Employee-Like Workers

Business Guide

Australian Chamber of Commerce and Industry

Canberra BUSINESS CHAMBER



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Contents

1. Introduction 2

2. Employee-Like Workers 4

3. Powers of the FWC in relation to employee-like workers 10

4. Minimum Standards Orders 12

5. Minimum Standards Guidelines 19

6. Collective Agreements 22

7. Unfair deactivation of regulated workers 29

8. FAQs 35

9. General Advice 36

1. Introduction

1.1 The regulatory landscape for engaging contractors (including so-called 'gig workers') has undergone significant changes following the enactment of the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024. These changes include the following:

a. there is a new framework for protecting the interests of certain workers in what is broadly described as the 'gig economy'.

b. these workers are called 'employee-like workers' and are independent contractors who perform work through a digital labour platform and who exhibit characteristics similar to employees but may not fit the traditional employee category.

c. the Fair Work Commission (FWC) will be able to set minimum standards specifically for these 'employee-like' workers by making minimum standards orders or guidelines. The FWC will also be able to deal with disputes on relating to unfair deactivations of employee-like workers from a digital labour platform.

d. registered organisations (like a union) representing employee-like workers will be able to make collective agreements with digital labour platform operators.

e. independent contractors who earn less than the contractor high income threshold (including employee-like workers) will be able to apply to the FWC if they think their services contract contains an unfair contract term. The contractor high income threshold hasn't been set yet.

f. the FWC will be able to make orders and guidelines setting standards for people in contractual chains in the road transport industry, including employee-like workers who perform work in the road transport industry.

g. a Digital Labour Platform Consultative Committee will also be established.

1.2 This guide is intended to help businesses navigate these changes and offer practical advice for complying with new obligations. It is important that businesses are familiarised with these changes, particularly given that some of them impose significant obligations on businesses with penalties for non-compliance. These changes will affect a wide range of businesses across different sectors.

1.3 The guide should serve as a starting point for understanding new obligations and considering potential vulnerabilities for individual businesses. It is not a definitive guide to the legislative changes, but rather the substantive provisions. Further advice should always be sought for the resolution of specific issues.

1.4 When reading the guide, it is important to check the commencement date under the title at the top of each section or in the table below. The footnotes throughout this guide assume that the provisions have commenced and reference the resulting section of the Fair Work Act 2009 (**FW Act**).

1.5 The guidance in this document was finalised on 6 August 2024 and may be subject to future revision.

Summary of Advice and Commencement

Topic	Change	Commencement	Advice	Page
Employee-like workers	Introduction of a new framework for those who perform work through a digital labour platform and who exhibit characteristics similar to employees, being 'employee-like workers'.	26 August 2024	Determine whether you engage employee-like workers and will be regulated by the new laws.	4
Minimum Standards Orders	The Fair Work Commission will be empowered, on its own initiative, or on application, to make binding minimum standards orders for employee-like workers. There are certain terms which may or may not be included.	26 August 2024	Monitor the progress of the FWC in making Minimum Standards Orders. Some Digital Platform Operators may wish to participate in the proceedings which will give rise to the Minimum Standards Orders.	9
Minimum Standards Guidelines	Introduction of a system for the creation of minimum standards guidelines for employee-like workers. These are similar to minimum service orders, however, are non-binding.	26 August 2024	Monitor the progress of the FWC in making Minimum Standards Guidelines. Some Digital Platform Operators may wish to participate in the proceedings which will give rise to the Minimum Standards Guidelines.	17
Collective Agreements	The Fair Work Commission will also now be able to register Collective Agreements made by consent between digital labour platform operators and organisations entitled to represent employee-like workers.	26 August 2024	Consider whether there is any benefit to pursuing a collective agreement and/or whether there is a likelihood that workers and/or a union may pursue one.	22
Unfair deactivation of regulated workers	The Fair Work Commission will receive a new jurisdiction to deal with 'unfair deactivations' which are in essence an unfair dismissal jurisdiction for employee-like workers working on digital platforms.		Workers will be able to 'challenge' deactivations from 26 August 2024. Digital Platform Operators should review their deactivation policies and practices to ensure they are compliant with the new regime.	31

* These commencement dates could commence earlier on a date fixed by proclamation, although it is unlikely that this will occur. The Federal Government has given no indication for the possibility of early commencement.

Terms used

Term	Meaning
Bill	Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023
Closing Loopholes	The name of new legislation (laws) introducing changes to the Fair Work Act and other workplace laws
ELMSO	Employee-Like Minimum Standards Order
FW Act	Fair Work Act 2009
FWC	Fair Work Commission
Minister	Minister for Employment and Workplace Relations
MSG	Minimum Standards Guideline
MSO	Minimum Standards Order

2. Employee-Like Workers

Commencement: 26 August 2024

Key advice and takeaways

Digital labour platform businesses should:

- Determine whether they are currently engaging workers who fit the definition of 'employee-like worker';
- Familiarise themselves with amendments to the FW Act with respect to the protections for employee-like workers;
- Determine whether current business practices are in line with the amendments to the FW Act.

Highlights

- the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 includes a new framework for protecting the interests of certain workers in the gig economy.
- these workers are called 'employee-like workers' and are independent contractors who perform work through a digital labour platform and who exhibit characteristics similar to employees but may not fit the traditional employee category.
- some examples of these types of 'employee-like workers' include food delivery independent contractors, rideshare independent contractors, and courier delivery independent contractors.

Changes

What is an 'employee-like' worker?

2.1 Employee-like workers are essentially individuals who are performing 'services contracts' for 'digital labour platform' operators.

2.2 There are different rules regarding whether a person is an employee-like worker, depending on the entity through which they are engaged (i.e. personally, through a company, as a partnership etc). A person is considered an 'employee-like' worker if all the following requirements are met:

a. the person is one of the following:

Individual	the individual performing work under the contract
Body corporate	an individual who is either a director of the body corporate, or a member of the family of a director of a body corporate, and who performs work under the contract
Trustee of a Trust	an individual who is a trustee of that trust, and performs work under the contract, whether or not the individual is a party to the contract;
Partnership	an individual who is a partner in that partnership and performs work under the contract, whether or not the individual is a party to the contract

b. the person performs all, or a significant majority, of the work to be performed under the **services contract**; and

c. the work that the person performs under the services contract is **digital platform work**; and

d. the person does not perform any work under the services contract as an employee; and

e. the person meets 2 or more of the following:

i. the person has **low bargaining power** in negotiations in relation to the services contract under which the work is performed;

ii. the person receives **remuneration at or below the rate of an employee** performing comparable work;

iii. the person has a **low degree of authority** over the performance of the work;

iv. the person has such other characteristics as are prescribed by the regulations.1

Low bargaining power and low authority

2.3 Of the above factors, interpretation is anticipated to be required around whether a person has 'low bargaining power' during contract negotiation or a 'low degree of authority' over the performance of the work.

2.4 Determining this issue will depend on a range of factors, including:

a. how much control the worker has over when, where and how the work is performed. In this regard, the Explanatory Memorandum to the new laws indicates that it is not intended that skilled tradespersons be covered as they have a high degree of control over these matters;2 and

b. whether the digital labour platform sets the rate for the performance of work or whether it can be negotiated by the worker. This will be very important to determining a worker's 'bargaining power'.

2.5 Examples of workers who may have low bargaining power could include individuals with limited ability to access alternative forms of work, workers with limited access to financial or legal advice and migrant workers. These types of workers could arise in contexts where there are low barriers to providing services — such as cleaning, food delivery, passenger transport, and courier delivery services.

What is a digital labour platform?

2.6 A 'digital labour platform' is an online enabled application, website or system that operates to arrange, allocate or facilitate the provision of labour services. This will essentially capture platforms that meet the common understanding of the 'gig-economy' (e.g. app-based meal delivery, ad-hoc services etc.) but will not capture the forums that do not process payments (e.g. Facebook Marketplace).

2.7 A digital labour platform is an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services, where:

a. the operator of the application, website or system:

i. engages independent contractors directly or indirectly through or by means of the application, website or system; or

ii. acts as an intermediary for or on behalf of more than one distinct but interdependent sets of users who interact with the independent contractors or the operator via the application, website or system; and

b. any of the following processes payments referable to the work performed by the independent contractors:

i. the operator of the application, website or system;

ii. and associated entity of the operator;

iii. a person contracted, whether directly or through one or more interposed entities, by the operator or an associated entity of the operator to process the payments (e.g. a third party such as a bank or financial institution is contracted by the operator of the application to process payments).3

2.8 Digital labour platforms could include operators which provide a payment platform to secure the services of an independent contractor.

1 FW Act s 15P

2 Revised Explanatory Memorandum to *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* , [1192]

3 FW Act s 15L

Illustrative examples: digital labour platforms

CourierCo and Jane

Jane works an independent contractor providing services on a gig platform in the courier sector called CourierCo. CourierCo operates as an online courier service, where contractors pay a fee (per engagement) to operate on the platform and must agree to terms of service (services contract) that place obligations on how they use the platform and interact with clients found on the platform. CourierCo's platform provides for communications between the parties and processes payments from clients to CourierCo. **CourierCo's platform is a digital labour platform** because it acts as an intermediary between Jane (and other contractors) and clients, and it processes payments.

What is a 'digital labour platform operator'?

2.9 A digital labour platform operator is the party that enters into or facilitates a service contract under which work is performed by employee-like workers.4

What is 'digital platform work'?

2.10 Digital platform work is work performed by an independent contractor under a services contract through a digital labour platform. In this scenario the contract is directly to the digital labour platform. Alternatively, if the contract relating to the work was arranged through the digital labour platform, for example the platform acted as a marketplace to organise the contract, then this can be considered digital labour platform work.5

What is a 'services contract'?

2.11 A services contract, that is a contract that exhibits typical characteristics of a client-contractor contract, that particularises the performance of work under the contract by an individual and has the requisite constitutional connection in section 15H of the FW Act.6

2.12 To have the requisite constitutional connection, the contract needs to be either:

a. be one where a constitutional corporation is a party to the contract (e.g. a Pty Ltd company or other company incorporated under the *Corporations Act 2001*); or

b. be one where one of the parties is incorporated in a Territory in Australia (e.g. ACT or NT); or

c. wholly or principally be performed in a Territory in Australia; or

d. entered into in a Territory in Australia; or

e. be one where one of the parties is a natural person who is a resident in a Territory in Australia; or

f. be one where one of the parties is a business that has its principal place of business in a Territory in Australia.

