



Fair Work
Commission

Implementing Legislative Change

The Fair Work Commission in 2024

**Australian Industry Group PIR Conference –
13 August 2024**

Presented by

**Justice Adam Hatcher
President**



The legislative agenda

Secure Jobs Better Pay Act 2022

commenced on 6 December 2022

- Single and multi-employer bargaining
- Termination of agreement provisions and sunseting "zombie" agreements
- Limiting the use of fixed-term contracts
- Prohibiting pay secrecy
- Gender equity and job security objectives
- Equal remuneration
- New expert panels
- Anti-discrimination framework
- Flexible work and unpaid parental leave requests
- Prohibiting sexual harassment
- Abolishing the ROC and ABCC

Closing Loopholes Act 2023

commenced on 14 December 2023

- Criminalising wage theft
- Regulated labour hire arrangement orders
- Enhancing delegates' rights
- Stronger protections against discrimination, adverse action and harassment
- Small business redundancy exemption in insolvency
- Conciliation conferences
- Entry to assist Health and Safety Representatives
- Amendments to Asbestos Safety and Eradication Agency Act 2013
- Presumptive provisions for first responders in the Safety Rehabilitation and Compensation Act 1988
- WHS reforms, including industrial manslaughter

Closing Loopholes No. 2 Act 2024

commenced on 26 February 2024

- Extend the FWC's powers to set minimum standards for 'employee-like' workers
- Allow the FWC to set minimum standards to ensure the road transport industry's safety
- Give workers the right to challenge unfair contractual terms
- Casual employment changes
- Civil penalties and sham contracting
- Meaning of 'employee' and 'employer' in the Fair Work Act 2009
- Enabling multiple franchisees to access the single enterprise agreement stream
- Strengthening right of entry to investigate underpayments
- FWC preparing enterprise agreement model terms and transitioning from multi-enterprise agreements
- Repeal de-merger from registered organisations amalgamation provisions
- Workplace determinations
- Right to disconnect

**Secure Jobs, Better Pay amendments -
Reforms to enterprise bargaining -
the first 12 months**



Secure Jobs, Better Pay reforms – bargaining and agreements

7 December 2022

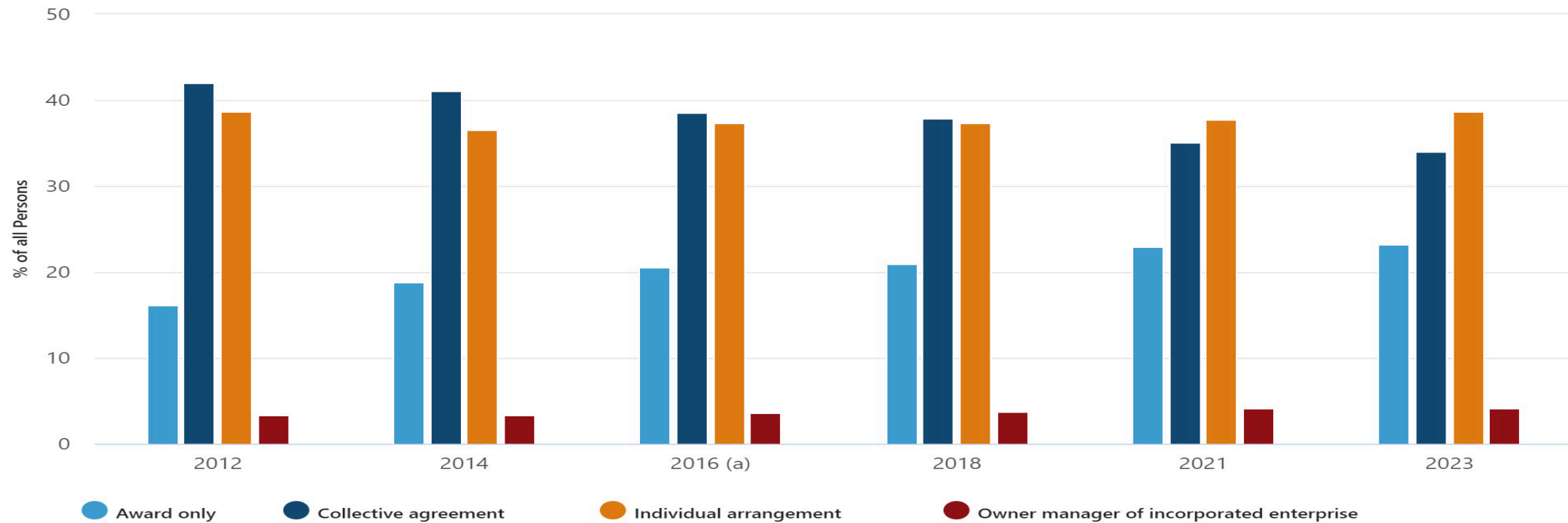
- **Sunsetting of ‘zombie’ agreements by 7 December 2023, subject to extension applications.**

