MOTOR TRADERS' ASSOCIATION OF NSW

On 12 February 2024, the Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2023 (Closing Loopholes (No 2)) was passed by Parliament, legislating additional changes to the Fair Work Act 2009 (FW Act).

The Bill received Royal Assent on 26 February 2024.

What are the standouts?

The standout items are as follows:

1. A new definition for a casual employee to which is where there is **'no firm advance commitment to continuing and indefinite work'** and they are entitled to a **casual loading**. The test is also on the **'real substance, practical reality and true nature'** of the employment relationship.
2. Employers no longer are required to offer casual conversion (i.e. offering a casual employee a permanent position after 12 months). However, casuals will be able to seek **casual conversion** to part time or full time employment after **6 months** (12 months for small businesses) if they believe they are not a true casual employee.
3. There is a new statutory test of "employee" and "employer" which takes us back to the **multi-factorial** approach to understand the **'real substance, practical reality and true nature of the relationship'.**
4. The Casual Employment Information Statement is now required to be provided more frequently, including at the time the employee commences employment as a casual employee, then 6 months, 12 months and every 12 months thereafter.
5. Increased regulation of **employee-like workers** (including digital platform gig workers) and road transport workers, including **powers for the FWC to make minimum standard orders and guidelines** in relation to the performance of work by regulated workers.
6. An employer must now prove that they had a **reasonable belief** at the time of making the representation that there was an **independent contractor arrangement** in place.
7. A right to disconnect, giving employees the ability to **refuse to monitor, read or respond to contact from their employer outside of their working hours**. The FWC has jurisdiction to resolve disputes and make orders.
8. A union will be able to seek approval from the FWC for **right of entry** in respect of underpayment **without any advance notice**.

In more detail, these changes involved the following.

Effective date: Six months from Royal Assent (**26.8.2024**)	**Meaning of casual employee** Section 15A of the Fair Work Act 2009 (Cth) ("the Act") provides for a new definition of a casual employee to be: • "real substance, practical reality and true nature of the employment relationship" which is characterised by "an absence of a firm advance commitment to continuing and indefinite work"; and • the employee would be entitled to a casual loading. *What does this mean for your business?*

	When the change comes into effect, employers will no longer be able to solely rely on the terms and conditions of the contract of employment. This increases uncertainty for which casuals can and cannot make an unfair dismissal claim and any leave entitlements and redundancy payments. The Vehicle Repair, Services and Retail Award and the Clerks Private Sector Award have both been amended to include the new definition.
Effective date: Six months from Royal Assent (**26.8.2024**)	**Employee choice about casual employment** The Fair Work Act 2009 (Cth) currently requires employers to offer casual employees permanent employment in certain circumstances. This Bill removes this obligation and places the **onus on the employee** to make the request that their employment become permanent. In essence, where a causal employee believes that they are not a casual employee (in accordance with section 15A of the Act) then they can make a request to become a permanent employee where: • they been employed for at least 12 months as a casual and their employer is a small business employer; or • they have been employed for at least 6 months as a casual and the employer is not a small business employer; and • the employee has not had a dispute or received a written response from the employer regarding casual conversion in the last 6 months. Once the request is received, the employer must give a written response within 21 days from the day the request indicating whether the request has been accepted or the employer does not accept the request and that there are "fair and reasonable operational grounds for not accepting the notification", the reasons of which must be included in the written response. <u>What are fair and reasonable grounds?</u> • Substantial changes would be required to the way in which the employer's organisation is organised; • There would be significant impacts on the operation of the employer; or • Substantial changes to the employee's terms and conditions would be reasonably necessary to ensure that the employer does not contravene a term of a fair work instrument that would apply to eh employee as a full time employee or part time employee as the case may be. <u>What happens if an employer accepts the notification?</u>

