

New Limits on Engaging Employees and Contractors

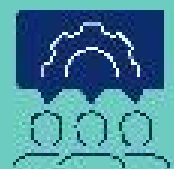
Helping employers understand, navigate and
comply with recent changes to the Fair Work Act

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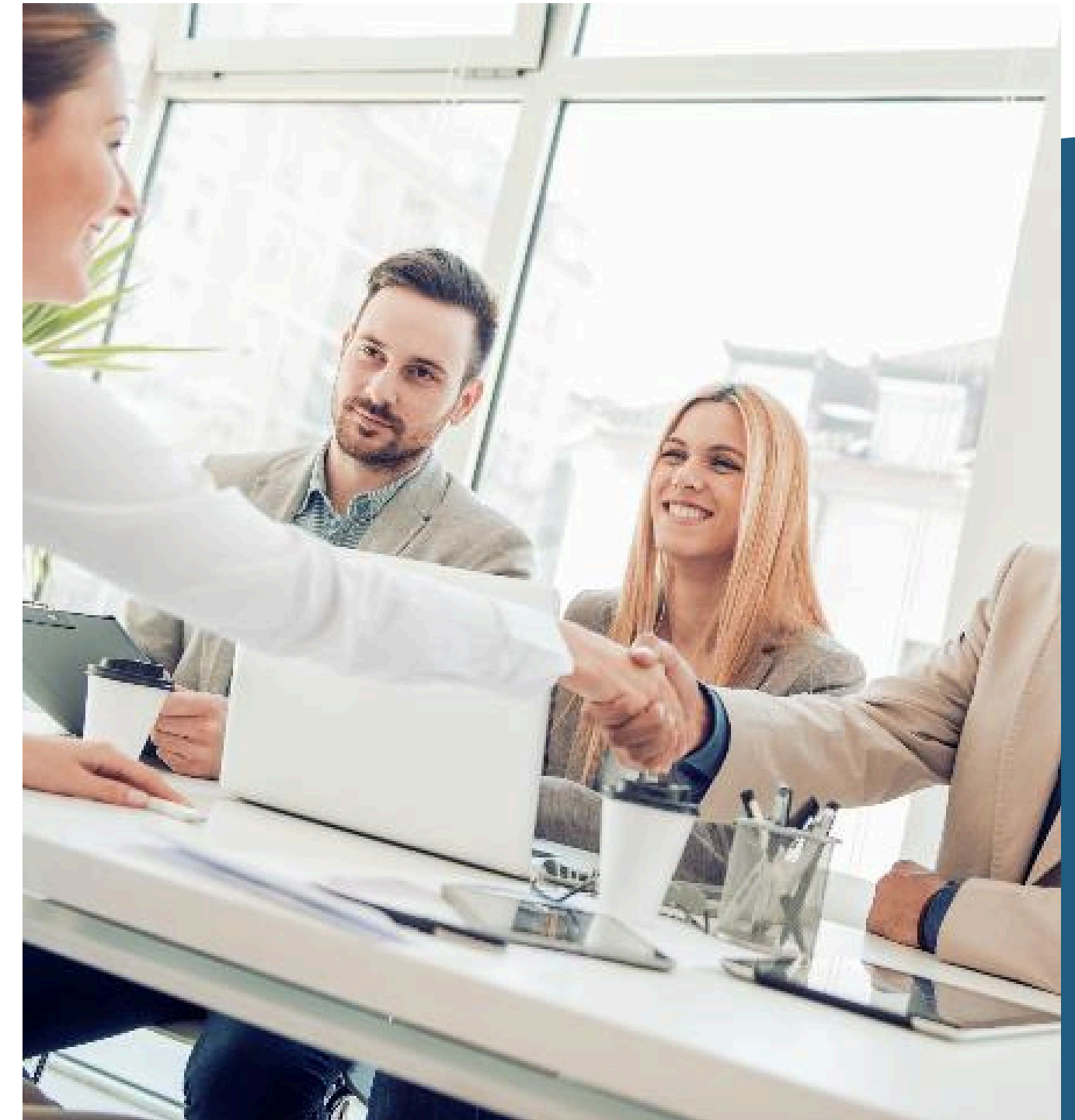
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An Australian Government Initiative

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WORKSHOP **AGENDA**

?Closing Loophole Changes – What Happened

- | | |
|---|--|
| <p>① NEW DEFINITIONS - TYPES OF EMPLOYMENT</p> <p>② New casual definition and casual employee-choice</p> <p>New definition of 'employee' and 'employer'</p> <p>WAGE COMPLIANCE</p> <p>Same Job, Same Pay changes for labour hire workers</p> <p>③ Independent contractor unfair contract terms disputes</p> | <p>④ NEW PROTECTIONS FOR 'EMPLOYEE LIKE' WORKERS</p> <p>Gig workers</p> <p>Road Transport Workers</p> |
|---|--|



