



Fair Work
Commission

Implementing Legislative Change

The Fair Work Commission in 2024

Australian Public Transport Industrial Association –
4 July 2024

Presented by
Justice Adam Hatcher
President



Implementing reforms

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



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

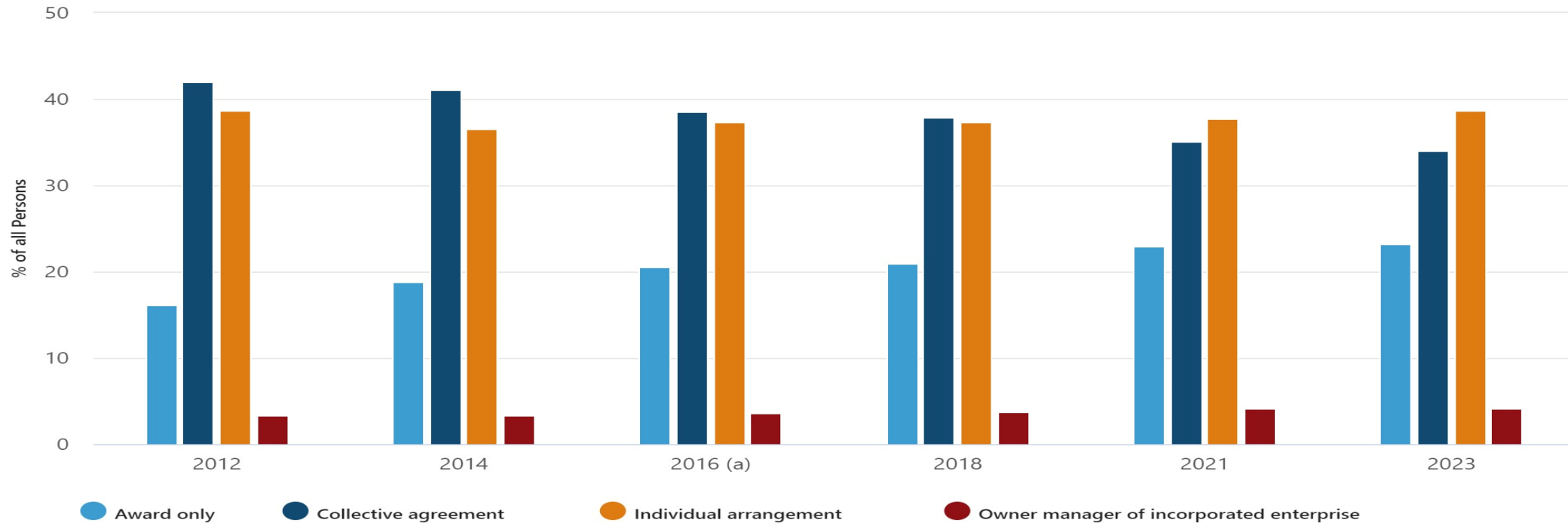
- New requirement for post-PABO conciliation conference.
 - Intractable bargaining declarations.
 - Multi-enterprise bargaining.
 - Changes to genuine bargaining requirements.
 - BOOT test altered.
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Trends in enterprise bargaining

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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	1133	1155	99.9%	98.0%
Q2	1543	1264	1324	122.1%	116.5%
Q3	913	686	742	133.1%	123.0%
Q4	1201	947	1042	126.8%	115.3%
YTD	4,789	4,030	4,263	119.0%	112.0%



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

- 3 applications so far, 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.

Single interest employer authorisations

- Since 6 June 2023, 10 applications for single interest employer authorisations have been lodged and 7 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.
 - Application by APESMA for an authorisation covering colliery staff at 5 mines in NSW is first opposed application - will be heard in late April- early May.
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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.
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Enterprise bargaining – private bus industry

- Only 18 enterprise agreements approved in bus and coach industry in last 12 months.
 - Cover 3,095 employees – 60% of these under 2 of the agreements.
 - 5 of these cover coach drivers.
 - 11 cover route bus drivers.
 - Others – admin and maintenance staff.
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Closing Loopholes Act (No 1)



Changes from 15 December 2023

Main measures affecting the FWC's functions are:

- small business redundancy exemption
- regulated labour hire arrangement jurisdiction (but earliest date for order is 1 November 2024)
- workplace delegates' rights
- protections for those subject to family and domestic violence
- technical amendments in relation to compulsory conciliation conferences in protected action ballot matters
- right of entry – assisting health and safety representatives.

