Closing Loopholes Reforms

Overview of key changes

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Introduction

Following extended public discussion, the Federal Government introduced the *Fair Work Legislation Amendment (Closing Loopholes) Bill* (**the Bill**) to Parliament on 4 September 2023. Subsequently, on 7 December 2023, Parliament divided the Bill and passed a substantial portion of the reforms into law under the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**2023 Act**), including labour hire reforms, union delegate rights and wage theft. The remaining amendments – contained in the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (**2024 Act**) – subsequently passed the Parliament on 12 February 2024, including changes to casual employment, the introduction of a new "regulated workers" framework, critical changes to the intractable bargaining regime and a new right to disconnect.

Whilst the reforms have been described by the Government as having somewhat limited application (targeted towards addressing specific "loopholes"), it is apparent that they will have far-reaching impacts, for most (if not all) Australian businesses. Corrs, and our expert team of employment and labour specialists, has prepared this summary of the key changes set out by the legislation. This is an amended version of our previous updates – incorporating the significant amendments made in the House of Representatives and the Senate during the parliamentary process. The passage of the amended legislation through Parliament means that many of these changes have already come into effect, while others will soon follow.

This publication is divided into two sections — the first section below deals with reforms introduced by the 2023 Act, while the balance of the reforms contained in the 2024 Act are dealt with in the subsequent section.

Reforms introduced by the 2023 Act

"Same Job, Same Pay" to "Labour Hire Loopholes"

Although expressed as closing a loophole in a limited amount of cases, these reforms – passed by both houses of Parliament on 7 December 2023 – provide a wide discretion for the FWC to make an order that will trigger an obligation for employers to pay its employees the full rate of pay under a host's enterprise agreement, despite having an enterprise agreement in place that covers the work performed at the host's business. In our view the potential scope of orders under these provisions remains very wide despite amendments made by parliament.

The 2023 Act's "Closing labour hire loopholes" regime (rebranded from the much talked about "Same Job, Same Pay"), provides for the making of targeted "regulated labour hire arrangement orders" (**RLHA Orders**) by the Fair Work Commission (**FWC**) on application by certain specified persons. That is, the obligations will not apply at large, and will only be applicable where an RLHA Order has been made.

In essence, the basic effect of an RLHA Order is that an employer who supplies employees to a host must pay those employees at least as much as is earned by direct employees under the host's enterprise agreement.

Importantly, the framework will potentially capture arrangements beyond traditional arm's length "labour hire" arrangements, including service contractors, joint ventures and intra-group arrangements.

Applications to the FWC are expected to be made in early 2024 and considered contemporaneously with FWC consideration of guidelines on RLHA Orders. However, RLHA Orders made under the regime will not take effect until 1 November 2024.

Scope of framework

Under the framework – to be set out in new Part 2-7A of the *Fair Work Act 2009* (**the FW Act**) – the FWC's power to make an RLHA Order applies to arrangements where an employer is supplying one or more employees (***regulated employees***) to perform work for a host entity, in circumstances where an enterprise agreement, workplace determination or other "covered employment instrument" (as defined) that applies to the host (the ***host employment instrument***) would apply to the regulated employee(s) if the host were to directly employ employees to perform work "of that kind" (including work substantially of that kind). This is the initial capture of a wide variety of circumstances – subject to two limited opportunities to escape the FWC's obligation to make an order.

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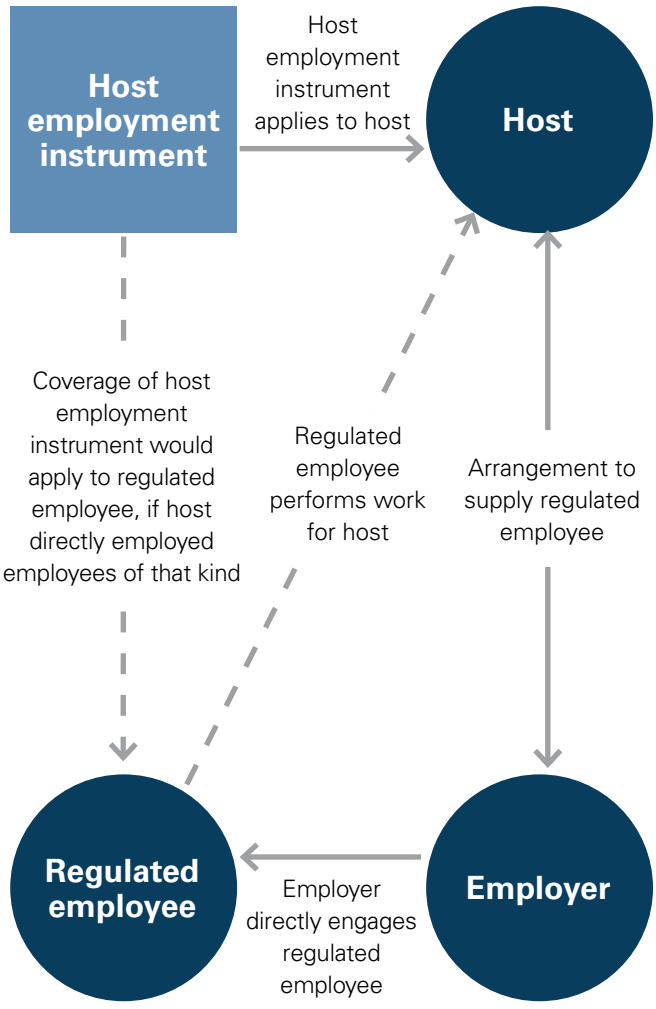
Arrangements captured by the framework



The FWC's limited discretion

The following matters are irrelevant when assessing whether the FWC will make an RLHA Order, thereby limiting the scope for exclusion from the framework:

- the basis on which the regulated employee(s) are or would be employed if the host were to employ them directly (for the purpose of assessing whether the host employment instrument would apply to them);
- whether the supply is the result of an agreement, or one or more agreements, and who any such agreement(s) is between; and
- whether the host and the employer are related entities.

If satisfied that the arrangement falls within the scope of the framework then, subject to two possible FWC's discretionary avenues to decline to make the order, an order must be made. The two possible avenues are the service contractor assessment and the "fair and reasonable" assessment. These are likely to become the major focus of litigation and are each discussed further below. Unless an employer can establish a case based on one of these FWC assessments, the FWC must make the RLHA Order on application by a regulated employee, an employee of the host, a relevant union or the host itself. However, no order can be made where the host is a small business employer, or otherwise falls outside the national system (although small businesses providing labour to a host that is not a small business employer can be captured). The FWC also has broad powers to join to an RLHA Order application additional employers (who are not named in the application) and their employees, with the effect that any subsequent order made would apply to the additional employer and the employees.

The service contractor assessment

The FWC's obligation to make an RLHA Order is also subject to the requirement that the FWC not make the order unless it is satisfied that the performance of the work is not (or will not be) for the provision of a service, rather than the supply of labour, having regard to:

- the involvement of the employer in matters relating to the performance of work;
- the extent to which, in practice, the employer directs, supervises or controls the regulated employee(s) when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work;
- the extent to which the regulated employee(s) use system, plant or structures of the employer to perform the work;
- the extent to which the employer (or another person) is or will be subject to industry or professional standards or responsibilities in relation to the regulated employee(s); and
- the extent to which the work is of a specialist or expert nature.

Importantly, this is not an exclusion based on clear definitions of the concepts of labour hire and service contractors. It is obvious that the assessment will essentially be a matter of subjective judgment apparently focussing on the work the employees are performing rather than the services provided by the employer. The factors to be considered all involve an element of degree, which must be considered in an overall sense to make an assessment best described as a broad discretion. Unions have already identified targets that include many service contractors. Limited appeal rights will be available against the discretionary assessment.

The "fair and reasonable" assessment

The requirement for the FWC to make an RLHA Order is tempered by a further overarching discretion. The FWC is not required to make an RLHA Order if satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to any of the following matters in relation to which submissions are made:

Matter	Description
Pay arrangements for regulated employees, and employees of the host	The pay arrangements that apply to regulated employees and employees of the host (or related bodies corporate of the host) including in relation to: • whether the host employment instrument applies only to a particular class or group of employees; • whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employee(s); and • the rate of pay that would be payable to the regulated employee(s) if the order was made.
History of industrial arrangements	The history of industrial arrangements applying to the host and the employer.
Relationship between provider and host	The relationship between the host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise.
Joint venture or common enterprise	If the performance of the work is wholly or principally for the benefit of a joint venture or common enterprise engaged in by the host and one or more other persons: • the nature of the host's interests in the joint venture or common enterprise; and • the pay arrangements that apply to employees of any other persons engaged in the joint venture or common enterprise (or related bodies corporate of those other persons).

Matter	Description
The terms and nature of the labour hire arrangement	The terms and nature of the arrangement under which the work will be performed, including: • the period for which the arrangement operates; • the location of the work performed under the arrangement; • the industry in which the host and the employer operate; and • the number of employees of the employer performing work for the host under the arrangement.
Anything else relevant	Any other matters the FWC considers relevant.

