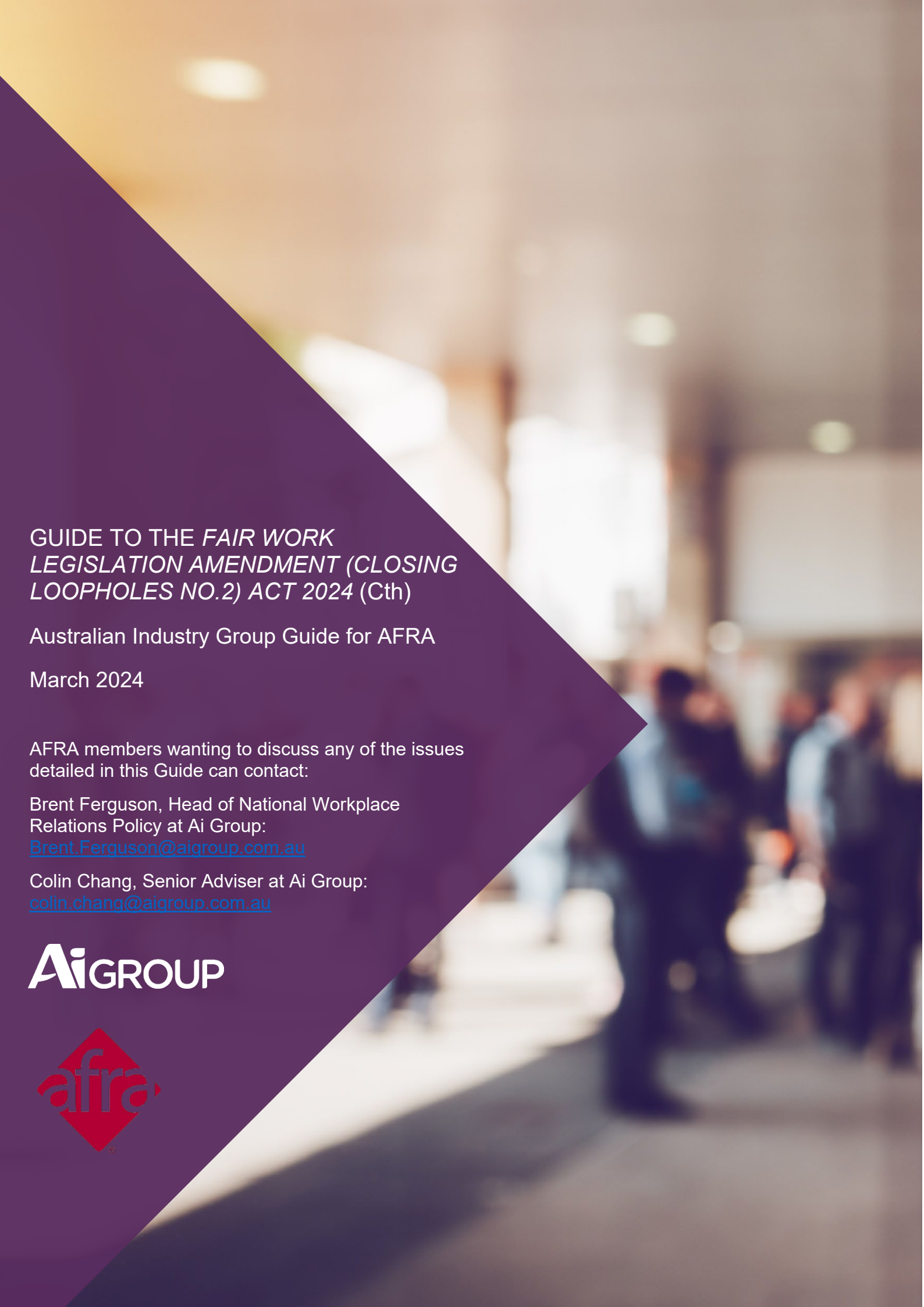

GUIDE TO THE *FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES NO.2) ACT 2024* (Cth)

Australian Industry Group Guide for AFRA

March 2024

AFRA members wanting to discuss any of the issues detailed in this Guide can contact:

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1. Introduction

The *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* received Royal Assent on 26 February 226. This constitutes the final element of the Government's controversial 'third tranche' of changes to workplace relations laws.

Background to the development of the legislation

The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (**Closing Loopholes BillI**), incorporating a range of amendments, was passed by the House of Representatives on 29 November and was introduced to the Senate on 4 December 2023.

On 7 December, the Senate agreed with Government amendments to split the Closing Loopholes Bill and divided it into two parts. Certain provisions were relocated into a separate bill, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2024* (**Closing Loopholes No. 2 Bill**).

The pared down version of the Closing Loopholes Bill passed Parliament on 7 December 2023 and was given Royal Assent on 14 December 2023: *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**Closing Loopholes Act**). A Guide to the Fair Work Legislation Amendment (Closing Loopholes) Act is **available here**.

The Closing Loopholes Bill (in its original form and including the provisions now in the Closing Loopholes No.2 Bill) was referred to a Senate Committee inquiry which was scheduled to report to Parliament by 1 February 2024. On 7 December 2023, the inquiry was restricted to consider only the provisions in the Closing Loopholes No. 2 Bill which are the subject of this Guide.

On 1 February the Senate Committee reported back to Government on the Closing Loopholes No.2 Bill and recommended it be passed, subject to some amendments. On 8 February 2024, the Closing Loopholes No.2 Bill passed the Senate and on 26 February 2024 it received Royal Assent: *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (**Closing Loopholes (No.2) Act**).

On 15 February 2024, the Government introduced the Fair Work Amendment Bill 2024 to Parliament which amends the FW Act to clarify that criminal penalties will not be imposed for a breach of an order dealing with the right to disconnect.

The key amendments made to the *Fair Work Act 2009 (Cth)* (**FW Act**) by the Closing Loopholes (No.2) Act are listed in the Table of Contents on pages 2 and 3 of this Guide.

What is covered in this Guide?

This Guide is intended to assist AFRA members in understanding the changes made by the Closing Loopholes (No.2) Act to the FW Act, which are of particular relevance to AFRA members.

The Executive Summary (section 2) provides a high-level outline of the proposed changes, and each change is explained in further detail in the body of this Guide.

Commencement dates are set out in each section and summarised here in the final section of this Guide.

Where can I obtain further advice and assistance?

Members seeking more detailed advice and assistance can also contact Brent Ferguson, Ai Group's Head of National Workplace Relations Policy: Brent.Ferguson@aigroup.com.au or Colin Chang, Senior Adviser at Ai Group: colin.chang@aigroup.com.au.

2. Executive Summary

Changes to employment

New statutory meaning of 'employee' and 'employer'

The FW Act has introduced a new 'ordinary meaning' for '*employee'* and '*employer'* which is determined by reference to the "*real substance, practical reality and true nature of relationship"* between the parties.

This reverses the common law approach[1] to characterising employment versus contractor arrangements. At common law, where a comprehensive written contract is in place, courts and tribunals must give primacy to the terms of the written contract rather than applying a multi-factorial analysis, unless the contract is a sham, has been varied or rendered unenforceable or is subject to an estoppel.

The new meaning of 'employee' and 'employer' applies to relationships entered into before this provision commences if those relationships continue on that date, as well as those entered into on or after commencement. This means that if a person becomes an employee because of the new meaning under the FW Act, their employment and service before this provision commences does not count for the purposes of entitlements under the FW Act. Contractors have a limited ability to 'opt-out' of the application of the statutory meaning before it commences.

The new statutory meaning applies only to the FW Act and is limited to workers who are engaged by national system employers. It applies to relationships which start before and after the definition commences and to employee and employer definitions in modern awards, enterprise agreements and workplace determinations.

The common law approach otherwise continues to apply to entitlements and obligations under other Federal, State or Territory laws – for example, taxation, superannuation, workers' compensation and long service leave.

Further information about the New statutory meaning for national system employers is here.

Narrowing of defence to disguising an employment relationship as a contractor relationship – sham contracting

Part-3-1 of the FW Act prohibits sham contracting, where an employment arrangement is disguised as an independent contractor relationship so an 'employer' avoids legal entitlements paid to employees under the FW Act, modern awards, enterprise agreements or workplace determinations.

The Closing Loopholes (No.2) Act amends the defence to an allegation an employer has misrepresented employment as independent contracting. Previously an employer would not be liable if it did not know and was not reckless as to whether the contract was a contract of employment rather than a contract for services. However, now an employer must have at least a "*reasonable belief*" that the contract was a contract for services to mount a defence.

Further information about Employment - defence for sham contractor arrangements is here.

[1] As determined in *CFMMEU v Personnel Contracting Pty Ltd* [2022] and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

Engaging casual employees

A new casual employment definition under the FW Act

The Closing Loopholes (No.2) Act introduces a new "*objective definition*" of 'casual employee' under the FW Act.

A person will be a casual employee if two conditions are satisfied:

- the employment relationship is characterised by an "absence of a firm advance commitment to continuing and indefinite work"; and
- the employee must be entitled to a casual loading, or a specific rate of pay.

The new statutory definition is not confined to a consideration of the offer of employment or the contract of employment or offer. However, the terms of the contract of employment are relevant to a consideration of whether there is a "firm advance commitment to continuing and indefinite work".

If a person is genuinely a casual employee at the beginning of the relationship, their status will not change even if over time they no longer satisfy the new statutory definition. A casual employee's status will only change if a specific event occurs. For example, a casual employee's status may change:

- if they exercise rights under the employee choice or transitional casual conversion pathways;
- pursuant to a FWC order made when resolving a dispute about the employee's status (e.g., when their employment has been mischaracterised);
- under a fair work instrument: or
- if the casual employee accepts an offer from their employer to commence work as a part-time or full-time employee.

Casual employees can be engaged on contracts of employment for an identifiable period, except if they are lecturers or academics working in the higher education sector.

