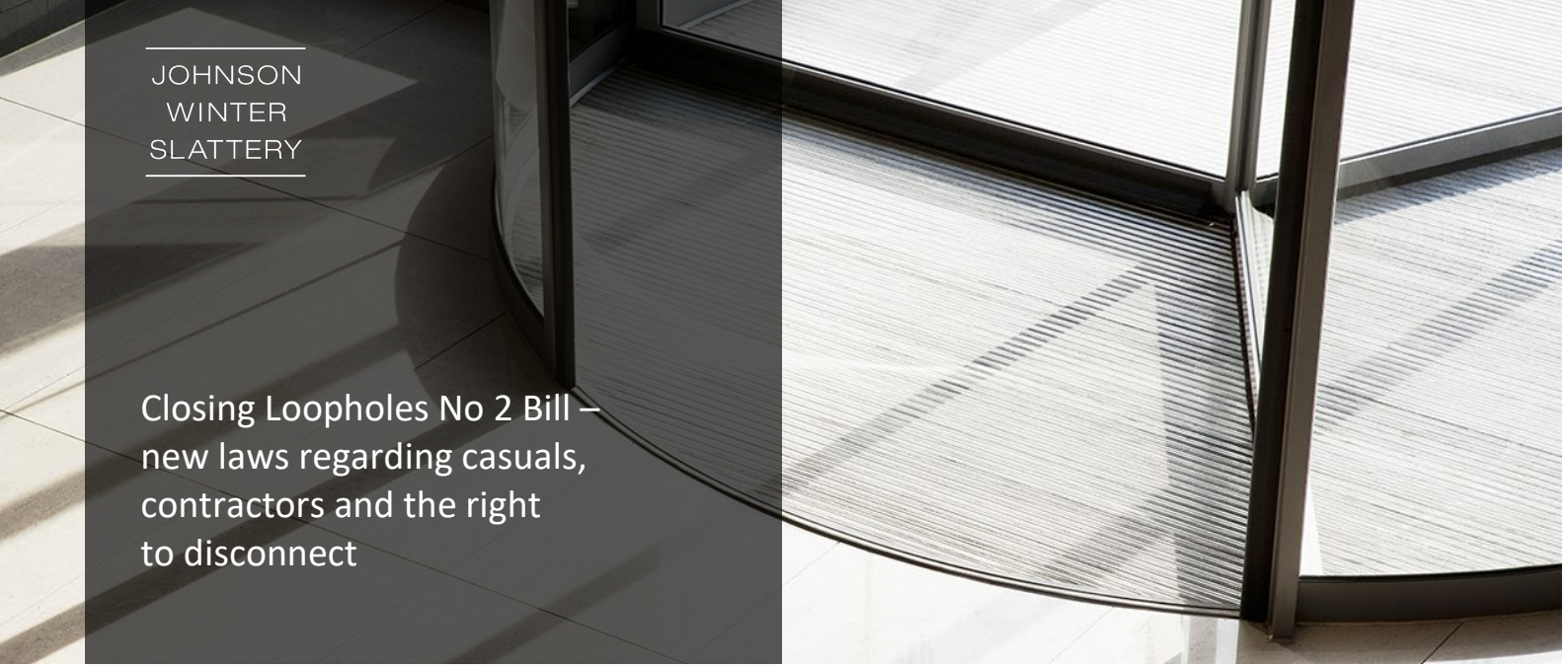

JOHNSON WINTER SLATTERY

Closing Loopholes No 2 Bill – new laws regarding casuals, contractors and the right to disconnect

The second round of the Federal Government's "Closing Loopholes" amendments to the *Fair Work Act 2009* (Cth) (FW Act) were passed by Parliament on 12 February 2024 and received Royal Assent on 26 February 2024. These amendments mean employers will need to review their contractor arrangements, casual employee contracts and policies, hours of work provisions in employment contracts and policies as well as their practices, and enterprise bargaining strategies.

These amendments follow the Fair Work Legislation Amendment (Closing Loopholes No.1) Act 2023 amendments which received Royal Assent on 14 December 2023. See our previous article for a summary of these amendments.