Note that these circumstances are not expressed as exclusions, and it is not clear how the factors will be assessed and weighed. All that can be said at this stage is that the potential scope of orders is very broad and the discretion of the FWC is effectively open-ended.

The terms and effect of an RLHA Order

If an RLHA Order is made, the employer must pay the regulated employee(s) specified in the order at no less than the "protected rate of pay" (**PROP**) for the employee(s) in connection with the work they perform for the host.

The order must specify the employer, the host, the regulated employee(s) and the host employment instrument covered by the order, as well as when the order comes into force (and may specify when it ceases to be in force). However, the order need not specify the applicable PROP, which the employer must work out itself (potentially with some help from the host, discussed below).

Obligations of the employer

Protected rate of pay

In general terms, the PROP is the "full rate of pay" (within the meaning of the FW Act) that would be payable to the employee if the host employment instrument specified in the order were to apply to the employee. As such, compliance under the framework will require the employer to appropriately classify the regulated employee(s) under the host employment instrument (having regard to the work they perform for the host), before then calculating the PROP on that basis.

Full rate of pay
- Wages
- Incentive payments and bonuses
- Loadings
- Monetary allowances
- Overtime rates
- Penalty rates
- Any other separately identifiable amounts

However, if a regulated employee is a casual and there is no "covered employment instrument" (e.g. an enterprise agreement or workplace determination) applying to the host that provides for work of that kind to be performed by casual employees, then the PROP will be the "full rate of pay" that would be payable if the employee was engaged on a permanent basis, plus an additional 25% of the "base rate of pay" that would be payable on those circumstances. This is likely to create significant challenges in circumstances where the host's employment instrument provides for a "rolled-up" salary which is intended to cover a wide range of benefits.

Interaction between the obligation to pay the PROP and other instruments

The Act confirms that the obligation to pay no less than the PROP applies "despite" any provision of an applicable fair work instrument (such as an enterprise agreement) or the employee's contract of employment that provides for a rate of pay for the regulated employee that is less than the protected rate of pay for the regulated employee. Otherwise, the legislation does not go into any further detail to address the interaction between the PROP and other applicable instruments, including the availability of set-off and the treatment of non-monetary benefits.

Alternative PROP

In circumstances where an RLHA Order has been made or applied for, the employer, the host, a regulated employee or a relevant union may apply to the FWC for an "alternative PROP order" requiring the host to pay a regulated employee the PROP that would apply if the "host employment instrument" covered by the order were instead replaced by another covered employment instrument applying to the host (or a related body corporate).

Effectively, this enables the FWC to substitute the host employment instrument specified in the RLHA Order or application for the order (as applicable) with a different employment instrument.

The FWC must not make the order unless satisfied that it would be unreasonable for the requirement to pay no less than the standard PROP to apply in connection with the work (including, for example, because the rate would be insufficient or would be excessive). Additionally, before doing so, the FWC must consider the views of other persons who could have applied for the order, the parties to whom the covered employment instrument applied, and any organisation entitled to represent the industrial interests of those persons.

In deciding whether to make the order, the FWC must have regard to the following matters:

Matter	Description
Coverage of host employment instrument	Whether the host employment instrument covered by the RLHA Order applies only to a particular class or group of employees.
Application of host employment instrument in practice	Whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employee.
Parties' views	Any views expressed by any persons or organisations to the FWC.
Rate of pay if alternative PROP order made	The rate of pay that would be payable to the regulated employee in connection with the work if the order were made.
Anything else relevant	Any other matters the FWC considers relevant.

Obligations of the host

Once an RLHA Order is in force, the employer may, if it reasonably considers it lacks all necessary information to work out the PROP for one or more regulated employees, request in writing that the host provide it with specified information needed. The host must then comply with the request as soon as reasonably practicable and in any event, within such a period as would reasonably enable the employer to comply with the obligation to pay the PROP in relation to the employee(s).

The Act confirms that the host may comply with the request simply by providing the employer with the information requested, or alternatively, by setting out the applicable PROP for the employee(s) for each relevant pay period for them. It is unclear whether a host simply providing a copy of its enterprise agreement will be sufficient to satisfy the host's obligations.

If the employer then reasonably relies on the information provided by the host in accordance with the request, and fails to pay the PROP because the information provided is incorrect in a material particular, the employer is not in breach of its obligation to pay the PROP.

It is noteworthy that the host's obligations are contained in a civil remedy provision, such that any breach by the host may attract civil penalties. It is not clear whether — or to what extent — the provision of incorrect information by the host will amount to a contravention of its obligations.

Furthermore, there are obligations on hosts who are subject to an RLHA Order that has been made, and then an additional employer (not named in the order) supplies employees to perform work for the host in circumstances where the host employment instrument would apply to the employees if the host were to directly employ employees to perform work "of that kind". In these circumstances, the host must proactively apply to the FWC for a variation to the RLHA Order to cover the new employer and its employees. The FWC must then vary the order to include the new employer and the employees, if satisfied of the requirements for the making of an RLHA Order.

Exemption from the obligation to pay the PROP

Generally, the obligation to pay the PROP will not apply where the employee performs, or is to perform, work for the host for up to three months. The FWC can reduce or vary this period. This is apparently intended to avoid impacting labour hire arrangements for surge work and temporary replacements.

FWC determinations

However, the application of the default exemption period is subject to the FWC's power to, by way of determination, increase or decrease the duration of the exemption period from three months (or even to determine that no exemption period apply). Further, the FWC may determine that a specified period of more than three months, starting on a specified day of the year in specified consecutive years, is a "recurring extended exemption period" for the host in relation to a specified kind of work to which the RLHA Order relates. This will ensure that seasonal requirements for additional labour can be fulfilled.

The FWC may only make a determination on application by the regulated host, the employer, a regulated employee or a relevant union. Before deciding whether to make a determination, the FWC must seek the views of any other person who could have applied for the determination.

The Commission may then make the determination only if satisfied that there are exceptional circumstances that justify making it, having regard to the following matters:

Seasonal or short-term work
Whether the purpose of the proposed exemption period relates to satisfying a seasonal or short-term need for work

Industry
The industry in which the work is performed or to be performed

Circumstances
The circumstances of the host and the employer

Views
The views of any persons who could have applied for the determination

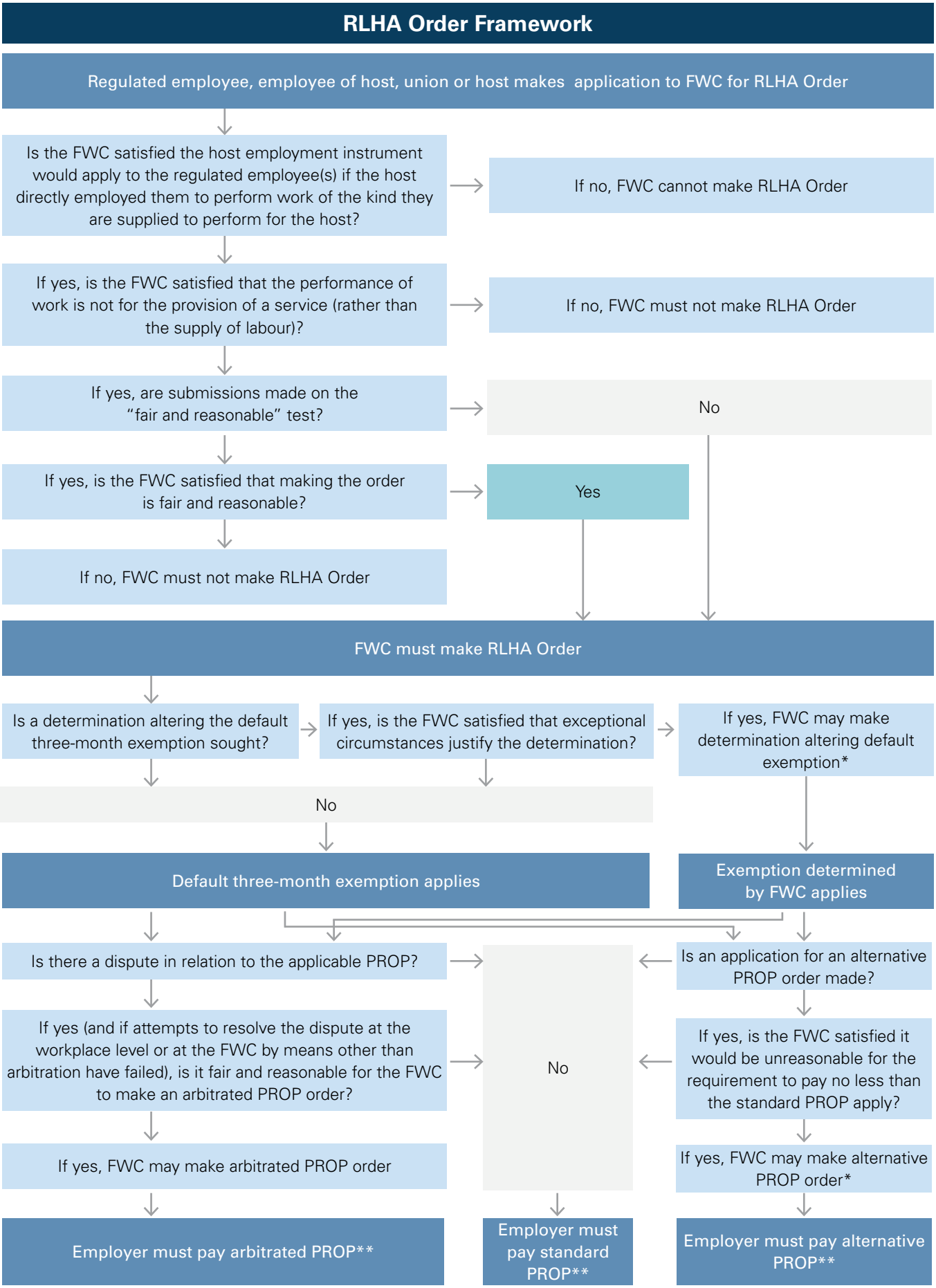
Duration of period
The principle that the longer the period to be specified, the greater the justification required