Employees engaged as casual employees before commencement of this provision are deemed to be casual employees within the new definition from the commencement date. This takes effect even if the relevant employment arrangements are inconsistent with the definition of a casual employee.

The timing requirements for an employer to provide the Casual Employment Information Statement to casual employees has changed and it must be provided to casual employees on additional occasions.

Employees with a dispute about the employee choice pathway or their classification can access the small claims jurisdiction for remedies.

The Fair Work Commission (**FWC**) has been empowered to vary fair work instruments to resolve uncertainty or difficulty relating to the interaction between the instrument and the new statutory definition of casual employee.

Further information about the new casual employment definition under the FW Act is here.

New employee choice pathway to change to part-time or full-time employment

The Closing Loopholes (No.2) Act introduces a new employee choice notification process.

This replaces the casual conversion pathway, subject to transitional provisions.

An employee must have 6 months' qualifying service to be eligible to use the new employee choice notification procedure. If the employer is a small business, they must have 12 months' qualifying service. Service accrued by a casual employee prior to commencement is not recognised. Transitional arrangements preserve the right to request casual conversion for employees who are engaged as casual employees as at commencement.

An employer must consult with the employee about the employee choice notification and respond in writing within 21 days.

An employer may refuse an 'employee choice notification' on any of the following grounds:

- having regard to the employee's current employment relationship with the employer and the statutory definition of a casual employee, the employee still meets the requirements of the definition and remains a casual employee;
- there are "*fair and reasonable operational grounds*" for not accepting the notification;
- accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

"*Fair and reasonable operational grounds*" for not accepting an employee choice notification include the following:

- that substantial changes would be required to the way in which work in the employer's enterprise is organised;
- that there would be significant impacts on the operation of the employer's enterprise;
- that substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full time employee or part-time employee (as the case may be).

Employees are not required to change or convert (i.e., during the transitional period) to part-time or full-time employment and cannot be compelled to do so by their employer. An employer is also not required to change an employee's hours of work because an employee makes an employee choice notification.

If an employee changes to part-time or full-time employment after an employee choice notification, their previous service accrued as a regular casual employee is recognised when the employee changes to part-time or full-time employment.

The FWC may deal with a dispute about employee choice notifications (or casual conversion, during the transitional period), including by arbitration in exceptional circumstances. The FWC has also been empowered to vary fair work instruments to resolve uncertainties or difficulties relating to the interaction between the instrument and the new statutory definition of casual employee.

Further information about the New employee choice pathway to change to part-time or full-time employment is here.

Interactions between fair work instruments and the new casual employee definition and employee choice pathway

The FWC has been empowered to resolve uncertainties and difficulties with the interaction between a fair work instrument and the definitions of casual employee and employee choice.

Further information about the FWC's power to address this interaction is available here.

Expanded anti-avoidance provisions for employee choice notifications (and casual conversion during transitional period)

The Closing Loopholes (No.2) Act repeals and expands the existing anti-avoidance provision. Employers are prohibited from reducing/varying an employee's hours of work, changing their pattern of work or terminating their employment to avoid rights and obligations in respect of employee choice notifications and transitional casual conversion.

Further information about the Expanded anti-avoidance provisions for employee choice notifications and casual conversion is here.

New sham arrangements provisions relating to engagement of casual employment

The Closing Loopholes (No.2) Act amends the existing sham arrangements provisions in Pt 3-1 of the FW Act to include the following two general protections for casual employment.

First, an employer is prohibited from dismissing an employee to reengage them as a casual employee to perform the same, or substantially the same, work.

Secondly, an employer must not knowingly make a false statement to a current or former employee with the intention of persuading or influencing that employee to become a casual employee to perform the same, or substantially the same, work for the employer.

Further information about the sham arrangements for disguising part-time/full-time employment as casual employment is here.

Regulated worker delegates

The workplace delegates rights and protections introduced by the Closing Loopholes Act for employees have now been extended to regulated workers.

As is the case for employee worker delegates, associated regulated businesses will be prohibited from:

- unreasonably failing or refusing to deal with a workplace delegate;
- knowingly or recklessly making a false or misleading representation to a workplace delegate; or
- unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.

Regulated delegate workers have a right to reasonable access to the workplace or facilities provided by the regulated business. However, they are not entitled to paid time for the purposes of training about their role as a workplace delegate.

Further information about regulated worker delegates is here.

New rights and obligations for certain independent contractors

Overview

The FW Act has been amended to increase the regulation of certain independent contractor relationships. Most of the amendments are targeted at independent contractors who are either '*employee-like workers'* performing digital platform work or road transport contractors. However, there are also significant new provisions which seek to regulate those in a road transport contractual chain.

The amendments:

- provide a framework for the FWC to exercise functions and powers that relate to digital platform work, the road transport industry, and road transport contractual chains;
- establish a new jurisdiction for the FWC to set binding minimum standards orders and non-binding guidelines for employee-like workers and road transport contractors;
- introduce new powers for the FWC to make binding road transport contractual chain orders and non-binding guidelines for those in a road transport contractual chain;
- enable digital labour platform operators and road transport businesses to make consent-based collective agreements with unions;
- empower the FWC to deal with unfair deactivation claims by an employee-like worker and unfair termination claims by a road transport contractor;
- enable independent contractors earning below a contractor high income threshold (that is yet to be prescribed) to dispute unfair contract terms in the FWC;
- ensure the *Independent Contractors Act 2006* (Cth) (**IC Act**) continues to apply in respect of independent contractors performing work that is remunerated at an amount that exceeds the new contractor high income threshold.

Details on these amendments are set out in the Regulation of road transport contractors, Regulation of employee-like workers, Regulated workers and industrial action and Unfair contract terms sections of this Guide, and they are summarised below in this Executive Summary.

Regulation of road transport contractors and employee-like workers

The FWC has been empowered to regulate independent contractors who are either '*employee-like workers*' performing digital platform work or who are engaged in the road transport industry, including the following:

- to set enforceable minimum standards or non-binding guidelines for such workers;
    - to grant remedies for unfair deactivation/termination; and
    - to register consent collective agreements (struck between a union and business) if they are in the public interest, including a power to deal with disputes related to the making of such agreements, without the parties' consent.

The existing general protections regime under the FW Act now includes '*adverse action*' taken by digital labour platform operators, employee-like workers, and industrial associations. The general protections in the FW Act, as they relate to taking membership

action and coverage by industrial instruments, have also been extended to employee-like workers and road transport contractors.

Further information about the Regulation of road transport contractors is here and further information about the Regulation of employee-like workers is here.

Road transport contractual chain provisions

The FWC will be given very broad powers to make binding road transport contractual chain orders and non-binding guidelines in relation to road transport contractors, road transport employee-like workers and other persons in a '*road transport contractual chain*'. This will potentially have a significant impact on commercial arrangements, including subcontracting arrangements, between businesses in the road transport industry.

A binding road transport contractual chain order must include a coverage, dispute resolution and interaction term. It may deal with a broad range of matters but this is expressly stated to potentially include payment times, fuel levies, rate reviews, termination, and cost recovery.

However, such orders cannot deal with overtime rates, rostering arrangements, or any term which changes the form of the engagement or the status of the worker (including deeming them to be an employee), or various other matters relating to work, health and safety, and the *Heavy Vehicle National Law Act 2012* (Qld).

Further information about the Regulation of road transport contractors is here.

Regulated workers and industrial action

The FW Act has expanded the definition of industrial action under the FW Act to regulated workers and businesses covered by a MSO (or where there is an application for a MSO).

Examples of industrial action include:

- the performance of work by a regulated worker in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by a regulated worker, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- a ban, limitation or restriction on the performance of work by a regulated worker or on the acceptance of or offering for work by a regulated worker;
- a failure or refusal by regulated worker to attend for work or a failure or refusal to perform any work at all by regulated contractors who attend for work;
- the lockout of regulated worker by the regulated business

Further information about Regulated workers and industrial action is here.

Unfair contract terms

The FWC will be given new powers to deal with unfair terms in services contracts to which an independent contractor is a party, where the services contract contains terms which, in an employment relationship, would relate to 'workplace relations matters' as defined under the FW Act. This will be subject to the sum of the contractor's annual rate of earnings (and such other amounts as prescribed) being less than the specified contractor high income threshold in the year the application is made. This threshold has not been set at the date of this guide's release.

The FWC will be able to issue orders that change or set aside all or part of the services contract (including terms which do not relate to 'workplace relations matters'). The provisions do not empower the FWC to award financial compensation. However, if a person contravenes an order, they may be liable for a civil penalty of up to 60 penalty units.

The *Independent Contractors Act 2006* will continue to apply for contactors not eligible to make an application under the unfair contracts jurisdiction in the FW Act.

Further information about the Unfair contract terms is here.

Underpayments measures and serious contraventions

Exemption certificates for suspected underpayments

This change enables officers of a registered organisation (i.e., a union) to obtain an exemption certificate from the FWC to waive the 24 hours' advance notice required for entry to an employer's premises if they suspect a member of their organisation has been or is being underpaid.

However, the FWC must reasonably believe that advance notice would hinder an effective investigation into the suspected contravention (or contravention) to be able to grant an exemption certificate.

Further information about the Exemption certificates for suspected underpayments is here.

Compliance notice measures

Section 716 of the FW Act which deals with compliance notices has been amended to clarify that:

- a compliance notice issued to a person may require the person to calculate and pay the amount of an underpayment; and
- a court may make an order requiring compliance with a notice (other than an infringement notice) issued by a Fair Work Inspector or the FWO.

Further information about the Compliance notice measures is here.

Civil penalties and serious contraventions

These changes:

- increase maximum penalty amounts for underpayment contraventions for medium and large body corporate employers by five for specific underpayment contraventions that are known as 'selected civil remedy provisions' (this does not apply to small business employers);
- in certain circumstances and if an application is made, permits penalties to be alternatively awarded on the basis of 3 x the quantum of the relevant underpayment for medium and large body corporate employers if that amount is larger than the maximum penalty amount (this does not apply to small business employers);
- increases the penalty for contravening a compliance notice from 30 to 60 penalty units (and to 300 penalty units for medium and large body corporate employers); and
- alters the current threshold for a 'serious contravention' of a civil remedy provision.

