LOOKING AHEAD IN 2025
—AUSTRALIAN EMPLOYMENT LAW UPDATE

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In 2024, the Australian Government passed several amendments to various laws regulating employment in Australia. These amendments will take effect at different times between now and 2026. With another major round of changes expected to be introduced over the next few years and a federal election coming up in May 2025, employers will need to be prepared to adapt to the changing regulatory landscape.

Looking ahead to 2025, we provide a summary of the following:

- Wage Theft Laws
- New Fair Work Commission Powers
- Casual conversion: Employee Choice Pathway to permanent employment
- Unfair Deactivations and Terminations of Contract for Regulated Workers
- Privacy law reform
- Right to disconnect – small businesses
- Non-Compete Clauses
- Independent Review of the *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)

1. WAGE THEFT LAWS:

On **1 January 2025**, a new criminal offence for intentional wage theft commenced, following the *Voluntary Small Business Wage Compliance Code Declaration 2024* being lodged on the Federal Register of Legislation in December 2024. The Code provides small business employers (less than 15 employees) with a clear pathway to avoid criminal prosecution for the new wage theft offence, which applies to all National System Employees.

An employer will commit an offence if:

(a) they are required to pay an amount to an employee under the Fair Work Act 2009 (Cth) or an industrial instrument (such as an enterprise agreement); and

(b) they intentionally engage in conduct resulting in failure to pay these amounts to or for the employee on or before the due date.

(c) The new offence only applies to underpayments that happened after the provisions took effect.

Penalties include up to 10 years in prison and a $1.565 million fine for individuals, as well as a $7.825 million penalty for companies. The new laws will mean that this maximum penalty can, in some circumstances, be the greater of 3 times the value of the underpayment or the relevant penalty unit amount for the contravention.

Key actions for HR and In-House Counsel

- Remuneration of employees should be carefully reviewed and updated according to the Fair Work Act and relevant industrial instruments to ensure there is no risk of underpayment.
- Policies and procedures should be updated to include processes for regular remuneration review.
- Small businesses should update their policies and procedures to reflect the *Voluntary Small Business Wage Compliance Code Declaration 2024*.

2. NEW FAIR WORK COMMISSION POWERS

From **26 February 2025**, the Full Bench of the Fair Work Commission will be able to establish model terms that can be adopted in enterprise agreements. The Fair Work

Commission must make model terms covering individual flexibility arrangements, consultation processes, and dispute resolution. These model terms will not override existing terms and will not automatically apply to all enterprise agreements that meet the requirements of the Fair Work Act, but can be adopted by parties during the enterprise agreement negotiation process, if they choose to do so.

Key actions for HR and In-House Counsel

- Model terms established by the Fair Work Commission should be reviewed and considered prior to enterprise agreement negotiations.

3. CASUAL CONVERSION: EMPLOYEE CHOICE PATHWAY TO PERMANENT EMPLOYMENT

In 2025, a new 'Employee Choice Pathway' will become available to casual employees who wish to become permanent employees. From **26 February 2025** (or **26 August** for small business employers), eligible casual employees can give their employer written notice of their choice to become permanent, to which employers must respond within 21 days.

If the casual employee's notification is accepted by the employer, they will become permanent. However, if:

(a) the employee still meets the definition of a casual employee (which has recently changed in August 2024);

(b) there are fair and reasonable grounds not to do so; or

(c) acceptance would mean the employer can't comply with a recruitment or selection process required by law;

the employer can refuse the casual employee's notification.

A casual employee can give their employer a notification of their choice to become permanent if:

(a) they have worked for the employer for at least 6 months (or 12 months for small business employers), and;

(b) they believe that they no longer meet the definition of casual employee.

However, an employee will not be eligible to provide notice if:

(a) the employee is currently in a dispute with their employer about changing to permanent employment, or;

(b) their employer has already refused a notice in the previous 6 months, or;

(c) a dispute about employee choice has already been resolved between them under a relevant dispute resolution process.

There are some additional restrictions for casual employees who were employed before 26 August 2024.

The Fair Work Commission will be able to arbitrate all disputes about the Employee Choice Pathway if other methods of resolution have failed. Any orders considered appropriate by a Commission Member can be made, including that the employee continue to be treated as casual or become permanent.

Under the General Protections provisions of the Fair Work Act, employers will be unable to take adverse action against employees (e.g. dismiss them, reduce, vary or change their hours or patterns of work) because they used the Employee Choice Pathway or to avoid the rights and obligations that would arise from the employee becoming permanent.

Key actions for HR and In-House Counsel:

- Existing arrangements with casual employees should be reviewed with reference to the new definition of casual employee and the company's position regarding acceptance or refusal of potential Employee Choice Pathway notices.
- Systems and processes should also be put in place to ensure that any notice sent by an employee will be considered and responded to appropriately within 21 days.

4. UNFAIR DEACTIVATIONS AND TERMINATIONS OF CONTRACT FOR REGULATED WORKERS

From **26 February 2025**, the Fair Work Commission will be able to accept applications from eligible persons for unfair deactivations or unfair terminations of contract.

- Regulated road transport workers who have performed work under a services contract for a period of 6 months after 26 August 2024, will be protected from unfair termination.
- Employee-like workers who perform work through a digital labour platform (an app) or under a service contract managed through an app, who have been working for a period of at least 6 months after 26 August 2024, will be protected from unfair deactivation.

