

# Industrial Relations in 2022: The Big Picture

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# The (likely) highlights in 2022

- The High Court reconsiders the line between employment and independent contracting
  - > two major decisions handed down on 9 February, with important implications for how work arrangements are structured
- The May 2022 federal election – and what's to follow (or not follow)

# The High Court rules on employment status



*CFMMEU v Personnel Contracting* [2022] HCA 1



*ZG Operations v Jamsek* [2022] HCA 2

# The outcomes weren't a surprise

## *ZG Operations*

- > two longstanding owner-drivers found to be independent contractors, despite working for same lighting company for over three decades
- > key factors – investment in expensive equipment, contracting through partnerships

## *Personnel Contracting*

- > unskilled labourer engaged by agency and sent to work for builder was an employee of the agency
- > although contract labelled him a contractor, degree of subordination suggested otherwise

# But a big shift all the same

- Still necessary to use a multi-factor test to determine whether a worker is an employee
- But a majority of the court insisted test must be applied strictly according to what the parties have agreed, not the 'reality' of the relationship
- So should be easier in future to defend treating workers as contractors rather than employees, even if they have no business of their own

# Implications for businesses

- ❖ Important to review any contracts for services in light of the new decisions
- ❖ May be some greater scope now to avoid employment relationships, but beware of controls on sham contracting
- ❖ If sourcing labour through an agency, note potential impact of *Personnel Contracting* on 'Odco' model of labour hire

# What happens next?

- Highly unlikely LNP will see any problem with the decisions, despite long-term implications for revenue and retirement income
- Current political dynamics (see below) make an immediate Labor response unlikely
- But if we do see a steady shift towards contracting arrangements, will be difficult for a future Labor government to ignore

# The choice in 2022





# Policies? What policies?

- Likely to be a contest between
  - > a Liberal/National Coalition with no clear agenda or leadership on IR
  - > a resurgent Labor opposition determined to present a smaller target than in 2019, and still unclear about some of its policy priorities

# If the Morrison government is re-elected

- ❖ Certain to carry on
  - > looking for ways to marginalise or hinder unions
  - > appointing 'friends' to the Fair Work Commission
- ❖ Committed (in theory) to
  - > national registration for labour hire agencies
  - > longer greenfields agreements for major projects
  - > prohibiting religious discrimination
  - > continuing process of implementing *Respect@Work* recommendations

# If the Morrison government is re-elected (2)

## Other possibilities

- > resuscitating other abandoned proposals from Omnibus Bill on award flexibilities, enterprise bargaining, wage theft, etc
- > legislating to encourage award simplification (as opposed to leaving it to a new FWC President)
- > reviving proposals from Small Business and Family Enterprise Ombudsman on unfair dismissal

## Highly unlikely to make improving wages growth a priority

# If an Albanese government is elected

## Policy commitments include

- > redefine casual employment, as per *Skene*
- > restrict repeated fixed-term contracts (max 2 years)
- > promote secure employment, both in public sector and in government-funded work
- > work with States and Territories to extend portable leave schemes
- > 'same job, same pay' rule for labour hire
- > allow FWC to regulate wages and conditions for 'employee-like' workers

# If an Albanese government is elected (2)

- Policy commitments include (continued)
  - > 10 days' paid family and domestic violence leave
  - > criminalise wage theft
  - > improve processes for recovering unpaid wages
  - > reform pay equity laws, ban pay secrecy clauses, require large employers to report gender pay gaps
  - > implement *Respect@Work* reforms in full
  - > abolish ABCC and ROC
  - > 'restore balance' to FWC

# If an Albanese government is elected (3)

- Also likely to
  - > restrict termination of enterprise agreements
  - > introduce national labour hire licensing
  - > encourage industrial manslaughter laws
- Committed to lifting wages, but little detail yet on how
- And certain to come under union pressure to do much more than currently promising!

# Questions?