6 June 2023

- **New requirement for post-PABO conciliation conference.**
 - **Changes to approval criteria re genuine bargaining requirements and the BOOT test.**
 - **Intractable bargaining declarations.**
 - **Multi-enterprise bargaining.**
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The state of enterprise bargaining

All employees, proportion of employees - method of setting pay



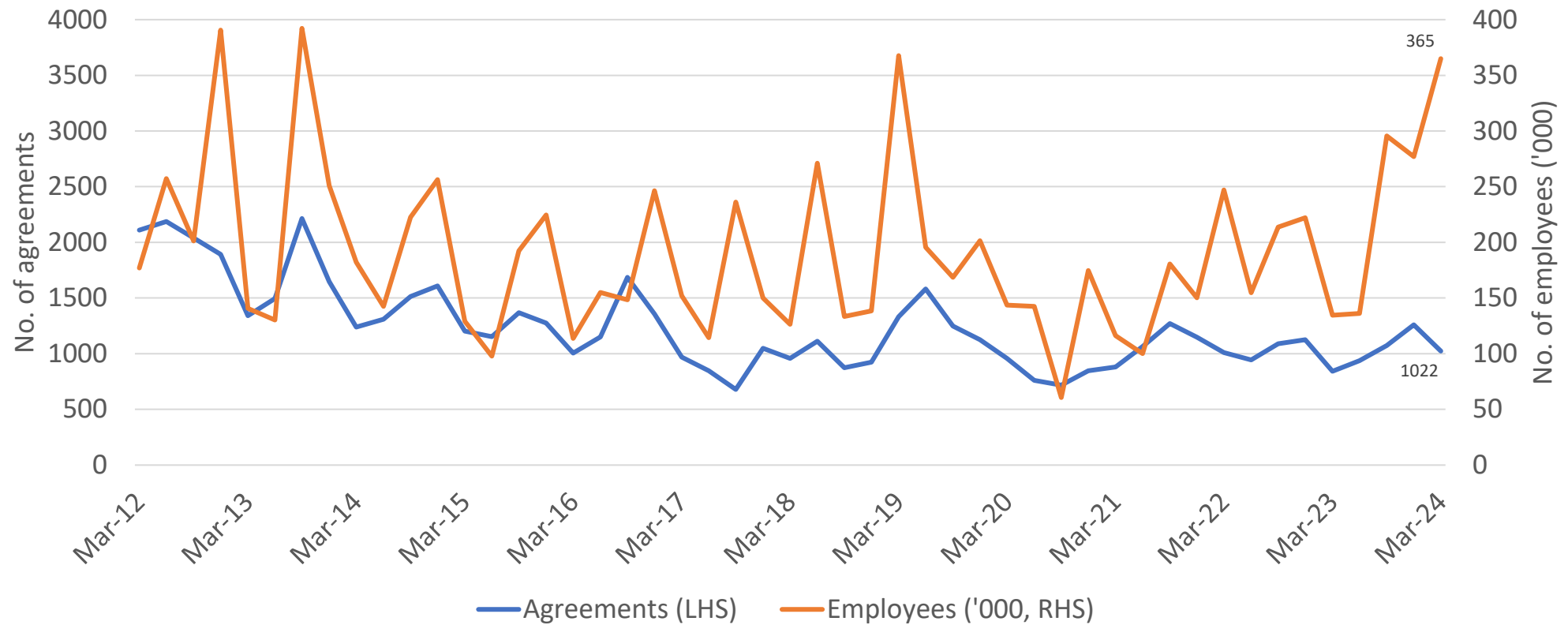
Source: Australian Bureau of Statistics, Employee Earnings and Hours, Australia May 2023