Other relevant matters
Any other matter the FWC considers relevant

Disputes and arbitrated PROP orders

If an RLHA Order has been made, then any dispute in relation to the Part 2-7A (including in relation to what the PROP is or whether the regulated employee(s) have been paid the PROP) may be resolved by application to the FWC, failing initial attempts to resolve the dispute by way of discussions at the workplace level between the parties.

In the first instance, the FWC is to deal with the dispute by means other than arbitration (except in exceptional circumstances); otherwise, the FWC may make an arbitrated PROP order determining how the rate of pay at which the employer must pay the employee in connection with the work is to be worked out. The FWC must not make such an order unless it considers it would be fair and reasonable to do so. Arbitrated orders can only be made retrospectively if the parties agree to the FWC arbitrating the dispute.



*The FWC may also make these orders if a valid application for an RLHA Order has been made, but not yet finally determined.
**Subject to applicable exemption

Anti-avoidance provisions

Consistent with the Act's objective, the framework is reinforced by a number of anti-avoidance measures. Those provisions penalise businesses (including by way of pecuniary penalties) for carrying out schemes to prevent the making of an RLHA Order, and conduct designed to attract an applicable exemption from the obligation to pay the PROP.

Arrangements specifically captured by the provisions include the following:

Arrangements prohibited under anti-avoidance provisions

Schemes preventing or avoiding RLHA Order

Schemes for the sole or dominant purpose of preventing the FWC from making, or for the sole or dominant purpose of avoiding the application of, an RLHA Order

Employer engages other employees

Employer engaging employees on a short-term basis for the purpose of avoiding paying the PROP under an applicable exemption

Host enters into other labour hire arrangements

Host sources labour hire workers on a short-term basis for the purpose of avoiding the PROP under an applicable exemption

Employer engages independent contractors

Employer dismisses employee and engages independent contractor for the purpose of avoiding paying the PROP

It is noteworthy that these civil remedy provisions will apply retrospectively to conduct engaged in on or after the day the Bill was introduced to Parliament (4 September 2023).

Rights and protections for union delegates

Union delegates' rights

The Act confers significant additional rights on "workplace delegates", being persons appointed or elected in accordance with the rules of a union to be a delegate or representative (however described) for members of the union who work in a particular enterprise (whether as employees or regulated workers). These include the following:

Rights of workplace delegates

Right to represent industrial interests

Workplace delegates are entitled to represent the industrial interests of union members and any other persons eligible to be members, including in disputes with their employer.

Right to reasonable communication

Workplace delegates are entitled to reasonable communication with union members and any other persons eligible to be members, in relation to their industrial interests.

Right to reasonable access to workplace facilities

Workplace delegates are entitled to reasonable access to the workplace and workplace facilities where the enterprise is being carried on, for the purpose of representing the industrial interests of union members and any other persons eligible to be members.

In the case of regulated workers, reasonable access to workplace facilities is assessed having regard to the actual facilities available at the regulated business.

Right to reasonable access to paid leave

Unless the employer is a small business employer, workplace delegates are entitled to reasonable access to paid leave for the purpose of training related to their role of representing the industrial interests of union members and any other persons eligible to be members.

In determining what is "reasonable" for the purposes of workplace delegate rights, regard must be had to the size and nature of the enterprise, the resources of the employer of the workplace delegate, and the available facilities at the enterprise.

In addition to the above statutory rights, all modern awards are set to be updated to include a delegates' rights term, while all enterprise agreements and workplace determinations made after 1 July 2024 will be required to include a delegates' rights term for workplace delegates to whom the agreement or determination applies. A delegates' rights term is defined as a term in a fair work instrument that provides for the exercise of rights of workplace delegates. If the delegates rights term in an enterprise agreement is less favourable than the term(s) contained in one or more applicable modern awards at the time the agreement is approved, the most favourable term of those modern awards is taken to be a term of the agreement (meaning that it cannot be traded away as part of the usual "better off overall" analysis).

This is in contrast to the usual FWC agreement approval process, whereby a term of an enterprise agreement may be less beneficial than the corresponding term of the modern award, provided that the relevant employees are better off overall if the agreement applies to them.

Union delegates' protections

The Act also provides the following protections for employees who become union delegates, when such employees are acting in the capacity of a workplace delegate as defined in the Act. The protections apply to workplace delegates representing the interests of employees and representing the newly introduced "regulated workers".

Protections for workplace delegates

Dealing with workplace delegates

An employer must not unreasonably fail or refuse to deal with the workplace delegate

Making representations to workplace delegates

An employer must not knowingly or recklessly make a false or misleading representation to the workplace delegate.

Exercise of rights of the workplace delegate

An employer must not unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under this Act or a fair work instrument.

If a workplace delegate alleges that an employer failed or refused to deal with them, the onus shifts to the employer to prove the reasonableness of their acts or omissions with regards to the above protections (therefore allowing employers to undertake reasonable management action if conducted lawfully). For delegates that fall within the meaning of a "regulated worker", the onus of proving reasonableness rests with the business that engaged the workplace delegate under a services contract or the business that arranged for, or facilitated entry into, the services contract under which the workplace delegate performs work.

These protections also do not apply in relation to conduct that is required under a law of the Commonwealth or a State or Territory.

A breach of these new provisions will attract a civil penalty consistent with the penalty applying to other general protections breaches.

Right of entry changes (assisting health and safety representatives)

Under Senate amendments introduced shortly before the passing of the 2023 Act, union officials will enjoy a relaxed entry regime when responding to requests for assistance from health and safety representatives.

The Act removes various existing entry requirements (including requirement to give notice of entry, to produce an entry permit or to enter during working hours only) for union officials exercising a State or Territory OHS entry right in the course of assisting a health and safety representative in response to a request made by the representative. However, the changes are complemented by provisions which deem such union officials to be subject to prohibitions on permit holders – such as hindrance and obstruction, misrepresentation and unauthorised use or disclosure of information – even in circumstances where the official is not a permit holder.

Wage theft

With underpayment cases continuing to make headlines for all the wrong reasons, there is no surprise that wage compliance remains an area of focus. Accordingly, the Act introduces a new criminal offence for wage theft, with stiff penalties for non-compliance.

An employer commits wage theft if they intentionally fail to pay an amount required under the FW Act, a fair work instrument, a transitional instrument or superannuation legislation, in full when due.

For corporations, wage theft is punishable by fines of up to three times the underpayment amount or 25,000 penalty units (currently $7.825 million), whichever is greater.

For individuals, the maximum penalty is the greater of three times the underpayment amount or 5,000 penalty units (currently $1.565 million), and/or 10 years' imprisonment.

These punishments are all in addition to rectification costs of the underpayments and can be imposed on conviction.

The Fair Work Ombudsman (**FWO**) however, may enter into a cooperation agreement with an employer, the effect of which is that the FWO must not refer the employer to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence.

The FWO must have regard to certain matters in deciding whether to enter into such an agreement, including whether there has been full, frank and voluntary disclosure by the employer; the employer's cooperation with the FWO; and the nature and gravity of the employer's conduct, its history of compliance and the circumstances.

Helpfully, there is to be publication by the FWO of a compliance and enforcement policy, to include guidelines for matters such as when the FWO will accept enforceable undertakings in place of prosecutions and the use of cooperation agreements (e.g. where there is voluntary, frank and complete disclosure of underpayments and subsequent cooperation with the FWO). It should not be assumed that the FWO will enter cooperation agreements lightly, or that they will be guaranteed in the absence of significant disclosure and cooperation.

Amendments to post-PABO conciliation conference regime

The Act seeks to remedy an apparently unintended consequence of the compulsory post-PABO conciliation regime introduced by the *Secure Jobs, Better Pay* legislation.