In both instances, the Fair Work Commission will look at whether there was a valid reason for termination, by reference to the worker's capacity or conduct. They will also look at whether any processes under the Road Transport Industry Termination Code or Digital Labour Platform Deactivation Code (whichever is relevant) were followed, and anything else relevant to the claim.

Regulated workers and contractors will have 21 days from termination or deactivation to make an application to the Fair Work Commission and will only be eligible if they earn less than the Contractor High Income threshold.

Key actions for HR and In-House Counsel

- Before termination or deactivation of eligible workers, careful consideration should be undertaken as to whether the termination or deactivation could be considered unfair, including with regard to the reason for termination or deactivation and following processes under the relevant codes above.

5. PRIVACY LAW REFORM

In response to global developments around privacy law and recommendations from the Australian Competition and Consumer Commission, privacy legislation in Australia has been reformed to include an initial tranche of changes.

Some of the major reforms that will come into force over 2025-2026 include the introduction of a statutory tort for serious invasions of privacy, which can result in damages, and a new requirement that privacy policies contain information about any automated decision-making system in use, which could reasonably be expected to significantly affect the rights or interests of an individual.

Further privacy reforms that were agreed to by the Government, including additional requirements on employers in relation to employee records, are unlikely to be introduced until late 2025, after the upcoming federal election.

From **10 June 2025**, a plaintiff will have a cause of action in tort against a defendant where:

(a) the defendant invaded the plaintiff's privacy by intruding upon the plaintiff's seclusion or misusing information that relates to the plaintiff, and;

(b) a person in the plaintiff's position would have had a reasonable expectation of privacy in all of the circumstances;

(c) the invasion of privacy was intentional or reckless; and

(d) the invasion of privacy was serious.

'Intruding upon the seclusion' of the plaintiff is defined as including (but not limited to) a physical intrusion into a person's private space and watching, listening to or recording a person's private activities or private affairs. Similarly, 'misusing information' is defined as including (but not limited to) collecting, using or disclosing information about a person.

There are some defences and exceptions, but under the new tort, courts may award damages for emotional distress as well

as exemplary or punitive damages for invasions of privacy up to $478, 550 (or the maximum amount of damages for non-economic loss under defamation law). Courts will also be able to grant a range of other remedies in addition to, or instead of damages as the court thinks appropriate in the circumstances.

From **December 2026**, there will also be new requirements around the information that must be included in privacy policies, including the kinds of personal information used and the types of decisions made in automated decision-making. If an entity has arranged for a computer program to be involved in decisions that affect the rights or interests of individuals and their personal information, the entity must include information about:

(a) the kinds of personal information used by the computer programs; and

(b) the kinds of decisions made by the computer programs (and relevant information related to those decisions).

Key actions for HR and In-House Counsel

- Privacy policies should be reviewed to ensure they are as clear and transparent as possible with regard to information about automated decision-making and personal information collected.
- Mechanisms and policies around the protection of personal information should also be reviewed and improved if necessary to avoid liability under the statutory tort for breach of privacy.

6. RIGHT TO DISCONNECT – SMALL BUSINESSES

Since **26 August 2024**, employees have had a right to refuse to monitor, read or respond to contact, or attempted contact from their employer (or third parties related to their work), outside of the employee's working hours, unless the refusal was unreasonable.

From **26 August 2025**, this right will apply to employees of small businesses.

Key actions for HR and In-House Counsel

- Consideration should be given before engaging in contact with employees outside of their working hours, and it should be expected that employees may not respond to that contact.

7. NON-COMPETE CLAUSES

In response to movement in the UK and the US towards restricting or regulating non-compete clauses, the Australian Competition Review Taskforce released an issues paper in April 2024 entitled *Non-competes and other restraints: understanding the impacts on jobs, business and productivity* for public comment, with the issue being raised again in the *Revitalising National Competition Policy* consultation paper published in August 2024.

In Australia, non-compete clauses are common, restricting both senior executives and even very junior employees from joining competitors or starting new competing businesses after their former employment relationship concludes or is terminated. Legal limitations apply, for example on the duration of the applicable period and activity restrained.

Some of the key themes that emerged from the submissions noted above include:

(a) most unions and individuals suggested that non-compete clauses should only apply to employees who meet or exceed the high-income threshold, and that the duration of the post-employment restrictions should be limited (e.g. to 3 – 6 months); and

(b) businesses were largely in favour of retaining non-compete clauses, citing the need to protect trade secrets.

It remains to be seen whether the Australian Government will take legislative action, however it is possible that next steps

will come into focus after the upcoming election, and this is definitely an area to keep an eye on in 2025.

8. INDEPENDENT REVIEW OF THE *FAIR WORK AMENDMENT (SECURE JOBS, BETTER PAY) ACT 2022* (CTH)

The *Secure Jobs, Better Pay Act* amends the *Fair Work Act* and other employment legislation to introduce reforms which commenced in 2022 and 2023. Professors Mark Bray and Alison Preston have been appointed to lead an independent statutory review of the *Secure Jobs, Better Pay Act,* which is due in January 2025. The review will assess the effectiveness of the amendments, identify any unintended consequences, and determine whether further legislative change is required..

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