	If the employer responds that they accept the notification, then the employee is taken to be a full time employee or a part time employee as the case may be beginning on the day specified in the response. The day specified in the response must be the first day of the employee's first full pay period that starts after the day the employer response is given, unless the employer and employee agree to another day. <u>What role does the Fair Work Commission play?</u> The Fair Work Commission may deal with the dispute only where the dispute is not resolved at the workplace level or there are exceptional circumstances. In the first instance, the FWC must deal with the dispute other than by arbitration. If the dispute is not resolved by the FWC in the first instance, the FWC may deal with the dispute by arbitration and they make any orders "it considers appropriate" provide such order is "fair and reasonable", including that the employee continue to be treated as a causal employee, the employee be treated as a full time or part time employee (as the case may be). *<u>What does this mean for your business?</u>* **Employers will need to have systems in place to assess the regularity of casual work patterns, including start and finishing times and keeping track of communications issued to employees that set expectations about availability for continuing work.**
Effective date: Six months from Royal Assent (**26.8.2024**)	**Casual Employment Information Statement** An employer must now give a casual employee a Casual Employment Information Statement: • as soon as practicable after the employee starts as a casual employee; • as soon as practicable after the following: o the employee has been employed for a period of 6 months as a casual employee; and o the employee has been employed for a period of 12 months as a casual employee; and o at the end of any subsequent period of 12 months.
Effective date: The day after Royal Assent.	**Enabling multiple franchises to access to the single enterprise stream** Franchisees will only be 'related employers' if they can establish that they are engaged in a common enterprise. The Bill addresses this uncertainty by extending the definition of 'related employers' to employers who carry on similar business activities under the same franchise and are franchisees of the same franchisor or related bodies corporate of the same franchisor (or a combination of these). Accordingly, franchisees fitting this description will be able to bargain for a single-enterprise agreement.
Effective:	**Workplace delegates' rights**

1 July 2024	The Bill requires employers to allow workplace delegates to communicate with other employees who are current or prospective union members at the workplace. An "associated regulated business" for a workplace delegate must not unreasonably fail/refuse to deal with the workplace delegate, knowingly or recklessly make a false or misleading representation to the workplace delegate, or unreasonably hinder/obstruct/prevent the exercise of the workplace delegate. Workplace delegates will be entitled to paid time during normal working hours to attend training in relation to their role (except for employees of small businesses). An "associated regulated business" is a business that engaged the workplace delegate under a services contract or arranged for or facilitated entry into, the services contract under which the delegate performs the work. These rights have recently been included in both the Vehicle Repair, Services and Retail Award and the Clerks Private Sector Award.
Effective from: 6 months from Royal Assent (**26.8.2024**) (18 months after Royal Assent (**26.8.2025**) for small business employers – being 15 employees or less).	**Right to disconnect** All employees now have a workplace right to refuse to "monitor, read or respond to contact, or attempted contact" from an employer (or third party) outside of the employee's working hours, unless the refusal is unreasonable. <u>What is unreasonable?</u> What is unreasonable is not defined, however the Fair Work Act confirms the following <u>*must*</u> considered: 1. the reason for the contact; 2. how the contact is made and the level of disruption to the employee; 3. the extend to which the employee is compensated for working outside of the employee's ordinary hours of work 4. the nature of the employee's role and level of responsibility; 5. the employee's personal circumstances; and 6. whether the contact is required under a law of the Commonwealth, a State or Territory. <u>What role does the Fair Work Commission play?</u> If an employer believes that the refusal of an employee is unreasonable then the dispute must attempt to be resolved at the workplace level.