2.13 In most cases involving companies the requisite constitutional connection will be satisfied.

4 FW Act s 15M
5 FW Act s 15N
6 FW Act s 15H

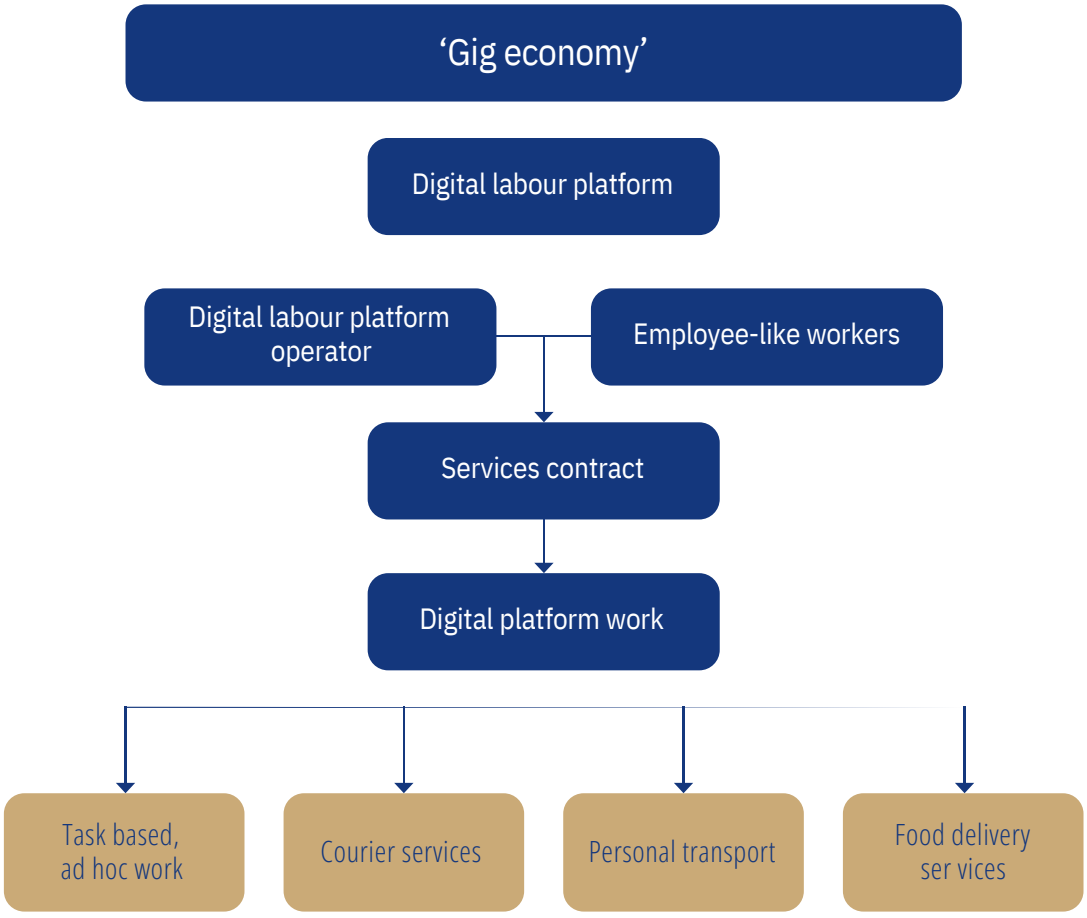
CHECKLIST: Am I a digital labour platform operator?

To check whether you are a digital labour platform operator, complete the checklist below:

Digital Labour Platform Operator Checklist
☐ 1. Do you operate an application, website, or other system?
☐ 2. Do you enter into or facilitate service contracts (ensuring that you have the requisite constitutional connection)?
☐ 3. Is the work required under the services contract performed by employee-like workers?

If you ticked all the above options, **you are a digital labour platform operator.**

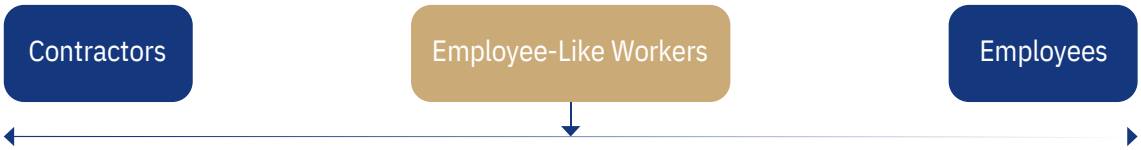
Flowchart 1 — Working concept of Employee-Like Workers operating for Digital Labour Platform Operators



CHECKLIST: Will an individual be considered an 'employee-like worker'?

Who are 'employee-like workers'?

An 'employee-like worker' is an independent contractor who exhibits characteristics similar to an employee but does not fit the traditional employee category. Simply put, 'employee-like workers' fall somewhere in between contractors and employees when it comes to how much access they have to safety net provisions under the Fair Work Act.



Step 1:

Employee-like workers can fit into three broad categories depending on who is a 'party' to the services contract.

The first step is to look at who is a party to a 'services contract' (i.e. did an individual enter into the services contract or was it entered into by another entity such as a body corporate or a trustee).

Who is a party to a services contract?	Indicative of contracting relationship
An individual	An individual who is performing work under the contract.
A body corporate (i.e., Pty Company)	An individual who is either: a. a director of the company or a family member of the company; and b. who performs work under the contract.
Trustee of a trust	An individual who is either: a. a director of the company or a family member of the company; and b. who performs work under the contract.
Partnership	An individual who is: a. a partner in the same partnership; and b. performs work under the contract, whether or not the individual is a party to the contract

When an individual is the party to the service contract, it is a bit more straightforward. However, when a body corporate or a trustee is party to the contract, the law is more specific about whether the individuals within that entity may be considered an 'employee-like worker'.

Step 2:

Once you have determined that the individual falls under one of the categories of 'employee-like workers' above, you must answer the below questions.

Does the individual:
☐ 1. Perform all, or a significant majority of the work under a **services contract?**
☐ 2. Perform **digital platform work**? (definition above)
☐ 3. Not perform any work under the services contract as an employee?

If the answer to all the above questions is 'Yes', proceed to step 3. If not, then the person will not be considered an 'employee-like worker'.

Step 3:

In addition to steps 1 and 2, the individual must also satisfy at least two of the below criteria:

Step 3 — Additional Criteria to Satisfy
☐ 1. Does the individual have low bargaining power in negotiations in relation to the service contract under which the work is being performed? Factors to consider may be: - Is the individual able to amend terms of their contract? - Is the individual a migrant worker? - Does the individual have any ability to set their own rate of pay, or to negotiate the rate of pay? - Are you aware of whether the individual has access to other forms of employment?
☐ 2. Is the individual remunerated at or below the rate of an employee performing comparable work?
☐ 3. Does the individual have a low degree of authority over the performance of the work under the service contract?
☐ 4. Does the individual have any characteristics prescribed by the regulations?7

If the answer is 'Yes' to any of the above questions in Step 3, and then the employee will be considered an employee-like worker.



Practical Tip: Remember that although 'employee-like workers' are independent contractors, they will be placed in a separate category and will have more access to safety net minimum provisions than other independent contractors.

7 Note: no characteristics have been prescribed by the Regulations at the time of publication

3. Powers of the FWC in relation to employee-like workers

3.1 If an individual falls under the definition of an 'employee-like worker', from 26 August 2024, the FWC will have powers to regulate this type of arrangement.

What can the FWC do?

3.2 Make Minimum Standards Orders (binding);

3.3 Make Minimum Standards Guidelines (non-binding);

3.4 Register Collective Agreements made between digital labour platform operators and organisations entitled to represent employee-like workers; and

3.5 Deal with 'unfair deactivations' (similar to unfair dismissals but for employee-like workers).

3.6 The FWC's new powers when it comes to employee-like workers are summarised below. The following sections of this guide will provide a detailed analysis of these powers.

Minimum Standards Orders (MSOs)

What are MSOs?

3.7 MSOs are orders set by the FWC to establish an appropriate safety net of minimum standards for employee-like workers. They resemble, to an extent, the National Employment Standards and modern awards that are conferred on all employees. MSO are set by the FWC. Below is a list of terms which can and cannot be included in MSOs.

Terms	Must be included	May be included	Can't be included
Coverage	✓		
Procedures for settling disputes	✓		
Payment terms		✓	
Deductions		✓	
Record Keeping		✓	
Insurance		✓	
Consultation		✓	
Representation		✓	
Delegates' rights		✓	
Cost Recovery		✓	
Overtime Rates			✗
Rostering Arrangements			✗
Commercial matters (not relating to workers covered by MSO)			✗
Terms which would deem a worker an employee			✗
WHS matters that are addressed by State or Territory Law			✗
Penalty rates for work performed at particular times or on particular days (e.g., loadings and shift allowances)			✗
Payment for time before the acceptance of an engagement;			✗
Payment for time between the completion of an engagement and the commencement of the next engagement on a digital labour platform			✗
Other prescribed matters8			✗

If MSOs apply to an individual and the MSO is breached civil penalties may apply

Minimum Standards Guidelines

3.8 Minimum Standards Guidelines (**MSG**) set standards for regulated workers who perform work under a services contract. MSG's can be made in the following ways:

a. FWC can make an MSG on its own initiative; or

b. under the Act which includes:

i. An organisation that is entitled to represent the industrial interests of one or more regulated workers or businesses covered by the MSG; or

ii. A regulated business covered by the MSG; or

iii. The Minister.9

3.9 MSGs apply to employee-like workers and digital labour platform operators. Terms which can and cannot be included in MSGs are the same as the terms in MSO's which are set out in the table above.

3.10 MSGs are not legally binding. This means that breaches of MSGs do not attract penalties.



Tip: The main difference between minimum standards orders, and minimum standards guidelines is that MSO are binding and attract penalties and guidelines do not.

8 FW Act s 536(KM)
9 FW Act s 536(KS)

4. Minimum Standards Orders

Commencement: 26 August 2024

What to do next: Monitor the progress of the FWC in making MSOs. Some Digital Platform Operators may wish to participate in the proceedings which will give rise to the MSOs.

Highlights

- The FWC will be empowered, on its own initiative, or on application, to make MSOs for employee-like workers.
- In exercising its jurisdiction, the FWC will be guided by the Minimum Standards Objective, a provision similar to the Modern Awards Objective, however, focusing on the particular attributes of 'employee-like work'.
- An MSO will impose minimum terms and conditions on the relationship between a digital labour platform and the independent contractor, that must be met. The reforms provide certain terms that may be included in the MSOs (e.g. terms about payment, insurance, record keeping and consultation) but there are also terms which cannot be included (e.g. rostering arrangements and commercial matters). The full list of what can and cannot be included is described in detail in this section.
- Contravening employee-like worker MSOs will incur a civil penalty.

Changes

What are MSOs?