?Questions

CLOSING LOOPHOLES LEGISLATION WORKSHOP

KEY COMMENCEMENT DATES FOR CHANGES

2023

15 December →

- Same Job, Same Pay changes for labour hire workers
- Small business redundancy exemption
- New workplace delegate rights

2024

27 February

- Significant increase to penalties
- Sham contracting changes
- One sided arbitration of bargaining disputes
1 July
- Right of entry changes for suspected underpayments
- Workplace delegates rights terms for employee in modern award and enterprise agreements

26 August

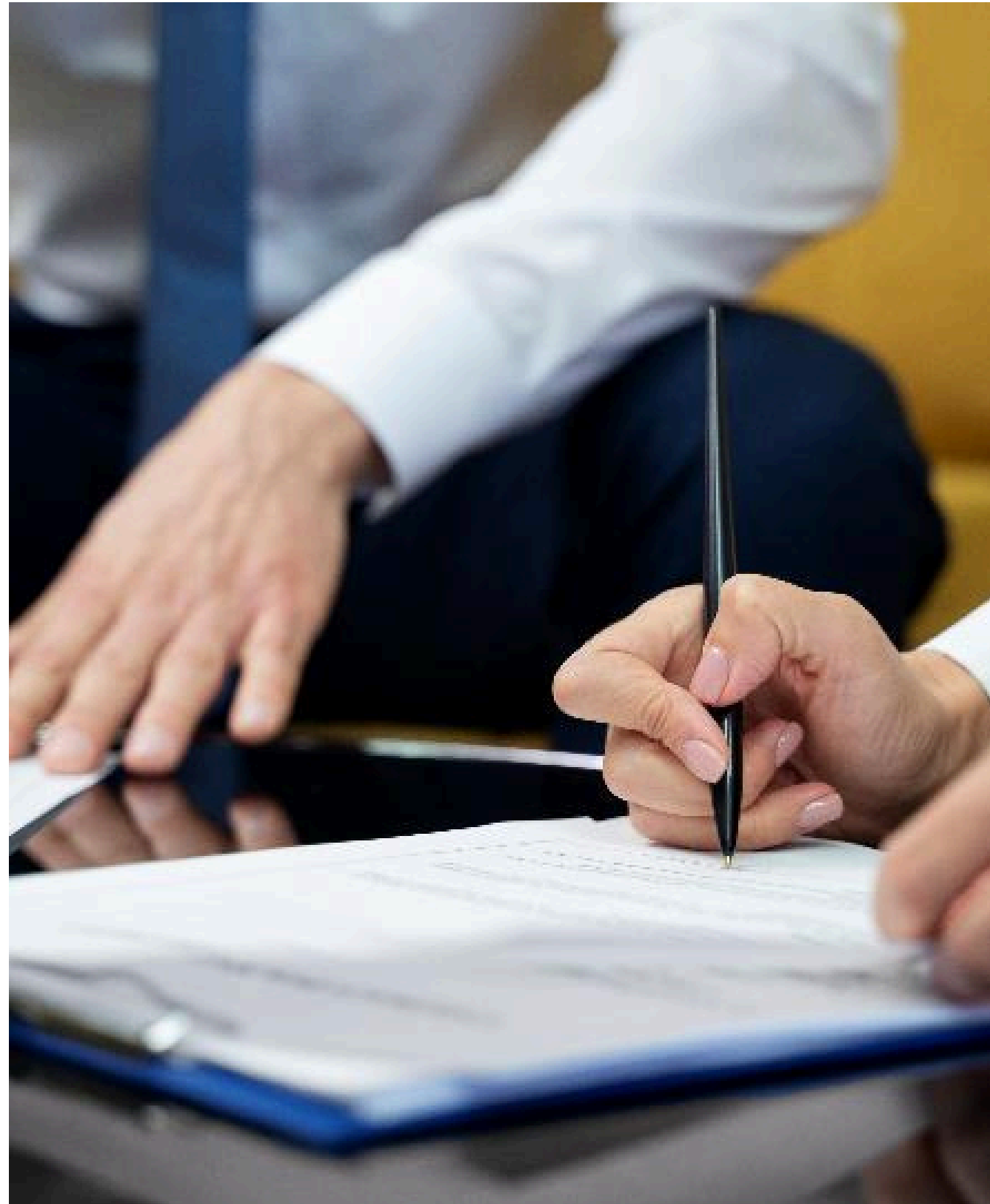
- Changes to the definition of casual and casual employee-choice
- Right to disconnect for non-small businesses
26 August (or an earlier date by proclamation)
- Independent contractor unfair contract terms disputes
- New definition of employee and employer
- New protections for gig workers
- New protections for road transport workers
1 November
- Regulated labour hire arrangement orders can commence operation

2025

1 January →

- Wage & superannuation theft offence**
26 August
- Right to disconnect for small businesses

**The later of 1 January 2025; and the day after the Minister declares a Voluntary Small Business Wage Compliance Code



New definitions - types of employment

Part 1 - Closing Loopholes Bill Changes

NEW DEFINITION OF CASUAL

The existing definition of 'casual employee' in the Fair Work Act is being replaced with a new one



REDEFINING CASUAL EMPLOYMENT

- High Court's *WorkPac Pty Ltd v Rossato* [2021] HCA 23
 - Focus was on the contracted terms – “contract is king”
- **New definition** = reverting to the (less certain) pre-*Rossato* position where the practical reality of the employment relationship must also be considered.