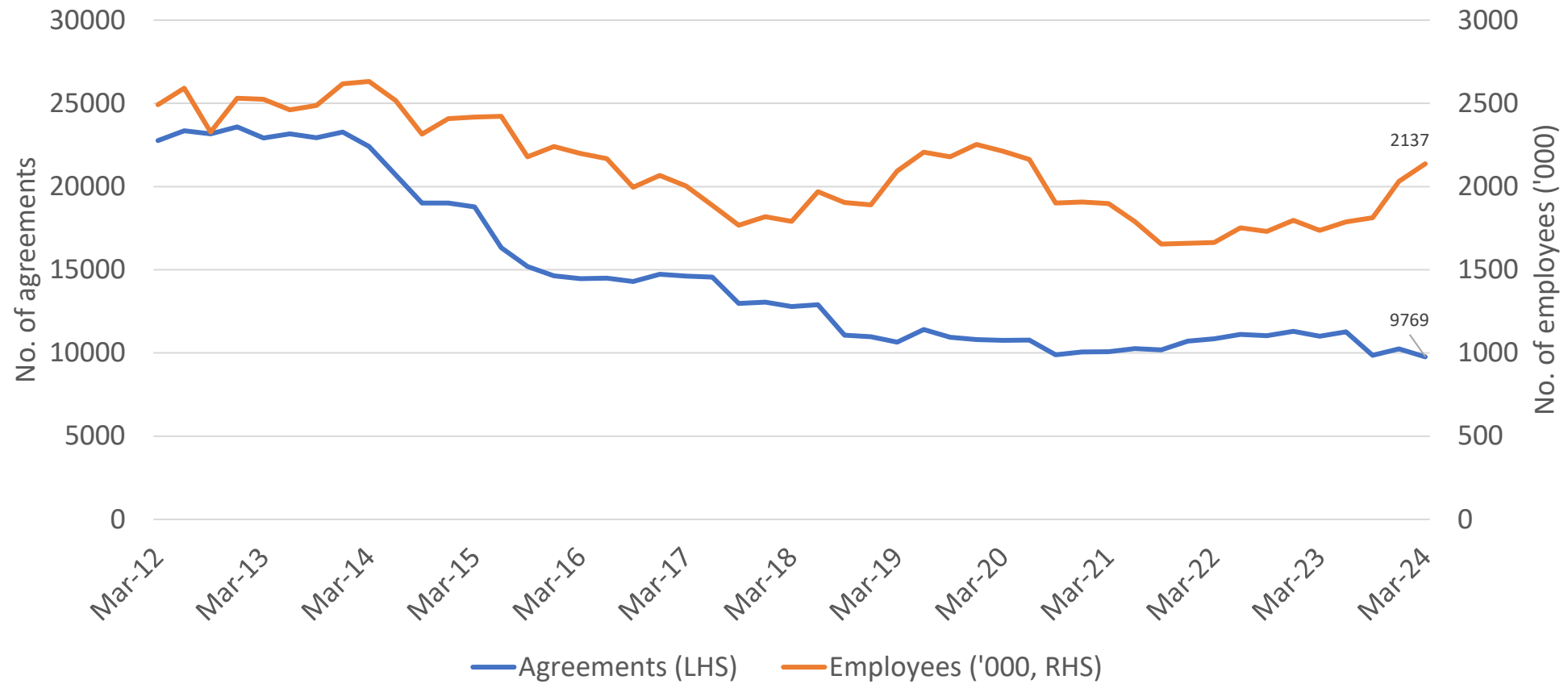
Agreement approval application lodgments

Quarter	Lodgments			% Difference	
	2023-2024	2022-2023	5yr avg	last year	5 year avg.
Q1	1132	1138	1155	-0.5%	-2.0%
Q2	1543	1266	1325	21.9%	16.5%
Q3	913	697	737	31.0%	23.9%
Q4	1201	1072	1016	12.0%	18.2%
YTD	4,789	4,173	4,234	14.8%	13.1%

Approved agreements by quarter, March quarter 2012 to March quarter 2024



Current agreements by quarter, March quarter 2012 to March quarter 2024





Increased use of s 240

- **Section 240 of the *Fair Work Act* provides that a bargaining representative for a proposed enterprise agreement may apply to the FWC for the FWC to deal with a dispute about the agreement if the bargaining representatives for the agreement are unable to resolve the dispute.**
 - **In endeavouring to resolve such a dispute, the FWC may conduct mediation or conciliation and make a recommendation or express an opinion. The FWC may also arbitrate the dispute by agreement.**
 - **Increased use of s 240 to resolve bargaining disputes sooner – up 15% in FY to date.**
 - **Successful use of s 240 to resolve a number of high-profile bargaining disputes in 2023 and 2024:**
 - **Switzer** **Chevron**
 - **Woodside** **Virgin**
 - **Esso** **DP World**
 - **That participation in s 240 is a precondition for an intractable bargaining declaration may also be driving higher use of s 240.**
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Multi-employer bargaining

Supported bargaining authorisations

- Six applications as of 6 August 2024, one granted:
- *Application by United Workers' Union, Australian Education Union and Independent Education Union of Australia* [2023] FWCFB 176 re early childhood and education sector (27 September 2023).