4.1 MSOs are set by the FWC to establish an appropriate safety net of minimum standards for employee-like workers.

4.2 The objectives of MSOs are that they:10

a. are clear and simple;

b. are fair and relevant;

c. recognise the perspectives of regulated workers, including their skills, the value of the work they perform and their preferences about their working arrangements;

d. do not change the form of the engagement of regulated workers from independent contractors to employees — that is, the terms cannot vary the nature of the relationship to such an extent that the engagement becomes one of employment. No one single term is likely to do this. However, if a combination of terms operate in combination so that a worker is no longer viewed as conducting their own business, but is actually performing work in the business of the digital labour platform — then this is the type of term that would be inconsistent with the MSO objective;

e. do not give preference to one business model or working arrangement over another;

f. are tailored to the relevant industry, occupation or sector and the relevant business models;

g. are tailored to the type of work, working arrangements and regulated worker preferences;

h. reflect the differences in the form of engagement of regulated workers as independent contractors to the form of engagement of employees; and

i. have regard to the ability of regulated workers to perform work under services contracts for multiple businesses, and the fact that the work may be performed simultaneously.

10 FW Act s 536JX

4.3 The need to provide "fair and relevant" terms involves a broad evaluative assessment from the FWC. This concept has been applied for 15 years in the modern awards context and experience suggests that the FWC will consider all matters that might affect the engagement, for example: matters pertaining to ensuring sufficient take-home pay, ensuring work is safe and ensuring that terms do not unnecessarily or excessively increase the burden of regulation / productivity.

4.4 Terms can only be included in an MSO to the extent necessary to achieve the Minimum Standards Objective.

That is, terms cannot be included that, while generally having merit, are not needed to ensure the MSO objectives are met. Whilst this appears to provide some limit on the extent to which terms may be included in MSOs, this concept has also applied in the modern awards context for the past 15 years and the broad nature of the test (including the requirement to have "fair and relevant" terms) means that the diversity and extent of terms that might be included can still be quite broad.

4.5 The MSOs issued will likely vary depending on the industry involved. By way of example, in the courier industry and passenger transport industries, significant focus will be placed on the cost of running a vehicle to transport goods or persons, and ensuring sufficient remuneration is paid to the worker to cover the costs of running the vehicle (including finance, depreciation, fuel, repairs and maintenance and insurance). On the other hand, in industries where the worker is not providing a significant asset (for instance ad-hoc tasks or provision of personal labour), the cost of the providing the labour/running the business will attract less focus in the MSO.

4.6 In relation to minimum rates, the FWC must take into account the following:11

a. costs necessarily incurred by regulated workers directly arising from the performance of a services contract

b. safety net minimum standards that apply to employees performing comparable work

c. not to change the form of engagement of the workers.

Impact of MSOs

4.7 It is intended that the FWC would need to consider the type of adverse impacts that could be imposed by MSOs in setting them. This would include considering:12

a. adverse impacts on sustainable competition amongst industry participants

Examples include: provisions that do not allow competitors to differentiate their offering. For instance, provisions that require workers to all follow the same route, work at the same times, etc.

b. business costs, regulatory burden, sustainability, innovation, productivity or viability

Examples include: provisions that impose cost (e.g. high remuneration, penalty rates, reimbursement obligations), provisions that impose administrative burden (e.g. record keeping, monitoring of hours), provisions that require minimum work periods or resourcing levels that might exceed what is needed to perform the work, provisions that oblige digital labour platforms to provide advance notice of changes, etc.

c. administrative and compliance costs for industry participants

Examples include: record keeping obligations, provisions that oblige digital labour platforms to provide advance notice of changes, etc.

d. the national economy

Examples include: provisions that would affect an industry holistically to such an extent that the economy is affected as a whole. Most provisions would not have this effect, but it is possible that material changes to the way contractors are engaged could have this impact. For instance, an unnecessarily high minimum trip payment in the food delivery context could disincentivise the provision of food delivery services industry-wide which in turn affects food service providers throughout the economy.

e. persons or bodies that use or rely on the work performed by regulated workers, or the services received under service contracts.

Examples include: restaurants or shops who rely on regulated workers to deliver goods and services and consumers who receive these types of goods and services.

4.8 The FWC is also obliged to consider and avoid unnecessary overlap of different MSOs made under the FW Act.

Reminder:

MSOs are legally binding as a minimum safety net of terms and conditions. Penalties will apply for breach.

MSGs are only guidelines that do not attract penalties if they are not complied with.

11 Revised EM 1294

12 FW Act 536JX(c)

Who do MSOs apply to?

4.9 MSOs apply to employee-like workers and digital labour platform operates who are identified in the MSOs coverage clause.

4.10 The coverage clause of an MSO will be expressed to apply to classes of operators or workers.

Example: Classes of operators or workers

The MSOs will describe the persons bound either by class or individually by name. Where a group is named in a class, the group bound by the MSO will usually be defined by reference to common characteristics they share. For example:

- all food delivery contractors; or
- all contractors performing passenger transport services with less than 4 passengers; or all couriers delivering parcels on bikes or vehicles weighing less than 2 tonnes.

4.11 In the event of an inconsistency between and MSO and State or Territory law, the MSO will prevail.13

This means that once an MSO comes into effect, instruments such as contract determinations (which exist in the NSW industrial system) will not apply to the workers subject to the MSO.

What can MSOs contain?

4.12 MSOs must contain terms relating to:

a. coverage14

b. procedure for settling disputes15

4.13 MSOs may contain terms relating to:

a. payment terms (that is, over what periods payments should be made)

b. deductions (that is, when an operator can or cannot deduct money from payments owing to the contractor.

For instance, the MSO might contain provisions limiting the extent to which an operator can deduct money from payments owing to the contractor)

c. record keeping, in relation to matters covered by or required by the Act, or by an order or instrument made under the Act

d. insurance

e. consultation (usually consultation will be required where major changes arise that are likely to have a significant impact on the contractor. The types of circumstances that would trigger consultation obligations (and the extent of consultation required) can be included in the MSO)

f. representation (usually for the purposes of consultation or disputes in relation to the application of the MSO or the engagement)

g. delegates' rights (this pertains to union delegate rights to represent contractors); and

h. cost recovery16

4.14 It is important to note that this list does not specifically limit the terms that may be included in an MSO.

In addition to the required terms, an MSO order may include terms that it is permitted to include, however only to the extent necessary to achieve the minimum standards objective.17 Given the breadth of the minimum standards objective, there are likely few limitations, with the exceptions of the prohibited terms below.

What can't MSOs contain?

4.15 MSOs can't contain terms relating to:

a. overtime rates

b. rostering arrangements

c. commercial matters that are not about the engagement or workers covered by the minimum standards order

13 Supplementary EM 2 (22), FW Act s536JS
14 FW Act s 536KH FW Act s 536KK FW Act s
15 536KL FW Act s 536KO
16
17

d. terms that would deem a worker an employee (this includes terms that are so incompatible with the nature of independent contracting that to comply with them would cause the regulated worker to be treated as if they were an employee)18

e. WHS matters that are comprehensively addressed by other Commonwealth, State or Territory law

f. Other prescribed matters.19

4.16 The prohibition of terms relating to WHS matters has been qualified in the amendments. The Regulations may specify which WHS matters are not dealt with comprehensively by a law of the Commonwealth, a State, or a Territory. Additionally, the Regulations may prescribe one or more laws of the Commonwealth, a State, or a Territory to which the prohibition either does, or does not, apply. To date, no laws have yet been prescribed.

4.17 The FW Act also provides that certain terms may qualify for inclusion in an MSO, if the FWC is satisfied that their inclusion is appropriate.20 If the FWC has not made such a determination, the following terms must not be included in an MSO:

a. penalty rates for work performed at particular times or on particular days (including loadings and shift allowances)

b. payment for time before the acceptance of an engagement; or time in between the completion of an engagement and the commencement of the next engagement on a digital labour platform; and

c. minimum periods of engagement or a minimum payment referable to a minimum engagement.21

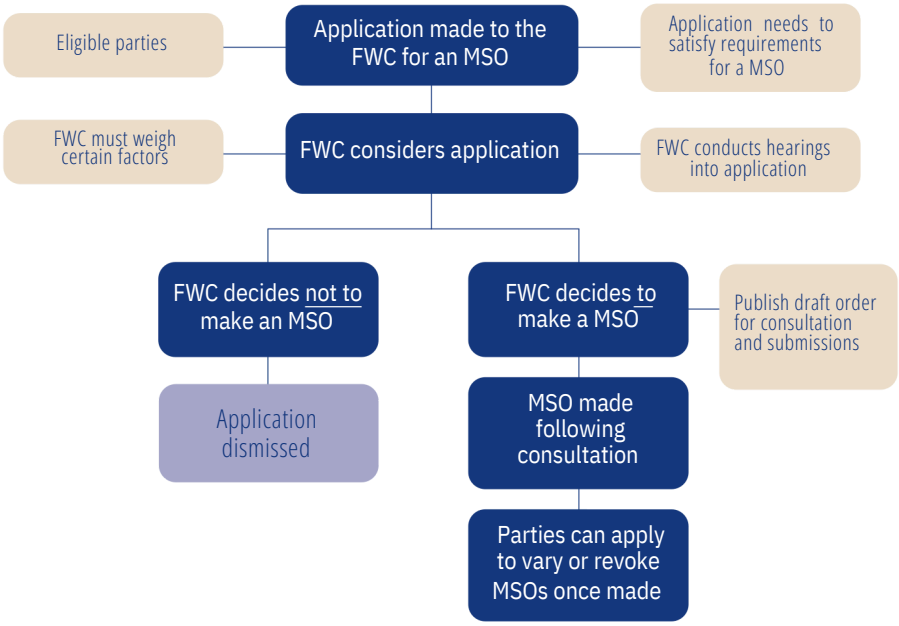
4.18 The purpose of this different treatment of these additional terms appears designed to discourage the FWC from including these provisions generally or by default, because the legislature appears to have recognised that regulation of these types of additional matters could significantly impede the operation of a digital labour platform's operation. However, by allowing their inclusion where "appropriate" the laws provide some residual ability to regulate these matters if the FWC considers it necessary once it reviews the specific type of work being performed by the employee-like workers and the specific arrangements in place with particular kinds of digital labour platforms.

Penalties for the breach?