This means it will no longer be (as is the case now) that a casual is determined **just** by looking at the terms of the contract when the employee is first employed.



THE NEW CASUAL DEFINITION



- **New casual definition =**

- The absence of a **'firm advance commitment to continuing and indefinite work'** + entitlement to a casual loading (as is the case now)

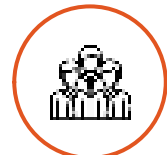
BUT

- Going forward this will be **assessed** by considering both:
 - The **'real substance, practical reality and true nature of the employment relationship'** (i.e how the parties behave and treat each other after the employment has begun)
 - +
 - As well as the **terms of the contract**



Consequence = greater uncertainty

:FACTORS YOU NEED TO CONSIDER IN ASSESSING

 The following factors will be relevant in considering whether or not there is a '**firm advance commitment to continuing and indefinite work**'

- whether there is a mutual understanding or expectation between the employer and employee
- whether the employee can elect to accept or reject work (and whether this occurs in practice)
- the future availability of continuing work
- whether there are other employees performing the same work who are full time employees or part time employees
- whether there is a regular pattern of work for the employee

No single factor should be considered in isolation



How does the new definition impact your casuals:

- **All current casuals** = stay as casuals, the new definition does not affect existing casuals who are casual on 26 August 2024 when the law comes into effect.
- **All new casuals after 26 August 2024** = will need to meet the new definition. If you get it wrong on commencement, they are not a casual and you could be subject to civil penalties.

CASUAL CONVERSION



What happens if someone meets the definition of casual when they are first employed but the way they work changes over time (e.g. working regular hours, expectation of ongoing work, unable to refuse shifts etc) so they no longer meet the definition ?

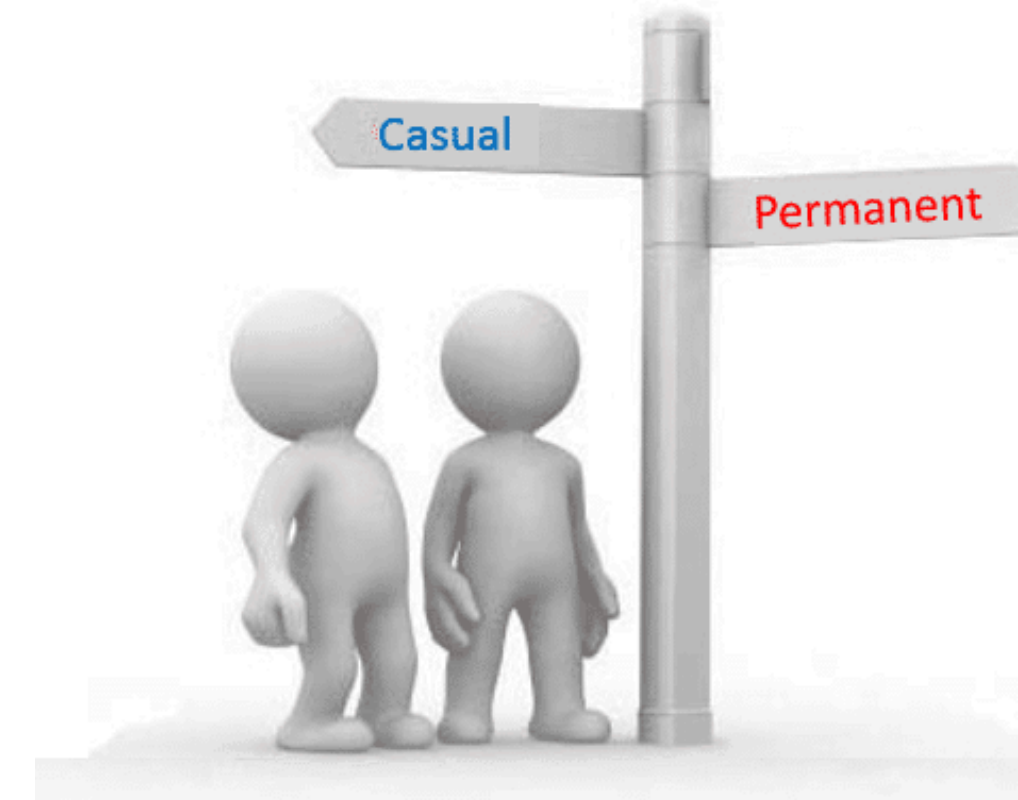
- Good news – casuals **cannot** simply morph into permanent employees
- They remain casual but have the right to “elect” to convert to permanent employment through what is called the ‘*employee choice*’ process **if** they no longer meet the definition of casual
- If a casual does not elect to convert = they remain a casual
- No exposure to civil penalties, provided they were actually a casual at the time of engagement
- Employees have the right to issue a notification that they would like to change to full/part time **if** they believe they no longer meet the casual definition after:
 - 6 months for non-small businesses (15+ employees)
 - 12 months for small business (less than 15 employees)