Further information about the Civil penalties is here and serious contraventions is here.

Enterprise agreements, bargaining, franchises, model terms and unions

Transitioning from multi-enterprise agreements

This change gives employers the new ability to transition out of coverage under multi-enterprise agreements by making a single enterprise agreement.

However, if employers wish to transition out during the nominal term of a multi-enterprise agreement, they will need the written agreement of each of the unions to whom the multi-enterprise agreement applies before putting the new single enterprise agreement to a vote. If the relevant unions do not provide written agreement, the employer will need to apply to the FWC for a voting request order. The FWC must make a voting request order if the unions' failure to agree was unreasonable in the circumstances and it would not undermine good faith bargaining for the agreement.

When the FWC applies the better off overall test to the new single enterprise agreement, it is applied by reference to the old multi-enterprise agreement instead of the modern award.

Further information about Transitioning from multi-enterprise agreements is here.

Changes to intractable bargaining workplace determinations

The *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* introduced provisions enabling the FWC to make intractable bargaining declarations and intractable bargaining workplace determinations if bargaining stalls and certain criteria are met.

This change:

- clarifies what constitutes 'agreed terms,' which are terms included in an intractable bargaining workplace determination as agreed by the bargaining representatives and which are not subject to arbitration by the FWC; and
- prohibits the FWC from making a determination that includes terms which are less favourable to employees or their bargaining representatives as compared to the particular term in the enterprise agreement dealing with that matter.

Further information about the Changes to intractable bargaining workplace determinations is here.

Enabling multiple franchisees to access the single-enterprise stream

The amendments enable franchisees of a common franchisor to bargain together for a single-enterprise agreement as 'related employers'. An amendment has also been made to enable those franchisees to alternatively make a multi-enterprise agreement, despite now falling within the definition of 'related employers'.

Further information about Enabling multiple franchisees to access the single-enterprise stream is here.

Model terms

This change gives the Full Bench of the FWC the power to determine 'model terms' concerning flexibility, consultation and dispute resolution in relation to enterprise agreements. Currently, these model terms are prescribed in regulations.

The model terms would not override terms agreed to between the parties to an agreement or instrument where the terms meet the requirements of the FW Act.

Further information about the Model terms is here.

Demergers

This change prevents a de-merger ballot being made more than five years after a union amalgamation has occurred.

Further information about Demergers is here.

Right to disconnect

A new right to disconnect has been inserted into the FW Act.

The new provisions:

- allow an employee to refuse to monitor, read or respond to contact or attempted contact from their employer or a third party (e.g., a client) outside of the employee's working hours unless the refusal is unreasonable.
- empower the FWC to resolve disputes by making stop orders – a breach of which may result in a civil penalty of up to 60 penalty units.
- require that modern awards be varied to include a 'right to disconnect term'.
- require the FWC to make written guidelines in relation to how this new right operates.
- clarify that the right is also a 'workplace right' within the meaning of Pt 3-1 of the FW Act (i.e., the general protections provisions).

Further information about the Right to disconnect is here.

Commencement dates

The commencement dates for the key provisions are summarised in this table here.

Statutory review

The Minister must cause a review of the Closing Loopholes (No.2) Act to be conducted no later than 2 years after the day on which the Act receives Royal Assent. This review will cover all amendments, including but not limited to the new jurisdiction relating to regulated workers and the right to disconnect.

The review must:

- consider whether the operation of the amendments are effective and appropriate;
- identify any unintended consequences of the amendments; and
- consider whether further amendments are necessary to improve the operation of the amendments or to rectify any unintended consequences.

We encourage AFRA members to let us know their concerns about the operation of the amendments and of any adverse consequences so that we can ensure they are considered as part of the statutory review and/or for any interim regulations which may assist.

Part A – Changes to employment

3. New meaning for 'employee' and 'employer' under the FW Act

Commencement

These provisions commence on the date on which a proclamation is issued or 26 August 2024, whichever is earlier.

However, the ability to elect to opt-out commences 27 February 2024.

See also the Table of Commencement Dates which can be found here.

Narrow common law contract-based approach

Historically, courts and tribunals applied a multi-factor analysis that looked beyond the agreed contractual terms between the parties and considered how the relationship operated in practice at the outset and over time. This created significant uncertainty for organisations.

The current common law approach removed this uncertainty by providing a point-in-time at which parties can agree in their written contract as to what relationship is established.

This was determined in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* [2022] HCA 1 (**Personnel Contracting**) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (**Jamsek**). In these cases, the High Court confined the analysis of whether a person is an employee or an independent contractor to the terms of the written contract, where a comprehensive written contract exists and the contract is not a sham, has been varied or rendered unenforceable or subject to an estoppel. Under this approach, the courts do not have regard to the parties' conduct, either at the point the relationship was entered or afterwards, except to determine or clarify contractual terms.

New statutory definition to determining 'employment' under the FW Act for national system employers

A new statutory definition has been created and inserted into the FW Act. This reverses the common law approach discussed above for the purposes of the FW Act and fair work instruments and is confined to national system employers. It does not change the meaning of 'employee' or 'employer' at common law or in the context of other legislation.

For the purposes of the FW Act, the ordinary meaning of 'employee' and 'employer' is now determined by ascertaining the *real substance, practical reality and true nature of the relationship* between the parties. This reinstates the historical approach applied under common law (prior to Personnel Contracting and Jamsek) involving a multi-factorial analysis

which considers surrounding circumstances relating to how work is performed in practice and in addition to the contractual terms.

Specifically, the statutory definition requires the courts to determine a relationship with reference to:

- the totality of the relationship between the parties;
- the terms of the contract governing the relationship as far as they reflect the real nature of the working relationship;
- other factors relating to the totality of the relationship, including but not limited to how the contract is performed in practice.

Under the new statutory definition, the contract will no longer be definitive (although it is still relevant) and the nature of the relationship may change over time.

What are the key factors relevant to the multi-factorial analysis?

The Revised Explanatory Memorandum identifies key factors relevant to the new statutory multi-factorial analysis based on previous case law[2] which may indicate an **employment relationship**.

The key indicative factors are as set out below:

- the degree of control which a person exercises over the contractor/employee (i.e., the greater the control, the more likely there will be an employment relationship)
- the mode of remuneration;
- the provision and maintenance of equipment;
- the obligation to work;
- the hours of work and provision for holidays;
- the deduction of income tax;
- whether the person delegates work to others.
- the right to have a particular person do the work;
- the right to suspend or dismiss the person engaged; and/or
- the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.

The Revised Explanatory Memorandum also identifies key factors relevant to the new multi-factorial analysis based on previous case law[3] which may indicate a **principal/contractor relationship**.

[2] *Hollis v Vabu Pty Ltd* (2001) 27 CLR 21 and *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

[3] *Hollis v Vabu Pty Ltd* (2001) 27 CLR 21 and *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

The key indicative factors are set out below:

- work involving a profession, trade or distinct calling on the part of the person engaged;
- the person providing their own place of work or their own equipment;
- the creation by the person of goodwill or saleable assets on their own behalf in the course of their work;
- the payment by the person from their remuneration of business expenses of any significant proportion;
- the payment to the person of remuneration without deduction for income tax.

The Revised Explanatory Memorandum states these factors are drawn from "a considerable number of case authorities", including *Hollis v Vabu Pty Ltd* (2001) 27 CLR 21 and S*tevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16. However, these factors are not exhaustive and the Revised Explanatory Memorandum says the factors will vary from case-to-case, as will the weight to be afforded to particular factors. According to the Government, this reflects that the test as applied has and will continue to adapt to changing social conditions and new work arrangements.

The Revised Explanatory Memorandum provides this illustrative example:

Illustrative example

Wei is a cleaner and works via a cleaning agency to clean commercial offices in Melbourne's Central Business District. She works five nights per week and is told which offices to clean among the agency's list of clients. Wei signed a services agreement with the cleaning agency, which describes her as an independent contractor and specifies a rate of $90 per office, which can take anywhere from three to six hours in the evening. The services agreement also specifies that she is responsible for travel to and from worksites, and able to delegate work to others as required.

The new interpretive principle to determine the meaning of 'employee' and 'employer' under the FW Act applies when determining whether Wei is an employee of the cleaning agency. The interpretive principle allows an assessment of the arrangement by way of reference to the real substance, practical reality and true nature of the relationship between Wei and the agency, and beyond the terms of the services agreement to which Wei has agreed.

For example, a court or a tribunal would take into account a range of factors relating to the totality of the relationship, such as Wei being told where and when she has to work, that she has little control over how she performs the work, the expectation that Wei would dress in attire branded with the logo of the cleaning agency and that her work is judged against the agency's performance standards. It would be relevant that she is able to delegate that work.

Does it apply to all employees and employers?

The new statutory definition applies to national system employers and national system employees. However, the statutory definition does not apply to employees and employers that are national system employees and employers under the States' referrals of industrial relations power.

A *national system employer* under the FW Act is defined as:

- A constitutional corporation, so far as it employs, or usually employs, an individual.

- The Commonwealth, so far as it employs, or usually employs, an individual.
- A Commonwealth authority, so far as it employs, or usually employs, an individual.
- A person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
    - a flight crew officer;
    - a maritime employee; or
    - a waterside worker.
- A body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual.
- A person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

In this definition, "*Australia*" includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

The statutory definition does not apply to sole traders, partnerships, other incorporated entities and non-trading corporations or state or local government employees. It also does not apply to corporations that do not have '*substantial'* or '*not insubstantial*" financial or trading activities.

Additionally, the definition only applies to the FW Act (in the limited sense). It does not apply to other federal legislation (e.g., taxation or superannuation) or to excluded state-based entitlements such as long service leave and workers' compensation which continue to be government by the common law approach.