4.19 A person must not contravene a term of a minimum standards order. This section is a civil remedy provision. A person does not contravene a term of a minimum standards order unless the order applies to the person. The penalty for a serious contravention is 600 penalty units or otherwise 60 units. From 1 July 2023 a penalty unit was $313. That means 60 penalty units = $18,780.22

Process for making MSOs

Flowchart 2 — Process for making Minimum Standards Orders



18 Revised EM 1358
19 FW Act s 536KM
20 FW Act s 536KMA(2)
21 FW Act s 536KMA
22 FW Act s 536JB. Please note, figures are accurate at the time of publishing

Process in detail

4.20 Before making, varying, or not making or varying an employee-like worker MSO, the FWC must consider

whether, overall, the persons included (or purportedly included) in the class of employee-like workers are actually employee-like workers.23

4.21 The FWC cannot consider the application, or make or vary an order, if they are not satisfied that the persons included in the order are employee-like workers (see section 2.1 above).24

4.22 To make or vary an MSO, the FWC must be satisfied that genuine engagement and consultation has occurred with the parties to be covered and must have regard to choice and flexibility in working arrangements.25

4.23 The requirement to have regard to choice and flexibility in working arrangements would further ensure that the FWC considers the unique nature of digital platform work, without compromising on minimum safeguards to be afforded to employee-like workers to whom an MSO would apply, i.e. the ability of an employee-like worker, as a type of independent contractor, to have choice and flexibility regarding matters such as when and how they perform digital platform work, the time of day they choose to work, the duration of such work, and how many times a day they choose to work.26

4.24 In practice, this means that the FWC would not intervene to vary an MSO if the proposed variation would remove employee choice regarding when and how they perform work — for instance, if a proposed variation specified the times at which an employee must work or must not work. On the other hand, this factor might motivate the FWC to vary an MSO if it considers that the existing MSO is unnecessarily constraining a worker's ability to work flexibly (for instance, because it requires the employee to be available at particular times or perform a minimum volume of work).

4.25 Before making an employee-like MSO, the FWC must:

Process step	Content of step FWC must take
Notice of intent	Publish a notice (a notice of intent) stating that the FWC proposes to make an employee-like worker MSO and publish a draft of the employee-like worker MSO.
Publication of Notice	Publication of the notice on the FWC website and any other considered relevant by the FWC.27
Reasonable period of consultation	The FWC must also be satisfied that there has been a reasonable period of consultation after the relevant notice of intent for the order was published, having regard to the unique nature of digital platform work.28
Written response to draft order	The FWC is to ensure that affected entities have a reasonable opportunity to make written submissions to the FWC in relation to the draft of an employee-like worker MSO. Submissions (other than those which contain confidential or commercially sensitive information) are to be published by the FWC. Those which contain confidential or commercially sensitive information may either not be published or be published in a summary form without confidential or commercially sensitive information.29
Hearing optional but not mandatory	The FWC may hold a hearing in relation to a draft employee-like worker MSO but is not required to do so.30
Decision to make or not make MSO	Once submissions are received, the FWC may make the MSO or decide not to make the MSO.31 The FWC may make any changes it thinks appropriate to a draft employee-like worker MSO32 however, if these changes are significant, the FWC must commence a new statement of intent in relation to the revised draft MSO and follow a new consultation process with respect to the newly drafted MSO.

23 FW Act s 536K FW
24 Act s 536K FW Act
25 s 536K Revised EM
26 1316 FW Act s
27 536KAB Revised
28 EM 1226 FW Act s
29 536KAB FW Act s
30 536KAC FW Act s
31 536KAD FW Act s
32 536KAD

Varying or revoking minimum standards orders

4.26 To vary or revoke MSO, any of the following parties may apply to the FWC for a determination:

a. an organisation entitled to represent, or another body that represents, the industrial interests of one or more regulated workers covered by the MSO or who would be covered by the MSO proposed to be varied (i.e. a union);

b. an organisation that is entitled to represent, or another body that represents, the industrial interests of one or more of the regulated businesses covered by the MSO or that would be covered by the MSO proposed to be varied (i.e. an association of employers or businesses);

c. a regulated business covered by the MSO proposed to be varied;

d. a national or State council or federation that is effectively representative of a significant number of organisations; or

e. the Minister.33

4.27 The FWC may make a determination varying or revoking an MSO if consistent with the minimum standards objective. This determination does not need to include all of the elements of the variation sought in an application. This includes refusing to make a variation to the extent that it would result in the MSO covering persons who are not regulated workers.34 A determination varying or revoking an MSO would operate on the day specified in that determination.35 Furthermore, a determination varying or revoking an MSO must not be earlier than the day on which the determination is made.36

4.28 The reasons an MSO might be varied are likely to differ depending on the entity that has sought the variation:

a. if the variation is proposed by a union or employee-like workers, the variation is likely to be motivated by some concern that the MSO is still not ensuring sufficient compensation for the relevant workers, or by some concern that business practices are giving rise to unsafe work or insufficiently secure or certain work patterns.

b. if the variation is proposed by a digital platform operator or a business association, the variation is likely to be motivated by some concern that the MSO is in practice imposing unrecoverable costs, too rigid rostering, engagement rules that are preventing businesses from effectively running, or some other burden that is impeding the efficient running of the digital labour platform.

c. variations by the FWC are most likely to arise where a significant or prominent (and most likely public) issue has arisen (i.e. a major hurdle to the businesses operating effectively or a major hole in the remuneration structure) such that the FWC is motivated to vary the MSO on its own motion. Variations by the FWC on its own motion sometimes also arise where technical or drafting issues are identified in other disputes and the FWC identifies a need to fix these technical/drafting matters.

4.29 MSOs operate until revoked.37

Deferral of MSOs

4.30 The Minister may make a declaration deferring the operation or application of an MSO deferring the operation of an MSO or the application of specified, or all of the terms, of the MSO, to all persons, or specified class(es) of persons.38

4.31 Any deferral decisions are effective the day that they are made.39 Deferrals may apply to a particular industry or sector, or a part of an industry or sector, or particular kinds of work.40 Deferral declarations are to be published on the Department's website.41

4.32 Deferral decisions are likely to be very rare. This provision appears directed at ensuring that if a significant public outcry arises out of a particular MSO, the Minister can intervene to prevent the MSO from commencing operation whilst the relevant parties can then address the FWC on any concerns arising from the MSO. The provision has no doubt been influenced by the experience of the former Road Safety Remuneration Tribunal (RSRT) — which issued minimum payment determinations in 2016 that caused an outcry amongst 'owner-drivers'. The then Federal Government abolished the entire RSRT in response to the outcry. This deferral power is intended to provide a circuit breaker that can minimise public outcry over MSO terms without threatening the viability of the whole employee-like worker jurisdiction. Having regard to this history, it is very unlikely a Minister will intervene to defer an MSO unless a particular class of regulated businesses generate substantial public outcry over a particular MSO or some of its specific terms.

33 FW Act s 536KP FW
34 Act s 536KQ(2)
35 Revised EM 1229
36 Revised EM 1230
37 Revised EM 1233 FW
38 Act s 536KQA(3) FW
39 Act s 536KQA(1) FW
40 Act s 536KQA(4) FW
41 Act s 536KQA(5)

4.33 Deferral declarations must not be made to an MSO that has already come into operation42 and the Minister may only make one full deferral declaration in relation to a particular MSO.43 However, the Minister may make more than one part deferral declaration in relation to a particular MSO.44

4.34 An MSO is not in operation during any period when a full deferral declaration is in place but is in operation when a part deferral declaration is in operation.45

Suspension of MSOs

4.35 The Minister may make a declaration (without consultation) suspending the operation or application of an MSO

deferring the operation of an MSO or the application of specified, or all of the terms, of the MSO, to all persons, or specified class(es) of persons.46

4.36 The period of the suspension must not be longer than 12 months.47 The period of suspension ends immediately after the end of the period specified in the suspension declaration. Suspension declarations are to be published on the Department's website.48

4.37 A full suspension declaration in relation to a particular MSO must be made within 12 months of the day on which the MSO came into effect, with a part suspension declaration being made within 12 months, subject to certain conditions.49

4.38 An MSO is not in operation during any period when a full suspension declaration is in place but is in operation when a part suspension declaration is in operation.50

The role of the FWC in varying or revoking a deferred or suspended MSO

4.39 The FWC must consider whether to vary or revoke an MSO that has been deferred or suspended if the Minister makes a deferral declaration or suspension declaration in relation to an MSO. The FWC must not vary or revoke the MSO unless there has been genuine engagement with the parties covered and must have regard to employee-like worker choice and flexibility in working arrangements.51

4.40 Having regard to the history and comments at paragraph 3.33 above, the FWC may decide to vary or revoke the MSO to address whatever public outcry gave rise to the Minister's intervention. For example, it could be that certain minimum engagement or penalty clauses were introduced by an MSO that made some digital platform operators unviable. If the FWC underestimated the impact of the MSO, it could reconsider the provisions and lessen their impact to allow digital platform operators to maintain their viability.

4.41 Before deciding to vary or revoke an employee-like worker MSO in relation to which a deferral declaration or determination has been made, the FWC is to publish a notice of intent stating that the FWC proposes to vary or revoke the employee-like worker MSO; and if the proposal is to vary the employee-like worker MSO then publish a draft of the proposed employee-like worker MSO.52

4.42 The FWC must ensure that businesses regulated by the MSO have a reasonable opportunity to make submissions and comment on proposed variation or revocation of an employee-like MSO. The FWC have an obligation to publish any submissions made to the FWC with the exception of submissions made by an entity which includes information considered to be confidential or commercially sensitive, in which case the FWC may decide not to publish the information, or instead publish a summary of the information, without disclosing anything that is confidential or commercially sensitive.53

4.43 The FWC may, but is not required to, hold a hearing in respect to a draft employee-like MSO as proposed to be varied or a proposed revocation of an employee-like worker MSO.54

4.44 The FWC may make any changes it thinks appropriate to a draft employee-like worker MSO, as proposed to be varied.55

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42 43 44 45 46 FW Act s 536KQB(1)
47 48 49 50 51 FW Act s 536KQB(2)
52 53 54 55 FW Act s 536KQB(4) FW Act s 536KQC FW Act s 536KQD(1) FW Act s 536KQD(3) FW Act s 536KQA(8) FW Act s 536KQE FW Act s 536KQF FW Act s 536KQS FW Act s 536KQW FW Act s 536(KQX) FW Act s 536(KQX(7)) FW Act s 536(KQY))

5. Minimum Standards Guidelines

Commencement: 26 August 2024

What to do next: Monitor the progress of the FWC in making Minimum Standards Guidelines. Some Digital Platform Operators may wish to participate in the proceedings which will give rise to the Minimum Standards Guidelines.

Highlights

- The *Fair Work Legislation Amendment (Closing Loopholes) Act 2024* introduces a system for the creation of 'Minimum Standards Guidelines' for employee-like workers.
- Minimum Standards Guidelines are subject to similar rules to Minimum Standards Orders however would set non-binding minimum standards.
- A Minimum Standards Guideline cannot be made where a Minimum Standards Order covers the same subject matter.

Changes

What are they?