‘Employee Choice’ Process (replaces the existing casual conversation process)

*The new employee choice process will not commence for small business employers until 26 August 2025

COMMENCING

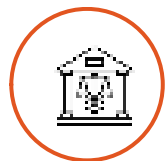
**26 August
2024***



RESPONDING TO A CASUAL EMPLOYEES NOTIFICATION TO CONVERT



Employers have 21 days to respond (accept or decline)



Grounds for declining:

1. Employee **still meets the definition of casual employment**; OR
2. Accepting would **affect compliance** with a recruitment or selection process required under a law of the Cth, a State or Territory; OR
3. There are **fair and reasonable operational grounds** for declining including that:

- 'Substantial changes would be required to the way in the employer's enterprise is organised'; or
- The switch to permanent would bring 'significant impacts on the employer's enterprise'; or
- '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'

This request requires your approval

Approve

Decline



CASUAL EMPLOYMENT INFORMATION STATEMENT



Obligation to give the casual information statement remains but new timing



Small business employers (less than 15 employees)

- On commencement
- Employee's 12-month anniversary

Non-small business employers (15+ employees)

- On commencement
- Employee's 6-month anniversary
- Every subsequent 12-month anniversary (e.g. 12 months, 24 months, 36 months etc)



Check the FWO website here to ensure you give the correct and up to date version of the statement



What this means for your business?

- **Casual employment statement** – put in place steps to manage the large administrative burden that comes from the frequency with which you need to give this to casual employees
- **For all new casual workers**, - you will need to consider both the terms of the contract of employment as well as the way the employee works.
- **Casual contracts** - review of your casual employment contracts and update any terms which may indicate a firm advance commitment to continuing and indefinite work
- **Onboarding processes** – ensure they are robust enough to ensure that only those who should be engaged as a casual worker are
- **Casual employment audit** – to look at where you are using casuals and put in place a system to manage the operational uncertainty that comes from employee choice
- **Casual Change Process Change** - ensure someone in your business who has appropriate knowledge about the day-to-day working arrangements of individual casuals is responsible for the casual change process

NEW DEFINITION OF EMPLOYEE & EMPLOYER

'New definition of 'employee' and 'employer



*or earlier by proclamation

- A definition of “employee” and “employer” has been added to the Fair Work Act
 - Both will be determined by reference to the real substance, practical reality and true nature of the relationship between the parties.
- Designed to overcome the High Court’s *Personnel Contracting and Jamsek Decisions*
 - Focus under these decisions was on the terms of the contract



THE RETURN OF THE MULTI-FACTOR TEST

What's old is new again!

- To determine whether a person is an employee or a contractor it will no longer be sufficient to simply look to the terms of the written contract.
- Must “*ascertain the real substance, practical reality and true nature of the relationship*” which requires an assessment of:
 - the totality of the relationship; and
 - 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 actually performed in practice.



EMPLOYEES VS CONTRACTORS



Back-pay

- ‘Back-pay’ for unpaid entitlements will not arise for workers who were contractors under the old version of the Act and will change in status to employees as a result of the new amendment.
- However, for such workers, **employment liabilities** started accruing from **27 February 2024**.



Opt-out notices (choice for high income contractors)

- Records an election that the new employee definition not apply
- Only available to those earning over the ‘contractor high income threshold’





What this means for your business?

- Review the current use of independent contractors to assess the likelihood that contractors would be considered employees under the new definition.
 - To help you review your current use of contractors against the new 'employee' definition have a look at the **Independent Contractor Assessment Tool** handout.
- Review any template contracts used to engage independent contractors and consider whether amendments should be made to those templates to reflect the changes to the law.
- Review arrangements for the engagement of highly paid independent contractors and consider whether it would be appropriate to agree with these contractors should they exercise the opt out mechanism.
- 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.