Single interest employer authorisations

- Since 6 June 2023, 16 applications for single interest employer authorisations have been lodged and 13 have been granted so far, all by consent.
- *Independent Education Union of Australia v Catholic Education Western Australia Limited* [2023] FWCFB 177 re Catholic school sector in WA (28 September 2023).
- Application by APESMA for an authorisation covering colliery staff at 5 mines in NSW is first opposed application – a decision is expected in coming weeks.



Approval of enterprise agreements

For 1 July 2023 to 30 June 2024:

- **Median time for all approvals = 16 days.**
- **96% of agreements approved.**
- **3% withdrawn.**
- **1% rejected.**



Zombie agreements

- **Estimated to have been some thousands of zombie agreements.**
- **‘Drop dead’ date of 7 December 2023 unless extension application made before then.**
- **Received applications for extension of 483 agreements (402 collective agreements and 81 AWAs).**
- **All these applications have now been determined.**
- **Extensions granted for 299 agreements.**
- **Longest extension was 2 years and 8 months, but most extensions well under a year.**
- **In most cases, the extension has been to allow for bargaining for a replacement agreement or to allow a period of adjustment.**
- **As of 1 July 2024, the Commission has received 39 applications for further extensions, generally for the purpose of allowing bargaining for a replacement agreement to be finalised.**



Post-PABO conferences – s 448A

Outcome	Number of matters	Percentage of matters
Conference conducted – no progress recorded	481	77.7%
Conference conducted – progress recorded	138	22.3%
Total	619	



Post-PABO conferences – s 448A

Outcome	Number of matters selecting this outcome	Percentage of matters where progress was reported*
New EA terms agreed or in principle agreement reached on key terms of the new proposed enterprise agreement	36	26%
Issues/claims advanced or resolved	106	77%
Bargaining procedural issues advanced or resolved	38	28%
Recommendations made by the Commission	22	16%
S.240 application to be made	8	6%
Ballot order revoked	3	2%
		* Percentages add up to more than 100 because more than one outcome may be recorded

Modern awards review 2023-24

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Modern awards review 2023-24

- Pursuant to a request of the Minister on 12 September 2023, the Commission has undertaken a targeted review of modern awards in relation to 4 subject matters:
 - Arts and culture sector
 - Job security
 - Work and care
 - Making awards easier to use.
- Undertook a process of publishing discussion papers and research reports, receiving submissions and engaging in consultations with parties.



Modern awards review 2023-24

- **FWC published its report on 18 July 2024.**
- **Report notes a lack of consensus on most major issues.**
- **FWC will initiate proceedings in a number of priority areas identified in the review, including:**
 - **Working from home – *Clerks – Private Sector Award 2020***
 - ***General Retail Industry Award 2020.***
 - **Part-time employment.**

Closing Loopholes Legislation

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Closing Loopholes Legislation 2023–2025

Key dates for changes affecting the Fair Work Commission

2023

15 December

- Regulated labour hire arrangements
- Workplace delegates rights for employees
- New family and domestic violence protections
- Changes to compulsory conciliation conferences in protected action ballot matters

2024

27 February

- Multiple franchisees access to single-enterprise bargaining
- Transitioning from multi-enterprise agreements
- Intractable bargaining workplace determinations
- Registered organisation withdrawal from amalgamations

1 July

- Workplace delegates rights terms for employees in modern awards, workplace determinations and enterprise agreements
- Exemption certificates for entry to investigate suspected underpayment

26 August

- Changes to definition of casual employee and pathway to full-time and part-time employment
 - Right to disconnect*
 - Provisions for 'employee-like' workers and the road transport industry
 - Collective agreements and workplace delegates rights for regulated workers
 - Determining whether a relationship is employment
 - Independent contractor 'unfair contracts' disputes
- 1 November
- Regulated labour hire arrangement orders can commence operation