Opt-out of the statutory meaning – operative from 27 February 2024

A person (**principal**) may notify an individual (**contractor**) that they may give the principal an opt-out notice to elect that the statutory meaning does not apply to their relationship.

This statutory opt-out commences the day after Royal Assent is given.

(*Note that the statutory definition does not commence until the date on which a proclamation is issued or 26 August 2024, whichever is earlier*).

When can a principal notify a contractor that the contractor can give an opt-out notice?

A principal may notify a contractor in writing before, on or after the statutory meaning commences that they may provide the principal with an opt-out notice.

However, a contractor is only entitled to give one opt-out notice. Also, a contractor may only revoke the notice on one occasion.

What does a principal need to do?

A principal may notify a contractor in writing stating that the contractor may give an opt-out notice to the principal if the following criteria are satisfied:

- the principal considers the relationship may on commencement of the statutory meaning (or on or after commencement) become a relationship (or may be a relationship) in which the 'principal' is the employer of the 'contractor'; and
- the principal considers that at the time the notice is given that the individual's earnings for work performed under the relationship exceed the contractor high income threshold.

(**notification**)

How does a contractor give an opt-out notice?

If the principal has given the contractor a notification, the contractor must provide an opt-out notice within 21 days of that date (if they wish to opt out).

If the principal has not given the contractor a notification, the contractor may give the principal an opt-out notice at any time after the statutory meaning commences.

The opt-out notice must state that the contractor considers that their earnings for work performed under the relationship exceed the contractor high income threshold when the opt out notice is given.

As stated above, only one opt-out notice may be given in respect a particular relationship.

What is the effect of the opt-out notice?

If given before statutory definition commences

If the opt-out notice is given (and satisfies the criteria) before the new statutory definition commences then the statutory definition will not apply to the relationship on commencement, unless the opt-out notice is revoked.

This means the common law contract-based approach will continue to apply to the determination of rights and obligations under the FW At.

If given on or after statutory definition commences

If the opt-out notice is given (and satisfies the criteria) on or after the new statutory definition commences, the statutory definition will not apply to the relationship on or after the day the opt-out notice is given, unless the opt-out notice is revoked.

This means:

- the common law contract-based approach applies before the statutory definition commences;
- the statutory definition applies until the opt-out notice is given; and
- the common law contract-based approach applies on and after the opt-out notice is given.

The opt-out notice may be revoked

A contractor who has given an opt-out notice to the principal may revoke the opt-out notice by giving the principal notice in writing that the individual elects that the statutory definition is to apply to their relationship.

Only one revocation notice may be given in respect of a particular relationship.

Revocation given before the statutory definition commences

If a revocation notice is given by the contractor to the principal before the statutory definition commences, the statutory definition applies to the relationship between the person and the individual on and after that commencement.

The common law contract-based approach continues to apply to the relationship for the period prior to commencement.

Revocation given on or after the statutory definition commences

If a revocation notice is given by the contractor to the principal on or after the statutory definition commences, the statutory definition applies to the relationship on and after the day on which the revocation notice is given.

This means, for example:

- the common law contract-based approach applies to the relationship before the statutory definition commences;
- the common law contract-based approach applies during the period of the opt-out notice; and
- the statutory definition applies to the relationship on and after the day the revocation notice is given.

Does it apply differently if the employee started before or after commencement?

Subject to the giving or revoking of an opt-out notice, the statutory definition applies to a relationship which started before commencement of the legislation, and which continues to exist on or after commencement.

See below for recognition of pre-commencement service.

How does it apply to fair work instruments made before commencement?

The statutory definition applies to employee and employer definitions in modern awards, enterprise agreements and workplace determinations.

A reference in a fair work instrument made before commencement and in operation on or after commencement to an employee or an employer is taken on and after commencement, to include a reference to an employee or an employer within the meaning of new section.

This means individuals and persons who become employees or employers under the new statutory definition will be covered by a modern award, enterprise agreement, workplace determination or FWC order made before commencement and in operation on or after commencement that is otherwise expressed to be cover employees. However, a reference in a fair work instrument does not include a reference to an individual in respect of whom an opt out notice has been given and not revoked.

The Revised Explanatory Memorandum provides an illustrative example which is set out below:

Illustrative example: A new employee being covered by an enterprise agreement

Hamish is a security guard who has worked with the same security firm, Protect Pty Ltd (Protect), for the past four years. Hamish is engaged as an independent contractor, and the agreement between the two parties describes him as such.

*Protect also employs 55 security guards who are covered by the Protect and United Workers' Union Enterprise Agreement 2022 (**Protect E**A). The Protect EA was approved on 1 December 2022 and is expressed to cover all employees of Protect who are employed as security guards. The nominal expiry date for the Protect EA is 1 December 2025.*

On commencement of new section 15AA, Hamish becomes an employee of Protect. Despite the relationship being described as one of principal and contractor in the written agreement governing the relations between Hamish and Protect, various factors suggest that the relationship is one of employment. Among other things, Hamish is required to wear Protect branded attire, Protect tell him when and where he is required to work and Hamish has no capacity to delegate the services that he performs for Protect.

If Hamish becomes an employee of Protect because of the operation of new section 15AA, he will be covered by the Protect EA.

Is service accrued as a 'contractor' recognised prior to commencement?

Rights and entitlements under the FW Act or fair work instruments are often calculated by reference to the individual's length of service or a minimum period of employment.

Subject to the giving or revoking of an opt-out notice, service accrued by a person prior to commencement is ascertained in accordance with the FW Act as in force immediately before commencement or in accordance with an opt-out notice. This means rights accrued prior to commencement by a worker continue in effect after commencement. Those pre-commencement rights and entitlements accrue in accordance with the common-law contract-based characterisation of that relationship.

The Revised Explanatory Memorandum provides an example which is replicated below:

Illustrative example: Recognising length of service

Sharon is a personal trainer and engaged as an independent contractor at a large gym franchise. She was engaged as an independent contractor on 1 April 2023.

Following commencement of new section 15AA, Sharon talks to the gym that engages her and they both agree she is better characterised as an employee under the new provisions.

Sharon has an eight year old daughter and wishes to enter into a flexible work arrangement so she can take her daughter to school three days a week. Under the FW Act, permanent employees who have worked for the same employer for at least 12 months can formally request flexible working arrangements in specified circumstances – including where they are a parent, or have the responsibility for the care, of a child who is school-aged or younger. The employer must follow certain procedures, and the employee has the right to dispute resolution if the employers does not agree.

Sharon makes the request on 1 August 2024. Although Sharon has worked at the gym since 1 April 2023, a period of 16 months, she only became an employee on 1 July 2024. Therefore, Sharon will need to wait until 1 July 2025 before she is eligible to request a flexible working arrangement under the formal processes in the FW Act. This does not prevent Sharon and her employer from negotiating a flexible working arrangement earlier.

Does the statutory definition apply to existing proceedings?

It is the narrower common law approach which continues to apply to the following existing proceedings:

- an application made, or proceedings on foot at commencement other than as prescribed by regulations (if any); and
- an application for review, or an appeal relating to, an application or proceedings on foot at commencement whether made before, on or after commencement - this continues until all rights of review or appeal have been exhausted or expired.

For example, if a person applied for unfair dismissal remedies prior to commencement, alleging they were an employee and not an independent contractor, the jurisdictional question would be decided by reference to the common law position pre-commencement. That is the case even if the application is dealt with after the statutory definition commences.

The Revised Explanatory Memorandum provides an example which is replicated below:

> ***Illustrative example: Unfair dismissal proceedings on foot***
>
> *Henry was a cook engaged as an independent contractor to provide services to an off-site catering business. Henry began work in February 2022 and on 15 May 2024 had his services contract terminated.*
>
> *On 1 June 2024, Henry applied to the Fair Work Commission (FWC) for an unfair dismissal remedy alleging that he was an employee of the catering business, not an independent contractor, and therefore protected from unfair dismissal. The respondent business objected to the FWC dealing with the application, contending that Henry was not a person protected from unfair dismissal on the basis that he was not an employee.*
>
> *The FWC begins to deal with the application in June 2024, but the matter is still on foot on 1 July 2024 when the amendments commence.*
>
> *As Henry lodged his application before the commencement of the amendments to the FW Act, the FWC must determine whether Henry was an employee within the meaning of that term according to the FW Act as in force immediately before commencement of the amendments until the matter is determined to finality. This is also the case if either party decides to appeal the single member decision to a Full Bench of the FWC.*

Can the FWC vary fair work instruments because of uncertainties or difficulties arising from the operation of the new definitions?

The FWC may vary a fair work instrument (i.e., modern award, enterprise agreement or workplace determination) to resolve an uncertainty or difficulty arising in connection with the new statutory definition for employers and employees. For example, where the fair work instrument defines 'employee', 'employer' or 'employment' in a way that does not align with the new definition.

The variation operates from the day specified in the determination, which may be a day before the determination was made (i.e., it may be retrospective).

When can the FWC vary a modern award?

The FWC may vary a modern award:

- on its own initiative; or
- on an application by:
    - an employer, employee, organisation or outworker entity covered by the modern award; or
    - an organisation that is entitled to represent the *industrial interests* of one or more employers or employees covered by the modern award; or
- if the modern award includes outworker terms - on application by an organisation that is entitled to represent the *industrial interests* of one or more outworkers to whom the outworker terms related.

When can the FWC vary an enterprise agreement or workplace determination?

The FWC may vary an enterprise agreement or workplace determination:

- on its own initiative; or
- on an application by:
    - one or more of the employers covered by the enterprise agreement or workplace determination;
    - an employee covered by the enterprise agreement or workplace determination;
    - an employer organisation covered by the enterprise agreement or workplace determination.

When can the FWC vary an FWC order?

The FWC may vary an FWC order:

- on its own initiative; or
- on an application by:
    - a person affected by the order; or
    - if the FWC order is of a kind prescribed by the regulations - by a person prescribed by the regulations in relation to that kind of order.