5.1 The FWC may make MSGs that set standards for regulated workers who perform work under a services contract. The FWC may make MSGs on its own initiative or on application under section 536KS.

5.2 The Guidelines are likely to establish best practice for digital platform operators and set out behaviours/ conditions that are 'desirable' without being mandatory in all contexts.

5.3 Given that MSOs are legally binding and the breach of an MSO gives rise to penalties, the FWC will adopt a very considered and cautious approach regarding what provisions are included in an MSO. By contrast, allowing the FWC to set MSGs gives the FWC the flexibility to provide significantly greater guidance as to what is desirable without being concerned that their guidance might not be able to be complied with in all circumstances. It also minimises the prospect of public outcry if some provisions are difficult to comply with because the operator can elect not to comply, should they wish.

5.4 In practice, MSGs are also likely to have a 'precursor' or 'trial' characteristic. That is, if the FWC was not satisfied whether to include a particular term into an MSO, the FWC might include the term into an MSG to monitor how the term operates in practice. If the term appears over time to be adopted successfully in practice, it is likely that subsequent applications might be made by parties to include the term into MSOs.

Who do they apply to?

5.5 MSGs apply to employee-like workers and digital labour platform operates who are identified in the MSG's coverage clause.

5.6 The coverage clause of an MSG might be expressed:

a. to apply to classes of operators or workers (i.e. described by reference to their activities); or

b. to apply to specifically named operators and their relevant employee-like workers (i.e. described by referencing the digital labour platform operator that is covered).

Example: Classes of operators or workers

The MSGs will describe the persons bound either by class or individually by name. Where a group is named in a class, the group covered by the MSG will usually be defined by reference to common characteristics they share. For example:

- all food delivery contractors; or
- all contractors performing passenger transport services with less than 4 passengers; or
- all couriers delivering parcels on bikes or vehicles weighing less than 2 tonnes.

What can MSGs contain?

5.7 MSGs must include terms setting out the same matters in relation to MSOs. [56] Refer to section 3.7 above.

What MSGs can't contain?

5.8 MSGs must not include terms about any of the matters that must not be included in relation to MSOs. [57] Refer to section 3.7 above.

Process for making an MSG

5.9 Applications for MSGs may be made by:

a. an organisation entitled to represent (i.e. a union), or another body that represents, the industrial interests of one or more regulated workers covered by the proposed MSG;

b. an organisation that is entitled to represent the industrial interests of one or more of the regulated businesses that would be covered by the proposed MSG;

c. a regulated business that is included in a class of regulated businesses that would be covered by the proposed MSG;

d. the Minister.58

5.10 An application for an MSG needs to specify the class of regulated workers to be covered by the MSG, along with the class of regulated businesses to be covered. Note, the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.59

5.11 Before making a decision to make or vary, or not to make or vary, employee-like worker MSG, the FWC must consider whether the class of employee-like workers to be covered by the proposed MSG, or MSGs as proposed to be varied, are employee-like workers. If the FWC aren't satisfied that the persons aren't in the class of employee-like workers then the FWC may decide to refuse to consider the application, or not to make or vary the MSGs.60 Circumstances where this might arise is where the workers don't meet the relevant test set out at 2.3 above. For instance, there might be significant doubt as to whether the workers have low bargaining power or authority over how they perform the work. The types of bargaining power/authority over how the workers perform their work might be quite varied across an industry making it impossible to define or treat the class in the same way.

5.12 In making a decision, the FWC may decide to:

a. refuse to consider the application; or

b. make MSGs; or

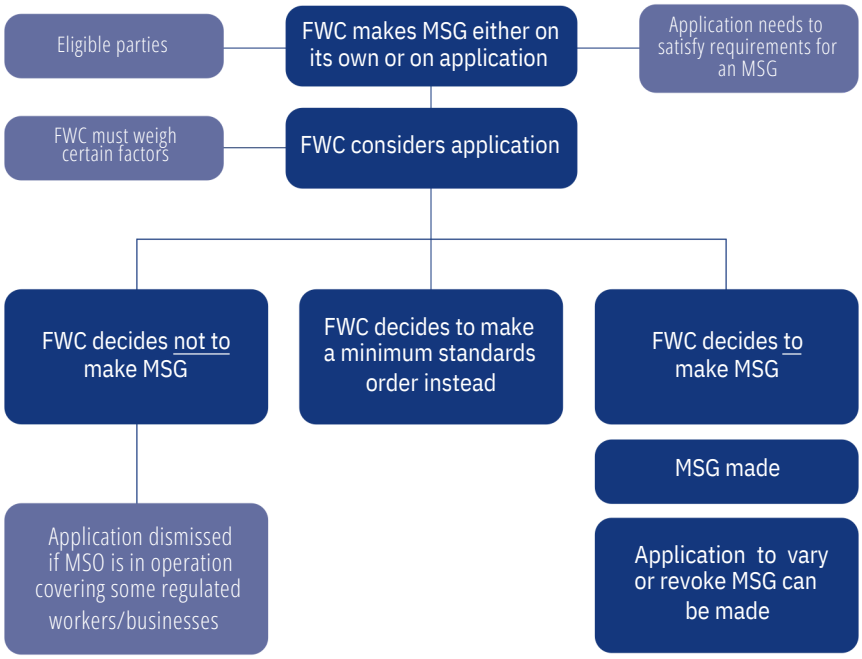
c. not make MSGs; or

d. instead make an MSO under section 536JY(1) instead, as if the application had been an application for a MSO in relation to regulated workers.61

5.13 The FWC must not make MSGs that cover the same regulated workers and the same regulated businesses where an MSO is in operation.62

56 FW Act s 536KW
57 FW Act s 536KY
58 FW Act s 536KS
59 FW Act s 536KS
60 FW Act s 536KT
61 FW Act s 536KV
62 FW Act s 536KU

Flowchart 3 — Process for making Minimum Standards Guidelines



Process on varying or revoking MSGs

5.14 The following organisations can make an application to the FWC to vary or revoke MSGs:

a. an organisation entitled to represent, or another body that represents, the industrial interests of one or more regulated workers covered by the proposed MSG (i.e. a union);

b. an organisation that is entitled to represent the industrial interests of one or more of the regulated businesses that would be covered by the proposed MSG (i.e. a business association);

c. a regulated business that is included in a class of regulated businesses that would be covered by the proposed MSG;

d. the Minister.63

5.15 A determination for revoking MSGs would operate on the day specified in that determination; which must not be earlier than the day on which the determination is made.64

5.16 MSGs continue to operate until they are revoked.65

The difference between Minimum Standards Orders v Minimum Standard Guidelines

	Minimum Standards Orders (MSO)	Minimum Standards Guidelines (MSG)
Who is responsible?	FWC	FWC FWC on their own initiative or under
How are they made?	FWC	the Act. No No The FWC can give more
Are they legally binding?	Yes	guidance without
Do penalties apply?	Yes	taking into account whether these things can be implemented.
Features of each	Binding in nature and attract penalties.	

63 FW Act s 536KS
64 Revised EM 1242
65 Revised EM 1243

6. Collective Agreements

Commencement: 26 August 2024

What to do next: Consider whether there is any benefit to pursuing a collective agreement and/or whether there is a likelihood that workers and/or a union may pursue one.

Highlights

- The Fair Work Commission will also now be able to register collective agreements made by consent between digital labour platform operators and organisations entitled to represent employee-like workers.
- Agreements negotiated between digital platform operators and unions will be able to be ratified by the Fair Work Commission. The role of the Fair Work Commission in this respect is a relatively passive one.
- These Agreements will need to leave the 'employee-like workers' no worse off than any applicable MSO or any applicable State or Territory law that applies to the employee-like worker.
- Collective agreements can only be terminated pursuant to an arrangement recorded in the collective agreement which enables the agreement's termination.
- he legislation would also expressly permit all conduct associated with the making of a collective agreement as well as all conduct incidental to or in preparation for the making of a collective agreement for the purposes of competition and consumer laws, which has the effect of ensuring that such conduct does not breach the Competition Code.

Changes

Who can a collective agreement apply to?

6.1 A collective agreement may be made between a digital labour platform operator and an organisation that is entitled to represent the industrial interests of one or more employee-like workers, in respect of the following:

a. the terms and conditions on which employee-like workers covered by the collective agreement perform digital platform work, either under a services contract to which the digital labour platform operator is a party or under a services contract arranged or facilitated through or by means of the digital labour platform operated by the digital labour platform operator; and

b. how the collective agreement will operate.66

6.2 A collective agreement is effectively a set of terms and conditions that apply collectively as a minimum safety net to the whole group of workers specified in the agreement. It does not operate as a contract for each employee-like worker, but rather as a minimum set of terms that the individual contracts must comply with.

6.3 As collective agreements are negotiated between the parties (as opposed to being determined/arbitrated by the FWC), digital platform operators will have greater control over the terms of the collective agreement. This in turn might make the collective agreements attractive to some digital platform operators because they can introduce terms specific to their enterprise which might not be reflected in the industry-wide MSOs. They are particularly attractive where an MSO contains terms that the digital platform operator might have difficulty complying with. Provided the collective agreement is more beneficial to the workers overall than the MSO, the digital platform operators can negotiate out terms of the MSO that are difficult to comply with.

6.4 The process for making collective agreements is addressed in detail further below.

66 FW Act s 536MK

When does a collective agreement cover a regulated worker, a regulated business or an organisation?

6.5 A collective agreement covers a regulated worker (e.g. a gig worker), a regulated business (e.g. a digital labour platform) or an organisation (e.g. a union) if the agreement is expressed to cover the regulated worker, the regulated business or the organisation.67

Employee-like workers who collective agreements can be made with

6.6 An eligible employee-like worker for a proposed employee-like worker collective agreement is an employee-like worker who, at any time during 28 days before the consultation notice was given, was performing work under a services contract through or by means of a digital labour platform operated by the digital labour platform operator.

6.7 However, once made, the collective agreement covers all employee-like workers who fall within the class of persons specified in the collective agreement's coverage clause.