2025

26 February
(or a date by proclamation)

- Model enterprise agreement flexibility, consultation and dispute terms

* Commencing 12 months later for small business

Published 27 February 2024

Regulated labour hire arrangements

(‘same job, same pay’)



Regulated labour hire arrangements jurisdiction

- **Closing Loopholes Act (No 1) provides for the Commission, on application, to make a ‘regulated labour hire arrangement order’ (RLHA order) – cannot take effect before 1 November 2024.**
- **Will apply to employees supplied by their employer to a ‘regulated host’ employer (other than a small business employer), where the regulated host has a ‘host employment instrument’ (usually an enterprise agreement) that would apply to the employees if they were employed by the regulated host.**
- **When such an order is in force, subject to certain exemptions, the employees being supplied to the regulated host (the ‘regulated employees’) must generally be paid no less than the ‘protected rate of pay’ in the ‘host employment instrument’.**
- **If application is made for an order, FWC must be satisfied that the work being performed is not for ‘provision of a service’ rather than for the supply of labour.**
- **If the criteria are satisfied, FWC must then determine whether it is fair and reasonable to make the order, having regard to a number of specified criteria.**



Applications so far

- **As at 7 August 2024, 31 applications for RLHA orders made.**
- **17 applications relate to the black coal mining industry.**
- **5 applications withdrawn, including one where the host employer agreed to directly employ the relevant labour hire workers.**
- **1 RLHA order issued, by agreement (Batchfire Callide: [2024] FWCFB 299).**
- **25 applications currently on foot:**
 - **2 listed for hearing (in October and November).**
 - **2 matters in which all parties consent to order sought.**
 - **21 listed for report back/directions (including the 13 applications lodged by the MEU and AMWU in relation to the host BHP Coal Pty Ltd).**

Delegates' rights and right to disconnect



New rights and award terms

Closing Loopholes (No 2) Act established two new statutory rights:

- **Workplace delegates' rights (s 350C).**
- **Right to disconnect (s 333M).**

In both cases, ancillary requirement for the FWC to establish new award terms by specified dates.

- **Standard delegates rights term in all awards took effect on 1 July 2024.**
- **Right to disconnect clause in process of development – will take effect on 26 August 2024.**



New protected right – workplace delegates

New section 350C creates protected rights for workplace delegates:

- **Reasonable communications with member and persons eligible to be members in relation to their industrial interests.**
- **Reasonable access to the workplace and workplace facilities.**
- **Reasonable access to paid time during normal working hours for the purpose of related training (except small businesses).**
- **Compliance with delegates' rights term in award or enterprise agreement is taken to be compliance with the section.**



Delegates' rights award clause

Standard clause in all modern awards provides for:

- **the notification procedure for election as workplace delegate.**
- **matters about which a workplace delegate may represent employees who wish to be represented, including consultation re workplace change, dispute resolution, disciplinary processes and enterprise bargaining.**
- **a right for workplace delegates to communicate with other employees, including during working hours and breaks.**
- **access to or use of workplace facilities, including room to hold discussions, noticeboard and electronic communications, provided such facilities exist and practicable for employer to provide them.**
- **reasonable access to training in paid time – up to 5 days in 1st year and one day per year thereafter, for one delegate per at least 50 employees.**



Delegates' rights award clause

A workplace delegate must:

- **comply with their duties and obligations as an employee.**
- **comply with reasonable policies and procedures of employer.**
- **not hinder, obstruct or prevent the normal performance of work.**
- **not hinder, obstruct or prevent employees exercising their rights to freedom of association.**

The clause does not require an eligible employee to be represented by a workplace delegate without the employee's agreement.



Enterprise agreements – delegates' rights term

- **Enterprise agreements made after 1 July 2024 must contain a 'delegates' rights term' – i.e. a term that at least provides for the exercise of the rights in s 350C.**
- **If the term in the agreement is less favourable than the relevant award term, the term in the agreement has no effect and the award term taken to be a term of the agreement.**



Right to disconnect

- **An employee may refuse to monitor, read or respond to contact, or attempted contact, from:**
 - (1) their employer outside of the employee's working hours,**
 - (2) a third party if the contact or attempted contact relates to their work and is outside of the employee's working hours,**

unless the refusal is unreasonable.
- **A number of matters that must be taken into account in determining whether a refusal is unreasonable.**
- **The refusal will be unreasonable if the contact or attempted contact is required under a law of the Commonwealth, a State or a Territory.**



