UPDATE to *PRACTICAL EMPLOYMENT LAW* - MAY 2024

By Dr Louise Floyd

The original book, *Practical Employment Law* (2023-2024) foreshadowed that there would be a further tranche of reform to employment law in the near future, called Closing Loopholes (refer eg Chapter One). At the time of writing the original book, Closing Loopholes was regarded as an omnibus bill – a very large piece of potential legislation that contained within it a diverse range of changes. As correctly observed in Chapter One of *Practical Employment Law*, the original bill was ultimately divided into two parts and both have now been passed by the parliament and become law in the form of: *Fair Work Legislation Amendment (Closing Loopholes) Act* 2023 (received Royal Assent 14 December 2023) and *Fair Work Legislation Amendment (Closing Loopholes No 2) Act* 2024.

The combined total of pages of Closing Loopholes 1 and 2 is over 400 pages long. The purpose of this update is to consider the major changes and what are likely to be their key aspects.[1] It will do so thematically and relating back to the chapters of the original *Practical Employment Law* book:

- Chapter One – THE CONTRACT OF EMPLOYMENT: Employees, Contractors, Labour Hire, Casuals, Gig workers, Unfair and Sham Contracting
- Chapter Two – TERMS OF THE CONTRACT OF EMPLOYMENT: Terms of Employment – wages theft
- Chapter Four – ENTERPRISE AGREEMENTS AND AGREEMENT MAKING: Bargaining
- Chapter Five – TRADE UNION LAW:
- Chapter Seven – ALLIED AREAS OF LAW: Workplace Health and Safety – including the right to disconnect or unplug; industrial manslaughter
- Chapter Eight – TERMINATION OF EMPLOYMENT: Redundancy in Insolvency for Small Business.

While such a thematic approach suits an update to the book, outlining which changes were introduced by which Closing Loopholes Act is useful for readers as it gives them further insight into eg the dates on which parts of the statutes will become operational and it connects readers to for instance the government's own update material. In that connection, two of the most useful websites provided by the Federal Government for following the changes and their ongoing implementation are:

[1] Note the original *Practical Employment Law* drew from parts of the earlier Chapters of Floyd L *Employment Law* 2018 for its discussion of bargaining and trade union law. It is that which is especially updated presently.

FAIR WORK COMMISSION:
https://www.fwc.gov.au/about-us/closing-loopholes-acts-whats-changing

&

DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS:

https://www.dewr.gov.au/closing-loopholes

PRACTICAL TIP:

Crucially, although it is important for this update to outline the key sections of the relevant new legislation, it is vital to acknowledge that the new laws give increasing jurisdiction to the Fair Work Commission (FWC) – and that FWC, in exercising its new jurisdiction and hearing in some instances the first applications under new sections, will be handing down decisions which set out principles for how these new areas of law will operate. This update to *Practical Employment Law* – continuing its ethos as a pracademic book – will outline some of these early applications and their guidance but in the initial stages it is recommended all readers to subscribe to eg government updates so they have a constant stream of continuously updating government/FWC-sponsored information. Some of the government subscription services are noted throughout the update.

SEE DIAGRAM 1.

In addition to an outline of the substantive changes to the law in this update, it is useful to note that some law firms have outlined some of the practical realities that will confront eg business as they assess compliance costs with Closing Loopholes. So, for example, Herbert Smith Freehills has suggested there will be extensive compliance costs for business; that the legislation is complex and will require much expert legal advice; that unions are central to the new scheme; that labour costs will increase; and that:[2]

> Some road transport workers and digital labour platform workers (employee-like workers) will have extensive minimum standards and protection from unfair termination/deactivation, and businesses in those industries will find themselves having to navigate a new system of collective bargaining with these workers.

CHAPTER ONE: THE CONTRACT OF EMPLOYMENT

Casuals; Labour Hire; Employee-like workers eg Gig Economy, Road Transport

Paragraphs [1.105] et seq and [1.70] et seq of *Practical Employment Law* highlighted the weight the Minister was placing on regulating the above workers. The Closing Loopholes legislation largely implements those foreshadowed changes. It does so by significantly

[2] https://www.herbertsmithfreehills.com/insights/2023-09/the-australian-government-tables-closing-loopholes-bill-what-it-means-for-your

increasing the jurisdiction of the Fair Work Commission to deal with issues arising as regards these workers and by modifying the impact of cases such as *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (discussed at eg paragraph [1.65] of *Practical Employment Law*) as well as *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 (discussed at paragraph [1.50] of *Practical Employment Law*). In particular, that modification seeks to lessen the emphasis those two High Court of Australia decisions had placed on the black letter wording of the contract of employment and instead place greater emphasis on the practicalities of the employment relationship.

