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# HR Perspective: Workplace Reform Rolls on....Again

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# WHERE HAVE WE COME FROM?

**Supporting  
Australia's jobs  
and Economic  
Recovery**

Assented 26 March  
2021

**"Secure Jobs,  
Better Pay"**

Assented 6 December  
2022

**Paid Family and Domestic  
Violence Leave**

Assented 9 November 2022

**Closing Loopholes  
No. 1**

Assented 14 December  
2023

**Anti-Discrimination and  
Human Rights Legislation  
Amendment (Respect at Work)**

Assented 12 December 2022

**Protecting Worker  
Entitlements Act**

Assented 30 June 2023

**Closing Loopholes No. 2**

Assented 26 February 2024

# LEGISLATED CHANGES

## Gender Equality

- Prohibition on pay secrecy
- Paid Family and Domestic Violence Leave
- Changes to sexual harassment and discrimination
- WGEA reporting obligations
- Changes to flexible work
- Changes to parental leave

## Job Security and Protection

- Limitations on fixed term contracts
- Right to Superannuation contribution added to National Employment Standards
- Redefining casual employment
- Definition of employment
- Regulating independent contractor agreements
- Criminalising wage theft
- Regulated workers
- Regulated labour hire arrangements
- Regulated labour hire orders
- Right to disconnect

## Enhancing Union Rights

- Multi-employer bargaining
- Intractable bargaining
- Workplace delegates rights
- Exemptions certificates for suspected underpayments
- PABO

### KEY:

In effect



Effective within six months



Effective within 12 months





# JOB SECURITY

# NEW DEFINITION OF 'CASUAL'

**New definition for casual employees:** the definition of casual employment focusses on the totality of the employment relationship.

Casual employment will now consider the totality of the employment relationship.

This is a departure from the previous assessment of casual employment, which focused on the terms of the employment contract.

These provisions commence on 26 August 2024.

- 1 New framework requires (one) an absence of a 'firm advance commitment to continuing and indefinite work' & (two) the employee is paid a casual loading or a specific rate of pay for casual employees.
- 2 '**Firm advance commitment**' is assessed based on a number of factors, including: the real substance & practical reality of the relationship, the contract of employment, an ability to offer and refuse work, patterns of work and future availability of work.
- 3 Practitioners will be familiar with this approach. This is a return to the broader test for casual employment, which was narrowed following the High Court decision in *WorkPac v Rossato* [2021] HCA 23.

# CHANGES TO CASUAL CONVERSION

**New workplace right for all employees:** Casual employees may now give an employer written notification if they would like to change their employment status to full-time or part-time employment after six months' employment (12 months for small businesses).

The existing casual conversion provisions are being replaced with a similar, but separate, "employee choice" framework.

This will replace the existing regime where the predominant onus is on the employer to offer conversion to qualifying employees.

These provisions commence on 26 August 2024.

1

Employers will be required to respond to written notifications from casual employees within 21 days after the notification is given to the employer.

2

The employer may not accept the employee notification if the employee does not qualify for conversion; there are fair and reasonable operational grounds for not accepting the request; or, it may result in non-compliance with a Government recruitment or selection process or an award/EBA.

3

Disputes regarding conversion are intended to be resolved at the workplace level. However, the FWC has powers to resolve the dispute if necessary.

# EMPLOYMENT V CONTRACTING

**New distinction between ‘employee’ and ‘contractor’:** The Bill introduces an updated classification criteria for ‘employees’ versus ‘independent contractors.’

Involves an assessment of the real substance, practical reality and true nature of the relationship between the parties.

This amendment unwinds previous decisions which held that primacy was to be given to contractual terms, as opposed to the behaviour of the parties.

These provisions commence 6 months after royal assent on 26 August 2024.

- 1 To make an assessment concerning the real substance, practical reality and true nature of the relationship, consider: **degree of control, remuneration (loading, invoices, tax etc) and hours of work.**
- 2 As a transitional measure, a high-income contractor at risk of becoming an employee may formally ‘opt out’ of the provision before it takes effect.
- 3 Practitioners will remember this as a return to the common law multi-factorial test as exemplified in *Hollis v Vabu* [2001] HCA 44 and *Stevens v Bodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

# FIXED TERM CONTRACTS

- Commenced 6 December 2023
- Parties cannot enter into a contract that:
  - Operates for more than two years;
  - Could be extended to operate for more than two years through an option or right to renew; or
  - Provides for more than one option or right to renew the contract (irrespective of the total term).
- Applies to successive contracts for the same or substantially similar work
- Limited exceptions apply (eg: training arrangements; employees on salaries in excess of the high income threshold of AU\$167,500) with the onus on the employer to satisfy the applicability of the exemption if challenged
- Contracts in violation of these rules will operate as if they have no end date



# FIXED TERM CONTRACTS – ACTIONS FOR EMPLOYERS

- 1 Review all template employment contracts and remove any terms that provide option / right to extend or renew.
- 2 Review current fixed or maximum term arrangements to determine how long employees have been employed, including under previous contracts.
- 3 If seeking to rely on any relevant exception, consider adding that exception to the terms of the contract (with an explanation as to why such exception applies).