SAME JOB, SAME PAY

Regulating Labour Hire Arrangements

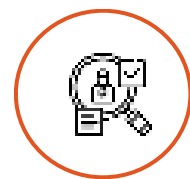


- Anti-avoidance provisions are retrospective backdated to 4 September 2023
- Regulated labour hire arrangement orders can commence operation from 1 November 2024



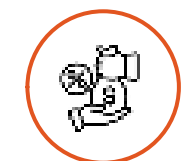
The reforms now exclude the possibility that a contract **wholly or principally performed for the provision of services rather than the supply of labour** will be subject to a 'Regulated Labour Hire Arrangement Order'

Changes aimed at not allowing an employer to use labour hire to undercut wages in their own enterprise agreement = protecting 'bargaining outcomes'



'REGULATED LABOUR HIRE ARRANGEMENT ORDERS'

- Parties can apply to the Fair Work Commission for a '**Regulated Labour Hire Arrangement Orders**' (RLHAO)
 - RLHAO's will require the employer providing labour (subject to some exceptions) to pay the applicable rate of pay under the host employer's enterprise agreement.
 - Test is that the FWC must issue the order unless it is not 'fair and reasonable' to do so in all the circumstances (having regard to a long list of factors in the legislation)
 - Small business hosts are exempt
 - Orders can commence operation from 1 November 2024



SAME JOB, SAME PAY OBLIGATION

- RLHAO gives rise to an obligation to pay a 'Protected Rate of Pay' – not to apply all the conditions of the enterprise agreement.
- Alternate 'Protected Rate of Pay' can be sought where 'Protected Rate of Pay' is unreasonable

SAME JOB, SAME PAY CONT.

Regulating Labour Hire Arrangements

**Genuine
Contracting
Service**

**Use of labour
hire to meet
shifts in
demand etc**

**Use of labour
hire as a
secondary
workforce**

SIGNIFICANT INCREASE **TO PENALTIES**



Significant increases to the civil remedy provisions for many contraventions of the FW Act plus a lowering of the bar for what a 'serious contravention' is



VERY SIGNIFICANT INCREASES TO THE CIVIL PENALTIES REGIME

- Maximum civil penalties for most contraventions to increase **by 500%** for selected civil remedy provisions (including breaches of the NES, modern awards and enterprise agreements)
- Companies face a basic civil penalty of almost **\$1m** for a single contravention
- Company penalties for serious contraventions will be as high as **\$4.695m**
- Increase the financial penalty for failure to comply with a compliance notice **by 10 times**
- Only applies to corporations that are **not small business employers**



SERIOUS CONTRAVENTIONS

- Serious contraventions no longer exclusively pertain to intentional acts; they encompass reckless behaviour as well – greater risk of prosecution for business



'Proportionality' not likely to be relevant for civil penalties – rather what penalty is going to deter conduct



SHAM CONTRACTING



MISREPRESENTING EMPLOYMENT AS AN INDEPENDENT CONTRACTING ARRANGEMENT

The Act prohibits an employer from intentionally misclassifying an employee as a contractor, .
."commonly referred to as "sham contracting



SHAM CONTRACTING DEFENCE CHANGE

- The Act previously provided a defence to sham contracting if an employer proves that they •
did not know and were not **reckless** as to whether the individual should have been
.engaged as an employee rather than a contractor
- This defence has been replaced and narrowed, so that an employer now bears the onus •
of proving that they '**reasonably believed**' that individual could be validly engaged as a
.contractor



INDEPENDENT CONTRACTOR UNFAIR CONTRACT TERM DISPUTES



Independent contractors in any industry who earn below a yet-to-be-specified “contractor high income threshold” will be able to raise a dispute over ‘unfair contract terms’ related to workplace relations matters in the Fair Work Commission