	If this is not possible, a party to the dispute may apply to the FWC to make an order for the employee to stop refusing contact, the employer to stop making contact or to otherwise deal with the dispute. The FWC has recently included this right in both the Vehicle Repair, Services and Retail Award and the Clerks Private Sector Award. The right to disconnect will be a workplace right for the purposes of the general protection regime under the Fair Work Act, which enables an employee to claim that they have suffered a detriment for refusing to monitor, read or respond to contact. <u>What does this mean for your business?</u> Employers should exercise caution in disciplining, terminating or injuring the employee in his or her employment (including changing any terms of their employment to their detriment or failing to offer a promotion), because the employee has a right to disconnect or has exercised their right to disconnect, as this could result in a successful General Protections claim. **Employers should observe that they can still connect employees outside of usual business hours provided such contact is not unreasonable. The criteria for what constitutes unreasonable is yet to be tested in the Fair Work Commission.**
Effective from: **1 July 2024.**	**Underpayments and right of entry** A union can now obtain an exemption certificate from the Fair Work Commission to waive the minimum 24 hours' notice requirement for entry to a workplace if they reasonably suspect a member of their organisation has or is being underpaid wages or other monetary entitlements if the FWC believes that the advance notice of entry would hinder an effective investigation into the suspected contravention.
Effective from: The day after Royal Assent or when (but not before) the Wage Compliance Code comes into effect.	**Increased penalties for underpayments** Penalties have also increased for underpayments and for the first time a penalty could be ordered which is proportionate to the extent of the underpayment. Employers who intentionally (rather than dishonestly) underpay staff will face a penalty of up to 10 years in prison and a maximum fine of up to $7.825 million, or three times the underpaid amount (if it exceeds the cap). The Fair Work Commission has yet to set out the detail for the Wage Compliance Code.

Effective from: Six months after Royal Assent or earlier by proclamation.	**A new definition of 'employee' and 'employer'** As a result of the decision of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1* and *ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2*, which focused not on the relationship between the parties but on the terms of the contract between the parties, Closing the Loopholes Bill No 2 provides for a new definition of an employee. The meaning of an employee and employer is by determining the "*real substance, practical reality and true nature of the relationship*" between the parties, including the totality of the relationship and considering terms of the contract and how the contract is performed in practice. In other words, this definition takes us back to the multi-factorial approach that applied previously.
Effective from: The day after Royal Assent	**Opt-out regime** Independent contractors who earn over the new contractor high income threshold will be empowered to issue "opt out" notices (to the persons who could become their employer) recording their election that the new employee definition does not apply to them in respect of the relationship. The effect of this will be to preserve their status as an independent contractor for the period that the "opt-out" notice is in effect.
Effective from: An application in relation to a service contract may only be made if the contract was entered into on or after 1 July 2024.	**Unfair contract terms of services contract** It will also be possible for independent contractors to dispute unfair contract terms in the Fair Work Commission. The Commission will have power to set aside contracts. In considering whether a term is unfair or not, the Fair Work Commission will consider: • the relative bargaining power of the parties to the services contract; • whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties; • whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract; • whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract; • any other matter the FWC considers relevant • whether the services contract as a whole provides for a total remuneration for performing work that is: ○ less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or

	○ less than employees performing the same or similar work would receive. The Commission may set aside all or part of the contract or amend/vary all or part of a contract.
Effective from: **1 July 2024**	**Regulating employee-like workers** The Fair Work Commission will be empowered with the discretion to determine minimum standards (in the form of Minimum Standard Orders) for what are termed 'employee-like' workers in the gig economy. A Minimum Standards Order may include any of the following matters: • payment terms; • deductions; • record-keeping in relation to specified matters; • insurance; • consultation; • representation; • delegates' rights; and • cost recovery. *Who are 'employee-like' workers?* The Bill introduces the new concepts of "regulated workers" and "regulated businesses," which will fall within scope of the new gig economy laws. There are two general types of regulated workers and regulated business: • 'employee-like workers' working with a digital labour platform operator; or • 'road transport businesses' working with a regulated road transport contractor. A person will be an "employee-like worker" if they perform work under a services contract through a digital labour platform and includes prospective workers (persons who may become regulated workers for a services contract).
Effective from: The amended defence only applies in relation to representations made on or after the day	**Sham contracting arrangements** Section 357 of the Fair Work Act 2009 (Cth) provides that an employer must not represent to an individual that a contract of employment is actually a contract for services under which the individual performs work as an independent contractor. The amended defence to sham contracting confirms that an employer will not be liable, if at the time of the misrepresentation, **the employer can prove that they reasonably believed that the contract was a contract for services.**

after Royal Assent.	Regarding must be had as to the size and nature of the employer's business and any other relevant matters.

The ER Team appreciate that these changes are significant and complicated. If you have any questions about this article or employment related questions in general the Employee Relations team may be contacted on 02 9016 9000 or at eradvice@mtansw.com.au