Delegates' rights



Protected rights – 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.



Modern awards delegates' rights terms

- FWC required to establish a 'delegates' rights term' in all modern awards.
- Act requires that the term must 'at least' provide for the exercise of the rights in section 350C.
- Full Bench tasked with establishing such terms.
- The new terms came into operation on 1 July 2024, including in the *Passenger Vehicle Transportation Award 2020*.



Delegates' rights award clause

Clause in *Passenger Vehicle Transportation Award 2020* provides for:

- the notification procedure for election as workplace delegate
- matters about which a workplace delegate may represent employees who wish to be represented
- a right for workplace delegates to communicate with other employees
- access to or use of workplace facilities
- reasonable access to training in paid time.



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.

Closing Loopholes Act (No 2)



Timetable of major changes affecting FWC

Changes to intractable bargaining workplace determinations	27 February 2024.
Changes to definition of casual employee and pathway to full-time or part-time employment	26 August 2024
Determining whether a relationship is employment	26 August 2024
Regulated workers, road transport and gig economy	26 August 2024
Unfair deactivation and unfair termination	26 August 2024 Further 6 months for eligibility to apply
Unfair contracts	26 August 2024
Right to disconnect disputes, model terms and guidelines	26 August 2024 (12 months later for small businesses)
Model flexibility, dispute and consultation terms for EAs	26 February 2025

New definition of casual employment





New casual definition – 26 August 2024

An employee is a casual only if:

1. employment is characterised by an absence of a firm advance commitment to continuing and indefinite work
AND
2. paid the casual loading.



New casual definition – 26 August 2024

Indicators re first criterion include:

- the real substance, practical reality and true nature of the employment relationship
- firm advance commitment can be a mutual understanding
- whether, in reality, employee can elect to accept or reject work
- reasonable likelihood of future availability of work
- whether permanent employees performing same kind of work
- whether a regular pattern of work.

Right to disconnect





Right to disconnect

- The new provisions add Division 6—Employee right to disconnect to Part 2-9—Other Terms and Conditions of Employment to the FW Act.
- The changes insert a new workplace 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

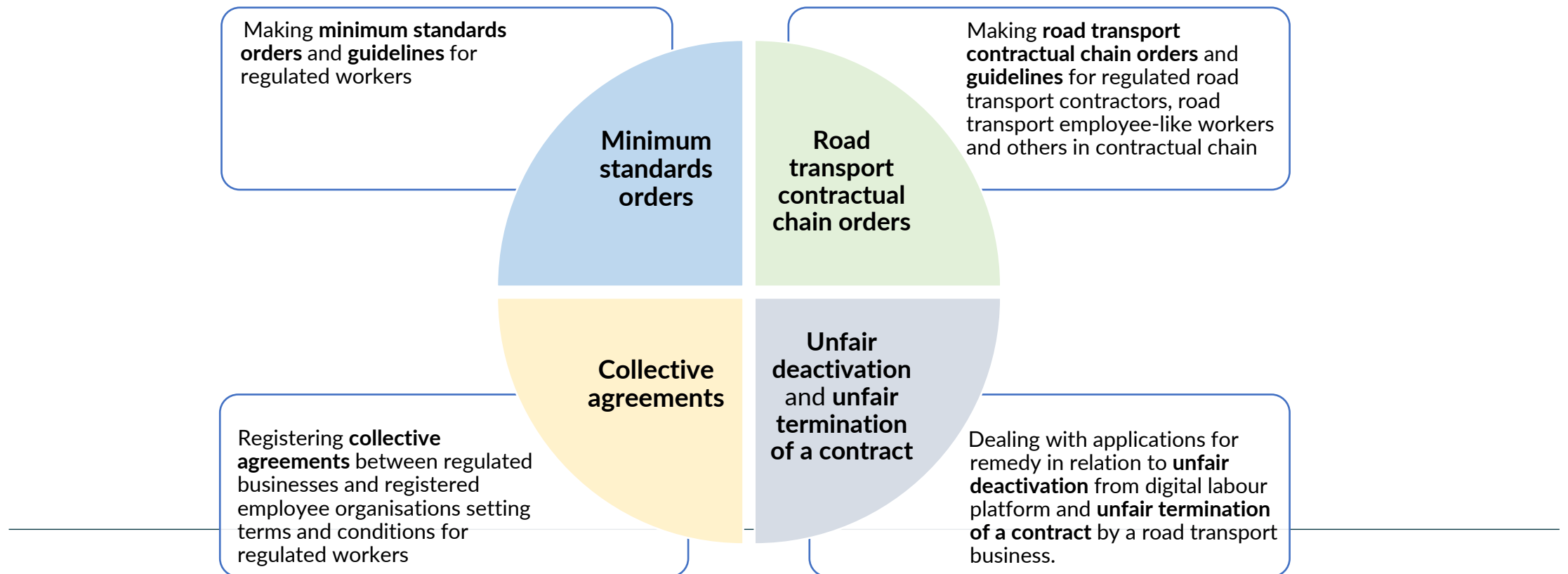
- Act provides for the resolution of disputes in relation to the exercise of that right (including Commission powers to make stop orders)
- The provisions commence on 26 August 2024, but do not apply to small business employers until 12 months after commencement.
- Commission must, by 25 August 2024, 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 to be published for comment by 15 July 2024.
- Commission must also make guidelines about the right to disconnect.