Casuals (due to become operational 26 August 2024)

Although Closing Loopholes retains the notion that a casual is a worker without a firm advanced commitment to work, it changes the assessment of that test by specifically directing parties to the working relationship to consider the practical realities of that relationship, not just the written contract of employment. The legislation then provides for access to the Fair Work Commission for casuals to make applications to be made permanent. So that mechanism is a replacement from its predecessor and places emphasis on the choice of the worker. The crucial starting provision is repealed and replaced. s15A now states:

> Indicia that apply for purposes of general rule
>
> (2) For the purposes of paragraph (1)(a), whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work is to be assessed:
>
> (a) on the basis of the real substance, practical reality and true nature of the employment relationship; and
>
> (b) on the basis that a firm advance commitment can be in the form of the contract of employment or, in addition to the terms of that contract, in the form of a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract (or to a variation of any such term); and
>
> (c) having regard to, but not limited to, the following considerations (which may indicate the presence, rather than an absence, of such a commitment):
>
> (i) whether there is an inability of the employer to elect to offer, or not offer, work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);
>
> (ii) whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;
>
> (iii) whether there are full-time employees or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee;
>
> (iv) whether there is a regular pattern of work for the employee.
>
> Note: A regular pattern of work does not of itself indicate a firm advance commitment to continuing and indefinite work. An employee who has a regular pattern of work may still be a casual employee if there is no firm advance commitment to continuing and indefinite work.
>
> (3) To avoid doubt:
>
> (a) for the purposes of paragraph (2)(b), a mutual understanding or expectation may be inferred from conduct of the employer and employee after entering into the contract of employment or from how the contract is performed; and

(b) the considerations referred to in paragraph (2)(c) must all be considered but no single consideration is determinative and not all considerations necessarily need to be satisfied for an employee to be considered as other than a casual employee; and

(c) a pattern of work is regular for the purposes of subparagraph (2)(c)(iv) even if it is not absolutely uniform and includes some fluctuation or variation over time (including for reasonable absences such as for illness, injury or recreation).

Exceptions to general rule

(4) Despite subsection (1), an employee is not a casual employee of an employer if:

(a) the contract of employment includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and

(b) the employee is a member of the academic staff or teaching staff of a higher education institution; and

(c) the employee is covered by one of the following modern awards: (i) the Higher Education Industry-Academic Staff-Award 2020 as in force from time to time; (ii) the Higher Education Industry-General Staff-Award 2020 as in force from time to time; and

(d) the employee is not a State public sector employee of a State within the meaning of subsection 30A(1).

Note 1: A modern award covers an employee if the award is expressed to cover the employee, even if the modern award does not apply to the employee because an enterprise agreement applies to the employee in relation to that particular employment (see subsection 57(1) which deals with interaction between modern awards and enterprise agreements).

Note 2: This means an employee on a fixed term contract who is not covered by paragraphs (4)(b) and (c) may be a casual employee or may be other than a casual employee, depending on whether the employee satisfies the requirements of subsections (1) to (3).

New section 66AAA then outlines a procedure through which casuals can approach employers for permanent work and the Fair Work Commission can settle disputes. Very briefly:

- a casual employee who has been employed for 12 months by a small business or 6 months by a large business and believes they are no longer casual can seek permanent appointment under s66AAB.
- Under s66AAC an employer is to respond in writing within 21 days, having consulted with the employee. The employee can decline the application on eg "reasonable operational grounds" (sub section (b))
- Consequences of any change are considered in s66AAD, 66K
- It is the option of the employee to make this approach (s66L) and certain aspects of an application are considered the exercise of a workplace right eg s66L(3)
- Under s66M, disputes on this issue should be resolved at the workplace. However, they can be referred to the Fair Work Commission – first by conciliation, then possibly arbitration (s 66MA).
- Under 125B, large employers are to give casuals a Casual Information Statement shortly after starting work.
- Ss359B and C prohibit what might be considered sham casualisation.
- Under s15AB, there are some circumstances through which an individual can opt out of the above legislative scheme

- A statement by the President of the Fair Work Commission will provide further guidelines regarding casuals (cf President's Statement 27 February 2024, Justice Hatcher President).