Will regulations support the operation of this new section?

Regulations may provide that a specified fair work instrument or specified class of fair work instrument may or may not be varied by the FWC to deal with inconsistencies or uncertainty arising in connection with the statutory definition to determining who is an ‘employer’ or ‘employee’.

Regulations may also be made to deal with transitional issues, including whether the statutory definition will have retrospective effect. If made, these would be subject to scrutiny by both Houses of Parliament and would be subject to disallowance.

It is unclear to what extent the Government proposes to enact these regulations. However, the Revised Explanatory Memorandum says regulations could be made with retrospective application as long as a person would not be convicted of an offence or be ordered to pay a pecuniary penalty for contravening a provision of the FW Act.

Transitional provisions

Subject to the giving or revoking of an opt-out notice and to the extent that is relevant, the following transitional provisions are relevant to the application of the statutory definition to relationships:

- It applies to relationships entered into before commencement if those continue on that date, as well as those entered into on or after commencement.
- A reference to ‘employee’ or ‘employer’ in an order made by the FWC, enterprise agreement, modern award or workplace determination made before commencement (and which is operation on and after commencement) is on and after commencement is a reference to ‘employee’ or ‘employee’ as prescribed by the new definition. However, this does not include a reference to an individual in respect o
- If the statutory definition means a person becomes an employee, their employment and service before commencement is determined by applying the common law approach.
- The common law contract-based approach continues to apply on and after commencement in relation to the following:
    - an application made (or proceedings on foot) as at commencement, other than an application (or proceedings) prescribed by the regulations;
    - an application for review of, or an appeal relating to , an application or proceedings made or on foot as at commencement, whether that application for review was made before, on or after commencement.

This is also discussed in the relevant sections above.

To go back to this section in the Executive Summary, click here.

4. Narrowing of defence to sham contracting for disguised employment arrangements

Commencement

These provisions commence on 27 February 2024.

See the Table of Commencement Dates which can be found here.

What are sham contracting arrangements?

Part-3-1 of the FW Act currently prohibits sham contracting arrangements, where employment arrangements are portrayed as independent contractor relationships.

Employers engage in sham contracting when they mischaracterise or misrepresent an employment relationship as an independent contracting arrangement. If a person is engaged as an independent contractor, an employer is not liable to pay the person entitlements under the FW Act, modern awards, enterprise agreements or workplace determinations.

What is the prohibition against sham arrangements?

A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be engaged is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Is there a defence?

Previously, an employer was not liable for a misrepresentation if they could prove that when they made the representation, they did not know **and** were not reckless as to whether the contract was a contract of employment rather than a contract for services.

However, the employer's defence has been narrowed so that an employer will only have a defence against the contravention if the employer can prove it **reasonably believed** that the contract was a contract for services and not employment.

The burden of proof lies with the party who made the representation.

What is a reasonable belief?

When a court assesses 'reasonable belief' for the purposes of the sham arrangement prohibitions, it must have regard to the size and nature of the employer's enterprise when determining if the employer has taken appropriate steps to understand how they are engaging an individual before entering the contract.

A court also has the discretion to consider other relevant factors when considering what would have been the appropriate steps to be taken. This may include but is not limited to the following factors:

- the employer's skill and experience;
- the industry in which the employer operates;
- how long the employer has been operating;
- the presence or absence of dedicated human resource management specialists or expertise in the employer's enterprise; and
- whether the employer sought legal or other professional advice about the proper classification of the individual, including any advice from an industrial association and, if so, acted in accordance with that advice.

If an employee is found to have contravened the sham arrangements prohibition but successfully makes out the ‘reasonable belief’ defence, they will not be liable to a civil penalty for the contravention.

However, despite the successful defence to the sham arrangements contravention, the employer may still be liable for other civil contraventions in relation to the misclassification. For example, if the employer has not paid correct entitlements to an employee (as required under the FW Act or a fair work instrument) because of the misclassification of an employee as an independent contractor, the employer may be liable to a civil penalty and/or required to backpay the unpaid entitlements accrued under the FW Act or a fair work instrument.

Transitional provisions

The amended defence applies in relation to representations made on or after 27 February 2024.

To go back to this section in the Executive Summary, click here.

Part B – Casual employment

5. A new casual employee definition

Commencement

These provisions commence 26 August 2024.

See also the Table of Commencement Dates which can be found here.

A new casual employee definition for the FW Act

Previously, the statutory definition of a casual employee provided a person was a casual employee under the FW Act if they accepted an offer of employment on the basis that there was no firm advance commitment to continuing and indefinite work according to an agreed pattern of work and commenced work on that basis. This was determined at the outset on the basis of the terms of the offer of employment.

The Closing Loopholes (No.2) Act repeals the previous statutory definition and replaces it with a new '*objective definition*' of casual employment.

The new definition reinstates the '*totality test*', which draws on core common law elements of the meaning of casual employment as it was understood *prior* to the decision of the High Court of Australia in *WorkPac v Rossato*[4]. Under this new definition, courts and tribunals are no longer confined to considering only the terms and conditions agreed at the outset of employment and may now also consider the conduct or nature of the employment relationship, including how that changes over time. The court's focus has returned to determining the practical reality of the working arrangements.

The general meaning of 'casual employee'

A person will be a casual employee under the new definition if the general rule is satisfied.

The general rule requires that:

- the employment relationship must be characterised by an "***absence of a firm advance commitment to continuing and indefinite work***"; and
- the employee would be entitled to a ***casual loading***, or a ***specific rate of pay for casual employees*** under the terms of a fair work instrument if the employee were a

[4] *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

casual employee, or to such a loading or specific rate of pay under the contract of employment.

However, an employee who commences employment as a casual employee remains a casual employee until the occurrence of a specified event as set out below, even if the relationship does not satisfy the general rule.

How do we know when there is an absence of a firm advance commitment?

The new definition specifies indicia which must all be considered to establish whether there is an **absence** of a firm advance commitment to continuing and indefinite work.

The indicia which must each be considered in determining whether there is an absence of a firm advance commitment to continuing and indefinite work are as follows:

1. **The relationship must be assessed on the basis of the "*real substance, practical reality and true nature of the employment relationship*".**

   This requires an objective assessment of the totality of the relationship, and not just the terms of the contract of employment. This approach was applied by the Full Federal Court in *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 (i.e., prior to the High Court's decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23).

2. **The relationship must be assessed on the basis that a firm advance commitment can be in the form of the contract of employment or, in addition to the terms of that contract, in the form of a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract (or to a variation of any such term).**

   This means that regard can be had to relevant contractual terms (which can themselves give rise to a firm advance commitment) but the terms alone may not be determinative. That is, a firm advance commitment may be present despite the contractual terms not providing for this.

   Employers would be prudent to consider both how the terms of any contract or offer of employment are expressed, and how both the employment relationship and availability of work is portrayed to an employee on an ongoing basis.

What considerations indicate the presence of a firm advance commitment?

When determining the presence of a firm advance commitment exists, regard must be given to (but is not limited to) the following considerations that may indicate the presence of such a commitment:

- **Is there an inability of the employer to elect to offer work and/or an inability of the employee to elect to accept or reject work and whether this occurs in practice?**

  For example, can the employer elect to offer employment on a particular day, and, if or when offered, can the employee elect whether or not to attend to work? This can be demonstrated practically if the employee works only on demand or as required over a short period.

If this is not satisfied, it is an indicator the person may not be a casual employee.

- **Having regard to the nature of the employer's enterprise, is it reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee?**

  For example, is the business seasonal in nature such as a pop up shop selling Christmas decorations where work will not continue beyond that Christmas period?

  If so, this may support an absence rather than the presence of a firm advance commitment to indefinite and continuing work.

- **Are there full-time or part-time employees in the employer's enterprise performing the same kind of work that is usually performed by the employee?**

  For example, if there are no part-time or full-time employees doing the same kind of work as the casual employee this may support an absence of a firm advance commitment.

  However, if the casual employee works in a similar way to part-time or full-time employees this may indicate that they are not a casual employee.

- **Is there is a regular pattern of work for the employee?**

  A regular pattern of work could be, for example, set days and with set times.

  A 'regular pattern of work' may include some fluctuations or variations over time, including for reasonable absences such as for illness, injury or recreation, and does not need to be absolutely uniform.

  However, a statutory note states a regular pattern of work will not of itself determine whether there is a 'firm advance commitment to continuing and indefinite work'. This means an employee who has a regular pattern of work may still be a casual employee as long as there is no firm advance commitment to continuing and indefinite work.

While each of these factors must be considered, no single factor is determinative and they do not all need to be satisfied for a court or tribunal to determine that a person is not a casual employee and is instead properly classified as a part-time or full-time employee.

Examples of application of statutory definition

The Revised Explanatory Memorandum provides three illustrative examples of how the statutory definition is applied which are set out below:

Example 1: University student

Quyen is a university student who obtains a casual bar attendant position at her local hotel. Quyen chooses to accept casual employment as she prefers the flexibility to accommodate university commitments and the 25 per cent casual loading.

Upon commencement, Quyen and her employer have a discussion. Quyen advises her employer that she is available to work on Friday and Saturday nights only. Quyen advises that she is unavailable to work at any other time, due to study commitments. In response, the employer offers Quyen casual shifts each Friday and Saturday night, with Quyen able to reject any shifts if unavailable. This suits the employer's operational requirements and fits in with Quyen's advised availability. The employer explains to Quyen that there is no firm advance commitment to

continuing and indefinite work in the business, which is reflected in a written employment contract. Quyen accepts the contract and commences work.

Irrespective of the offer of regular shifts to accommodate Quyen's university schedule, the employer has made no firm advance commitment to Quyen to continuing and indefinite work upon commencement; which means Quyen is correctly classified as a casual within the meaning of section 15A.

After 6 months working with the local hotel, Quyen considers her circumstances and is happy to continue working as a casual employee each Friday and Saturday night when available and decides not to give her employer written notice seeking to change from casual to part-time employment.