We outline the key changes and proposed actions for employers in our latest information sheet.

Proposed effective date	Proposed amendment	Actions by employers
26 August 2024	**Right to disconnect:** a new "right to disconnect" will be introduced into the FW Act. • Employees will be able to refuse to monitor, read or respond to contact or attempted contact from an employer (or third party that relates to their work) outside of their working hours unless the refusal is unreasonable. There are a number of factors that must be taken into account when determining what is unreasonable, such as the reason for the contact, how the contact is made, the extent to which the employee is compensated and the nature of the employee's role. • This is a workplace right, meaning that employers are prohibited from taking adverse action against employees who exercise their "right to disconnect". • All modern awards will include a right to disconnect term. • The FWC will publish guidelines about the right to disconnect before it comes into effect. **Disputes about the right to disconnect:** disputes will first be dealt with at the workplace level by discussions between the parties. If these discussions do not solve the dispute, either party can apply to the FWC for an order (see below).	Employment contracts and policies for those employees who may be required to be available outside working hours should be reviewed to reflect such out-of-hours requirements.

	Orders to stop refusing contact or stop taking certain actions: The FWC will have powers to make orders to: • prevent an employee continuing to unreasonably refuse to monitor, read or respond to contact; • prevent an employer from taking disciplinary or other action on the basis that the refusal is unreasonable; or • prevent an employer from continuing to require the employee to monitor, read or respond to contact or attempted contact. **Breaching an order:** if the FWC makes such orders and a term of an order is breached, civil penalties will apply, amounting to A$18,780 for individuals and A$93,900 for corporations (based on penalty unit as at 1 July 2023).	
26 August 2024	**Casual employees:** while the test for casual employment will continue to require an absence of a *"firm advance commitment to continuing and indefinite work*", it will also require an entitlement to a casual loading or casual rate of pay. In determining whether there is a *"firm advance commitment to continuing and indefinite work*", regard must be had to: • the real substance, practical reality and true nature of the employment relationship; • the form of the contract of employment or, in addition to the contract, the mutual understanding or expectation between the employer and employee; other considerations such as: – the inability of the employer to elect to offer or not offer work, or the inability of the employee to elect to accept or reject work (and whether this occurs in practice); – whether it is reasonably likely there will be availability of continuing work of the kind usually performed by the employee in that enterprise; – whether there are full-time or part-time employees performing the same kind of work that is usually performed by the employee; and – whether there is a regular pattern of work for the employee. • No single consideration is determinative of the "firm advance commitment" test, and not all of the considerations above need to be satisfied to establish a firm advance commitment. • The presence of a regular pattern in the hours worked by a casual employee does not of itself indicate a firm advance commitment.	Employers should amend casual employment contracts to ensure they satisfy the new test for casual employment and prepare management guidelines for employing new casual employees having regard to the new test.

26 August 2024	**Casual conversion:** there will be a new pathway for casuals to request to change their employment status. • The new provisions will apply to new casual employees, while the existing provisions will continue to operate for employees engaged as casuals at the time the changes commence until six months after the Bill commences, being 26 August 2024 (and 12 months after the Bill commences for small business employers, being 26 February 2025). • A casual employee can provide an employer with a written request to convert if: – the casual employee believes they should convert to a full-time or part-time employee because they no longer satisfy the definition of casual employment; and – the employee has been employed by the employer for at least six months (or 12 months in the case of a small business employer). • An employee cannot issue such a notification in certain circumstances, for instance, if the employee has been declined casual conversion in the previous six months. • Employers are obliged to consult with the employee about the notification and provide a written response within 21 days of receiving the notice. • An employer can refuse an employee's request based on "fair and reasonable operational grounds". These include: – substantial changes would be required to the way in which work in the employer's enterprise is organised; – there would be significant impacts on the operation of the employer's enterprise; – substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a Fair Work instrument that would apply to the employee as a full-time, or part-time, employee. • There is a robust framework for dealing with disputes about employment status, including: – mandatory negotiations at a workplace level; – a broad discretion for the FWC to deal with the dispute as it considers appropriate, including by mediation, conciliation, making recommendations or stating an opinion; and – arbitration by the FWC to make orders about whether the employee continues to be casual or the employer is to treat them as a full-time or part-time employee.	Audit existing casual arrangements to determine who may be eligible for casual conversion under the new pathway. Review HR policies and procedures that make reference to the existing casual conversion pathway.