Specifically, unions have complained that under the regime, non-compliance with an order to attend a post-PABO conference by *any* employee bargaining representative will render subsequent employee claim action unprotected, even if that non-compliance is by a bargaining representative who did not apply for the PABO.

As a result, the amendments clarify that only non-compliance by the employee bargaining representative who applied for the PABO will result in subsequent industrial action being unprotected.

Work health and safety: Industrial manslaughter and increased penalties

The Act introduces changes to the *Work Health and Safety Act 2011* (Cth) (**WHS Act**). The WHS Act applies to the Commonwealth, public authorities and non-Commonwealth licensees.

The changes align with recent amendments made by Safe Work Australia to the Model Work Health and Safety Act (upon which the WHS Act is based).

Industrial manslaughter offence

Creating an industrial manslaughter offence under the WHS Act follows several other jurisdictions (Queensland, Victoria, Western Australia, the Northern Territory and the Australian Capital Territory (and soon likely to be South Australia)) which, over a number of years now, have introduced the offence.

Under the WHS Act, the offence will be committed by a "person conducting a business or undertaking" (**PCBU**), or an officer of a PCBU, if they:

- intentionally engage in conduct that:
  - breaches a duty owed under the WHS Act; and
  - causes (i.e. significantly contributes to) the death of a person; and
- were reckless, or negligent, as to whether that conduct would cause a death.

The Act also permits a court to find a defendant guilty of either a category 1 or category 2 offence if they are not satisfied that a guilty verdict for industrial manslaughter (referred to as the "alternative offence") is made out.

The maximum penalty for the offence will be $18 million for a body corporate and 25 years imprisonment for an individual, including an officer. These penalties are among the highest nationally for industrial manslaughter offences.

There will be no time limitations to commence proceedings and alternative verdicts will be available (i.e. if proceedings for the industrial manslaughter offence are not successful, a finding of guilt for another less serious offence is possible).

This offence will not come into effect until 1 July 2024.

Increased penalties for existing offences

The Act increases penalties for all existing offences under the WHS Act by moving stated penalties to a tiered model to allow for annual increases reflecting the consumer price index.

However, a significant increase is made for the category 1 offence, which prior to the introduction of an industrial manslaughter offence, has to date been the most serious offence under the WHS Act. For example, the maximum penalties for a category 1 offence for a PCBU will increase from $3 million to $15 million; and, for an officer, from $600,000 and 5 years imprisonment to $3 million and 15 years imprisonment.

Discrimination

The Act includes "subjection to family and domestic violence" as a new "protected attribute" under the general protection from discrimination in section 351 of the FW Act.

The Act also outlaws enterprise agreement and award terms that discriminate against an employee because they are subject to family and domestic violence.

Otherwise, the Act does not contain any amendments to the discrimination and adverse action regime, despite the Department of Employment and Workplace Relations inviting consultation on reforms to that regime last year, including strengthened protections for employees engaging in lawful industrial activity and changes to vicarious liability provisions.

Small business redundancy counter-exemption

While small businesses generally enjoy a broad exemption from redundancy pay obligations under the NES, the Act introduces an exception to that rule.

In broad terms (and subject to various technical requirements), an employee of a small business which is bankrupt or in liquidation would be entitled to redundancy pay if retrenched in circumstances where the employer previously employed 15 or more staff, but in connection with the bankruptcy or liquidation has implemented redundancies such that it now falls within the definition of a small business. The apparent logic underpinning the change is to ensure that in situations where large businesses stagger the implementation of their redundancies across multiple stages when winding down, such that at the final stage there are less than 15 employees, the redundancy entitlements of the surviving pool of employees are preserved.

Reforms introduced by the 2024 Act

Casual employment

The new definition

Significantly, the 2024 Act repeals and replaces the definition of "casual employment" in section 15A of the FW Act, shifting away from the contractual terms of engagement as determinative of the employment relationship (as espoused by the High Court in the decision of *WorkPac Pty Ltd v Rossato* [2021] HCA 23) to the "practical reality" of the arrangement.[1]

The starting point under the new definition is that an employee is casually employed only if both of the following are satisfied:

- the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and
- the employee is entitled to a casual loading (or specific rate of pay for casual employees) under an applicable fair work instrument or the contract of employment.

The Act sets out a list of indicia to be considered when assessing whether there is a firm advance commitment to continuing and indefinite work, much like a multi-factor test which requires an objective assessment of the totality of the relationship.

It confirms that the absence (or presence) of a firm advance commitment is to be assessed on the basis of the "real substance, practical reality and true nature" of the employment relationship, and recognises that such a commitment need not rise to the height of a contractual term (or variation thereof) and may instead stem from a "mutual understanding or expectation" between the parties which may be inferred from their conduct after entering into the contract or from how the contract is performed.

This is a significant departure from the previous definition, which confined the prism through which the presence or absence of a firm advance commitment is assessed to the terms of engagement, and expressly excluded consideration of subsequent conduct by the parties following the formation of the contract. The complexity when applying the definition and lack of certainty as to the character of the relationship from the outset will most likely lead to unintended consequences, with employers potentially taking steps to mitigate the risks inherent with this changed definition (including a reduction in the engagement of casual employees or change to work practices with respect of casuals).

Further, while the Act retains the central concept of a "firm advance commitment", the new definition additionally provides that regard is to be had to the following considerations (which indicate the **presence** of a firm advance commitment) in assessing whether such a commitment exists. The Act confirms that while all of these matters must be considered, they do not all need to be satisfied:

Whether the employer can elect to offer or not offer work, and whether the employee can elect to accept or reject work (and whether this occurs in practice)

Whether, having regard to the nature of the employer's enterprise, it is reasonably likely that continuing work of that kind will be available in the future

Whether there are permanent employees performing the same kind of work in the employer's enterprise that is usually performed by the employee

Whether there is a regular pattern of work for the employee

Whether a pattern of work is "regular" will create challenges as the Act provides that a pattern will be considered regular even if it is not "absolutely uniform" and includes some fluctuation or variation over time. However, under an amendment to the legislation made in late November 2023, the Act now includes a legislative note explicitly stating that it is possible for a person to work regular hours and nevertheless meet the definition of casual employee.

There is a limited exception to the definition which carves out academic or teaching staff of higher education institutions employed on a fixed- or maximum-term basis. Importantly, this confirms that other fixed- and maximum-term employees may be a casual employee under the definition.

1 See our insight on this decision, *Rossato – High Court clears the air* – https://www.corrs.com.au/insights/rossato-high-court-clears-the-air.

The need for a specified event as a precondition to a change in status

Importantly, a person who commences employment as a casual employee (pursuant to the new definition) will remain a casual employee until the occurrence of a "specified event". The Act contemplates four such events:

Specified events

1. Change of status under employee choice framework

The employee's employment status is changed to permanent employment under the new employee choice framework.

2. FWC order under employee choice framework or fair work instrument

The employee's status is changed by order of the FWC under new section 66MA (which empowers the FWC to arbitrate disputes under the new employee choice framework), or existing section 739 (which establishes the FWC's jurisdiction to deal with disputes in accordance with dispute resolution clauses in fair work instruments, including by arbitration).

3. Change of status under fair work instrument

The employee's employment status is changed under the terms of an applicable fair work instrument.

4. Alternative employment

The employee accepts an alternative offer of employment (other than as a casual) by the employer and commences work on that basis.

The "employee choice" framework

The new "employee choice" regime replaces the existing casual conversion framework, including both the employer's obligation to proactively offer conversion after 12 months' service and the residual right of the employee to request conversion every 6 months thereafter. This is a significant expansion of the existing avenues available to casual employees to seek conversion to full-time or part-time employment, and on its face could lead to ongoing requests for conversion and disputation about the outcomes of such requests.

The basic operation of the framework is set out below:

Casual employee issues written notification	Subject to not being currently engaged in a dispute under new section 66M, or having certain notification or dispute resolution events occur within the preceding six months, casual employees may give a written notification to their employer seeking conversion to permanent employment after six months (or 12 months for small business employees) of commencement of their employment, if the employee believes they no longer meet the definition of "casual employee" in section 15A (1) to (4).
▽ Employer consults with employee	The employer must consult with the employee about the notification, and should it intend to accept the notification discuss the implications of that conversion with the employee.
▽ Employer must respond in writing within 21 days accepting or refusing request	The employer may only refuse the request on the basis either that: • The employee still meets the definition of "casual employee" having regard to matters in section 15A(1) to (4). • There are a fair and reasonable operational grounds for not accepting the notification. These grounds include that substantial changes would be required to the way the employer's enterprise is organised; that there would be a significant impact on the operation of that enterprise; or that substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene the terms of an applicable fair work instrument. • Conversion would result in the employer not complying with a recruitment or selection process required by a federal, state or territory law. The employer must give reasons for the refusal.
▽ Employee may lodge FWC dispute	The employee may refer the dispute to the FWC, who can resolve the dispute by means including arbitration (under section 66MA) (but must not make an order unless it considers that it would be fair and reasonable to do so).