Example 2: Mature age pensioner

Barry has retired from full time work and is on the part pension. Barry is offered casual employment at Parliament House on the basis that his employer expects to be able to offer him shifts on sitting days. The Parliamentary calendar is provided to Barry upon commencement in November for the next year, although it is subject to change.

Barry receives no guaranteed hours from the employer, nor a firm advance commitment that he will be offered casual shifts on every sitting day. This flexibility works well for Barry, as it provides him with the autonomy to accept or reject work so as not to impact on his pension. Barry is a casual employee upon commencement within the meaning of section 15A.

Example 3: Firm advance commitment

Alex accepts a casual position as a security guard at a shopping centre. The contract of employment Alex receives contains terms to the effect that they will be required to work rostered shifts each Thursday late night and at least one weekend day each week and will be paid a 25 per cent loading.

The contract communicates the firm advance commitment to continuing and indefinite work that Alex's employer makes to them. Due to the stated requirement for Alex to work those rostered shifts on Thursday evenings and over the weekend (as opposed to stating an expectation for their availability to work at peak trading times), it does not appear that Alex has the ability to elect to accept or reject work. The contract of employment does not include a term that provides the contract will terminate at the end of an identifiable period, or a term that limits the above requirement to work each Thursday night and one weekend day, to a specified season or period.

These considerations indicate Alex's employment should be characterised as permanent part-time and not casual within the meaning of section 15A.

If Alex questions their classification and they are found to have been misclassified as casual, amounts payable to Alex for relevant entitlements as a permanent employee can be reduced by an amount equal to the casual loading paid to them already. If Alex was mistakenly misclassified and the employer reasonably believed Alex would be correctly classified as a casual, no penalty would apply for misrepresentation.

Can a casual employee be engaged for a fixed term?

The FW Act limits the use of terms prescribing an identifiable period in an employment contract (i.e., fixed term limitations).

When first introduced into Parliament, the Closing Loopholes Bill No.2 proposed to prevent employers from engaging employees as casuals in circumstances where the contract of employment provided that it would terminate at the end of an identifiable period, except where that period was a duration of a specified season or the completion of a shift.

In response to significant industry concern over this limitation, these provisions were removed from the Bill in its final form. However, a new limitation on the use of 'fixed term casual employment' was introduced instead. The Closing Loopholes No.2 Act, as passed, essentially provides that the limitations on the fixed term contracts currently contained in the FW Act will apply in the context of casual employment. More specifically, it appears the amended FW Act will effectively prevent an employee being engaged on a casual basis under a contract which provides that it will terminate at the end of an identifiable period which extends for more than two years (or which has been renewed or is renewable beyond such a period) or which is entered into in the context of the employee working under more than two consecutive fixed term contracts.

This limitation was a product of last minute amendment to the legislation.

Specific limitations application in the context of higher education

Specific limitations will apply to use of engagement of casual employees through fixed term contracts by higher education institutions. Relevantly, an employee will **not** be a casual employee if the following criteria are satisfied:

- the contract of employment includes a term that provides the contract will terminate at the end of an identifiable period (even if it also has a term or terms providing that the contract can be terminated earlier); and
- the employee is a member of the academic staff or teaching staff of a higher education institution; and

- the employee is covered by one of the following modern awards:
    - the Higher Education Industry – Academic Staff – Award 2020 (as in force from time to time);
    - the Higher Education Industry – General Staff – Award 2020 (as in force from time to time); and
- the employee is not a State public sector employee of a State within the meaning of s.30A(1) of the FW Act,

(*Note - A modern award 'covers' an employee if it is expressed to cover the employee, even if the modern award does not apply to the employee because an enterprise agreement applies to the employee in relation to that particular employment as provided for under s.57(1) of the FW Act*)

(**Higher Education Casual**).

Casual employment does not change until a specified event occurs

An employee engaged as casual employee as newly defined will remain a casual employee, even if the nature of the relationship changes so that they cease to meet the definition, unless the one of the following events occurs:

- the employment status is changed or converted to full-time or part-time employment by the employee choice pathway or transitional casual conversion pathway in the FW Act
- the FWC makes an order under the new provisions to deal with a dispute about employee choice or transitional casual conversion which changes or converts the employment status of the employee from a casual employee to a full-time or part-time employee
- the employment status is changed or converted to full-time or part-time employment under the terms of a fair work instrument that applies to the employee (e.g., a modern award or enterprise agreement)
- the employer makes an alternative offer of employment (other than casual employment) to the employee and the employee commences work for the employer on that basis.

However, if the employment was misclassified at the outset of the employment, the employee will be a part-time or full-time employee from that point of time despite that not being a 'specified event'. If this occurs, the employee may make a claim for unpaid accrued entitlements and an employer may have recourse to the statutory offset (see below) to reduce that unpaid amount by an amount equal to the casual loading paid to the employee as set out above.

Calculating entitlements on change or conversion

When a casual employee's employment status is changed or converted through the specified circumstances, the method applied to calculating entitlements is as set out below.

If an employee was **correctly classified** as a casual employee on engagement in accordance with the statutory definition, they remain a casual employee until the date of that change or conversion. In this situation, there are no unpaid entitlements accrued.

If an employee was **misclassified** as a casual employee at commencement, the employee may be able to make a claim for unpaid entitlements as a full-time or part-time employee (as the case may be). However, when the court makes an order, they must apply the statutory offsetting requirement (if applicable) to reduce the amount payable to the employee for the relevant entitlements (but not below nil) by an amount equal to the casual loading amount received by the employee.

How does this affect casual employees engaged before commencement?

For casuals who were employed prior to 26 August 2024, the following transitional provision in the Closing Loopholes (No.2) Act is relevant:

> ***Continuing casual employees***
>
> *(3) For the purposes of subclause (1), an employee who was, immediately before commencement, a casual employee of an employer within the meaning of section 15A as in force at that time, is taken to be a casual employee of the employer within the meaning of section 15A of the amended Act on and after commencement.*

The effect of this is that all existing casual employees on commencement are deemed to be casual employees within the meaning of the new definition of a 'casual employee', even if the employment arrangements of these 'Continuing casual employees' are inconsistent with the new definition (e.g. because they have worked regular hours for an extended period).

A casual employee employed prior to 26 August 2024would continue to be a 'casual employee' unless the employee converts to permanent employment through one of the pathways in the legislation.

If, at any stage from 26 August 2024, the employment relationship did not meet the new definition of a 'casual employee', for example, because the employee had worked regular hours after 26 August 2024, the employee could notify the employer of their right to be converted to permanent employment (as discussed below). However, service accrued by a casual employee prior to 26 August 2024 is not recognised for the purposes of eligibility to participate in the employee choice pathway.

Casual Employment Information Statement

The requirement for an employer to provide their casual employee with a Casual Employment Information Statement (**CEI Statement**) has changed.

An employer must give a casual employee the CEI Statement:

- before, or as soon as practicable after, the employee starts employment as a casual employee with the employer; and
- except for small business employers, as soon as practicable after the employee has been employed by the employer for a period of 6 months beginning the day the employment started; and
- as soon as practicable after the employee has been employed by the employer for a period 12 months beginning the day the employment started; and
- except for small business employers, the end of any subsequent period of 12 months for which the employee is employed by the employer.

Except for the requirement in the second dot point above, an employer is not required to give the CEI Statement to an employee more than once in any 12-month period.

The CEI Statement is made available by the Fair Work Ombudsman (**FWO**) here.

Employers also need to provide casual employees with a Fair Work Information Statement (i.e. also available from the FWO here).

Small claims proceedings

The small claims jurisdiction is available in the Federal Circuit and Family Court.

Prior to the Closing Loopholes (No.2) Act, employees could access the small claims jurisdiction if they had a dispute about casual conversion. For example, whether the employer has to offer their casual employee permanent employment, if an employer has reasonable grounds to not make an offer or refuse an employee's request to become permanent and whether the casual employee has the right to request casual conversion.

The FW Act now provides that an employee may use the small claims jurisdiction if they have a dispute about whether they were a casual employee of an employer when they commenced employment with the employer. The Court may make orders including declarations that the employee was a casual employee, a part-time employee or a full-time employee when the employee commenced employment with the employer. The Court cannot make pecuniary penalty orders.

The statutory offset rule and the casual loading

If a casual employees is paid a casual loading, the statutory rule for offsetting may apply if a court determines the employee was misclassified at the outset and is in fact a part-time or full-time employee, as the case may be.

The FW Act provides a statutory rule for offsetting amounts payable by an employer to a person who has been deemed by a court as having been misclassified as a casual employee (s.545A).

This rule was inserted to address employers' concerns that misclassified employees will seek to 'double-dip', i.e., where employees are paid a casual loading by their employer but then additionally claim for paid leave entitlements which were due to them as part-time/full-time employees (as deemed by the court).

The statutory offsetting rule applies to cases where a person has:

- been misclassified as a casual employee.
- received a casual loading during the period of misclassification - specifically, for s.545A to apply, among the other indicia, the employer must have paid the employee an identifiable amount (the loading amount) to compensate the employee for not having one or more of the following entitlements under the NES, a fair work instrument or contract of employment during a period (the employment period):
    - paid annual leave;
    - paid personal/carer's leave;
    - paid compassionate leave;
    - payment for absence on a public holiday;
    - payment in lieu of notice of termination; and

    - redundancy pay.
- been subsequently found by a court to be a permanent employee who is entitled to benefits that accrue to that type of employment, such as annual leave.

Where the rule applies, a court when making orders in a civil remedy underpayment claim must reduce any amount payable by the loading amount (but not below zero).