Definition of Employee

In an approach similar to that adopted to casuals (ie considering the practical reality of the relationship), there is now a definition of employee in these terms in s15AA:

> 15AA Determining the ordinary meanings of employee and employer
>
> (1) For the purposes of this Act, whether an individual is an employee of a person within the ordinary meaning of that expression, or whether a person is an employer of an individual within the ordinary meaning of that expression, is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.
>
> (2) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:
>
> (a) the totality of the relationship between the individual and the person must be considered; and (b) in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

The legislative note to the section emphasises:

> Note: This section was enacted as a response to the decisions 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.

In other words, this section seeks to perhaps overrule in parts or at least modify those cases. Instead of primacy being placed on the written words of the contract, a person engaged formally as an independent contractor might be later held to have become an employee if the conduct of the parties subsequent to the start of the contract justifies that conclusion.

There is a relationship between the definition of "employee" and the treatment of contractors under the legislation. High income earning contractors may be able to opt out of the definition of employee where they will be better off financially doing so. Lower earning contractors will also be able to access an unfair contracts system through the Fair Work Commission. Although the present unfair contractor laws will remain, this new stream will provide a more cost effective avenue than the civil courts. Guidance should be provided on an ongoing basis by the Fair Work Commission on how this new jurisdiction should work and practitioners are advised to subscribe to FWC updates.

Regulated Workers – Digital Platform; Road Transport; Supply Chain

The FWC's *Implementation Report: Minimum Standards for Regulated Workers* is located at:

https://www.fwc.gov.au/documents/consultation/implementation-report-minimum-standards-2024-04-12.pdf

This report outlines the new functions of the FWC as regards "regulated workers" especially digital platform workers and road transport workers. It briefly outlines the new jurisdiction in these terms:

> The Closing Loopholes No.2 Act confers several new functions on the Commission... In summary, the new functions relating to regulated workers are:
>
> • making minimum standards orders and minimum standards guidelines for regulated workers
>
> • making road transport contractual chain orders and road transport contractual chain guidelines for regulated road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain
>
> • registering collective agreements made between regulated businesses (digital labour platform operators or road transport businesses) and registered employee organisations which set terms and conditions for the regulated workers to whom they apply
>
> • dealing with applications for a remedy in relation to unfair deactivation from a digital labour platform or unfair termination of a contract by a road transport business (not dealt with in this report).
>
> …Regulated workers are:
>
> • Employee-like workers performing digital platform work (section 15P), and
>
> • Regulated road transport contractors engaged in the road transport industry (section 15Q).
>
> …The Act also creates a sub-category, 'road transport employee-like worker', capturing employee-like workers performing digital platform work in the road transport industry (section 15RB).

In terms of some of the detail of this new jurisdiction, under Part 3A-2 Fair Work Act, FWC can make minimum standards orders and guidelines for regulated workers. Most notably:[3]

> Two forms of minimum standards orders will be able to be made (sections 15D and 536JY):
>
> • employee-like worker minimum standards orders, setting standards for employee-like workers performing digital platform work (including in the road transport industry), and
>
> • road transport minimum standards orders, setting standards for regulated road transport contractors.

The FWC needs to take into account 'minimum standards objectives' in s536JX and the road transport objective, outlined further below. Sections 536K and 536KA set out matters the FWC should consider. The relevant orders that can be made and guidelines that will assist are foreshadowed in sections 536JY and 536KR. Organisations, business or the Minister can apply under 536KS and JZ. Under 536KG the Commission can consider these applications. (See also 536KU). The FWC President's directions are relevant in this regard (582(4D)). The terms that must be included are covered in s536KO and see generally Part 3A-2 Div 3 Sub Div E. FWC must consult before making an order and also produce a notice of intent to make an order. (Refer eg Part 3A-2 Div 3 Sub Divs BA and D). As observed in paragraphs 31-33 of the Implementation Report:

> The Commission must ensure that affected entities have a reasonable opportunity to make written submissions in relation to the draft order, and these submissions must be published. The Commission may hold a hearing in relation to an order. In addition, the Commission must not make or vary an employee like minimum standards order, road transport minimum standards order or road transport contractual chain order … unless there has been genuine engagement with the parties to be covered by the order (section 536K, 536KA and 536PF respectively). For road transport minimum standards orders or guidelines or road transport contractual chain orders or guidelines, the Commission is also required to consult the Road

[3] Implementation Report at para 17

Transport Advisory Group before making or varying an order (sections 536KA and 536PG) (see paragraphs 58-59).

There is some capacity to apply for deferral and suspension of minimum standard orders eg sections 536KQ, KQD, KQJ, KQP, QB, QG, KQS and QK. Section 536PD deals with the FWC's power to deal with road transport contractual chain orders. See also: Part 3B Fair Work Act and s15RA.