While the new regime retains some limited features of the old casual conversion provisions, there are a number of key differences between the two. A comparison is below.

Comparison between old and new casual conversion frameworks		
Feature	Old conversion request framework	New employee choice framework
Trigger for assessment	When requested by employee provided employee has at least 12 months' service (requests can be made once every six months).	When requested by employee (in effect, requests can be made every 6 months; generally, employees must have 6 months' service except for small business employees, who must have 12 months' service).
Reference period for assessment	Six-month period preceding trigger for assessment.	Six-month period preceding trigger for assessment.
Core focus	Regular pattern of hours. Reasonable grounds.	Firm advance commitment as per section 15A. Fair and reasonable operational grounds.
Dispute resolution	At the workplace level via discussions between the parties. A party to the dispute may refer the dispute to the FWC. FWC may arbitrate the dispute with the consent of the parties (after exhausting other means for dispute resolution such as mediation or conciliation, or if in the first instance there were exceptional circumstances).	At the workplace level via discussions between the parties. A party to the dispute may refer the dispute to the FWC. FWC may arbitrate the dispute (after exhausting other means for dispute resolution, or if in the first instance there were exceptional circumstances). However, the Act removes the existing requirement for the parties to consent to FWC arbitration.

The new arbitration provisions set out a number of orders the FWC may consider appropriate to make if arbitrating a dispute, including that the employee be treated as a full-time or part-time employee from the date of the first full pay period that starts after the day the order is made (or a later date if the FWC considers it appropriate), or that the employee continue to be treated as a casual employee.

Any order must be fair and reasonable, and not inconsistent with a provision of the FW Act or an applicable fair work instrument.

Employers should also note that the Casual Employment Information Statement will be updated, and there will be an obligation to provide it to all casual employees (continuing and new casual employees) as soon as practicable:

- on commencement of employment;
- after they have been employed for 6 months;
- after they have been employed for 12 months; and
- at the end of any further 12-month period for which the casual has been employed.

The operation of the changes in practice

The apparent intention behind the "specified event" safeguard is to ensure that employers are not exposed to backpay claims on the grounds of misclassification, while preserving the choice of casual employees to remain engaged as such if they wish (provided that they are truly a casual employee within the meaning of the new definition).

However, there appears to be a tension between, on the one hand, requiring the occurrence of a specified event to trigger a change in the status of an employee who commenced employment as a casual; and on the other, relying on post-contractual conduct to determine an employee's status in the first place.

Practically, it would appear that there is scope for an employee initially engaged as a "casual" to, in substance, fail the new definition in section 15A — with the result that they would legally be regarded a permanent employee from the outset and in the absence of any specified event. This makes it unclear what the outcome may be where an employee refuses an offer to change status, but they are working an arrangement such that they did not meet the revised definition of casual employment in the first place. In our view, it would be a perverse outcome if an employee was able to challenge the nature of the relationship at a later point in time without taking into account offers to change status made to the employee.

Transitional provisions

These changes commence on 26 August 2024. Under transitional arrangements, existing casual employees will initially continue to be taken to be casually employed following commencement, although the new definition will apply to them and their status will be subject to change under the new employee choice framework.
It should also be noted that any pre-commencement period of employment will not count in assessing eligibility for the employee choice framework in accordance with minimum service requirements. Further, any pre-commencement conduct is to be disregarded in assessing status under the new framework.

In addition, the pre-existing casual conversion regime will continue to apply to existing casual employees for a limited transitional period (generally, six months) post-commencement, to allow them to access conversion rights under the old regime when reaching key milestones under it (such as 12 months' service, when the employer must proactively offer conversion; or after a period of six months' service which enlivens the right to make a residual conversion request).

In essence, the effect of this is that pre-existing casual employees' rights under the old casual conversion framework are preserved until such time as they can be expected to satisfy the minimum service requirements to access the new employee choice framework (being 26 February 2025 for non-small business employers).

Redefining employment

For the first time, the Act introduces a statutory definition of "employee" and "employer" into the FW Act. The Act includes a fluid definition of employee and employer tied to the "ordinary meaning" at common law. The fluid definition only operates for the purposes of the FW Act.

This definition will override the High Court decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 which required the characterisation of an employment relationship to be determined by the parties' contract.[2]

The Act provides that, to determine whether an individual is an "employee" and a person is an "employer" for the purposes of the FW Act, there be an assessment of the "real substance, practical reality and true nature" of the relationship between the individual and the person.

To ascertain the "real substance, practical reality and true nature" of this relationship:

- the totality of the relationship must be considered; and
- in considering the totality of the relationship, regard must be had to:
  - the terms of the contract governing the relationship; and
  - other factors including, but not limited to, how the contract is performed in practice.

This new definition has the potential to affect many independent contractors and businesses, and many will be outside of the gig economy.

The "opt-out" scheme

The new definition is supplemented by an "opt-out" scheme allowing independent contractors to elect to retain their status as such.

Under the scheme, a worker may give a principal an "opt-out notice", provided their earnings exceed the "contractor high income threshold". The effect of the notice is that the new "fluid" definition of employee will not apply to the relationship.

A high-income contractor may unilaterally give a written opt-out notice to the principal at any time. Alternatively, a principal can provide written notice to the worker stating that the worker may give them an opt-out notice, if the principal considers that their relationship may be one of employment under the fluid definition. In such a case, the individual may then give an opt-out notice within 21 days.

Importantly, an individual may issue only one opt-out notice in respect of a given relationship. It should also be noted that contractors can revoke an opt-out notice at any time after giving it. As a result of the cap of one opt-out notice per relationship, the worker would not be able to then opt back out.

Transitional provisions

While the new definition applies to work relationships entered into before commencement (anticipated to be 26 August 2024), any rights or liabilities accrued prior to commencement will remain unaffected. Further, for the purpose of determining a worker's service-based entitlements or their period of employment, their status (as an employee or contractor) during any pre-commencement period of service is to be ascertained in accordance with the old common law test. The new statutory definition, which has a purely prospective operation, will only determine status in respect of any post-commencement period of service.

"This new definition has the potential to affect many independent contractors and businesses outside of the gig economy.

2 See our insight on this decision, *Categorising work relationships: Contract rules?* – https://www.corrs.com.au/insights/categorising-work-relationships-contract-rules.

Regulated workers – Road transport and employee-like workers

There will be a new legal regime for gig economy participants and road transport workers, with new scope for collective agreements, a greater role for unions and procedures to challenge unfair deactivations from digital platforms or unfair terminations of road transport contractors.

The FWC will be given a new jurisdiction to set minimum standards, through Minimum Standard Orders (**MSOs**) and Minimum Standard Guidelines (**MSGs**), for the following two classes of independent contractors who are termed "regulated workers":

- employee-like workers performing digital platform work; and
- regulated road transport contractors.

Who will be "employee-like workers"?

An employee-like worker is an individual who meets all of the requirements below.

Employee-like workers	
Criterion	**Description**
Party to a services contract	The person must be an individual who is party to a services contract; a director of a body corporate that is party to a services contract; a trustee of a trust that is party to a services contract; or a partner in a partnership that is a party to a services contract.
Majority of the work	The person must perform all, or a majority of, the work to be performed under the services contract.
Digital platform work	The work is performed through or by means of a "digital labour platform", which in essence is an application, website or system operated to arrange, allocate or facilitate the provision of labour services. (It appears that both "vertical" and "horizontal" platforms may fall within the potential ambit of the scheme.)
No employment	The person does not perform any work under the services contract as an employee.
Low bargaining power, low pay or low autonomy	The person satisfies two or more of the following: • the person has low bargaining power in negotiations in relation to the services contract under which the work is performed; • the person receives remuneration at or below the rate of an employee performing comparable work; • the person has a low degree of autonomy over the performance of the work; or • the person has characteristics as are prescribed under the regulations.

The Explanatory Memorandum states that the definition for "digital platform work" is "*deliberately broad to ensure it can capture new market structures and forms of work as they emerge. It is not intended to capture online classifieds where there is not a payment processed, or digital platforms that facilitate the sale of goods*".

Minimum Standard Orders

The FWC will be able to make enforceable MSOs (which would be similar to an award), and non-enforceable MSGs, for regulated workers.

This could be done by the FWC on its own initiative or on application by organisations entitled to represent the industrial interests of one or more regulated workers, a regulated business or the Minister. Terms of MSOs may only be included to the extent necessary to achieve the "minimum standards objective", and the content of MSOs is subject to specific restrictions which are summarised below.