# SHAM ARRANGEMENTS & UNFAIR CONTRACTS

New employer/contractor protections: the Bill introduces a new defence for employers against sham contracting claims and provides contractors a means to fight unfair contract terms as well.

The sham contracting defence applies if it's **reasonably believed** the contract of employment was a contract for services.

A new framework for independent contractors to set aside perceived unfair contract terms in service contracts has been introduced.

These provisions commence on 27 Feb 24 and 26 August 24 respectively.

- 1 In determining whether an employer's belief was reasonable, regard will be had to the size and nature of the enterprise and any other related matters.
- 2 Unfair contracts, or their terms will be determined through a broad multi-factor test (e.g. bargaining power, interests, harsh unjust and unreasonable).
- 3 When dealing with these disputes, the FWC may choose to either conduct a private conference to deal with the matter or proceed to hearing.



# EMPLOYEE PROTECTIONS

# RIGHT TO DISCONNECT

**New workplace right for all employees:** Employees may refuse to monitor, read or respond to contact, or attempted contact, from an employer or a third party about work outside of their working hours unless the refusal is unreasonable.

Employer likely to bear the onus of establishing that refusal is unreasonable.

Will be added into all modern Awards from 26 August 2024, with 12 month delayed commencement for small business.

Practical application likely to turn on whether employee refusal is unreasonable.

- 1 Disputes should first attempt to be resolved at workplace level.
- 2 Failing this, employer, employee, or an industrial association can bring dispute to FWC to make an order directing employee to cease refusing contact, or directing employer to cease contact and/or to not take adverse action against employee.
- 3 FWC cannot issue pecuniary penalties unless existing order is breached.

# UNREASONABLE REFUSAL

Non-exhaustive factors to be taken into account when determining whether an employee's refusal to respond to out of hours contact is unreasonable:

- 
- Reason for contact or attempted contact
  - Method of contact and level of disruption it causes to the employee
  - Whether the employee is being compensated to remain available or perform additional work outside of hours
  - Nature of the employee's role and responsibility
  - Employee's personal circumstances
  - Any other relevant matter
-

# WHAT TO DO TO PREPARE

- Review employment contracts – specify out of hours requirements
- Develop policies and guidelines
- Training for managers and supervisors
- Consider ‘tech’ solutions
- View ‘right to disconnect’ as part of overall response to psychosocial risk management



# ENHANCING UNION AND OTHER RIGHTS

# INTRACTABLE BARGAINING WORKPLACE DETERMINATION

If parties can't resolve a dispute after an intractable bargaining declaration is made, the FWC, in making an intractable bargaining workplace determination that will replace an existing enterprise agreement, will only be permitted to include terms that are 'not less favourable' to each employee and union than a term of the existing enterprise agreement that deals with the matter.

The Commission must take into account:

- The merits of the case
- The interests of the employers and employees who will be covered by the determination
- The significance of any arrangements or benefits in an enterprise agreement that applies to the employees and employers immediately before the determination is made
- The public interest
- How productivity in the relevant enterprise(s) might be improved
- The reasonableness of the conduct of the bargaining representatives during bargaining
- The extent that bargaining representatives have complied with good faith bargaining requirements
- Incentives to continue bargaining at a later time



# RIGHT OF ENTRY

- 1 From 1 July 2024, registered organisations or unions can apply to the FWC for **an exemption certificate to circumvent the 24 hour notice requirement for right of entry**, where underpayment of wages or entitlements are suspected.
- 2 Safeguards which currently apply to the right of entry provisions will continue to operate. FWC will also have right to ban / impose conditions on certificates.
- 3 Persons must 'not otherwise act in an improper manner' towards a permit holder entering a workplace with an exemption certificate.

# WORKPLACE DELEGATES

- Rights for workplace delegates:
  - Represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer;
  - Reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and
  - For the purpose of representing those interests:
    - Reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
    - Unless the employer of the workplace delegate is a small business employer—reasonable access to paid time, during normal working hours, for the purposes of related training.

# WORKPLACE DELEGATES CONT.

Protections for workplace delegates.

- The employer of a workplace delegate must not:
  - Unreasonably fail or refuse to deal with the workplace delegate; or
  - Knowingly or recklessly make a false or misleading representation to the workplace delegate; or
  - Unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under this Act or a fair work instrument.

# PRESENTERS



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