Road Transport

There is to be an Expert Panel of the Fair Work Commission to deal with road transport matters (eg s582(4A), and a Road Transport Advisory Group established un s40E, F and G, the function of which is to s40E(2):

(2) The function of the Road Transport Advisory Group is to advise the FWC in relation to matters that relate to the road transport industry including, but not limited to the following: (a) the making and varying of modern awards that relate to the road transport industry;

(b) the making and varying of road transport minimum standards orders and road transport guidelines;

(ba) the making and varying of road transport contractual chain orders and road transport contractual chain guidelines;

(c) the prioritisation by the FWC of matters relating to the road transport industry;

(d) such other matters as are prescribed by the regulations.

The Road Transport Advisory Group does this after consulting with industry eg s40E(3) et seq and s40G. Its Road Transport Objective is set out in s40D:

40D The road transport objective

In performing a function or exercising a power under this Act, the Expert Panel for the road transport industry must take into account the need for an appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry, having regard to the following:

(a) the need for standards that ensure that the road transport industry is safe, sustainable and viable;

(b) the need to avoid unreasonable adverse impacts upon the following:

(i) sustainable competition among road transport industry participants;

(ii) road transport industry business viability, innovation and productivity;

(iii) administrative and compliance costs for road transport industry participants;

(c) the need to avoid adverse impacts on the sustainability, performance and competitiveness of supply chains and the national economy;

(d) the need for minimum standards in road transport contractual chains. This is the road transport objective.

Note: The matters that must be dealt with by the Expert Panel for the road transport industry are matters relating to modern awards relating to the road transport industry, road transport minimum standards orders and road transport contractual chain orders (see subsection 617(10B)). The President also has a discretion to direct the Expert Panel for the road transport industry to deal with a matter (see subsection 617(10D)).

Labour Hire: Same Job, Same Pay

Part 2-7A *Fair Work Act* contains laws on the Regulated Labour Hire Arrangements Orders – or to use the vernacular, the so-called 'same job, same pay' laws. Importantly, while some federal government laws (Part 2-7) deal with issues including equal pay for men and women (the gender pay gap), these laws in Part 2-7A also seek to address pay differences between employees and labour hire workers.

As was observed in *Practical Employment Law* (Chapter One), there is long running debate about whether the use of labour hire workers leads to the payment to those workers of a lesser amount than that which would be paid to a worker directly employed by an employer under an industrial instrument such an enterprise agreement. That concern (that the triangulation of the otherwise traditional employment relationship undercuts wages and hence could threaten employment in the long term) has been long analysed. In response, section 306E enables the FWC to make equal remuneration orders between employees covered by instruments such as enterprise agreements. It does so in what one may regard as complex terms in that statutory provision.

Very importantly, an application has been made by the Mining and Energy Union under s306E as regards Workpac Pty Ltd and the Callide Mine, the home page for the court documents in the ongoing application is located at (Application for regulated labour hire order):

https://www.fwc.gov.au/hearings-decisions/major-cases/meu-application-regulated-labour-hire-arrangement-order-c20241506

So, light should be shed on this new and complex jurisdiction through such applications.

CHAPTER TWO: TERMS OF THE CONTRACT OF EMPLOYMENT

Wages Theft

One of the major changes introduced by Closing Loopholes 1 (2023) was the criminalization of wages theft. Importantly, in addition to the stronger punitive measures, the topic is linked to fortified right of entry laws for trade unionists.

Under new s327A, an employer commits an offence if they intentionally engage in conduct which results in failure to pay (s327A(1)(c) and (d)) a required amount to an employee (s327A(1)(a) and (b)). This criminal prohibition does not apply to eg superannuation, under-payment of which is already extensively regulated. (Refer s327A(2) for this and other exceptions). Importantly under s327A(3), absolute liability applies. (Refer also Criminal Code 5.2 regarding intention and 6.2 re absolute liability). Subsections 327A(5) and (6) provide for penalties for both bodies corporate and individuals and for the latter, penalties can include

imprisonment. (Refer Part 2.5 Criminal Code for corporate criminal liability – new criminal offence of wages theft).

Section 327B provides that the relevant Minister may facilitate a Voluntary Small Business Wage Compliance Code and if that is complied with, the Fair Work Ombudsman may not refer the breach to prosecution and may instead enter into a cooperation agreement with that employer. Such cooperation agreements are governed by sections 717A et seq and may be entered into if eg the employer has a history of compliance and cooperation, the error is not major etc (s717B). Such agreements may be set aside however in the event of eg breach (s717D et seq). The Fair Work Ombudsman is to provide guidelines on these agreements and when they are to be entered into.

