LOOKING AHEAD IN 2024
—AUSTRALIAN EMPLOYMENT LAW UPDATE

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In 2023, the federal government passed several amendments to various laws regulating employment in Australia. Some of the amendments have already come into force and the remaining will take effect at different times between now and 2025. With another major round of changes pending before the Senate, employers will need to be prepared to adapt to the changing regulatory landscape in 2024.

Looking ahead in 2024, we provide a summary of the following:

1. FIXED TERM CONTRACTS

From **6 December 2023**, new rules regarding engaging employees on fixed term contracts came into force. Under the new section 333E of the *Fair Work Act 2009* (Cth) ("**FW Act**") FW Act, employees cannot be engaged under fixed term contracts for longer than two years (with no more than two renewals), except in a range of exceptional circumstances listed under section 333F. Those exceptions include contracts for the completion of specialised tasks, training contracts, contracts to complete projects funded by government grants, and any circumstance permitted by a modern award.

The above fixed term contract limitations do not apply to certain specific categories of fixed term contracts entered into after 6 December 2023 and on or before 30 June 2024. From **1 July 2024** onwards, the limitations apply in full to these categories of fixed term contracts entered into on or after this date. These specific categories include organised sport, high performance sport, live performance, higher education and funding reliant positions.

Practices that involve artificial changes to the contracts to make them appear as different jobs will also fall foul of these provisions. These are civil penalty provisions, and a serious contravention (involving deliberate and systematic breach) can attract significant penalties.

If a fixed term contract does not meet the new limitations, the fixed term provisions of the contract will not apply and the contract will be taken to continue beyond the contract end date. Other terms and conditions of employment under the contract will still apply, including entitlements from any relevant legislation, award, agreement or employment contract.

Further, employers must give a Fixed Term Contract Information Statement when a new employee enters, or as soon as possible after entering, a fixed term contract.

If there is a disagreement as to the terms of a fixed term contract, employers and employees must first try to resolve the dispute between themselves. If the discussions do not resolve the dispute, then the new section 333L of the FW Act now empowers the Fair Work Commission to receive applications to resolve such disputes. On receiving such applications, the Commission will deal with the dispute by arranging a mediation/conciliation, making a recommendation to the employer or arbitrating the dispute by consent of both parties.

2. POSITIVE DUTY REGARDING SEXUAL HARASSMENT

Changes introduced by the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* came into effect from **12 December 2023.**

Under section 47C of the *Sex Discrimination Act 1984*, employers have a **positive duty** to take "reasonable and proportionate" measures to eliminate sexual harassment, harassment on the grounds of sex, hostile workplace environments and victimisation, as far as possible.

Under the *Australian Human Rights Commission Act 1986*, the Australian Human Rights Commission now has powers to:

- inquire into compliance of the positive duty;
- ensure compliance with the positive duty by issuing compliance notices, applying to courts for an order to direct compliance with such notices, or entering into enforceable undertakings with duty-holders;
- promote an understanding and acceptance, and public discussion, of the positive duty;
- undertake research and educational programs in relation to the positive duty; and
- commence court proceedings.

3. SMALL BUSINESS REDUNDANCY EXCEPTION

Until **15 December 2023**, small businesses (national system employers under the FW Act that employ fewer than 15 employees at a particular time) were not required to pay redundancy pay to employees who were made redundant. However, section 121 of the FW Act has now been amended to provide for some limited circumstances where small businesses will be required to pay redundancy pay.

The exception will apply if the employer was not previously a small business and only became a small business due to terminating employees as part of their move to insolvency. The criteria for the obligation to pay redundancy pay are that at the time of making the relevant employee redundant:

- the employer is bankrupt or in liquidation (other than voluntary winding up); and
- the employer previously terminated various employees either:
    - six months before becoming bankrupt or going into liquidation; or due to the insolvency of the employer.