Transitional provisions

The key transitional provisions include (but are not limited to):

- For employment relationships entered into before, on or after commencement, the amended definition of 'casual employee' applies on and after that date.
- For the purposes of employment relationships entered into prior to commencement (**continuing casuals**):
    - they are taken to be a casual within the statutory definition on and after commencement – however:
        - conduct by the employer that occurred before commencement is only relevant to the general rule and not to the additional considerations for whether there is a 'firm advance commitment'; and
        - if they are engaged on a contract with a term providing that it will terminate at the end of an identifiable period, they can remain employed on that basis (and not therefore subject to the limitations on fixed term contracts) – however, note that other than Higher Education Casuals, casual employees can be engaged for an identifiable period and are not subject to the Fixed Term Limitations under the FW Act;
    - any period of employment as a casual employee that occurred before that date is not counted for the purposes of calculating the periods relevant to the giving of an employee choice notification to the continuing casual but is relevant for the purpose of applying the transitional casual conversion provisions;
    - the obligation to make an offer of casual conversion (or give a notice of no offer of casual conversion) to a continuing casual continues to apply for a period of 6 months from commencement, except for continuing casuals who work for small business employers;
    - the ability to request casual conversion continues for 12 months for continuing casuals engaged by small business employers and for 6 months for all other employers.
- For dispute resolution processes arising before commencement, they continue to apply under the 'old' FW Act provisions.
- The FWC may make a determination regarding modern awards, enterprise agreements and workplace determinations made before commencement to resolve uncertainties or difficulties in how they interact with the new definition.

To return to this section in the Executive Summary, go here.

6. Employee choice pathway to change to part-time or full-time employment

Commencement

These provisions commence 26 August 2024.

See also the Table of Commencement Dates which can be found here.

New single framework for employee choice notifications

The FW Act now has a single pathway for a casual employee to change to part-time or full time employment. Subject to transitional provisions that will apply temporarily, the casual conversion pathway has been repealed.

This employee choice notification pathway enables an employee to notify their employer in writing if they believe they are not a casual employee under the definition in the FW Act and are instead a part-time or full-time employee and wish to change their employment status.

The employee choice pathway replaces the casual conversion pathway, subject to transitional provisions.

Is an employee required to change employment?

An employee is not required to change to part-time or full-time employment through either of the employee choice notification or transitional casual conversion pathways.

Also, an employer cannot:

- require an employee to change to part-time or full-time employment under either of the employee choice notification or transitional casual conversion pathways; or
- require an employee to increase the hours of work of an employee who gives a notification to change to full-time or part-time employment under the employee choice pathway or transitional casual conversion pathway.

Employee notification eligibility

Under the new employee choice pathway, an eligible casual employees may be eligible to give their employer a written notification to change to part-time or full-time employment.

The eligibility requirements are as follows:

- the employee believes their employment no longer satisfies the statutory casual employee definition; and
- the employee has sufficient qualifying service (which does not include pre-commencement service) which is as follows:
    - if the employer is a small business employer at the time the notification is given – the employee has been employed by the employer for a period of at least 12 months beginning the day the employment started; or

- if the employer is not a small business employer at the time the notification is given – the employee has been employed by the employer for a period of at least 6 months beginning the day the employment started; and

- the employee is not engaged in a casual conversion or employee choice dispute with the employer;
- the employee has not in the period of 6 months before the day the notification is given:
  - received a response from the employer not accepting a previous employee choice notification; or
  - had a dispute with the employer about employee choice; or
  - in respect of continuing casuals:
    - had declined before commencement an offer of casual conversion; or
    - declined after commencement an offer of casual conversion (in accordance with the transitional provisions for continuing casuals);
    - been given a response before commencement by an employer refusing a casual conversion request made by the employee; or
    - been given a response after commencement by the employer refusing a casual conversion request made by the employee (in accordance with the transitional provisions for continuing casuals).

Service accrued by a continuing casual employee prior to commencement is not recognised for the purposes of eligibility to participate in the employee choice pathway. However, continuing casual employees retain the right to request casual conversion until eligible to utilise the employee choice notification pathway.

Timing of employer response

The employer must give a written response to the employee within 21 days after the notification is given to the employer.

Consultation requirement before providing a response

Before providing a response, employers **must** consult with the employee about the employee's notification.

If the employer is **accepting** the notification, they must also discuss the matters the employer intends to specify, including if the employment is to be part-time or full-time, hours of work and the day the change is to commence.

The Revised Explanatory Memorandum provides an example of consulting before responding to the employee which is replicated below.

Illustrative example

Mackenzie, the new owner of a beachside café, buys an upmarket espresso machine and wants to hire a barista to operate the machine. This will enable her to focus on establishing the new business.

Mackenzie engages Gus in November, on a casual basis, paying him a 25 per cent loading and

rostering him to work on an 'as needed' basis. He is a student and has nominated his availability to be Wednesday to Sunday between 7.30am–3.30pm.

She is not able to indicate how long she may be able to provide him with employment at the outset, but hopes that if the new coffee machine proves successful she may be able to provide more regular employment.

On engagement: Gus is correctly classified as a casual employee. There is no firm advance commitment to continuing and indefinite work, and he is paid a casual loading under the applicable fair work instrument.

Two years later: The business is thriving and Gus now works regularly at the café, Wednesday to Sunday 7.30am–¬12pm, with extra hours as required to meet customer demand during the summer period. Gus is absent for some single days due to illness.

Gus decides that a move to ongoing employment would be beneficial and decides to issue a notification to Mackenzie under the 'employee choice' provisions of the FW Act.

He considers that his working arrangements are, in effect, those of an ongoing employee, although there are no other employees with which to compare. Both Mackenzie and Gus expect that these arrangements will continue into the future.

Mackenzie agrees to Gus' notification and, after discussing the notification, they agree that he will commence as a permanent part-time employee two weeks later

Information that must be included in the employer's response

The employer's written response **must** include a statement that the employer accepts or does not accept the notification.

If the employer **accepts** the notification, the written response must advise the employee:

- whether the employee is changing to full-time employment or part-time employment;
- the employee's hours of work after the change takes effect (i.e., the first day of the first full pay period that starts after the day the response is given unless agreed otherwise);
- the day the employee's change to full-time employment takes effect.

If the employer **does not** accept the notification, the written response must identify which of the following grounds justified that decision (i.e., it can be one or more):

- having regard the statutory definition of casual employee and the employee's current employment relationship with the employer, the employee still satisfies that definition;
- there are fair and reasonable operational grounds for not accepting the notification; and/or
- accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

What are the fair and reasonable operational grounds to not accept a notification?

An employer may refuse to accept a notification for any of the following 'fair and reasonable operational grounds':

- substantial changes would be required to the way in which work in the employer's enterprise is organised;
- there would be significant impacts on the operation of the employer's enterprise;
- substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time employee or part-time employee (as the case may be).

'*Substantial'* changes include changes that significantly affect the way an employee would need to work.

What is the effect of an employer accepting an employee choice notification?

A casual employee becomes a part-time or full-time employee on and after the date specified in the employer's notification that they accept the employee choice notification for the purposes of:

- the FW Act and any other law of the Commonwealth;
- a law of a State or Territory;
- any fair work instrument that applies to the employee; and
- the employee's contract of employment.

Disputes about employee choice notifications

Employers and employees in a dispute must first attempt to resolve the dispute at a workplace level through discussions. However, the process is not specified and employers can handle the dispute in a way that suits their workplace structures and policies. For example, this could include discussion between the affected employee and their immediate supervisor or more senior levels of management if appropriate.

Modern awards and enterprise agreement must also have a term that provides a procedure for settling disputes in relation to the National Employment Standards (**NES**), including the casual employment provisions. If enterprise agreements or modern awards have supplementary, ancillary or incidental terms dealing with the resolution of casual conversion/employee choice disputes, these must also be complied with.

Dispute resolution and arbitration by the FWC

If workplace discussions do not resolve the dispute, either the employer or employee may refer the dispute to the FWC.

The FWC may deal with employee choice disputes on application (and, during the transitional period, disputes about casual conversion). However, for employee choice, the FWC must **not** deal with the dispute if the FWC is satisfied that a change to the employee's employment status would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

The FWC is required to initially deal with a dispute by means other than arbitration (e.g. through conciliation) unless there are exceptional circumstances. This might include mediation, conciliation, making a recommendation or expressing an opinion.

The employee or employer can appoint a representative to provide support, which can be a person or an employer organisation (i.e. Ai Group) or employee organisation which can represent the industrial interests of the employer or employee. Neither party can be represented by a lawyer or paid agent in a dispute without the permission of the FWC.

Procedural rules may provide that other employees with a dispute about employee choice/casual conversion or a union may be joined as a party to the dispute.

If the dispute is not settled through other means, the FWC may deal with the dispute through mandatory arbitration.

Arbitrated orders

If the dispute is arbitrated, the FWC may make orders as it considers appropriate, including but not limited to any of the following orders:

- an order that the employee be treated as a full-time or part-time employee from the first pay period that starts after the day the order is made (or a later date if the FWC considers it appropriate);
- an order that the employee continue to be treated as a casual employee from the first day of the employee's first full pay period that starts after the day the order is made or such latter day the FWC considers appropriate.

However, the FWC cannot make an order in an arbitrated dispute:

- unless it considers that making the order would be fair and reasonable; or
- if it is inconsistent with:
    - a provision of the FW Act; or
    - a term of a fair work instrument that, immediately before the order is made applies to the employer or employee.

When the FWC considers making orders to arbitrate a dispute it must:

- have regard to whether substantial changes to the employer's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time employee or part-time employee; and
- disregard the conduct of the employer and employee that occurred after the employee gave the employee choice notification to the employer.

Transitional provisions

The amendments relating to the employee choice pathway apply to employment relationships entered into before, on or after commencement, with some exceptions, including the following:

- For employment relationships entered into before commencement, any period of employment as a casual employee before commencement is to be disregarded for the purposes of the requirement that the employee must have 6 months of qualifying service (12 month for an employee of a small business employer); and

- For employment relationships entered into before commencement, the previous right for an employee to request casual conversion continues to operate for six months after commencement (12 months for an employee of a small business employer).

The intention is to ensure that existing casual employees retain a mechanism in the FW Act to request conversion to full-time or part-time employment, until such time as they are able to access the new employee choice pathway.