Paragraph 869 of the Explanatory Memorandum of the original Closing Loopholes Bill described these agreements as aiming to:

> introduce cooperation agreements with 'safe harbour' effect, in relation to self-reporting of conduct to the FWO which may amount to the commission of a wage theft offence under the FW Act;

[Refer Explanatory Memorandum paragraphs 908 et seq also]

S327C provides that proceedings may be commenced by the Australian Federal Police and the Commonwealth Director of Public Prosecutions. National System as well as Commonwealth Crown employers may be liable to investigation and potential prosecution. (Refer 794A et seq as well as paragraphs 869 et seq Explanatory Memorandum). In addition to applying possible criminal sanction against the Commonwealth and clarifying civil sanctions, Paragraph 869 of the Explanatory Memorandum raises the concept of attribution and states the new provisions aim to:

> establish new attribution rules enabling civil liability to be established under the FW Act against all Australian Governments (to the extent the Commonwealth's legislative power permits) and criminal liability to be established against the Commonwealth.

[See also 794A(3). See also Paragraphs 883-884 Explanatory Memorandum]

As to onus of proof and proving that conduct was engaged in and intentional, the Explanatory Memorandum from paragraphs 886 onwards states:

> For new paragraph 327A(1)(c), the prosecution will have to prove beyond reasonable doubt that the defendant intentionally engaged in the relevant conduct. A failure to make a payment, for example, due to a banking error would not be caught by the provision.
>
> For clarity, the term 'engage in conduct' will be defined in section 12 to mean: do an act or omit to perform an act. The term 'engages in conduct' allows the prosecution to allege a course of conduct in charging an offence rather than being required to identify a particular act as constituting the offending conduct.
>
> For new paragraph 327A(1)(d), the prosecution will have to prove beyond reasonable doubt that the defendant intended that their conduct would result in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.
>
> For there to be an offence, the person must mean to bring about the result (that is, a failure to pay the required amount), or be aware that result will occur in the ordinary course of events (refer to section 5.2 of the Criminal Code).
>
> This makes clear that underpayments that are accidental, inadvertent or based on a genuine mistake are not caught by the provision. For example, if an employer genuinely misclassifies an employee and pays them

an hourly rate of $25 per hour instead of $30 per hour (for the correct classification), the resulting failure to pay the required amount ($30 per hour) was not intentional and would not be caught by the provision.

If, however, an employer paid an employee $10 per hour, knowing it was below the minimum wage, the resulting failure to pay the required amount (whatever it may be) would be intentional, and caught by the provision. Exact knowledge of the required amount (to a dollars and cents value) would not be required to establish the offence.

As regards absolute liability and the relationship between the new provisions and the Criminal Code, this is discussed in the Explanatory Memorandum from paragraphs 892-895 onwards.

It is interesting to note that in insolvency, employees can access accrued entitlements through the Fair Entitlements Guarantee Scheme (see Fair Entitlements Guarantee Act 2012) and then the liquidator will step into the shoes of employees in seeking money from the company under s555-556 Corporations Act. There have been concerns some employers may have been using FEG as some form of business model – eg if the business is in financial peril, to avoid paying staff noting that such staff will be paid by the tax payer funded FEG scheme. Section 596AB was introduced into the Corporations Act to provide liquidators with extra legal grounds on which to pursue unscrupulous employers who reorganise a business to avoid paying employees. The criminalisation of wages theft both applies to solvent businesses and presumably may have the effect of getting ahead of the game in insolvency ie stopping underpayments in the first place.

NOTE relationship between wages theft laws and trade union right of entry, outlined in the updates to chapter 5 considered below.

CHAPTER FOUR: ENTERPRISE AGREEMENTS AND AGREEMENT MAKING

FWC will be amending its Enterprise Bargaining Bench Book.[4] In the interim, the FWC President's Statement of 27 February 2024 provides an outline of the enterprise bargaining changes as follows. Essentially,

From Justice Hatcher, President Fair Work Commission, Presidential Statement on Fair Work Legislation Amendment Act (Closing Loopholes No 2) Act 2024 - 27 February 2024