4. EMPLOYEE AUTHORISED DEDUCTIONS

From **30 December 2023**, changes to section 324 of the FW Act came into effect. These changes allow for greater flexibility for employee authorised deductions, allowing an employee's initial written deduction authorisation to specify that the amount of a deduction can be varied from time to time. Employees can choose to specify an upper limit for permitted deductions on their authorisation, either as a dollar amount or a percentage, within which the deduction can be varied without requiring a new written authorisation. However, all such deductions must still be for the employee's benefit, authorised by the employee in writing and recorded in the employee's records, such as pay slips.

5. PROTECTION OF EMPLOYEES SUBJECT TO FAMILY AND DOMESTIC VIOLENCE

The following provisions of the FW Act have been amended to protect employees subjected to "family and domestic violence":

- sections 153 and 195—modern awards and enterprise agreements must not have discriminatory terms toward such employees;
- section 351—the general protections from discrimination under the FW Act have been extended to such employees;
- section 578—when performing functions or exercising powers under the FW Act, the Fair Work Commission must take into account the need to respect and value the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of family and domestic violence; and
- section 772—the criteria for unlawful termination under the FW Act includes termination on the grounds family and domestic violence.

The above provisions came into effect from **15 December 2023.**

6. RIGHT OF ENTRY FOR ASSISTING HEALTH AND SAFETY REPRESENTATIVES

Under section 491(1) of the FW Act, officials of a registered trade union could not enter the premises of an employer to exercise their right to inspect the property or access employee records, as per their rights under work health and safety law, unless they had an entry permit.

From **15 December 2023**, a new subsection under section 491 allows such officials to enter the premises, where a health and safety representative requests their assistance.

7. WORKPLACE DELEGATES' RIGHTS

A workplace delegate is an employee who is appointed or elected to represent members of an employee organisation (for example, a union) in the workplace. From **15 December 2023**, workplace delegates have new rights and protections under the FW Act.

Under a new section 350C of the FW Act, workplace delegates are entitled to:

- represent the industrial interests of members and potential members of the employee organisation (including in disputes with their employer);
- reasonable communication with members and potential members about their industrial interests;
- reasonable access to the workplace and its facilities to represent those industrial interests; and
- if the employer employs more than 15 people, to have reasonable access to paid time, during normal working hours for the workplace, for the purposes of delegate training.

Further, workplace delegates are also covered by the general protections regime under the FW Act. Under new section 350A, an employer must not:

- unreasonably fail or refuse to deal with the workplace delegate;
- 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.

From **1 July 2024**, the following must have a term providing for the exercise of rights of workplace delegates:

- modern awards;
- new enterprise agreements voted on after 1 July 2024; and
- workplace determinations made after 1 July 2024.

8. LABOUR HIRE ARRANGEMENTS

From **15 December 2023**, a new Part 2–7A under the FW Act has come into effect. This Part empowers the Fair Work Commission to make "regulated labour hire arrangement orders". The aim of this reform is to ensure that employers who supply their employees to perform work for a "regulated host" pay their employees the same rate of pay as employees of the host who perform work of the same kind. Regulated hosts must also provide sufficient payroll information to those employers to enable them to comply with their new payment obligations. Although this Part is now in effect, labour hire arrangement orders can only come into operation from **1 November 2024.**

A regulated labour hire arrangement order can be sought wherever:

- an employer, that is not a small business, supplies or will supply, either directly or indirectly ("**labour hire employer**"), an employee ("**regulated employee**") to perform work for another person or entity, that is not a small business ("**regulated host**");
- an industrial instrument other than a modern award applies to the regulated host; and

- the industrial instrument would apply to the regulated employee if they were employed by the regulated host, on any basis, to perform work of the same kind that the regulated employee performs under their labour hire arrangement.

Labour hire employers, regulated hosts, unions as well as individual employees can apply to the Commission for labour hire arrangement orders.

The Commission cannot make a regulated labour hire arrangement order unless it is satisfied that the arrangement will be for supply of labour rather than for provision of a service. In considering this, the Commission must have regard to:

- the involvement of the employer in matters relating to the performance of the work;
- the extent to which, in practice, the employer directs, supervises or controls the regulated employees when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work;
- the extent to which the regulated employees use or will use systems, plant or structures of the employer to perform the work;
- the extent to which the employer will be subject to industry or professional standards or responsibilities in relation to the regulated employees;
- the extent to which the work is of a specialist or expert nature.