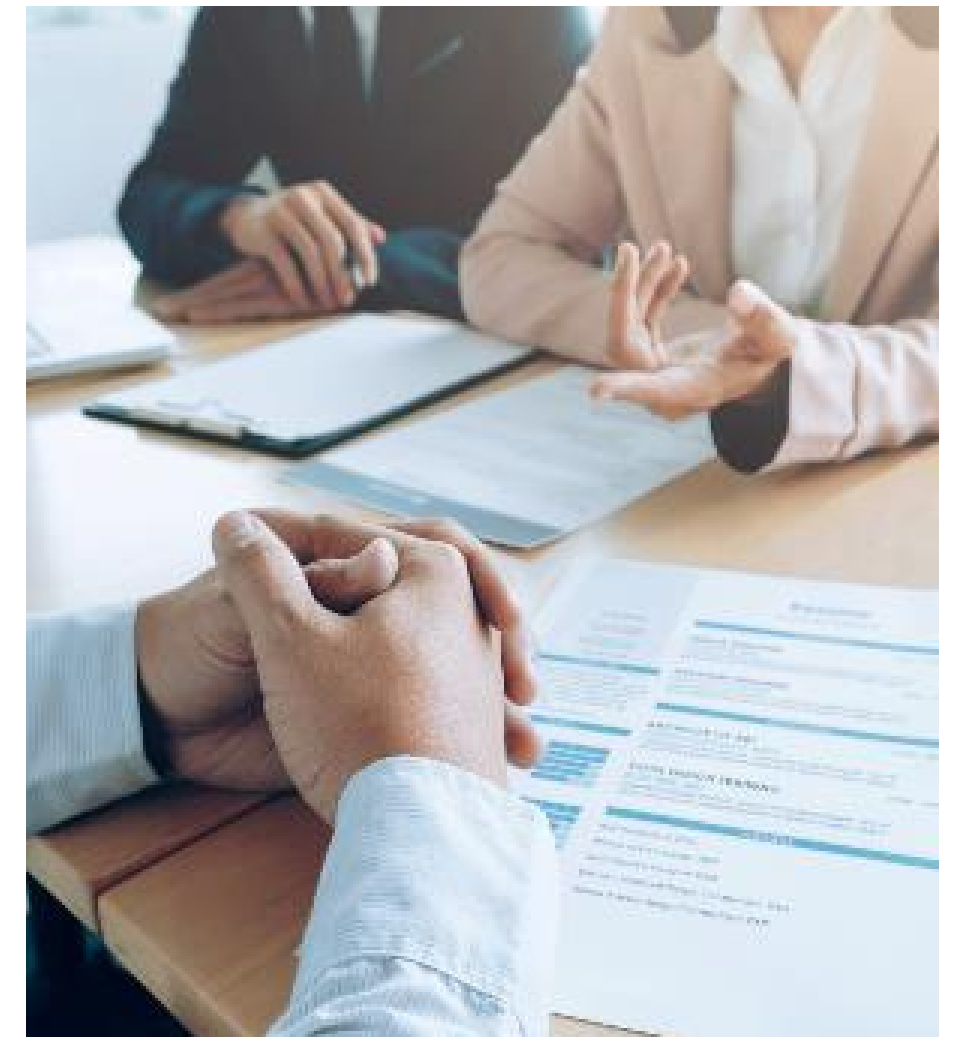
If satisfied that the contract contains unfair terms, the Fair Work Commission will be able to make orders that

- Set aside all or part of the contract which relate to workplace relations matters; or
- Amend or vary all or part of the contract which relate to workplace relations matters



.No orders for compensation will be able to be made by the Fair Work Commission

IMPORTANT: This change only apply to contracts that are entered into from **1 July 2024**.





What do these wage compliance changes mean for your business?

- A proactive stance will be your shield to the recent changes
- Preparation for the new criminal; wage/super theft offence and higher penalties should start now.
- Treat this as a warning to “double down” on compliance exercises around payroll – risk based periodic audit
- If you are using labour hire as a core part of your workforce + enterprise agreement covering the work the labour hire workers are doing, you should be taking steps to prepare for a possible regulated labour hire arrangement order.
- Carefully assess your independent contractor arrangements to:
 - Ensure you have a reasonable basis to classify independent contractors as such.
 - Ensure you have considered the ‘fairness’ of any template service contracts you use when compared to an employment relationship.
- Non-small business employers (15 or more employees) facing a bankruptcy or liquidation process may remain liable for redundancy payments to all employees despite becoming a ‘small business employer’ throughout the process.

“Waiting to remediate is no longer an option”