"Measure to enable multiple franchisees to access single-enterprise agreement making, [19] Part 3 of Schedule 1 to the Closing Loopholes No. 2 Act amends section 172 of the FW Act, and commences operation today, 27 February 2024.
[20] These changes restore the capacity of multiple franchisees of the same franchisor to voluntarily bargain together for a single-enterprise agreement, as an alternative to making a multi-enterprise agreement. Franchisees remain able to make a single-enterprise agreement alone or make a multi-enterprise agreement, provided they meet the statutory requirements.
[21] These changes will have a very minor impact on the Commission's processes to facilitate multiple franchisees making an application for a single-enterprise agreement and changes to the Enterprise Agreements Benchbook. Those changes will be made as soon as practicable in consultation with the National Practice Lead for Enterprise Agreements, Deputy President Masson. Transitioning from multi-enterprise agreements
[22] Part 4 of Schedule 1 to the Closing Loopholes No. 2 Act amends the FW Act to provide for circumstances in which a new single-enterprise agreement may replace a (multienterprise) single interest employer agreement or supported bargaining agreement which has not passed its nominal expiry date. These changes commence today, 27 February 2024.
[23] Under the new provisions, an employer will only be able to put a single-enterprise agreement to a vote with the agreement of each employee organisation to which the multienterprise agreement applies, or if the Commission has issued a voting request order.
[24] Consequential changes are also made to provisions dealing with: • The genuine agreement requirements for an enterprise agreement • The better off overall test (BOOT) and the application of the BOOT • Reconsideration of the BOOT • Majority support determinations • Scope orders • Voting request orders; and • Variation of supported bargaining authorisations.
[25] These changes will have an impact on the Commission's approval of enterprise agreement processes. New processes will be required and changes will need to be made to forms for various matter types. Updated guidance for parties seeking to utilise these provisions will be provided and the Enterprise Agreements Benchbook updated. These changes will be made as soon as practicable in consultation with the National Practice Lead for Enterprise Agreements, Deputy President Masson. Model terms — model flexibility term, model consultation term and model term for dealing with disputes in enterprise agreements
[26] Part 5 of Schedule 1 to the Closing Loopholes No. 2 Act amends the FW Act to confer new functions on the Commission to make new model terms for enterprise agreements and the copied State instrument model term for settling disputes. These provisions commence by proclamation (or 12 months after Royal Assent).

[4] Statement President FWC 27 February 2024 at para [21]

[27] Pursuant to sections 202, 205 and 737 of the FW Act as amended, the Commission must make, for enterprise agreements, a model: • flexibility term (section 202(5)), • consultation term (section 205(3)), and • term for dealing with disputes (section 737)
[28] These matters will require the constitution of a Full Bench to consider the content of the new model terms and this process will require extensive consultation with stakeholders.
[29] Given the broad considerations the Commission must take into account to determine the model terms, these matters will be dealt with as a major case. I will issue an initial Statement with a draft timetable and discussion paper in due course. At this stage, the Commission envisages that this consultation process will require the full 12 months contemplated by the commencement date.
Changes to intractable bargaining workplace determinations
[30] Part 5A of Schedule 1 to the Closing Loopholes No. 2 Act amends the intractable bargaining workplace determination provisions introduced as part of the Secure Jobs Better Pay Act changes. The amendments commence today, 27 February 2024.
[31] Section 270 of the FW Act sets out the terms that must be included in an intractable bargaining determination. This includes the 'agreed terms' and terms that the Commission considers deal with matters that were still at issue. The amendments make changes to the definition of 'agreed terms'.' New section 270A requires terms of the intractable bargaining declaration dealing with matters still at issue to be not less favourable than the terms of an enterprise agreement applying to one or more employees or to any bargaining representative of any of those employees. This 'not less favourable' test does not apply to a term that provides for a wage increase.
[32] These changes will have a minor impact on the Commission's current processes. Changes to forms and preparation of updated guidance materials and website content will be developed in consultation with the National Practice Lead for Bargaining, Deputy President Hampton."

CHAPTER FIVE: TRADE UNION LAW

Delegates' Rights and Right of Entry

Paragraph [5.110] of *Practical Employment Law* deals with union right of entry.

Closing Loopholes fortifies rights of union delegates eg right of entry both in terms of certain WHS issues and wage payment concerns. The aim expressed in the Second Reading Speech (4 Sept 2023 at 6236) is that better training and access for unionists will provide support for workers in the early reporting of eg wage underpayment. That change is a response to the fact some underpayments go on for years before they are reported and addressed.

There are fortified workplace delegates rights terms for eg modern awards and enterprise agreements (sections 149E and 201, 205A FWA – see also 273, 334). In particular under s350A:

> (1) The employer of a workplace delegate must not: (a) unreasonably fail or refuse to deal with the workplace delegate; or (b) knowingly or recklessly make a false or misleading representation to the workplace delegate; or (c) unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under this Act or a fair work instrument.