The Commission also cannot make a regulated labour hire arrangement order unless it is "fair and reasonable" to do so, considering:

- pay arrangements that apply to the regulated employees as well as the employees of the regulated host;
- the current and historical coverage and application of the industrial instrument;
- the relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise;
- the amount to which employees are entitled to be paid under the industrial instrument;
- the nature of the work required to be performed by the regulated employee—such as expertise, professional industry, and the extent to which the regulated host supervises the regulated employee and has control over their work on a daily basis; and
- any other matters the Commission considers relevant.

Labour hire arrangement orders may prescribe a "protected rate of pay" as well as an "alternative protective rate of pay" if it turns out that the relevant protected rate of pay is excessive or insufficient. Labour hire employers must comply with these orders and pay the relevant protected rate of pay to the regulated employees. Breaches of this Part or any labour hire arrangement orders may attract the civil penalty provisions of the FW Act.

9. SUPERANNUATION CONTRIBUTIONS

The *Superannuation Guarantee Charge Act 1992* regulates mandatory contributions that employers must make to employees' superannuation funds and the Australian Taxation Office (**ATO**) enforces any breaches of such employer contributions. From **1 January 2024**, in addition to the superannuation guarantee law, the FW Act also contains a right to superannuation contributions for employees.

A new Division 10A has been added to the National Employment Standards of the FW Act. This means that unless the ATO has already commenced proceedings in relation to their unpaid superannuation contribution, employees will have the option of commencing proceedings for unpaid superannuation contributions under the FW Act.

Any breaches of the new Division 10A will be subject to the civil penalty provisions of the FW Act. However, under section 116E, when making orders for compensation, a court must consider whether it would be most appropriate for the component of compensation relating to unpaid superannuation to be paid into the employee's superannuation fund.

10. WAGE THEFT—NEW CRIMINAL OFFENCE

From **1 January 2025**, a new section 327A will come into effect under the FW Act. This new provision introduces a criminal offence as follows:

- if an employer, who is required to pay an amount to an employee, omits to make the payment, then they will be liable if:
  - it is proved "beyond reasonable doubt" that the employer intentionally engaged in the act or omission; and
  - the employer intended that the act or omission would lead to failure of payment to the employee; and
- the employer could potentially rely on the defence of mistake or ignorance of fact if they can establish that at the time of the act or omission, the employer was under a mistaken belief or was ignorant of facts.

11. *FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES NO. 2) BILL 2023*

This Bill has been passed by the federal House of Representatives and is currently awaiting a report by the Senate Education and Employment Legislation Committee. The Committee is expected to publish its report by **1 February 2024**, following which, the Australian Senate will set down to vote on the Bill.

This Bill, if passed in its current form, will bring the following changes:

11.1 CHANGES TO THE TEST FOR CASUAL EMPLOYEES

Currently under section 15A of the FW Act, the test for determining whether a worker is a casual employee relies on the terms of the contractual arrangement. The Bill will repeal the current section 15A and change the test to whether there is a work relationship characterised by no firm advance commitment to ongoing and indefinite work. In determining whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work, the proposed Bill sets out the following criteria:

- consideration of the "real substance, practical reality and true nature of the employment relationship";
- consideration that a firm advance commitment may be in the form of a mutually agreed term in a contract of employment or a mutual understanding or expectation between an employer and employee;
- whether there is an inability of the employer to elect to offer work or an inability of the employee to elect to accept or reject work;
- whether it is reasonably likely that continuing work of the kind performed by the employee will be available in future; and
- if the employee engages in a regular pattern of work, noting that a pattern of work will be regular even if it is not absolutely uniform and includes some fluctuations and variations over time.

Employees can either seek to be converted to permanent employees or apply to the Fair Work Commission to change their employment status by applying the above criteria. The Commission will be given additional powers to deal with disputes about casual employment. It will also be a civil penalty offence to misrepresent employment as casual.