Must include	• Work, regulated businesses and regulated workers covered • Dispute settlement
May include (but not limited to)	• Payment terms • Deductions • Working time • Record-keeping • Insurance • Consultation • Representation • Delegate's rights • Cost recovery
Must not include	• Overtime rates • Penalty rates • Shift allowances • Minimum engagement periods • Payment for time between engagements • Rostering arrangements • Matters primarily of a commercial nature that do not affect the terms and conditions of engagement • Changing the form of the engagement or status of the regulated worker • Work health and safety matters that are comprehensively dealt with by a law of the Commonwealth, State or Territory (and for a road transport MSO, this will include matters relating to road transport comprehensively dealt with by Heavy Vehicle National Laws)

Collective agreements for regulated workers

Subject to a public interest test and various technical requirements, collective agreements will be possible between regulated businesses (i.e., a digital platform operator or a road transport business) and organisations entitled to represent the industrial interests of regulated workers. Collective agreements across multiple regulated businesses will not be allowed.

Unfair deactivations for employee-like workers

The FWC will be given the power to deal with disputes about the deactivation of employee-like workers. If the worker earns under the "contractor high income threshold" and the application is made with 21 days of the deactivation, the worker can challenge that deactivation. The definition of the "contractor high income threshold" is to be set out in the regulations.

A person will have been unfairly deactivated if the FWC is satisfied that:

- the person has been deactivated from a digital labour platform;
- the deactivation was unfair (e.g. was there a valid reason); and
- the deactivation was not consistent with the Digital Labour Platform Deactivation Code (being a code to be developed by the Minister following public consultation).

A person will be taken to have been deactivated if:

- the person performed digital platform work through, or by means of, a digital labour platform;
- the digital labour platform operator modifies, suspends or terminates the person's access to the digital labour platform; and
- the person is no longer able to perform work under an existing or prospective services contract, or their ability to do so is significantly altered that in effect the person is no longer able to perform such work.

If the FWC determines that the deactivation has been unfair, it can order reactivation but it may not order compensation.

Labour regulation for the road transport industry

In addition to the new jurisdiction to set minimum standards, the Act also establishes a new industrial framework for the road transport industry, namely through the establishment of two new bodies:

- an Expert Panel; and
- the Road Transport Advisory Group.

Expert Panel

This panel will ensure that the FWC has the appropriate expertise for assessing the minimum standards and conditions for those working in the road transport industry. The panel will consist of at least one presidential member of the FWC, and a member (of the FWC or external to) with knowledge of, or experience in, the road transport industry. The panel will be responsible for performing functions and exercising powers, including in relation to modern awards, MSOs and MSGs, for the road transport industry.

Road Transport Advisory Group

This group will be made up of members appointed by the Minister and must include persons who are members of, or who have been nominated by, organisations entitled to represent the industrial interests of one or more regulated road transport contractors and one or more road transport businesses.

This group will support the FWC in carrying out its functions in relation to the road transport industry. Its functions will be to advise the FWC in relation to road transport industry matters, including the:

- making and varying of a road transport MSO, MSG or road transport contractual chain order;
- making and varying of modern awards relating to the road transport industry; and
- prioritisation of matters relating to the road transport industry.

Road transport contractual chain orders

The Act empowers the FWC to make "road transport contractual chain orders" setting minimum standards for persons in a given "road transport contractual chain". This is defined as a chain or series of contracts (or arrangements) under which work is performed for a party to the first contract in the chain by a road transport contractor or "road transport employee-like worker" (i.e. an employee-like worker in the road transport industry).

A person is only considered to be "in" a chain (and therefore subject to an order) if they are a party to that first contract, or if they are a party to a subsequent contract in the chain under which work is performed "for" them by a regulated road transport contractor or a road transport employee-like worker. However, the legislation deems such work to be performed not only "for" the counterparty to that contract, but also "for" each party to a contract in the chain as a whole. As a result, the application of an order is potentially far-reaching, rippling through to parties to other contracts in the chain.

Although not characterised as MSOs (within the strict meaning of that term), these orders bear similarities to MSOs in their content and form, as they must include terms concerning coverage and dispute resolution, and may include entitlements concerning matters such as payment

times, fuel levies, rate reviews, termination and cost recovery. Certain terms, such as overtime rates and rostering arrangements, cannot be included.

The process for making the orders is also similar to the MSO-making process, and various threshold requirements must be satisfied (including requirements for the FWC to "genuinely engage" with the parties to be covered and consult with the Road Transport Advisory Group).

Unfair terminations of a road transport contractor

The FWC will be given the power to deal with disputes about the termination of a road transport contractor's services.

The contractor must earn under the "contractor high income threshold".

A road transport contractor will have been unfairly terminated if the FWC is satisfied that:

- the person was performing work in the road transport industry;
- the person was terminated;
- the termination was unfair (e.g. was there a valid reason); and
- the termination was not consistent with the Road Transport Industry Termination Code (being a code to be developed by the Minister).

There will not be a termination for the purposes of these provisions if the services contract contains a term which specifies the duration of the contract and the contract has expired and not been renewed by the road transport business.

If the FWC decides that a termination is unfair, it may order that a new services contract be entered into or the payment of compensation to a person. It can only order payment of compensation if it is satisfied that entering a new services contract would be inappropriate and an order for payment of compensation is appropriate in all the circumstances of the case.

Unfair contracts

Independent contractors will enjoy enhanced protections from "unfair contracts" under a set of provisions that supplement the existing scheme under the *Independent Contractors Act 2006* (Cth) (**IC Act**).

Under the reforms the FWC may make an order in relation to a services contract if it is satisfied that the services contract includes one or more unfair contract terms, which in an employment relationship, would relate to workplace relations matters. An order can only be made on application by a party, or an organisation entitled to represent the industrial interests of a party, to a services contract on the basis that a contract term is unfair.

As to whether a contract term is unfair, the FWC may consider:

- the relative bargaining power of the parties;
- whether the contract term:
  - is reasonably necessary to protect the legitimate interests of a party; or
  - imposes a harsh, unjust or unreasonable requirement on a party;
- whether the services contract as a whole:
  - displays a significant imbalance between the rights and obligations of the parties; or
  - provides for a total remuneration for performing work that is less than employees, or regulated workers, performing the same or similar work receive; and
- any other matters FWC considers relevant.

In determining whether to make an order, and the kind of order to make, the FWC must consider fairness between the parties. The FWC may set aside, amend, or vary all or part of the services contract.

One limitation for this unfair contract framework is an application cannot be made by a person if their earnings for the year meet, or are above, the 'contractor high income threshold'. The intention with this change is for low-income earners to be covered by this new unfair contract framework under the FW Act and for high income earners to be covered by the unfair contract framework under the IC Act. A corresponding change to the IC Act will be made to give effect to this intention.

Increases to civil penalties

Consistent with its agenda of minimising underpayments, the Act introduces increased civil penalties for non-compliance with certain provisions of the FW Act by employers other than small businesses (which remain subject to existing maximum penalties).

The legislation increases by a factor of five civil penalties for breaches of certain civil remedy provisions (including sections 44, 45 and 50, which respectively deal with contraventions of the NES, modern awards and enterprise agreements).

Generally, applicable maximum pecuniary penalties will increase from 60 to 300 penalty units ($18,780 to $93,900) or for serious contraventions, from 600 to 3,000 penalty units ($187,800 to $939,000).

It is worth noting that the test for a "serious contravention" will be lowered. The previous test was that the employer "knowingly" contravene the provision and engage in a "systematic pattern of conduct". This is replaced with a requirement that *either* the employer knowingly contravene the provision or was reckless as to whether the contravention would occur. There would no longer be any "systematic pattern of conduct" requirement.

Further, a contravention of a civil remedy provision may result in the relevant maximum pecuniary penalty being further increased, where the contravention is "associated with an underpayment amount". In such a case, a court can order a pecuniary penalty of up to the greater of:

- five times the maximum number of penalty units set by the FW Act; or
- three times the underpayment amount.

The new measures are to be supplemented by additional funding for the FWO of $32.4 million over four years.

The reforms also give courts the power to order that a person comply with a compliance notice given to them by the FWO or a Fair Work Inspector.

Given the enhanced risk profile, employers will be well advised to review and potentially re-calibrate their wage compliance initiatives.

Right of entry changes (suspected underpayments)

The legislation seeks to enhance the right of entry powers of union officials investigating suspected underpayments.

Under a new exception, the Act enables a permit holder's organisation to obtain an exemption certificate from the FWC to waive the minimum 24-hour notice requirement where the FWC

- is satisfied that the organisation reasonably suspects a member of their organisation has been, or is being, underpaid (relating to wages or other monetary entitlements); and
- reasonably believes that advance notice of the entry would hinder an effective investigation into the suspected underpayments.

The provisions regarding the right of entry for permit holders will be amended to:

- protect permit holders exercising a right of entry from improper conduct by others;
- empower the FWC to impose conditions on the entry permit, as an alternative to revoking or suspending the permit in circumstances set out in section 510 of the FW Act; and
- empower the FWC to take action in relation to further issues of exemption certificates if those rights are misused.