Further in s350C:

> (3) The workplace delegate is entitled to: (a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and (b) (i) in relation to

> employees—reasonable access to the workplace and workplace facilities where the enterprise concerned is being carried on; and (ii) in relation to regulated workers—reasonable access to the workplace facilities provided by the regulated business concerned; and (iii) if the workplace delegate is an employee—reasonable access to paid time, during normal working hours, for the purposes of related training, unless the workplace delegate is employed by a small business employer.
>
> (4) The employer of, or associated regulated business for, the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer or regulated business has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate..
>
> (5) Otherwise, in determining what is reasonable for the purposes of subsection (3), regard must be had to the following: (a) the size and nature of the enterprise or regulated business; (b) the resources of the employer concerned or the regulated business; (c) the facilities available at the enterprise or provided by the regulated business.

As regards right of entry for suspected underpayment, changes have been affected to eg sections 481-508 et seq, noting especially limits on the notice requirement where FWC reasonably believes such notice may lead to the destruction of documents etc or documents pertain to a breach (s519(1)(b) and see s483D.) (Exemption certificates from 24 hours notice – would 24 hours notice undermine the investigation?)

As regards right of entry and assisting on WHS matters, amendments have been affected by eg s494(4) and (5)

There remains no access to residential premises (s493). REFER also: Presidential Statement FWC "Variation of Modern Awards to include a delegates rights term" Justice Hatcher President FWC 18 January 2024.

CHAPTER SEVEN: ALLIED AREAS OF LAW (INCLUDES WORKPLACE HEALTH AND SAFETY)

<u>The Right to Disconnect or colloquially 'unplug'</u>

The so-called right to disconnect or unplug was considered in the main book, *Practical Employment Law*, at eg paragraph [7.40] and Chapter Three [3.90]. At that stage, it was a legislative possibility through which an employer was prohibited from contacting staff. Albeit in a modified form, it is now law under Part 8 of Closing Loopholes 2 (2024), which adds into the *Fair Work Act* particularly section 321 et seq. Those provisions deal with the circumstances when an employee can decline to answer or monitor their devices for after-hours communication from employers and work-related third parties. So importantly it is couched as a reasonable right for an employee to refuse contact rather than a prohibition on the right of an employer to contact an employee.

The crux of the new provisions is s333M – under which an employee has a right to refuse to monitor, read or respond to contact, or attempted contact, from an employer or work-related third party outside of the employee's working hours unless the refusal is unreasonable

The indicia of unreasonableness are akin to those used for unreasonable overtime and include eg: the reason for the contact; how the contact is made and how disruptive it is; the nature of the employee's role, responsibility and salary; and the personal circumstances of the employee

(s333M(3)). This right must not undermine national security or other laws (refer eg s333S-U and s333M(5)). Importantly, it is a workplace right for the purposes of adverse action laws (s333M(4)) and enterprise agreements may contain more generous rights to disconnect and they continue to operate (s333M(6)).

Disputes about the right to disconnect are dealt with under s333N et seq. Parties should attempt to resolve the issue at the workplace level in the first instance. If that fails, the matter may go to the FWC and parties may use representatives. FWC may make orders under s333P eg subsection (2) requiring the cessation of unreasonable employee refusal or unreasonable employer contact. FWC will usually deal with the matter within 14 days but dismiss vexatious applications or those which undermine national security (eg s333P(3) and (4)).

Importantly, under s333R, workplace health and safety applications are allowed. The section provides:[5]

> Section 115 of the Work Health and Safety Act 2011 and corresponding provisions of corresponding WHS laws (within the meaning of that Act) do not apply in relation to an application made under subsection 333N(3) that includes an application for an order under section 333P.
>
> Note: Ordinarily, if a person makes an application under subsection 333N(3) for an order under section 333P in relation to particular conduct, then section 115 of the Work Health and Safety Act 2011 and corresponding provisions of corresponding WHS laws would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the same conduct. This section removes that prohibition.

FWC is to provide guidelines on how it will treat disputes about this right, especially when it is related to another dispute (ss333V and W).

The FWC statement on this right is found at:

https://www.fwc.gov.au/documents/decisionssigned/pdf/2024fwc649.pdf

Industrial Manslaughter

Note the explanatory memorandum and related parliamentary material[6]

Closing Loopholes 1 amends the Workplace Health and Safety Act 2011 to add new s30A which comes into force on 1 July 2024 (check date):

> 30A Industrial manslaughter (1) A person commits an offence if: (a) the person is: (i) a person conducting a business or undertaking; or (ii) an officer of a person conducting a business or undertaking; and (b) the person has a health and safety duty; and (c) the person intentionally engages in conduct; and (d) the conduct breaches the health and safety duty; and (e) the conduct causes the death of an individual; and (f) the person

[5] S333R Fair Work Act as amended by Closing Loopholes 2 (2024).