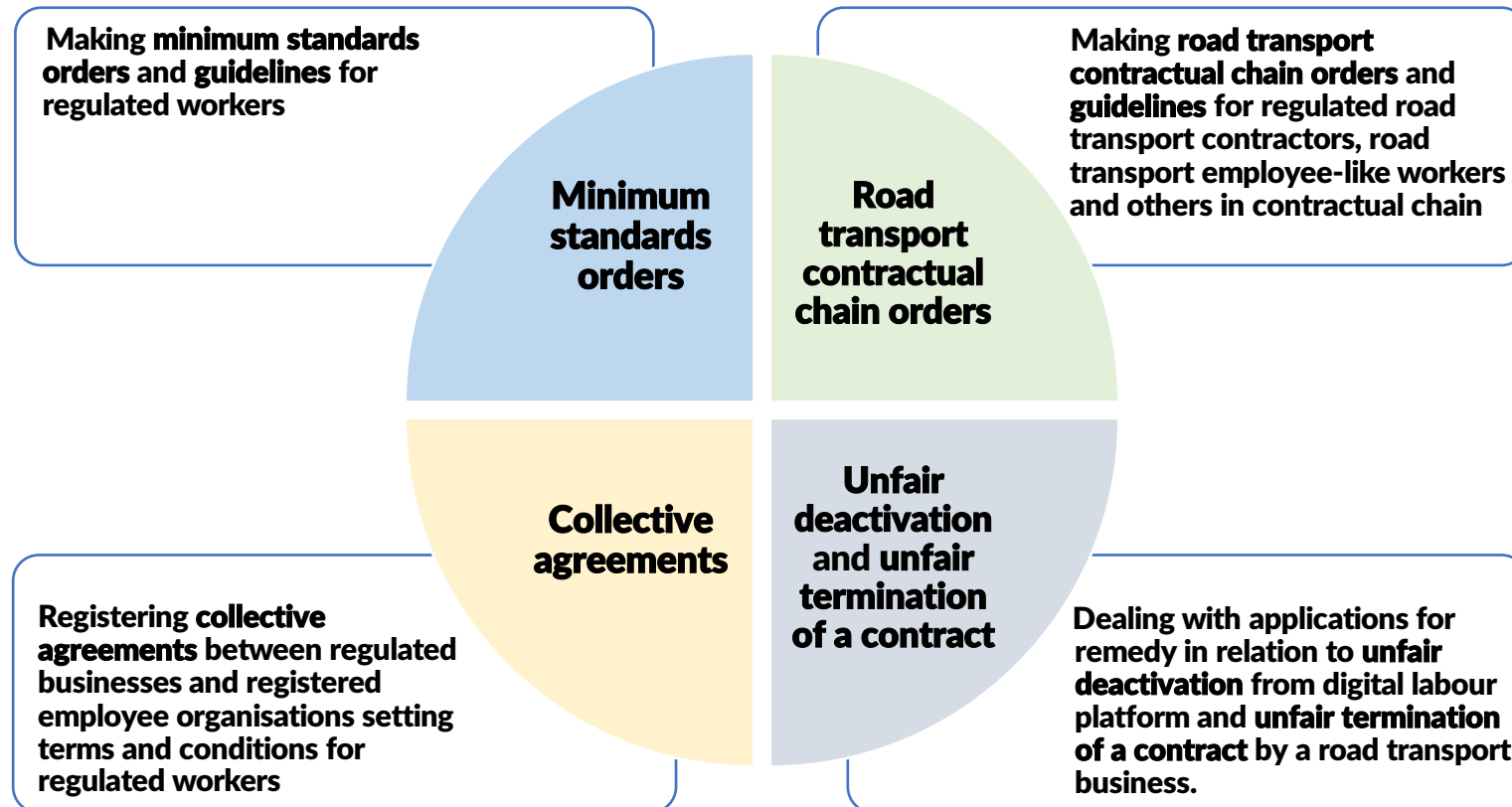
Right to disconnect

- **Act provides for the resolution of disputes in relation to the exercise of that right (including Commission powers to make stop orders)**
- **The provisions commence on 26 August 2024, but do not apply to small business employers until 12 months after commencement.**
- **Commission must, by 25 August 2024, vary modern awards to include a right to disconnect term concerning the exercise of the right to disconnect.**
- **Consultation timetable published on website.**
- **Draft award clause was published for comment on 15 July 2024.**
- **Commission must also make guidelines about the right to disconnect.**

Regulated worker jurisdictions

The regulated worker scheme

The Act confers new functions on the Commission. Changes concerning regulated workers commence on **26 August 2024** or sooner by proclamation.