New protections for ‘employee like’ workers

Part 4 - Closing Loopholes Changes

CONTRACTORS WORKING THROUGH DIGITAL PLATFORMS

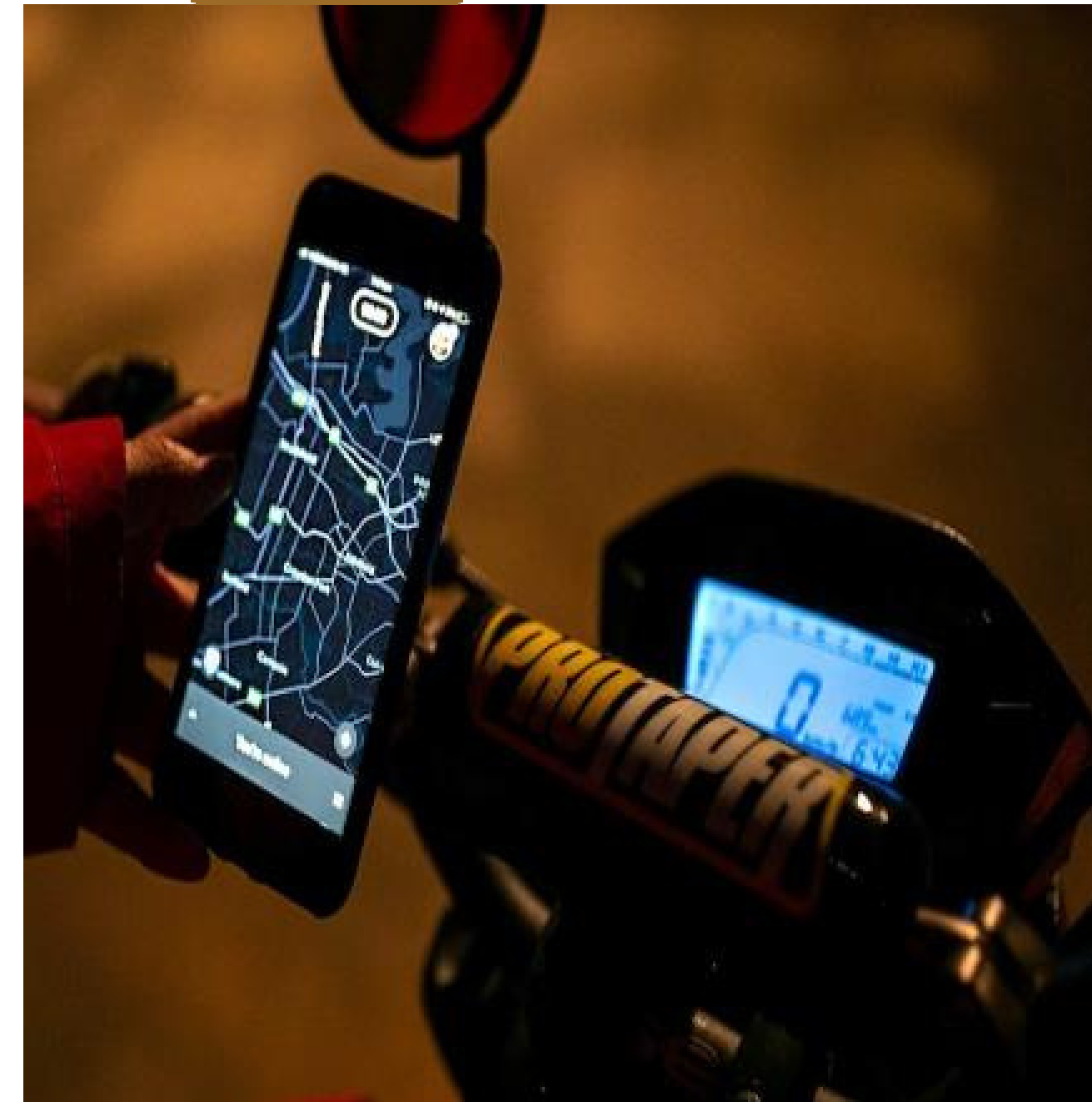
Regulating 'employee-like workers' performing 'services contracts' for
'digital labour platform operators' such as UberEATS, Deliveroo etc



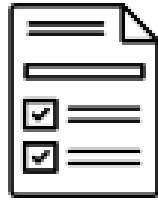
- The Fair Work Commission has been given the power to set **minimum standards** for gig economy workers
- Workers will be considered "**employee-like**" if they personally perform digital platform work performed under the service contract and have one or more of the following:
 - low bargaining power
 - remuneration at or below the rate of an employee
 - low degree of authority
 - such other characteristics as prescribed by the regulations



*or earlier by proclamation



MINIMUM STANDARDS



A new ability for the Fair Work Commission to make Minimum Standards Orders & non-binding Minimum Standards Guidelines.

YES:

- payment terms
- deductions
- record keeping
- insurance
- consultation
- representation
- delegates rights
- cost recovery

NO:

- overtime rates
- rostering arrangements
- commercial matters that are not about engagement or workers
- terms that would deem a worker an employee
- WHS matters that are addressed by other state or territory law
- other prescribed matters