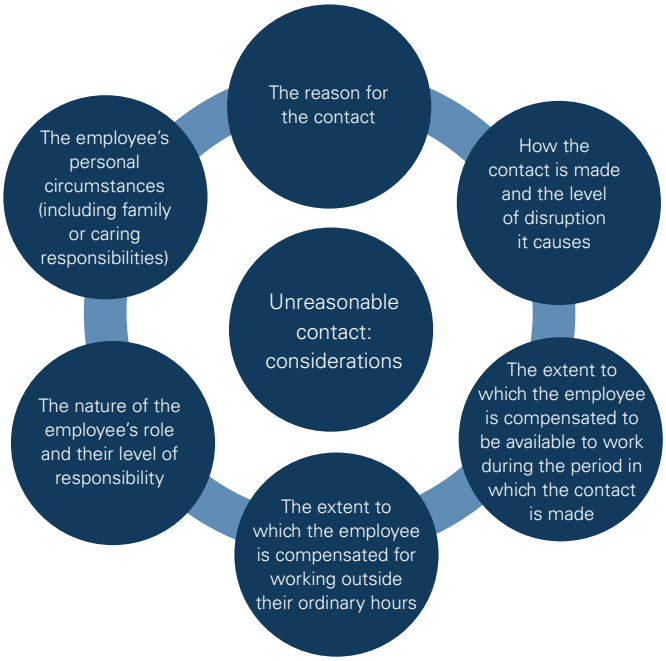
Right to disconnect

Under a deal secured with the Greens, the Government agreed to legislate a "right to disconnect" in response to a perceived increase in unreasonable after-hours intrusion associated with the advent of instant electronic communication and remote work. This is not a new concept: similar rights have been a feature of a number of recent enterprise agreements, while some foreign jurisdictions have regulated work-related contact outside hours. Nonetheless, the broad reach of the blanket right to disconnect means day-to-day work at any Australian business may now be impacted.

Overview

At its core, the right to disconnect allows employees to refuse to monitor, read or respond to contact or attempted contact from an employer (or work-related contact from a third party) outside of their working hours, unless the refusal is unreasonable.

Without limitation, the following matters may be taken into account in assessing whether such refusal is unreasonable:



The legislative regime is to be supplemented by the mandatory inclusion of a "right to disconnect term" in modern awards, being a term that provides for the exercise of the right to disconnect. There is also scope for more favourable "right to disconnect terms" to be included in enterprise agreements. In addition, the FWC is required to publish written guidelines in relation to the right to disconnect.

Importantly, the right to disconnect is a "workplace right" for the purposes of the general protections regime. Consequently, any disciplinary matters involving an employee's refusal of after-hours contact will need to be sensitively handled.

Dispute resolution and "stop orders"

The Act prescribes the following process for the resolution of disputes about the right to disconnect (including about whether a refusal of contact is unreasonable):

Workplace level discussions	In the first instance, the parties to the dispute must attempt to resolve it at the workplace level by discussions between them.
Employer / employee may lodge FWC dispute	If workplace discussions do not resolve the dispute, either party may apply to the FWC to make a "stop order" (i.e. an order to stop refusing contact or stop taking certain actions) and/or otherwise deal with the dispute.
FWC deals with dispute	To the extent that the application is for a "stop order", the FWC must start to deal with the stop order application within 14 days after it is made, and thereafter deal with it as soon as reasonably practicable. Otherwise, to the extent the application is not for a stop order, the FWC must deal with the dispute as it considers appropriate. If the parties notify the FWC that they agree to the FWC arbitrating the dispute, the FWC may do so.

Where an application for a "stop order" is made, the FWC may make any order (other than a pecuniary penalty) it considers appropriate to prevent:

- the employee from continuing to unreasonably refuse to monitor, read or respond to contact – provided that the FWC is satisfied the employee has unreasonably refused to do so and there is a risk they will continue to do so;
- the employer from taking disciplinary or other action against the employee in response to a refusal of contact – provided that the FWC is satisfied the employee's refusal of contact is not unreasonable and there is a risk the employer will take disciplinary or other action in response; or
- the employer from continuing to require the employee to monitor, read or respond to contact – provided that the FWC is satisfied the employee's refusal of contact is not unreasonable and there is a risk the employer will continue to require them to monitor, read or respond to contact.

A contravention of a "stop order" will give rise to civil penalties.

We expect the right to disconnect to give rise to increased disputation about day-to-day workplace matters. Accordingly, we consider it would be prudent for employers to start considering how they will address attendant risks while also preserving appropriate levels of flexibility.

Consideration should be given to measures including a dedicated policy governing communication in the workplace and/or after-hours contact, training for managerial staff and investment in effective internal dispute resolution processes.

Bargaining amendments

Terms of intractable bargaining workplace determinations

In significant changes to the intractable bargaining regime, the Act imposes considerable restrictions on "non-agreed" terms of intractable bargaining workplace determinations, as well as introduce crucial changes to the "agreed terms" which the FWC must include in such determinations.

Currently, the FWC is to include in a determination the terms it considers deals with the matters still at issue ("non-agreed terms"). It must also include any terms the parties had agreed should be included in the agreement at the time the intractable bargaining declaration (**IBD**) was made or at the end of any post-declaration negotiating period ("agreed terms").

However, under a restriction introduced by the legislation, the FWC must ensure that any non-agreed term is not less favourable to the employees (and any union) than a term of an applicable enterprise agreement dealing with that matter (although this does not apply to terms providing for a wage increase). This amendment appears designed to prevent employees' existing agreed terms and conditions being downgraded without their agreement via the intractable bargaining process. Critically, this will reduce employer leverage in bargaining, by eliminating the downside risk of arbitration for unions and employees who stand to gain from a stubborn approach to negotiations.

In addition, the Act expands the meaning of "agreed term" to any term the parties had agreed should be included in the agreement at the time the IBD *application* was made, as well as any other term agreed for inclusion at the time the IBD *itself* was made (and any further term agreed at the end of any post-declaration negotiating period). The key effect of this critical temporal change is that it mandates the inclusion in the determination of anything agreed by the parties at an earlier point in time in the bargaining process (being the time of the IBD *application*, rather than the *declaration*). As a result, a party would not be able to, after being served with such application, "unagree" to any terms it had previously agreed to and reserve its position for the arbitration. Because a party that agrees to any term runs the risk of creating "a rod for its own back", this can be expected to have a "chilling effect" on bargaining the longer it draws out, as parties become less willing to make concessions in the face of the growing prospect of an IBD application being made without notice.

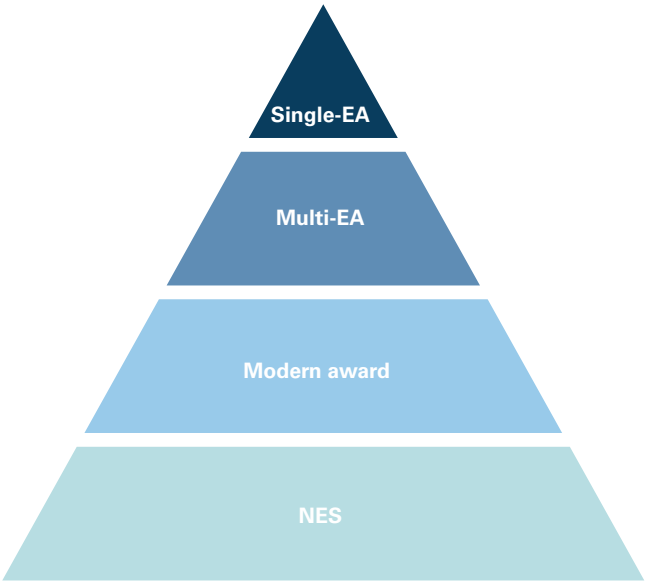
Changes to intractable bargaining workplace determinations framework		
	Old framework	New framework
Non-agreed terms	Determination must contain all non-agreed terms	Determination must contain all non-agreed terms provided they are not less favourable to employees/union than an applicable enterprise agreement
Agreed terms	Determination must include terms agreed between parties as at time when: • FWC makes the IBD; or • if there is a post-IBD negotiating period, the end of that period	Determination must include terms agreed between parties as at time when: • FWC receives IBD application from either party; and • FWC makes the IBD; and • if there is a post-IBD negotiating period, the end of that period

The impacts of these changes on bargaining dynamics (particularly in protracted disputes) should not be underestimated. They apply to any intractable bargaining workplace determinations made after commencement (i.e. 27 February 2024), even where the relevant IBD (or IBD application) was made prior to commencement.

> “Critically, this will reduce employer leverage in bargaining ... [t]he impacts of these changes on bargaining dynamics (particularly in protracted disputes) should not be underestimated.

Exit pathway from multi-employer bargaining

In response to concerns surrounding the limited avenues for withdrawal from a multi-enterprise agreement made under the expanded framework introduced by the 2022 *Secure Jobs, Better Pay* reforms, the Act installs an “off-ramp” for businesses who negotiate a single-enterprise agreement on better terms.



Previously, transitioning to a single-enterprise agreement could only be done once a single-interest employer agreement or supported bargaining agreement passed its nominal expiry date. Further, a supported bargaining authorisation could only be varied to remove an employer (and therefore enable an employer to bargain for a single-enterprise agreement) if all its employees were covered by a supported bargaining agreement. Employers were essentially “locked into” the multi-employer bargaining system while it remained in effect.

