CLOSING LOOPHOLES NO. 2 ACT HAS COMMENCED

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The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* ("**Closing Loopholes No. 2 Act**") received Assent and became law in Australia on 26 February 2024. This marks the second round of reforms to the *Fair Work Act 2009* (Cth) ("**FW Act**"), initiated by Minister for Employment and Workplace Relations, Hon Tony Burke MP.

Building upon the initial changes implemented under the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, the Closing Loopholes No. 2 Act makes changes such as the definition of employees and employers, rights for casual workers, protections for independent contractors, and the establishment of a statutory right to disconnect outside of work hours. Here are some key highlights of these changes and the dates the changes take effect.

CHANGES TO THE TEST FOR CASUAL EMPLOYEES (to operate from 26 August 2024)

From 26 August 2024, the current section 15A of the FW Act, the section that defines casual employment, will change to a new test based on 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 new test will outline 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 have additional powers to deal with disputes about casual employment. It will also be a civil remedy offence to misrepresent employment as casual if it is not.

Notably, the onus will now be on the casual employee to make a request to change their employment status (once certain thresholds are met, including that the employee has been employed for at least 6 months (or 12 months for small business employers, who are employers with fewer than 15 employees at a particular time)). This is a significant divergence from the former provisions, under which, employers were obligated to make a determination regarding offering permanent employment to an employee within 21 days after the employee completes working for the employer for a 12 month period.

NEW "ORDINARY MEANING" OF EMPLOYEE AND EMPLOYER (to operate from 26 August 2024 or earlier by Proclamation)

For the purposes of the FW Act, the Closing Loopholes No. 2 Act changes 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 reverts 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.

SHAM CONTRACT ARRANGEMENTS (in force since 27 February 2024)

Under the FW Act, employers are liable for representing to an individual that they are under a "contract for services" rather than a contract of employment, and this liability is subject to certain defences. The Closing Loopholes No. 2 Act has made the defence stricter — employers are now required to prove that they "reasonably believed" that the contract was a contract for services. The relevant criteria for the defence include the size and nature of the employer's enterprise and other factors such as legal or professional advice.

GIG ECONOMY WORKERS AND ROAD TRANSPORT CONTRACTORS (to operate from 26 August 2024 or earlier by Proclamation)

Effective from 26 August 2024 (or earlier by Proclamation of the Governor General), a new Part under the FW Act will identify and give rights to "employee-like workers" and "road transport contractors", workers who traditionally did not fit within the mould of employee but performed work with majority characteristics of an employee.

Employee-like workers 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 orders in relation to unfair deactivations, unfair terminations and unfair contracts.

INTRACTABLE BARGAINING DISPUTES (in force since 27 February 2024)

The Fair Work Commission has power to resolve intractable bargaining disputes by making an intractable bargaining declaration on application by a single bargaining representative. If an intractable bargaining declaration is made, the Commission must make a workplace determination. As per a new section 270A, such a workplace determination, must not be less favourable to employees or employee organisations than corresponding terms in existing enterprise agreements (other than in respect of wage increases and agreed terms).

WORKPLACE DELEGATES' RIGHTS (to operate from 26 August 2024 or earlier by Proclamation)

A new definition of a "workplace delegate" has been inserted, with accompanying rights. A workplace delegate is a person who is appointed or elected in accordance with the rules of an "employee organisation" to be a delegate or representative for members of the organisation who work in a particular enterprise (including trade unions and other registered organisations).

Workplace delegates will have express rights, such as:

- ability to communicate with other employees who are current or prospective union members;
- reasonable access to the workplace to undertake their duties as delegates; and
- paid time during normal working hours to attend training in relation to their role (except for employees of small businesses).

Modern awards, enterprise agreements and workplace determinations will be required to contain clauses providing for these workplace delegate rights. An employer who fails to provide a workplace delegate with the new entitlements will be liable under the General Protections provisions of the FW Act.

RIGHT TO DISCONNECT (to operate from 26 August 2024; from 26 August 2025 for small business)

A new right, inserted at the last hour of Senate debates, will now give employees the right to refuse to monitor, read or respond to contact (or attempted contact) from an employer outside of their working hours – unless that refusal is unreasonable. The right also extends to contact (or attempted contact) outside of the employee's working hours from a third party if work related (for example, from customers or clients).

Some of the factors that must be considered in determining whether an employee's refusal to be contacted is unreasonable are:

- the reason for the contact or attempted contact;
- how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
- the extent to which the employee is compensated (including non-monetary compensation) to remain available to perform work or be contacted, or for working additional hours, outside of ordinary working hours;
- the nature of the employee's role and the employee's level of responsibility; and
- the employee's personal circumstances (including family or caring responsibilities).

The Fair Work Commission will have the power to make an order to stop refusing contact, to stop taking certain actions, or to otherwise deal with the dispute. This will also be civil remedy provision, meaning that breach of an order could attract penalties.

KEY ACTION POINTS FOR HUMAN RESOURCES AND IN-HOUSE COUNSEL

- Review your current employment/contractor arrangements and consider whether any of them may fall under the new reforms.
- In particular, if your organisation utilises casual employees, ensure your contracts and systems comply with the new provisions.
- Gain an understanding of any union activities in your organisation to ensure that you comply with your obligations to union members and delegates.
- Consider implementing policies relating to outside work hours contact and the right to disconnect.

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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