[6] This material may be found at:
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr7072_ems_01d7cd27-1ed6-45d7-a976-800c6da47c6a%22

was reckless, or negligent, as to whether the conduct would cause the death of an individual. Note: There is no limitation period for bringing proceedings for an offence against this subsection (see subsection 232(2A)). Penalty: (a) In the case of an offence committed by an individual—25 years imprisonment. (b) In the case of an offence committed by a body corporate— $18,000,000. When conduct causes death (2) For the purposes of subsection (1), a person's conduct causes a death if the conduct substantially contributes to the death.

Further related provisions which address fault element of negligence are dealt with by s 244A et seq; offences and the Commonwealth 245A et seq;

NOTE: There are further reforms as regards **Asbestos Liability and the Safety Rehabilitation and Compensation Act. Also there is reinforcement of the requirement not to discriminate against nor take adverse action against those subject to domestic violence (s351 Fair Work Act).**

In the sphere of public work, there have been developments as regards both the interaction between public interest disclosure and national security/military law; and vaccine mandates for certain government workers in Queensland.

R v McBride (No 4) [2024] ACTSC 147 Mossop J lead to custodial sentence against Mr McBride who took government/military documents and discussed them with journalists. National security/military law was the focal point of the judgment.

Johnston & Ors v Carroll (Commissioner of the Queensland Police Service) & Anor; Witthahn & Ors v Wakefield (Chief Executive of Hospital and Health Services and Director General of Queensland Health); Sutton & Ors v Carroll (Commissioner of the Queensland Police Service) [2024] QSC 2 (4 March 2024)

DIAGRAM 1:

The relevant government department, the Department of Employment and Workplace Relations, lists the main changes Closing Loopholes 2023 as:[7]

- Compliance and enforcement: Criminalising wage theft
- Regulated labour hire arrangement orders (Closing the labour hire loophole)
- Enhancing delegates' rights
- Provide stronger protections against discrimination, adverse action and harassment
- Addressing anomalous consequences of the small business redundancy exemption in insolvency contexts
- Conciliation conference orders
- Entry to assist Health and Safety Representatives
- Amendments to Asbestos Safety and Eradication Agency Act 2013
- Amendments to the Safety Rehabilitation and Compensation Act 1988
- Industrial manslaughter and other work, health and safety reforms

That Government department provides on that webpage links to fact sheets on all of the above topics. The same webpage lists changes for Closing Loopholes No 2 2024 as being:[8]

- Extend the powers of the Fair Work Commission to set minimum standards for 'employee-like' workers
- Allow the Fair Work Commission to set minimum standards to ensure the road transport industry is safe, sustainable and viable
- Give workers the right to challenge unfair contractual terms
- Stand up for casual workers
- Compliance and enforcement: Civil penalties and sham contracting
- Meaning of 'employee' and 'employer' in the Fair Work Act 2009
- Enabling multiple franchisees to access the single-enterprise stream
- Strengthening rights of entry to investigate underpayments
- Fair Work Commission preparing enterprise agreement model terms
- Transitioning from multi-enterprise agreements
- Repeal demerger from registered organisations amalgamation provisions
- Workplace determinations

Importantly, many of the changes, especially in Closing Loopholes No 2 2024 relate to functions of the Fair Work Commission, so FWC's website contains a table of the key changes from both pieces of legislation and the dates on which the changes become effective:[9] https://www.fwc.gov.au/about-us/closing-loopholes-acts-whats-changing The Fair Work Ombudsman also has time line and fact sheet assistance at its hub: [10]https://www.fairwork.gov.au/about-us/workplace-laws/legislation-changes/closing-loopholes/additional-fair-work-act-changes which includes links to actions which will assist businesses prepare for change.

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[7] https://www.dewr.gov.au/closing-loopholes (last accessed 8 March 2024).

[8] https://www.dewr.gov.au/closing-loopholes (last accessed 8 March 2024).

[9] https://www.fwc.gov.au/about-us/closing-loopholes-acts-whats-changing (last accessed 8 March 2024).

[10] https://www.fairwork.gov.au/about-us/workplace-laws/legislation-changes/closing-loopholes/additional-fair-work-act-changes