26 August 2024	**Misrepresentation of casual employment:** • A new civil remedy provisions will prohibit employers from: – Making misrepresentations to influence an individual to enter into a casual employment contract; and – Dismissing an employee to re-engage them as a casual employee in certain circumstances. • A breach of each of these provisions has a maximum penalty of up to 300 penalty units, which amounts to a maximum of A$469,500 per breach for corporations (based on penalty unit as at 1 July 2023). • Employers are required to provide each casual employee with the Casual Employment Information Statement after 12 months of employment (in addition to the existing requirement to provide the Statement at the commencement of employment).	Employers should assess when all existing casual employees will be entitled to the Casual Employment Information Statement.
The earlier of either a day to be fixed by proclamation or 26 August 2024 (if the provisions do not commence within this period)	**Independent contractors**: A new definition of 'employee' and 'employer' will apply to new and existing relationships resulting in independent contractor relationships being determined by reference to the 'real substance, practical reality and true nature of the relationship' between the parties. This requires consideration of the totality of the relationship, including the contract terms and how the contract is performed in practice. This amendment overrides the common law test in *Personnel Contracting* and *Jamsek* requiring the application of a 'multi-factorial' test to assess workers rather than solely assessing the terms of the contract.	Review contractor engagements and seek legal advice to ensure contractors are appropriately engaged as such, and assess sham contracting risks. Employers should consider whether to give written notice to independent contractors that they may opt out of the new employee/contractor test once the contractor high income threshold is known.
27 February 2024	**Opt out notice**: A mechanism for an individual to "opt out" of the new employee/contractor definition will be introduced. This allows the principal to give notice to the individual if the individual earns above the contractor high income threshold. Where an individual "opts out" of the new definition, they will remain subject to the approach expressed by the High Court in *Personnel Contracting* and *Jamsek*. The opt-out notice can only be given once in respect of the relationship, and must state that the individual considers that their earnings exceeds the high income threshold. The opt-out notice is subject to certain revocation rights by the individual.	
27 February 2024	**Sham arrangements:** An employer will not breach the prohibition on representing an employment relationship as a contractor arrangement if it can show that at the time of the representation, it reasonably believed the contract was a services contract. In determining reasonableness, factors such as the size and nature of the organisation, and other relevant factors including the industry, skills and experience, and legal advice obtained by the organisation. The burden of proof is on employers to prove they reasonably believed the person would be an independent contractor.	

27 February 2024	**Increase in maximum penalties:** Civil penalties that apply to selected contraventions and serious contraventions will increase to up to A$469,500 or A$4,695,000 (or, if the contravention is associated with an underpayment amount, 3 times the underpayment amount if that is greater) and the civil penalty for failure to comply with a compliance notice by tenfold up to A$93,900. The test for a serious contravention has been amended such that it applies to contraventions that are knowing or reckless, rather than knowingly as part of a systemic pattern of conduct. **Penalties for sham arrangements:** The maximum penalties for misrepresenting employment as an independent contracting arrangement, dismissing an individual to engage them as an independent contractor and misrepresenting to engage an employee as an independent contractor are increased from up to A$93,900 per breach to a maximum of A$469,500 per breach for corporations (based on penalty unit as at 1 July 2023).	Undertake a compliance audit to ensure that there is no current underpayment for employees and contractors who may be classified as employees.
A day to be fixed by Proclamation, or 26 August 2024	**Unfair contractual terms:** • A new FWC regime will be introduced to deal with unfair contract terms in services contracts between independent contractors and principals. The sum of the independent contractor's annual rate of earnings, and such other amounts (if any) must be less than the contractor high income threshold in the year the application is made and the FWC must be satisfied that there are one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters. • In determining whether a term of a services contract is unfair, the FWC is to consider factors such as: – The parties' bargaining power; – Whether the contract displays a significant imbalance between the rights of the parties; – Whether the term is reasonably necessary to protect the legitimate interests of a party; – Whether the term imposes a harsh, unjust or unreasonable requirement; – Whether the services contract provides a total remuneration less than comparable employees or contractors. • The FWC may conduct a private conference, must not hold a hearing unless it is appropriate to do so in the circumstances, and has power to make an order to amend, vary or set aside all or part of a services contract. The FWC does not have power to make compensation orders. A party will only be able to appeal a decision made by the FWC if it is in the public interest or the decision involved a significant error of fact.	Once the contractor high income threshold is known, review and consider relevant independent contractor agreements against the factors the FWC can take into account in determining whether a term of a services contract is unfair.