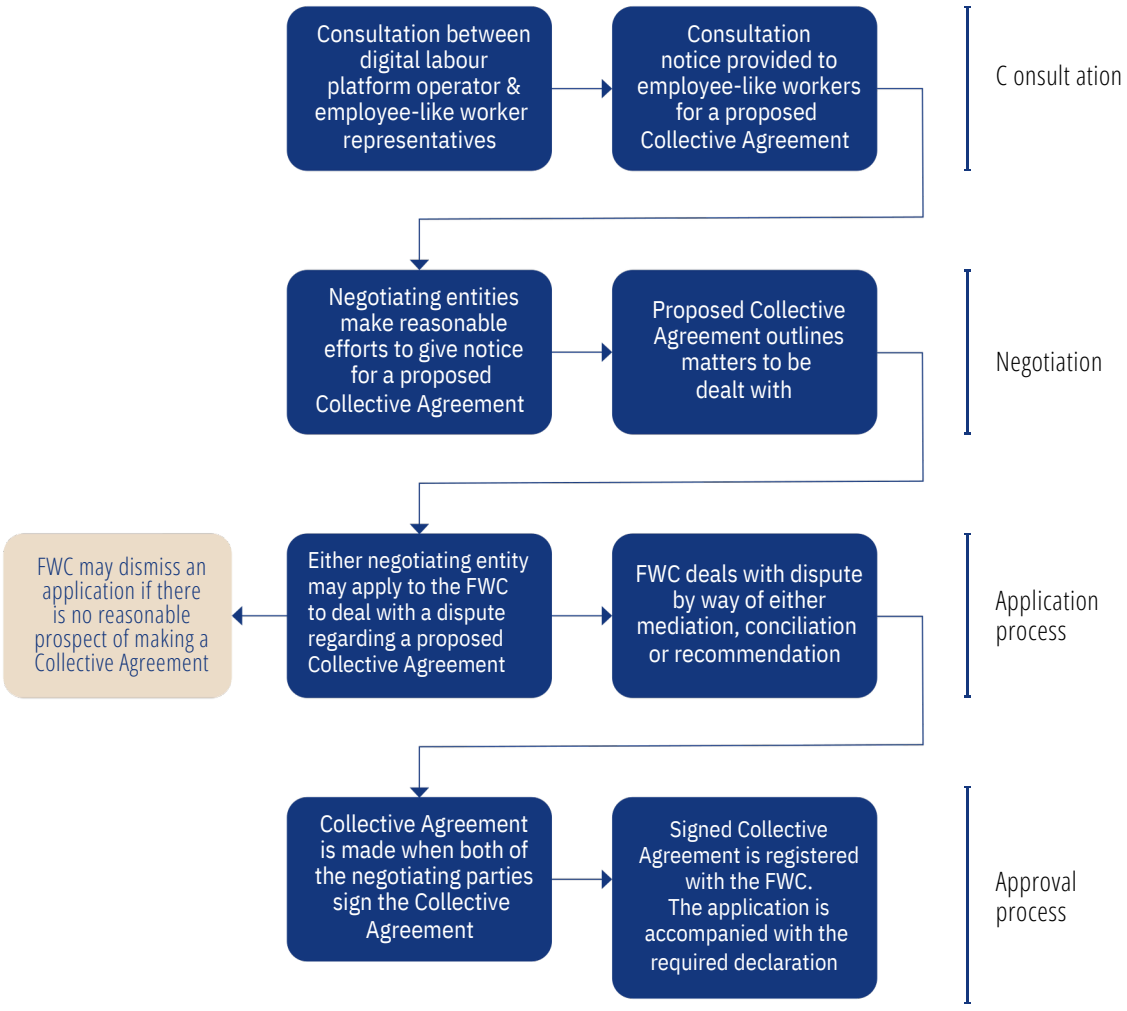
When a collective agreement is in operation

6.8 A collective agreement comes into operation on the day that it is registered or if a later day is specified in the collective agreement — on that later day.68

6.9 A person must not contravene a term of a collective agreement. Civil remedies may be sought in relation to a contravention. A person does not contravene a term of a collective agreement unless it applies to them.69

Process for making collective agreements

Flowchart 4 — Process for making Collective Agreements



67 68 69 FW Act s 536JM
FW Act s 536JN
FW Act s 536JK

Process for making a collective agreement in detail

6.10 The following parties may initiate a consultation period for a collective agreement:

- A regulated business that will be covered by the proposed collective agreement; or
- An organisation that is entitled to represent the industrial interests of one or more regulated workers who will be covered by the proposed collective agreement.70

The consultation notice

What must go into the notice

a. the notifying entity

b. if the notifying entity is a regulated business — the name of the organisation, otherwise the name of the organisation giving the consultation notice

c. matters to be dealt with by the proposed collective agreement

d. the regulated business that will be covered by the proposed collective agreement

e. the class of regulated workers who will be covered by the proposed collective agreement.71

Serving the consultation notice

6.11 A consultation notice for a proposed collective agreement must be given on the same day to the FWC and to either:

a. if the notifying entity is a regulated business (e.g. a digital labour platform) — to an organisation that is entitled to represent the industrial interests of the regulated workers (e.g. a union) who will be covered by the proposed collective agreement;

b. otherwise to the regulated business that will be covered by the agreement (i.e. the digital labour platform).72

Both parties are the negotiating entities of the proposed collective agreement.

Notifying employee-like workers

6.12 After a consultation notice has been given for the proposed collective agreement, the negotiating entities must make reasonable efforts to give notice for a proposed employee-like worker collective agreement to each eligible employee-like workers for the proposed collective agreement.

6.13 This would likely require the negotiating entities to communicate the notice in a manner that they would expect the workers would to be able to receive the communication. For instance, if the workers have email addresses, the notice could be communicated by email. If the workers do not have email addresses, then other forms of communication could be required like posting the notice to their homes or pushing notifications to the workers through an app. Given that these provisions relate to digital labour platforms, most workers are likely to have smart phones or apps and are likely to be readily able to access emails. For this reason, email or SMS notification is likely to be the safest form of notification.

6.14 The notice must specify:

a. the regulated business that will be covered by the proposed collective agreement;

b. the class of regulated workers that will be covered by the proposed collective agreement;

c. the organisation that will sign the proposed collective agreement; and

d. the matters proposed to be dealt with in the proposed collective agreement.73

70 FW Act s 536ML
71 FW Act s 536ML
72 FW Act s 536MM
73 FW Act s 536MM

Disputes during the negotiation period

6.15 Either negotiating entity may apply to the FWC for it to deal with a dispute regarding a proposed collective agreement. If an application is made by either negotiating entities, the FWC must deal with the dispute (other than by arbitration), in ways is considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion.74 The disputes that may arise are almost entirely likely to relate to the terms that should be included in the collective agreement. By way of example, disputes might arise with respect to:

a. rates of pay;

b. the right of union delegates to have access to workers for the purposes of induction;

c. rostering provisions or worker availability;

d. training;

e. reimbursement of certain costs involved in performing the work;

f. provision of equipment or uniforms;

g. duration of the collective agreement; and

h. any other term upon which the parties might not be able to reach agreement.

6.16 The FWC may dismiss an application for dispute resolution if satisfied that there are no reasonable prospects of the negotiating entities for the proposed collective agreement reaching agreement.75

When is the collective agreement made?

6.17 The collective agreement is made when both negotiating parties for the agreement sign the collective agreement.[76]

6.18 Unlike the enterprise agreement making process, there is no voting requirement in relation to the collective agreement. Provided both negotiating parties sign the agreement, then the agreement is made.

Registering the agreement with the FWC

6.19 If a collective agreement is made, a negotiating entity for the agreement that signed the agreement may apply to the FWC to register the agreement, with the consent of the other negotiating entity.77

6.20 The application must be accompanied by a signed copy of the collective agreement, which identifies the regulated business, organisation and class of regulated workers covered by the collective agreement.

Pre-requisites for approval of application for a collective agreement

The application must also include a declaration signed by the regulated business and the organisation covered by the collective agreement which must:78

- state that the regulated business and the organisation explained the terms of the agreement and their effect to the regulated workers covered by the agreement, and a description of the explanation;
- state that the regulated business or the organisation made reasonable efforts to give a notice to the regulated workers
- state that no parties were subject to any form of duress in relation to the making of the agreement
- if a minimum standards order is in operation covering the same class of workers, specify how the collective agreement is more beneficial to the regulated workers covered by the collective agreement.

The FWC must also be satisfied that:

- the collective agreement includes a dispute resolution clause;
- the collective agreement includes a period of operation and process/requirements for termination before expiry of the term
- the operation of the agreement would not be contrary to the public interest.

6.21 The application must also be accompanied by any other declaration required by the procedural rules. [79]

6.22 The FWC must publish a copy of the collective agreement and the declaration on the FWC's website. [80]

74 75 76 77 78 FW Act s 536MP
79 80 FW Act s 536MP
FW Act s 536MQ
FW Act s 536MR)
FW Act s 536MR
FW Act s 536MR
FW Act s 536MS

Illustrative example: Collective agreement-making framework

Platform A is a digital labour platform operator that engages courier partners under services contracts to provide courier services via its digital labour platform. The Transport Workers Union (TWU) is an organisation entitled to represent the industrial interests of one or more of the delivery partners engaged via Platform A digital labour platform. The delivery partners are employee-like workers.

The TWU gives a consultation notice to Platform A in accordance with section 536ML to negotiate an employee-like worker collective agreement. Platform A agrees to negotiate a collective agreement covering its courier partners, and the TWU provides the consultation notice to the FWC, which in turn publishes the notice on its website (section 536MM).

Platform A provides a notice under section 536MN about the proposed collective agreement to its courier partners that have performed work in the last 28 days. Platform A is best placed to give the notice via its digital labour platform in the most efficient and accurate manner. Courier partners engage with Platform A and the TWU over the proposed terms and implication of the collective agreement.

After 3 months of negotiation, the TWU requests Platform A sign the collective agreement. Once both parties have signed the agreement, it is made.

The TWU, with the consent of Platform A, applies to the FWC to register the agreement. The application is accompanied by a signed copy of the collective agreement and a signed declaration of both parties covered by the agreement declaring that the courier partners have had the terms of the agreement explained to them, that the parties made reasonable efforts to give a notice to eligible courier partners, and that no party was subject to any form of duress in relation to the making of the agreement.

The declaration also specifies the relevant MSO in operation. The declaration details in relation to each matter dealt with by a term of the collective agreement that is also dealt with by the MSO, how the term of the collective agreement is more beneficial to the courier partners covered by the agreement than the terms of the MSO.

Upon receiving the application and declaration, the FWC registers the agreement and publishes it on its website. The collective agreement comes into operation.

The collective agreement would continue to operate for as long as parties agree it to operate, unless the agreement is varied (and registered by the FWC) or is terminated in accordance with the provisions providing for its termination, and the termination is registered by the FWC.

If a courier partner or the TWU commences action under the FW Act to enforce a term of the collective agreement, it can only do so in relation to terms that relate to the terms and conditions of engagement of the courier partners, or how the agreement is to operate. Any other term of the agreement, including any that deal with matters that are primarily of a commercial nature cannot be enforced under the civil penalty framework of the FW Act.

Process for varying collective agreements

6.23 The regulated business or organisation covered by the collective agreement may apply for a variation of a collective agreement that is in operation.