The Government’s response in the Act is to allow an employer to negotiate a single-enterprise agreement with its own workforce prior to the multi-enterprise agreement’s nominal expiry date, which will apply to the exclusion of the multi-enterprise agreement provided it passes a “better off overall” test (**BOOT**) against the multi-employer agreement. These changes apply to two of the three types of multi-enterprise agreements, being supported bargaining agreements and single interest employer agreements.

The Act provides that a single-enterprise agreement will pass the BOOT if the FWC is satisfied, as at the test time, that each employee would be better off overall if the single-enterprise agreement applied to the employee than if the supported bargaining agreement or single interest employer agreement applied to the employee. This is in addition to the continuing requirements that employees are better off than if the relevant modern award were to apply.

Importantly, where the single-interest enterprise agreement or supported bargaining agreement (each of which is an "old agreement") has not passed its nominal expiry, an employer cannot request employees to approve a proposed new single-enterprise agreement by voting for it unless each employee organisation to which the old agreement applies has given the employer written consent. Once again, this gives unions (potentially multiple) significant power and the ability to withhold their consent if they are not completely satisfied with the proposed agreement. However, where the FWC considers failure to provide consent to the making of a request is unreasonable in the circumstances, it is empowered to make a voting request order to permit the employer to do so.

Model flexibility, consultation and dispute resolution terms

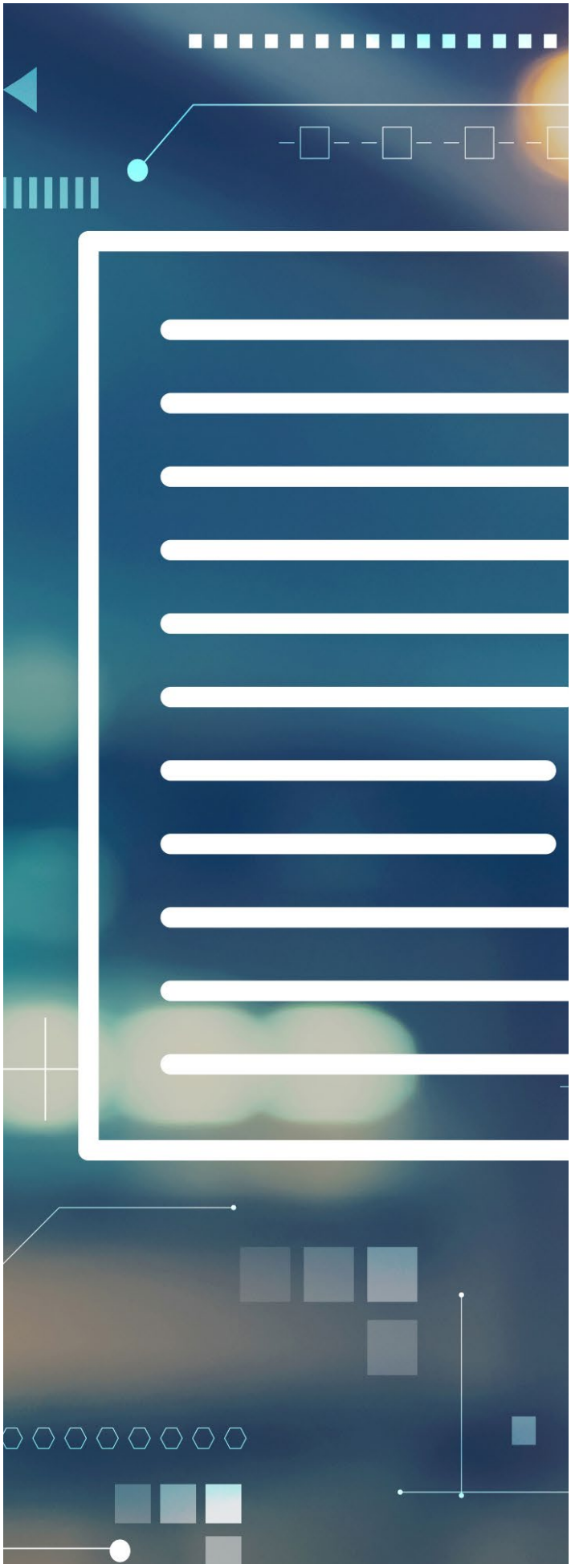
The FW Act currently requires that model terms be included in all enterprise agreements to act as a safety net to ensure that certain matters are dealt with in all agreements. The reforms empower the Full Bench of the FWC to determine and update (if needed) the model flexibility, consultation and dispute resolution terms for enterprise agreements and the model dispute settlement term for copied State instruments.

Changes to the union demerger regime

The former Morrison Government's 2020 amendments to the union demerger regime under the *Fair Work (Registered Organisations) Act 2009* (Cth) face repeal. The Coalition's *Fair Work (Registered Organisations) Amendment (Withdrawal From Amalgamations) Act 2020* (Cth) significantly expanded the scope for union demergers by:

- Introducing a demerger mechanism which bypassed the standard requirement that any demerger application by a "constituent part" of an amalgamated organisation be made within five years after that part was originally amalgamated into the organisation.
- Allowing any branch, division or "separately identifiable constituent part" of the amalgamated organisation to demerge. Previously, the ability to withdraw from an amalgamation was limited to the same organisation which was deregistered in connection with the amalgamation process in the first place (or its post-amalgamation incarnation).

The repeal of those changes is apparently designed to minimise division, disruption and factional conflict within the union movement, by limiting the opportunity for union divisions and branches to form breakaway organisations.



Commencement and where to next

The various reforms under each tranche of the Closing Loopholes legislation take effect at different times following Royal Assent (which the 2023 Act received on 14 December 2023, and the 2024 Act on 26 February 2024). A summary is below.

Reforms	15 Dec 2023	27 Feb 2024	1 Jul 2024	26 Aug 2024	1 Nov 2024	1 Jan 2025	26 Feb 2025	26 Aug 2025
• Closing the labour hire loophole (though RLHA Orders will not commence until 1 November 2024, while anti-avoidance provisions apply retrospectively to conduct/schemes on and from 4 September 2023) • Workplace delegates' rights for employees (however, enterprise agreements made before 1 July 2024 need not contain a delegates' rights term) • Entry rights for union officials assisting health and safety representatives • Post-PABO conciliation conference regime • WHS Act 2011 penalties • Family violence anti-discrimination • Small business redundancy counter-exemption								
• Intractable bargaining workplace determinations • Increased pecuniary penalties for contraventions of certain FW Act provisions (e.g. sections 44, 45 and 50) • 'Opt-out' notice scheme for independent contractors • Transitioning from multi-employer bargaining • Union demerger regime								
• Exemption certificate for entry to investigate suspected underpayments • Workplace delegates' rights as compulsory terms of enterprise agreements (agreements made on or after 1 July 2024) • Industrial manslaughter								
• Casual employment • Right to disconnect (other than small businesses)								
• New definition of employment • Unfair contract terms (independent contractors) • Regulated workers provisions • Workplace delegates' rights for regulated workers		A single day to be fixed by the Government, or if not fixed, 26 August 2024.						
• RLHA Orders made by the FWC commence operation								
• Wage theft • Increased pecuniary penalties for contraventions associated with underpayments						Later of 1 January 2025 or day after Minister declares Voluntary Small Business Wage Compliance Code.		
• Model flexibility, consultation and dispute resolution terms for enterprise agreements		A single day to be fixed by the Government, or if not fixed, 26 February 2025.						
• Right to disconnect (small businesses only)								

What is not in the legislation?

The Government has now purported to honour the bulk of its workplace reform commitments through its various tranches of legislation. Nonetheless, there remain some residual issues to which the Government can be expected to revert at some point in the future. These include the following:

Anticipated reform	Description
Portable leave	A scheme for insecure workers to carry accumulated leave entitlements (such as accrued annual leave, personal leave and long service leave) from employer to employer.
Roster justice	The introduction of various rostering restrictions into the FW Act.
Federal labour hire licensing scheme	A uniform model for harmonised labour hire regulation.
Commonwealth procurement code	The introduction of a Secure Australian Jobs Code that will apply to tenderers for all Commonwealth-funded projects and services (including requirements to adopt best-practice workplace relations).

Where to next?

With both Closing Loopholes Acts now passed into law and various commencement dates forthcoming (if not already here), employers need to start considering the implications of the changes immediately and how to respond.

It is also worth noting that there will be a review of the operation of the amendments within two years of Royal Assent, as was the case with the *Secure Jobs, Better Pay* reforms. This will provide an important opportunity to make submissions on whether the changes are appropriate and effective, and on any unintended consequences and necessary improvements. Further clarifications will come from test cases and guidelines issued by the FWC and cases that become subject to judicial review.

In the meantime, the Corrs team of experts stands ready to provide assistance in understanding the reforms and what they mean for your business, as well as strategic advice and guidance to help you prepare for the changes. We encourage you to reach out if you have any questions.

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