The earlier of either a day to be fixed by proclamation or 26 August 2024 (if the provisions do not commence within this period)	**Regulated workers** • The FWC will be able to make minimum standards orders (**MSOs**) for regulated road transport contractors and "employee-like" workers. • A **regulated road transport contractor** is anyone party to a services contract who performs all or a significant majority of their work under a services contract (and is not an employee) in the **road transport industry.** • **Employee-like workers** are those performing digital platform work under a services contract who (i) have low bargaining power, (ii) have low authority over the performance of work, and/or (iii) receive remuneration at or below the rate of employees performing comparable work. • MSOs may include terms about payment, deductions, working time, record keeping, insurance, consultation, representation, delegates' rights and cost recovery. • MSOs in the road transport industry cannot include terms about overtime rates, rostering arrangements, matters primarily of a commercial nature, terms that would change the form of the engagement or status of the regulated worker, or a matter relating to Work Health and Safety. For employee-like workers, MSOs cannot include terms related to overtime rates, rostering arrangements, matters primarily of a commercial nature, other terms transforming a workers' arrangement, and unless the FWC considers it appropriate, the MSO cannot include penalty rates for work performed at particular times or on particular days or terms regulating payments before and between engagements or minimum periods of engagement. • The FWC will also be able to make orders covering issues such as payment times, fuel levies, rate reviews, termination and cost recovery applying to the **road transport contractual chain**. This is a chain of contracts or arrangements under which work is performed for a party to the first contract by a regulated road transport contractor or a road transport employee-like worker. • The FWC will also be able to make minimum standards guidelines, provided no MSO applies. • Road transport businesses and digital labour platform operators will be able to enter collective agreements and take industrial action. **Other amendments include:** – An unfair termination regime for persons performing work in the road transport industry and an unfair deactivation regime for digital platform workers. – The establishment of an Expert Panel for the road transport industry and the establishment of a Road Transport Advisory Group to provide advice to the FWC. – New protections for workplace delegates will provide that regulated businesses must not unreasonably fail or	Review whether your business could be covered by these new provisions and consider how your terms and conditions of engagement compared to those applying to employees doing similar work.

	– refuse to deal with the delegate, knowingly or recklessly make a false or misleading representation to the workplace delegate or unreasonably hinder or prevent the exercise of their rights under the Act or a Fair Work instrument. – Expansion of the general protections provisions to cover digital platform operators in respect of their employee-like workers.	
27 February 2024	**Bargaining and enterprise agreements:** • Interaction rules allow single EAs to replace an in term multi-employer agreement provided the FWC is satisfied that each employee is better off under the single EA compared to the multi-employer agreement. • Bargaining representatives will not be able to make applications for majority support determinations or scope orders if a multi-employer agreement applies which has not passed its nominal expiry date. • Model flexibility, consultation and disputes procedure provisions for EAs will be determined by the FWC. • A major amendment to the intractable bargaining provisions that were introduced as part of the *Secure Jobs, Better Pay* amendments means that other than in respect of wage increases, the FWC must not include a term in workplace determination that is less favourable to employees or the relevant union than an enterprise agreement applying to employees.	• Single EAs will need to be assessed for BOOT purposes as against applicable multi-employer agreement. • Ensure new EAs comply with new model term requirements (to be developed). • The changes to the intractable bargaining provisions means that the prospect of protracted industrial action must be a key consideration in any enterprise bargaining strategy.

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