6.24 The application must be accompanied by a signed copy of the collective agreement as proposed to be varied, identifying the regulated business, organisation and class of regulated workers covered by the collective agreement, as proposed to be varied.81

6.25 The application must also include a declaration signed by the regulated business and the organisation covered by the collective agreement which must:

a. state that the regulated business and the organisation explained the terms of the agreement and their effect to the regulated workers covered by the agreement as proposed to be varied, and a description of the explanation;

b. if an MSO is in operation covering the same class of workers, specify how the collective agreement as proposed to be varied, is more beneficial to the regulated workers covered by the collective agreement as proposed to be varied; and

c. state that no parties were subject to any form of duress in relation to the variation of the agreement.

The application must also be accompanied by any other declaration required by the procedural rules.82

Explaining the terms of the agreement

The FWC has traditionally set relatively high expectations regarding what is required to explain the terms of an agreement and the effect of those terms in the employment context. This has customarily expected the following matters to be explained:

- a summary of the terms and what they mean; - how the terms compare to the underlying safety net (in this case, an MSO). That is, a comparison should be provided between the terms of the agreement and any MSO that applies to the workers;
- how the terms compare to any existing collective agreement that currently applies to the parties (this can most easily done by circulating a marked up copy of the existing collective agreement);
- providing these summaries in writing but also explaining them via briefings utilising other means of communication such as Powerpoint slides and FAQs.

6.26 The FWC must register the agreement if the requirements set out above (in accordance with section 536MT of the Act) are met in relation to the variation of the agreement. The FWC must also be satisfied that the variation of the agreement isn't contrary to public interest and must publish a copy of the collective agreement, as varied, on the FWC's website. The variation comes into operation when the agreement as varied is registered.83

When is a matter contrary to the public interest?

A matter will be contrary to the public interest where it affects the public as a whole, as opposed to affecting the interests of the particular parties to the matter.

The public interest may be affected where an agreement affects matters broader than the public.

For example, an agreement might be contrary to the public interest if it:

- adversely affects another industry (say businesses relying on the provision of the services);
- adversely affects consumers (for instance, by preventing when they can access certain services); or
- provides terms and conditions that have an adverse affect on workers generally such that general adverse outcomes arise (e.g. poor safety outcomes).

81 FW Act s 536MT
82 FW Act s 536MT
83 FW Act s 536MS

Process for terminating collective agreements

6.27 If a collective agreement has been terminated it must be done so in accordance with the process specified in the agreement for terminating the agreement before the end of its period of operation. The regulated business or the organisation covered by the collective agreement must, with the consent of the other, notify the FWC of the termination on the date the agreement is terminated. Notification must be accompanied by a declaration signed by the regulated business and the organisation covered by the collective agreement stating that the collective agreement has been terminated in accordance with the required process and specify the effective termination date. The application must also be accompanied by any other declaration required by the procedural rules.84

6.28 If a compliant notice is given to the FWC, the FWC must register the termination by publishing a notice on the FWC's website stating that the collective agreement has been terminated and specify the date of effect of the termination. The collective agreement ceases to operate on the date of effect of the termination specified in the declaration.85

6.29 A collective agreement would not cover a regulated worker, business or an organisation where it has ceased to operate.86

6.30 A collective agreement would continue in operation until it is terminated.87

84 FW Act s 536MS
85 FW Act s 536MS
86 Revised EM 1256
87 Revised EM 1260

7. Unfair deactivation of regulated workers

Commencement: 26 August 2024

Transitional arrangements: Workers will be able to 'challenge' deactivations from 26 August 2024. Digital Platform Operators should review their deactivation policies and practices to ensure they are compliant with the new regime.

Highlights

- The Fair Work Commission will receive a new jurisdiction to deal with 'unfair deactivations' — in essence, an unfair dismissal jurisdiction for employee-like workers working on digital platforms.
- The jurisdiction will provide a procedure for dealing with deactivation quickly and flexibly seeking to give effect to a 'fair go all round'.
- An employee-like worker is protected from unfair deactivation if they have been performing digital platform work on a digital labour platform on a regular basis for a period of at least 6 months (this is equivalent to the unfair dismissal regime).
- Remedies for unfair deactivation include re-activation and restoration of lost pay but do not include compensation.

Collective Agreements	
Who?	The FWC will be able to register collective agreements made by consent between a digital labour platform operator and organisations entitled to represent employee-like workers.
What?	Collective agreements work as a collective safety net to the group of employee-like workers that are specified in the agreement
When?	regulated worker (e.g., a gig worker), a regulated business (e.g. a digital labour platform) or an organisation (e.g. a union) if the agreement is expressed to cover the regulated worker, the regulated business, or the organisation
How	The process of making a collective agreement is set out in detail under Section 536MK

What is the objective of this jurisdiction?

7.1 The FWC will receive a new jurisdiction to deal with unfair deactivations.

7.2 The objective of this jurisdiction is to establish a framework for dealing with unfair deactivation of employee-like workers that balances the needs of regulated businesses and workers; and establishes procedures for dealing with unfair deactivation that are quick, flexible and informal; and address the needs of regulated businesses and workers.

7.3 The FWC will be able to provide remedies if a deactivation is found to be unfair, with an emphasis on reactivation or reinstatement.88

88 FW Act s 536LC

Meaning of 'deactivated'

7.4 A person has been deactivated from a digital labour platform if:

a. the person performed digital platform work through or by means of the digital labour platform; and

b. the digital labour platform operator modified, suspended, or terminated the person's access to the digital labour platform; and

c. the person is no longer able to perform work under an existing or prospective services contract, or the ability of the person to do so is significantly altered that in effect the person is no longer able to perform such work.89

7.5 An example where this might arise is where the platform has received a complaint about a worker and, in response, the platform has limited the worker's ability to identify new work or has removed their access to the platform entirely.

When is a person protected from unfair deactivation?

7.6 A person is protected from unfair deactivation at a time if, at that time:

a. the person is an employee-like worker; and

b. the person:

i. performs work through or by means of a digital labour platform operated by a digital labour platform operated by a digital labour platform operator; or

ii. (performs work under a services contract arranged or facilitated through or by means of a digital labour platform operated by a digital labour platform operator' and

c. the person has been performing work through or by means of a digital labour platform, or under a contract, or a series of contracts, arranged or facilitated through or by means of the digital labour platform, on a regular basis for a period of at least **6 months**.90



When are deactivations considered unfair or not unfair?

7.7 A person has been unfairly deactivated if the FWC is satisfied that: a. the person has been deactivated from a digital labour platform; b. the deactivation was unfair; and c. the deactivation was not consistent with the Digital Labour Platform Deactivation Code.91

In considering whether it is satisfied that a person's deactivation was unfair, the FWC will take into account:

7.8 a. whether there was a valid reason for the deactivation related to the person's capacity or conduct; and

b. whether any relevant processes specified in the Digital Labour Platform Deactivation Code were followed;

c. any other matters the FWC considers relevant.

The notion of when a valid reason exists to dismiss has been considered in countless unfair dismissal cases.

7.9 Valid reasons usually arise where:

a. a worker engages in behaviour that might be considered serious misconduct (theft, fraud, intoxication during work, sexual harassment, assault, engaging in dishonest conduct, engaging in behaviour that is materially unsafe and creates an imminent risk to health and safety);

b. a worker is not meeting performance expectations (e.g. delivery timeframes) and despite repeated warnings or opportunities for improvement, demonstrates no capacity to improve their performance;

c. a worker engages in a kind of improper behaviour or misconduct in breach of the platform's policy, despite having been warned previously that such behaviour could give rise to a deactivation;

d. a worker is no longer able to safely perform the work because of an illness or injury (and no reasonable accommodations can be made to enable them to perform the work); and

e. the work the worker is performing is no longer required.

89 FW Act s 536LG
90 FW Act s 536LD
91 FW Act s 536LF

Important:
Some types of deactivations are prescribed as expressly not being unfair.
These types of deactivations are outlined below.

Deactivations that will not be unfair

7.10 Deactivation that occurs because of serious misconduct of the person who was deactivated is not unfair.92

7.11 Furthermore, a deactivation of a person is not unfair if the deactivation is the result of the modification or suspension of the person's access to the digital labour platform for a period of not more than 7 business days and the FWC is satisfied that:93

a. the deactivation of the person is necessary to protect the health and safety of a user of the digital labour platform or member of the community; or
Examples: This could arise where a worker has engaged in aggressive behaviour towards an individual or has been engaging in a pattern of aggressive behaviour towards individuals and the suspension is necessary to protect the community in the short term

b. the person engaged in fraudulent or dishonest conduct; or
Examples: Workers dealing with delivery of goods or food might engage in fraud or dishonesty if they do not deliver the goods specified and misappropriate them; switch goods, lie about delivery timeframes or completions or otherwise make false representations to the platform in relation to the performance of the work.

c. the person didn't comply with relevant licensing and accreditation requirements; or
Examples: Driving without a drivers' licence; working with children without having Working With Children Checks in place.

d. the deactivation of the person is necessary to enable the digital labour platform operator to conduct an investigation or the refer the matter to a law enforcement agency to conduct an investigation.94
Example: Where an allegation of serious misbehaviour is made by a consumer of the services (e.g. sexual harassment), often a platform will need to undertake investigations to determine whether this behaviour occurred before implementing any sanction. The suspension process enables the platform to prevent the worker from performing work whilst the investigation occurs

Application process

7.12 A person who has been deactivated may apply to the FWC for an order granting a remedy for unfair deactivation, and for application fees.95 A person must not make an application unless their annual rate of earning is less than the contractor high income threshold, yet to be established at the time of writing.96

7.13 Applications are to be made within 21 days of the deactivation unless otherwise allowed by the FWC, in cases of exceptional circumstances.97 An application fee may be prescribed.

7.14 The FWC must decide whether the application was made within the period required in subsection 536LU(3), whether the person was protected from unfair deactivation and whether the deactivation was consistent with the Digital Labour Platform Deactivation Code.98

Flowchart 5 – Unfair deactivation application process



92 FW Act s 536LH(2)
93 FW Act s 536LH(3)
94 FW Act s 536LH(4)
95 FW Act s 536LU(1)
96 FW Act s 536LU(2)
97 FW Act s 536LU(4)
98 FW Act s 536LW)

The Digital Labour Platform Deactivation Code

7.15 The legislation makes provisions for the introduction of a Digital Labour Platform Deactivation Code. Public consultation is to occur before the Code is made. The purpose of the Code is to deal with:

a. the circumstances in which work is performed on a regular basis

b. matters that constitute or may constitute a valid reason for deactivation;

c. rights of response to deactivations;

d. the internal processes of platform operators in relation to deactivation;

e. communication between the employee-like worker and the platform operator in relation to deactivation;

f. the accessibility in practice of the internal processes of digital labour platform operators in relation to deactivation;

g. the treatment of data relating to the work performed by employee-like workers.99

h. a person's deactivation was consistent with the Digital Labour Platform Deactivation Code if, at the time of the deactivation, the digital labour platform operator complied with the Digital Labour Platform Deactivation Code in relation to the deactivation.100

7.16 The Digital Labour Platform Deactivation Code has not yet been issued.

Remedies available

Primary remedy is entry into new contract

The primary remedy is that the FWC order the entry into a new contract for a deactivated worker. Compensation is only available if the FWC is satisfied that issue of a new contract would be inappropriate.