Finally, in addition to the obligations at the start of employment, all employers will be required to provide casual employees with a Casual Employee Information Statement after they complete 12 months of employment.

11.2 NEW "ORDINARY MEANING" OF EMPLOYEE AND EMPLOYER

For the purposes of the FW Act, the Bill will change the current test for determining whether a worker is an employee or an independent contractor, which relies on the terms of the contract between the parties (irrespective of the way the relationship operates) following the High Court decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2. For the most part, the new definition will revert to a multi-factorial test under the common law as understood before those decisions—expressly providing that in determining whether a worker is an employee, the task is to determine the real substance, practical reality, and true nature of the relationship, with the following factors to be considered:

- the totality of the relationship;
- the terms of the contract governing the relationship; and
- other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

11.3 SHAM CONTRACT ARRANGEMENTS—STRICTER DEFENCE FOR EMPLOYERS

Section 357 of the FW Act sets out that employers are liable for representing to an individual that they are under a "contract for services" rather than a contract of employment. The current defence available to employers is that when the representation was made, the employer "did not know and was not reckless" as to whether the contract was a contract of employment rather than a contract for services.

The Bill will replace the current defence with a stricter defence—employers will be required to prove that they "reasonably believed" that the contract was a contract for services. The relevant criteria for the defence would include the size and nature of the employer's enterprise and other factors such as legal or professional advice.

11.4 INCREASE IN CIVIL PENALTIES

The Bill will increase maximum civil penalties under the FW Act significantly:

- $93,900 for individuals;
- $469,500 for body corporates;
- $939,000 for individuals for serious contraventions; and
- $4,695,000 for body corporates for serious contraventions.

11.5 GIG ECONOMY WORKERS AND ROAD TRANSPORT CONTRACTORS

A new Part will be introduced to the FW Act that seeks to identify "employee-like workers" and "road transport contractors" who traditionally do not fit within the mould of employee but perform work with majority characteristics of an employee.

Employee-workers will include persons who perform work on a digital platform and have one of the following characteristics:

- low bargaining power in negotiations;
- receive remuneration at or below the rate of an employee performing comparable work; and
- low degree of authority over the performance of the work.

Employee-like workers and road transport contractors will be able to apply to the Fair Work Commission for "Minimum Standard Orders" or "Minimum Standard Guidelines". Alternatively, they may negotiate and enter into "collective agreements" directly with the digital labour platform.

Minimum standard orders and minimum standard guidelines may include the following terms:

- payment terms;
- deductions;
- record-keeping;
- insurance;
- consultation;
- representation;

- delegates' rights; and
- cost recovery.

Further, employee-like workers will be able to apply to the Fair Work Commission for unfair deactivations, unfair terminations and unfair contracts.

12. INDUSTRIAL MANSLAUGHTER AND OTHER WHS AMENDMENTS

The federal work health and safety legislation (that is, the WHS Act) has been amended to align with other state and territory legislation to include the offence of "industrial manslaughter". The work health and safety legislation of New South Wales and Tasmania, while part of the National Work Health and Safety legislative scheme, do not currently have this offence; however, New South Wales is likely to introduce it in early 2024.

Under section 30A of the WHS Act, a person conducting a business or undertaking or its officer commits an offence if they intentionally engage in conduct that results in the death of an individual, and were reckless or negligent in doing so. The penalty for a corporation is up to $18 million and in the case of an individual, they can face up to 25 years' imprisonment.

In addition to creation of this new offence, the WHS Act has also been amended to:

- increase penalties for Category 1 offences; and
- create criminal responsibility for corporate and Commonwealth entities.

KEY ACTION POINTS FOR HUMAN RESOURCES AND IN-HOUSE COUNSEL

We recommend to clients that they further familiarise themselves with these changes and, if necessary, seek advice about how to ensure compliance with the new legal obligations.

Please call our Harmers legal team at +61 2 9267 4322 if you require advice or assistance.

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