Fundamental features of the scheme

Three fundamental features of the scheme as it applies to the road transport industry:

- 1. Powers of the FWC are exercised by the Expert Panel for the road transport industry.**
- 2. The ‘road transport objective’ must be taken into account in the exercise of the FWC’s powers in the Road Transport Industry.**
- 3. The Road Transport Advisory Group has been established to advise the FWC in relation to the road transport industry.**



Expert Panel for the road transport industry

The Commission must be constituted by an Expert Panel when exercising specified road transport industry powers including:

- **Making or varying modern awards relating to the road transport industry,**
- **Making minimum standards orders,**
- **Road transport contract chain orders,**
- **Road transport guidelines,**
- **Other road transport industry-related matters.**

Expert Panel must include full-time or part-time FWC members who have knowledge or experience of the road transport industry.

The road transport objective

Whenever exercising its powers, the Expert Panel 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:

- **the need for standards that ensure that the road transport industry is safe, sustainable and viable;**
- **the need to avoid unreasonable adverse impacts upon:**
 - **sustainable competition among road transport industry participants;**
 - **road transport industry business viability, innovation and productivity;**
 - **administrative and compliance costs for road transport industry participants;**
- **the need to avoid adverse impacts on the sustainability, performance and competitiveness of supply chains and the national economy;**
- **the need for minimum standards in road transport contractual chains.**



Road Transport Advisory Group (RTAG)

The Road Transport Advisory Group is an industry representative consultative body appointed by the Minister with a chairperson nominated by the FWC President.

RTAG Functions:

- **Advise the FWC on priorities for the road transport industry, including advising about the order in which the application pipeline should be dealt with.**
- **Consider and advise in relation to road transport industry applications and matters including making or varying road transport industry modern awards, minimum standards orders, contractual chain orders and guidelines.**
- **Convene and consult with subcommittee of industry participants, academics, agencies and the like for each application to assist the RTAG discharge its advisory functions.**
- **Call on the FWC to assist with research resources from time to time.**



Regulated worker jurisdictions - implementation

- **Implementation report re minimum standards powers published on 12 April 2024 on FWC website.**
- **Deals with issues such as development of information resources, case management system, internal workflows and performance standards, new forms and necessary changes to the Commission's rules.**
- **Establishing a Regulated Worker Use Group as mechanism to consult with affected businesses, workers and organisations – still open to expressions of interest at consultation@fwc.gov.au.**
- **Appointment of FWC National Practice Leader: Vice President Asbury.**
- **Development of educational resources – accessible on website.**
- **Education and consultation sessions with wide range of industry participants.**

FWC workload trends - 2023-24

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Case groupings	2023-24 lodgments	5-year average lodgments*	2023-24 compared to previous 5-year Avg (+/-)
Agreement approvals	4,789	4,234	13%
Agreement variation	61	197	-69%
Agreements - other	861	729	18%
Bullying & Sexual Harassment	987	743	33%
Bargaining	384	332	16%
Board of Reference	165	146	13%
Disputes	1,508	1,875	-20%
Elections	155	222	-30%
General Protections - Dismissal	5,478	4,682	17%
General Protections - Other	1,217	1,128	8%
Industrial Action - Protected	443	270	64%
Industrial Action – Protected (s.437)	727	636	14%
Industrial Action - Unprotected	32	29	11%
Right Of Entry	1,237	1,243	0%
Registered Organisations	1,460	1,629	-10%
Supported Wage	5,333	4,178	28%
Unfair Dismissals	14,771	13,578	9%
Other Matters	580	550	6%
Total lodgments	40,188	34,796	15%



FWC performance benchmarks

- **FWC is meeting its performance benchmarks notwithstanding the degree of change and additional workload resulting from legislative reform.**
- **50% of all matters were finalised within 31 days (against a target of 8 weeks [56 days]), and**
- **90% of all matters were finalised within 78 days (against a target of 16 weeks [112 days]).**
- **Reserved decisions: All internal targets were being exceeded, with 71% of all reserved decisions issued within 5 weeks and 91% issued within 12 weeks.**