7.17 The FWC may order a person's reactivation if satisfied that the person was protected from unfair deactivation and that the person has been unfairly deactivated.101

7.18 Remedies include reactivation and restoring lost pay.

Reactivation

7.19 An order for a person's reactivation must be an order that restores the person to the position they would have been in but for the deactivation. This includes removing a suspension or by reinstating the person's access to the platform.102 Where the platform no longer exists and a similar digital labour platform is operated by an associated entity, then an order may be made to provide access to the second digital labour platform on similar to terms and conditions which are no less favourable than they were on the other platform prior to the termination or suspension.103

Order to restore lost pay

7.20 The FWC, where it deems appropriate, may also make an order to cause the digital platform operator to pay the person an amount for remuneration lost, or likely to have been lost, by the person because of the deactivation. In determining an amount for the purposes of an order, the FWC will consider the amount of remuneration earned by the person from other work during the period between deactivation and reactivation and also the amount of any remuneration reasonably likely to be earned by the person during the period between making the order for reactivation and the actual reactivation.104

7.21 Compensation is capped at 6 months of the worker's pay or 6 months of the contractor high income threshold (whichever is lower).

7.22 Workers covered by MSOs cannot later bring proceedings to recover unpaid employment entitlements that 'employees' would otherwise be entitled to apply for.105

99 FW Act s 536LJ(2) FW Act s
100 536LJ(2) FW Act s 536LP
101 FW Act s 536LQ(1) FW Act
102 s 536LQ(2) FW Act s
103 536LQ(4) Supplementary
104 EM 1 135
105

Conference and hearing process

7.23 The FWC must conduct a conference or hold a hearing into a matter if the existence of facts is in dispute. Conferences are to be conducted in private. The FWC must take into account any differences, and wishes, in the circumstances of the parties in considering the application and informing itself in relation to the application.106

7.24 The FWC must not hold a hearing in relation to a matter unless the FWC considers it appropriate to do so, taking into account the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter. If the FWC holds a hearing it may decide not to hold the hearing in relation to parts of the matter. The FWC may decide at any time to hold a hearing into the matter, and this could include before, during or after conducting a conference.107

7.25 Applications may be dismissed by the FWC if applicant fails to attend a conference or hearing, fails to comply with a direction or order of the FWC, or fails to discontinue the application after a settlement agreement has been concluded.108

Appeal rights

7.26 The FWC must not grant appeal rights from a decision made by the FWC in relation to unfair deactivations unless the FWC considers that it is in the public interest to do so.

a. some considerations that the FWC may take into account in assessing whether there is a public interest element include:109

i. where a matter raises issues of importance and general application;

ii. where there is a diversity of decisions so that guidance from a Full Bench of the FWC is required;

iii. where the original decision manifests an injustice or the result is counter intuitive; or

iv. that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.

7.27 The public interest test is not satisfied simply by the identification of error or a preference for a different result. [110]

7.28 Where an appeal from a decision can relates to a question of fact, it must involve a significant error of fact for the FWC to consider the appeal.111

Costs orders and when they are available

7.29 The FWC may make an order for costs against a party in relation to an unfair deactivation matter if satisfied that the first party caused those costs to be incurred because of a reasonable act of omission of the first party in connection with the conduct or continuation of the matter.112

7.30 The FWC may make an order for costs against a lawyer or paid agent (the representative) representing a person in an unfair deactivation matter if the FWC is satisfied that the representative caused those costs to be incurred because the representative either encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success; or of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.113 This section is designed to deter lawyers and paid agents from encouraging others to bring speculative unfair deactivation claims.

7.31 An application for an order for costs must be made within 14 days after the FWC determines the matter or the matter is discontinued.114

7.32 A schedule of costs may be described relating to expenses, including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis. If this occurs, the awarding of costs is not limited to the items of expenditure appearing in the schedule, but if an item does appear in the schedule must not award costs at a rate that exceeds the rate appearing in the schedule.115

106 FW Act s 536LY
107 FW Act s 536LZ
108 FW Act s 536M
109 *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at para. 27, [(2010) 197 IR 266].
110 See for example *Qantas Airways Limited v Carter* [2012] FWAFB 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012) at para. 57, [(2012) 223 IR 177]; *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWCFB 3512 (Catanzariti VP, Watson VP, Gostencnik DP, 22 May 2015); *Harris v Home Theatre Group Pty Ltd T/A Home Theatre Group* [2011] FWA 2910 (Asbury C, 12 May 2011) at para. 18.
111 FW Act s 536MB
112 FW Act s 536MA
113 FW Act s 536MC
114 FW Act s 536MD
115 FW Act s 536ME

Illustrative example: Unfair deactivation claim

Tim is an employee-like worker performing meal delivery services for Fast Eats via its digital labour platform.

Tim is assigned a delivery via the app and accepts to do the delivery. Tim collects the order from the nominated restaurant however the customer contacts Fast Eats to advise that the delivery didn't occur. Fast Eats deactivated Tim from the Fast Eats platform.

Tim, through an employee-like worker representative group, applies to the Fair Work Commission for an order seeking a remedy for deactivation, and for application fees.

Both parties attend a conference into the matter. Fast Eats had undertaken a thorough investigation into the matter in accordance with company policy. Fast Eats provides evidence showing that Tim sent through a fake photo to suggest that the delivery had been completed, establishing that Tim's behaviour was dishonest and fraudulent.

The matter was dismissed as Fast Eats were able to establish that Tim's deactivation was not unfair.

8. FAQs

Does the change in law make gig workers employees?

8.1 No, however — their status as employee-like workers means that they will receive a range of employee-like rights — these rights might include rights such as standards relating to payment terms, deductions, consultation and representation etc. However, the specific rights included in each MSO are yet to be determined.

Will Collective Agreements be compulsory? If workers want an agreement, do I have to accept that?

8.2 No. Digital labour platform operators will not be obligated to initiate a collective agreement for their employee-like workers. MSOs or MSGs may instead be in place. However, employee-like workers, or their representatives, may wish to initiate a collective agreement by way of issuing a consultation notice.

If an employee-like worker is unfairly deactivated, how much money can they claim?

8.3 If the FWC decides that an employee-like worker has been unfairly deactivated, remedies can include restoring lost pay. The platform operator could be required to pay the person an amount for remuneration lost, or likely to have been lost, by the employee-like worker because of the deactivation.

The maximum compensation available is up to 6-months pay of the worker or 6-months of the contractor high income threshold (whichever is lower).

Are employee-like workers entitled to access the National Employment Standards?

8.4 No, employee-like workers are not entitled to access the NES. Employee-like workers are entitled to access those provisions listed in either the MSOs or collective agreement. MSGs will also apply, but are not binding upon the digital platform operator.

When are Minimum Standards Orders likely to be made/take effect?

8.5 At this point in time we don't have any guidance on when MSOs are likely to be made or take effect. It is likely that the initial conferencing process will commence in late 2024.

8.6 We advise digital platform operators to monitor the progress of the FWC in making MSOs.

8.7 Some digital platform operators may wish to participate in the proceedings which will give rise to the MSOs. ACCI will also continue to monitor progress and provide advice to members.

I am an independent contractor who uses a digital labour platform. Do I have to be covered by an MSO if one is made or can I opt out?

8.8 There is no ability for workers to opt-out of MSOs. If an MSO is made it applies to both the digital labour platform and the workers that the MSO is expressed to cover.

9. General Advice

Consideration/Review of Current Operating Model

9.1 The imposition of the new standards has the potential to fundamentally alter the operating model of platform operators. New minimum payment terms, restrictions on the ability to deactivate workers and new compliance obligations simply may not be consistent with current practice for some operators. Operators will need to make an assessment of whether their current operating model is sustainable under the new regime and what changes are possible to accommodate the new standards and rules.

Responding to minimum standards orders

9.2 It is recommended that platform operators monitor developments in the FWC regarding the determination of MSOs. Some operators may wish to actively participate in the proceedings which will give rise to the MSOs, Operators should seek advice on the best approach to have their positions considered.

Responding to minimum standards guidelines

9.3 It is recommended that platform operators monitor developments in the FWC regarding the determination of MSGs. Some operators may wish to actively participate in the proceedings which will give rise to the MSGs, Operators should seek advice on the best approach to have their positions considered.

Workplace Policies

9.4 Operators will need to develop processes around deactivations which comply with the new relevant standards. These should include developing decision-making standards around what behaviour or conduct could result in a deactivation, as well as processes around procedural fairness (getting the worker's response to allegations etc).

9.5 Operators will need to establish clearer frameworks for acceptable conduct/performance to ensure that any deactivations can be justified.

9.6 Assuming the creation of minimum standards orders and guidelines, onboarding processes would need to be tailored to ensure workers are engaged on at least the minimum standards required by the new regime. This would include creating a policy to reflect or engage with the procedure for settling disputes under a minimum standards order.

9.7 Operators would need to ensure that sufficient consideration has been given to any other relevant entitlements arising out of the minimum standards orders including:

- payment and deduction practices;
- record keeping
- consultation/representation etc.

Inform managerial employees and educate them in relation to the new policies and standards

9.8 Businesses should familiarise managerial employees with the new workplace rights. Initially, this will primarily focus on ensuring that deactivations of workers comply with the new standards. Once MSOs and MSGs are established, these will need to be communicated to managers.

Engaging with employee-like worker representatives

9.9 These reforms are likely to significant increase the involvement of unions and/or worker representatives in the operations of digital labour platform operators. For those operators who have not been operating with significant union involvement to date, this may change. Digital labour platform operators should seek advice regarding how to manage or respond to increased union activities or involvement.

Uncertainty about existing practices

9.10 In established businesses, digital labour platform operators may be uncertain about whether longstanding company practices breach the new arrangements. In such circumstances it is recommended that operators seek advice. It is very likely (if not certain) that the reforms will require digital labour platform operators to adopt some new practices or standards that differ from their existing arrangements.

Further Guidance

The Fair Work Ombudsman provides some advice relating to employee-like workers.

The Department of Employment and Workplace Relations (**DEWR**) has a factsheet on employee-like workers.

The FWC has extensive advice relating to adverse action and workplace rights in its general protections benchbook.

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