Regulated worker jurisdictions

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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.



The regulated worker scheme

Employee-like minimum standards order/guideline

- Set by Full Bench
- No role for RTAG

Employee-like
worker

Road transport
employee-like
worker

Road
transport
worker

Road transport minimum standards order/guideline

- Set by Expert Panel
- RTAG role to advise

Employee-like minimum standards order/guideline

- Set by Full Bench (unless President directs Expert Panel to deal with an ELMSO relating to the road transport industry)
- No requirement for RTAG to advise

Road transport contractual chain orders can set standards for:

- road transport contractors
- employee-like road transport workers (if FWC considers appropriate)
- persons in a contractual chain.
- Set by Expert Panel
- RTAG role to advise
- guidelines also available



All categories of regulated workers have common features

- Individuals who are party to a **services contract** by a variety of means – as an individual, or via a range of business structures (other than as a principal)
- Contract has a **‘constitutional connection’**
- Perform all, or a significant majority of work under the services contract
- Do not perform any work under the services contract as an employee



Road transport industry

A **regulated road transport industry contractor** and a **road transport employee-like worker** perform work in the **road transport industry**, which encompasses:

- Road transport and distribution industry within the meaning in the *Road Transport and Distribution Industry Award 2020*;
- Long distance operations in the private transport industry within the meaning in the *Road Transport (Long Distance Operations) Award 2020*;
- Waste management industry within the meaning in the *Waste Management Award 2020*;
- Cash in transit industry within the meaning in the *Transport (Cash in Transit) Award 2020*; and
- **Passenger vehicle transportation industry within the meaning in the *Passenger Vehicle Transportation Award 2020* (except for electric tramway, monorail or light rail).**



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.
- National Practice Leader: Vice President Asbury.

After implementation:

- Introduction of a new FWC Expert Panel for Road Transport to exercise FWC powers in the new jurisdictions.
- Introduction of a Road Transport Advisory Group (including specialist subcommittees), separate to the Commission, to advise the Commission in relation to specified matters that relate to the road transport industry.
- FWC President required to consult with RTAG about work priorities and issue directions to the FWC about this.

Other developments

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Modern awards review 2023-24

- On request of the Minister, the Commission is undertaking a review of modern awards in relation to 4 subject matters:
 - Arts and culture sector
 - Job security
 - Work and care
 - Making awards easier to use.
- Timetable for conduct of review published last year.
- Have received submissions from parties and have engaged in consultation sessions about each topic.
- Likely report will be published later this month.

FWC workload trends



Applications received: 1 July 2023 – 27 June 2024

Top 10 case categories by lodgement volume



2023-24 YTD

Applications lodged: 39,741

Case category	Lodgments	+/- 5-year avg (%)
Unfair Dismissals	14,625	+7.7%
General Protections - involving dismissal	5,419	+15.8%
Supported Wage System	5,247	+25.6%
Agreement approvals	4,755	+12.3%
Disputes	1,488	-20.6%
Right Of Entry Permits	1,234	-0.7%
General Protections - Other	1,203	+6.6%
Workplace bullying and sexual harassment	979	+31.8%
Agreements - Other	856	+17.5%
Industrial Action – Protected (s.437)	728	+14.5%



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 77 days (against a target of 16 weeks [112 days]).
 - Reserved decisions: All internal targets were being exceeded, with 69% of all reserved decisions issued within 5 weeks and 91% issued within 12 weeks.
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