a framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion. The *Fair Work Regulations 2009* (FW Regulations) support matters of detail within the framework established by the FW Act.

The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (the Amendment Act) received Royal Assent on 26 February 2024.

Part 15 of Schedule 1 to the Amendment Act amends the FW Act to insert an interpretive principle for determining the ordinary meanings of ‘employee’ and ‘employer’ for the purposes of the FW Act. This would require that the ordinary meanings of ‘employee’ and ‘employer’ be determined by ascertaining the real substance, practical reality and true nature of the relationship between the parties. Part 15A of Schedule 1 to the Amendment Act amends the FW Act to permit an independent contractor earning over the contractor high income threshold to remain a contractor rather than converting to an employment relationship.

Part 16 of Schedule 1 to the Amendment Act amends the FW Act to empower the Fair Work Commission (FWC) to exercise functions and powers that relate to regulated road transport contractors performing work in the road transport industry and employee-like workers performing digital platform work (together known as ‘regulated workers’) and the ability to resolve disputes in relation to services contracts. This will create new frameworks to protect independent contractors in these industries. It also makes amendments to the *Independent Contractors Act 2006*, to provide that an application to the federal courts must not be made in relation to a services contract unless the independent contractor’s annual rate of earnings worked out in accordance with the regulations, is over the contractor high income threshold within the meaning of the FW Act. These amendments commence on 26 August 2024.

The new provisions inserted by Part 15A and Part 16 of Schedule 1 to the Amendment Act provide for the regulations to prescribe a range of matters to support this new framework, such as the contractor high income threshold. The contractor high income threshold is an amount set by regulation for a variety of purposes. From 1 July 2024, it will be set at \$175,000. The Instrument amends and inserts new provisions into the FW Regulations to prescribe the amount of the contractor high income threshold for the current year and set out the manner in which the contractor high income threshold is to be worked out for later years.

Human rights implications

The Instrument does not engage human rights as it makes amendments of a consequential, minor or technical nature.

Conclusion

The Instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Hon. Murray Watt, Minister for Employment and Workplace Relations

ATTACHMENT A

Details of the *Fair Work Amendment (Contractor High Income Threshold) Regulations 2024*

Section 1 – Name

1. This section provides that the title of the instrument is the *Fair Work Amendment (Contractor High Income Threshold) Regulations 2024* (the Instrument).

Section 2 – Commencement

2. The table in this section sets out when the provisions of the Instrument commence.

Section 3 – Authority

3. This section specifies that the Regulations are made under the *Fair Work Act 2009* (the FW Act).

Section 4 – Schedules

4. This section provides that each instrument that is specified in a Schedule to the Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Instrument has effect according to its terms.

Schedule 1—Contractor High Income Threshold

Fair Work Regulations 2009

Item 1 – Before Subdivision C of Division 3A of Part 1-2

1.08AA Meaning of contractor high income threshold

5. Item 1 inserts new regulation 1.08AA.
6. Section 15C of the FW Act provides that the contractor high income threshold (the threshold) is the amount prescribed by, or worked out in the manner prescribed by, the Instrument.
7. The threshold is relevant for the following provisions:
 - it is the amount that an individual must earn above to ‘opt out’ of the application of the interpretive principle for determining whether a person is an employer/employee (see new sections 15AA and 15AB of the FW Act);
 - it sets the compensation cap the Fair Work Commission (FWC) can order for a person in the unfair termination jurisdiction as the lesser of (see new section 536LT of the FW Act):
 - half of the threshold; or
 - 26 weeks total remuneration received by the person or to which the person was entitled (whichever is the higher).
 - from 26 February 2025, a worker earning below the threshold can apply to the FWC for an unfair termination or unfair deactivation remedy if they have served a minimum of 6 months’ service (see new sections 536LD, 536LE and 536LU of the FW Act);
 - from 26 August 2024, an independent contractor earning below the threshold may apply to the FWC to resolve disputes in relation to unfair contracts terms in services contracts entered into after that date (see new section 536ND of the FW Act);
 - from 26 August 2024, only an independent contractor earning above the threshold can continue to apply to the federal courts to review a services contract on the grounds that it is unfair or harsh under the *Independent Contractors Act 2006* (see new subsection 12(2A) of that Act).
8. New regulation 1.08AA prescribes the amount of the threshold for the year starting on 1 July 2024 to be \$175,000; as well as setting out the manner in which the threshold is to be worked out for a later year starting on 1 July.
9. The amount of the threshold mirrors the employee high income threshold. However, it is set on the basis that it captures the entire value of the relevant contract or contracts.

Illustrative example 1

Maddie is an independent contractor working in the construction industry. She wants to opt out from application of the new interpretive principle. Maddie’s earnings for work performed under the relationship are \$150,000. Maddie is **not eligible** to opt out under new section 15AB as she does not earn over the threshold.

Illustrative example 2

Milena is an employee-like worker. She was deactivated from a digital labour platform. Milena's annual rate of earnings is \$25,000. Milena is **eligible** to apply for an unfair deactivation remedy as her total earnings are under the threshold.

Illustrative example 3

Gertie is an IT contractor. She considers that one of her contracts contains unfair terms. Gertie's annual rate of earnings is \$150,000. Gertie is **eligible** to apply to the FWC for an unfair contract remedy.

Illustrative example 4

Vaish is a last-mile courier in the road transport industry who drives a van. Her contract was terminated. Vaish's annual rate of earnings is \$165,000. Vaish is **eligible** to apply for an unfair termination remedy as her total earnings are under the threshold.

The maximum amount of compensation that Vaish could receive must not exceed the lesser of:

- half of the threshold immediately before termination; or
- the total amount of remuneration received or which she was entitled (whichever is higher) for any period during which she performed work under the services contract during the 26 weeks immediately before her termination.

Item 2 – Regulation 2.13 (notes)

10. Item 2 corrects a typographical error in the note to regulation 2.13. It omits 'of all employees', (wherever occurring) and substitutes 'of all employers'.