COLLECTIVE AGREEMENTS & DEACTIVATION



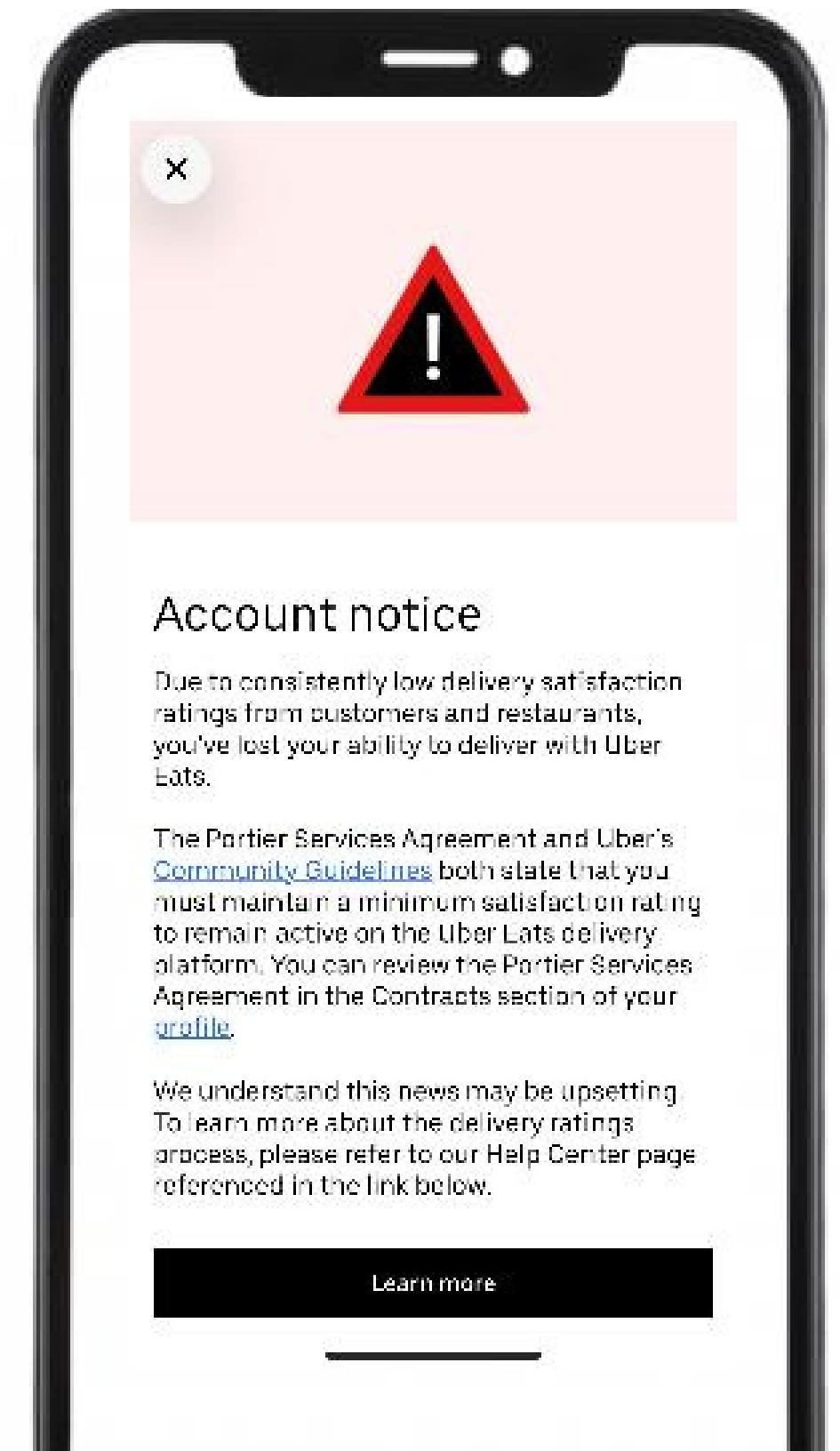
Consent collective agreements

- A new ability for the FWC to ratify consent collective agreements.



'Unfair Deactivations'

- New ability for the FWC to arbitrate disputes over unfair deactivations (similar to the unfair dismissal regime)
- Digital Labour Platform Deactivation Code (drafted by the Minister)
- Remedies include reactivation and lost pay because of the deactivation but not compensation



CONTRACTORS IN THE ROAD TRANSPORT INDUSTRY

Regulating certain road transport contractors in the road transport industry (e.g. owner-drivers)

- The Fair Work Commission has been given the power to regulate road transport contractors through the ability to make “**road transport contractual chain orders**” that sets minimum standards for certain road transport contractors.
 - The FWC may also make guidelines that set standards for road transport contractors
- A **Road Transport Industry Expert Panel** and **Road Transport Advisory Group** will be established to consider the need for minimum standards in the sector and to advise the FWC.

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26 August
2024

*or earlier by proclamation



ROAD TRANSPORT CONTRACTUAL CHAIN ORDERS



- A **“Road transport contractual chain order”** sets the standards for regulated road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain.
- The FWC can make an order on its own initiative or on application from a union, a regulated business or a person who is a primary party to a first contract in the chain.

YES:

- payment terms
- fuel levies;
- rate reviews;
- termination, including one way termination for convenience; and
- cost recovery.

NO:

- overtime rates
- rostering arrangements;
- the form of the engagement or the status of regulated workers (including so as to deem them to be an employee); or
- work health and safety that is otherwise comprehensively dealt with by a Federal / State law or the Heavy Vehicle National Law.

COLLECTIVE AGREEMENTS & UNFAIR TERMINATIONS



Road Transport collective agreements

- A new ability for the FWC to ratify road transport collective agreements.



'Unfair Terminations of a road transport contractor'

- New ability for the FWC to arbitrate disputes over unfair termination for Road Transport regulated workers (similar to the unfair dismissal regime)
- Remedies include reactivation and lost pay but not compensation



Outstanding Questions

- Interaction with state owner driver jurisdictions?
- Will it be another RSRT Disaster?



QUESTIONS

HOW WE CAN HELP



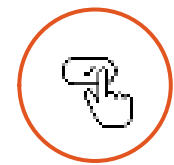
Download today's slide deck, materials & get access to tools and resources to assist you in managing the Closing Loopholes changes



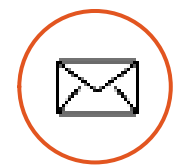
Review contracts, policies and procedures



Training your staff, management training



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