To return to this section in the Executive Summary, go here.

7. Interactions between fair work instruments and the new casual employee definition and employee choice pathway

Commencement

These provisions commence 26 August 2024.

See also the Table of Commencement Dates which can be found here.

Resolving uncertainties and difficulties

The FWC has been empowered to resolve uncertainties and difficulties with the interaction between a fair work instrument and the definitions of casual employee and employee choice.

Which fair work instruments?

The FWC may vary a fair work instrument that is a modern award, enterprise agreement or workplace determination made before the commencement of the amended casual employee definition and employee choice provisions.

Who can apply for a variation of an enterprise agreement or workplace determination?

An employer, employee or employee organisation covered by an enterprise agreement or workplace determination may apply to the FWC to vary the applicable enterprise agreement or workplace determination.

Who can apply for a variation of a modern award?

The FWC may vary a modern award on its own initiative.

Also, an employer or employee covered by the award or an employer organisation or employee organisation entitled to represent the industrial interests of an employer or employee covered by the award may apply to the FWC to vary the applicable modern award.

Employers who identify any uncertainties or difficulties arising from the interaction between a fair work instrument and the new statutory provisions are encouraged to contact Ai Group.

What can the variations address?

The FWC may vary an award, enterprise agreement or workplace determination:

- to resolve an uncertainty or difficulty relating to the interaction between the instrument and any of the following:
    - the revised statutory definition of casual employee (including to deal with uncertainty or difficulty arising from the circumstances in which employees are to be employed as casual employees under the instrument);
    - employee choice notification and offers or requests for transitional casual conversion; or
- to make the instrument operate effectively with the new statutory definition or the employee choice pathway.

When do the variations take effect?

A variation of a fair work instrument operates from the day specified in the determination, which may be a day before the determination is made.

If the determination relates to a modern award, the FWC must publish the award as varied as soon as practicable on the FWC's website or by any other measure the FWC considers appropriate.

To go back to this section in the Executive Summary, click here.

8. Casual employment – anti-avoidance and adverse action

Commencement

These provisions commence 26 August 2024.

See also the Table of Commencement Dates which can be found here.

Anti-avoidance

The Closing Loopholes (No.2) Act introduces expanded anti-avoidance provisions.

It retains the existing prohibition on an employer reducing/varying an employee's hours of work, changing their pattern of work or terminating their employment to avoid rights and obligations in respect of employee choice notifications and casual conversion.

The amendments insert an additional express prohibition on employers "*changing the usual pattern of work*". The Government says this is necessary to reflect the meaning of casual employee in new section 15A, in particular the requirement to have regard to whether there is a regular pattern of work for the employee when assessing whether there is an absence of a firm advance commitment to continuing and indefinite work. According to the Revised Explanatory Memorandum, the existence of a regular pattern of work is an important indicator of the presence of a firm advance commitment, although it would not be solely determinative of an employee's status.

Workplace rights

Each of the following is a workplace right within the meaning of Part 3-1 of the FW Act (general protections provisions):

- giving an employer an employee choice notification;
- receiving a response from an employer to an employee choice notification;
- being taken to be a full-time or part-time employee through the employee choice pathway;
- receiving an offer or notice in accordance with the transitional casual conversion provisions;
- accepting an offer and receiving a notice in accordance with the transitional casual conversion provisions;
- accepting an offer or notice in response to a request in accordance with the transitional casual conversion provisions; and
- participating in a dispute about the operation of the employee choice and transitional casual conversion pathways.

9. Sham arrangements – casual employment

Commencement

These provisions commence 26 August 2024.

See also the Table of Commencement Dates which can be found here.

Sham casual employment arrangements

The Closing Loopholes (No.2) Act amends the existing sham contractor arrangements provisions in Pt 3-1 of the FW Act to include the two general protections.

First, an employer is prohibited from dismissing an employee to reengage them as casual employee to perform the same, or substantially the same, work.

Secondly, an employer must not knowingly make a false statement to a current or former employee with the intention of persuading or influencing that employee to become a casual employee to perform the same, or substantially the same, work for the employer.

Dismissing to engage as a casual employee

An employer must not dismiss, or threaten to dismiss, an individual who:

- is an employee of the employer; and
- performs particular work for the employer in order to engage the individual as a casual employee to perform the same, or substantially the same, work.

Misrepresentation to engage as a casual employee

A person (the employer) that employs, or has at any time employed, an individual to perform particular work other than as a casual employee must not make a statement that:

- the employer knows is false; and
- is made in order to persuade or influence the individual to enter into a contract of employment under which the individual will perform the same or substantially the same work.

To go back to this section in the Executive Summary, click here.

Part C - Regulated workers

10. Regulated worker delegates

Commencement

These provisions commence on the date on which a proclamation is issued or 26 August 2024, whichever is earlier .

See also the Table of Commencement Dates which can be found here.

Extension of employee workplace delegate rights to regulated workers

The provisions creating workplace delegate rights for employee workplace delegates commenced on 15 December 2023, the day after the Closing Loopholes Act was given Royal Assent.

The Closing Loopholes (No. 2) Act includes workplace delegate rights provisions as they relate to regulated workers, which essentially expand the protections and rights available to employee workplace delegates to include regulated workers and associated regulated businesses.

The amendments also provide that a workplace delegate may be appointed or elected to represent the industrial interests of either or both employees and regulated workers.

Who is a regulated worker?

A person is a regulated worker if they are an 'employee-like worker', being an independent contractor performing digital platform work under a services contract with one or more 'employee-like' characteristics. See here for the definition of 'employee-like worker.'

A person is also a regulated worker if they are a 'regulated road transport contractor', performing work in the road transport industry under a services contract. See here for who is a '*road transport contractor*.'

What is an associated regulated business?

The associated regulated business for a workplace delegate who is a regulated worker, is the regulated business that:

- engaged the workplace delegate under a services contract; or
- arranged for, or facilitated entry into, the services contract under which the workplace delegate performs work.

Protections for regulated delegate workers

As for workplace delegates who are employees, an associated regulated business would similarly be prohibited from:

- unreasonably failing or refusing to deal with a workplace delegate;
- knowingly or recklessly making a false or misleading representation to a workplace delegate; or
- unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.

Limitations on protections

As for the protection for workplace delegates who are employees, the protection for workplace delegates who are regulated workers is subject to certain limitations.

For example, a delegate would only be protected from an associated regulated business *unreasonably* failing or refusing to deal with a workplace delegate, or *unreasonably* hindering, obstructing or preventing the exercise of the rights of a workplace delegate. As a result, associated regulated businesses would still be able to undertake reasonable management action, carried out in a lawful way.

The burden for establishing that the conduct of an associated regulated business is *not unreasonable* is on the business. Accordingly, if a workplace delegate establishes that a business failed or refused to deal with them, or hindered, obstructed or prevented the exercise of their rights, the burden would shift to the business to demonstrate the reasonableness of their acts or omissions by providing evidence about the reasons and intent behind the actions it took (or omitted to take).

The protections are only enlivened when an associated regulated business is dealing with a workplace delegate acting in that capacity.

Finally, the protections would not apply in respect of any conduct required by or under a law of the Commonwealth or a State or Territory. This would include action taken, for example, under relevant work health and safety legislation, to ensure the health and safety of workers while at work.

Regulated delegate worker rights

Regulated workers who are workplace delegates have a right to reasonable access to the workplace and facilities provided by the regulated business concerned.

Access is for the purpose of representing the industrial interests of all workers who are eligible to be a member of the relevant employee organisation.

The extent of access is assessed against a test of reasonableness, including having regard to the size, resources or facilities of the regulated business. Some regulated businesses may not have workplaces or facilities in the same way an employer does when employees work on-site, for example, a digital labour platform or a road transport business. This assessment will likely have regard to the actual facilities available at the regulated business and whether providing access to such facilities is possible.

Regulated delegate workers are not entitled to paid time for the purposes of training in relation to their role as a workplace delegate.

Delegates rights terms in fair work instruments

If a regulated business has complied with a delegates' rights term in the relevant fair work instrument, they will have complied with the obligations under the FW Act.

In the context of regulated worker delegates, a delegates' rights term is an optional inclusion in a minimum standards order (see MSOs) or collective agreement (see collective agreements).

To go back to this section in the Executive Summary, click here.

11. Regulation of employee-like workers

Commencement

These provisions commence on the date on which a proclamation is issued or 26 August 2024, whichever is earlier.

See also the Table of Commencement Dates which can be found here.

Overview – regulating employee-like workers

The Closing Loopholes (No.2) Act has amended the FW Act to provide certain protections for independent contractors who are:

- employee-like workers performing digital platform work; or
- engaged in the road transport industry; or
- in a road transport contractual chain.

In the FW Act:

- employee-like workers and road transport contractors are each a type of *regulated worker*;
- digital labour platform operators and road transport businesses are each a type of *regulated business*; and
- a person is in a road transport contractual chain if they are a party to the first or subsequent contract/arrangement, in a chain/series of contracts/arrangements.

This section deals with the framework as it applies to employee-like workers. See here for the regulatory framework for the road transport industry.

The definition of '*regulated workers'* extends to prospective regulated workers, who are persons who may become regulated workers for a services contract.

Guide to this section

This section is comprised of the following sub-sections which are hyperlinked below:

- Consent-based collective agreements between digital platform operators and unions
- Disputes over an employee-like worker's 'unfair deactivation' from a 'digital labour platform'

FWC powers in relation to employee-like workers

The FWC has been empowered to:

- set binding conditions through the making of **MSOs** and non-minding guidelines through the making of **MSGs** in relation to employee-like workers performing digital platform work;
- enable digital labour platform operators to make **consent-based collective agreements** with a union(s) entitled to represent the industrial interests of one or more employee-like workers – including to approve, vary and terminate those agreements;
- deal with an **unfair deactivation claim** by an employee-like worker (that has performed work through the digital labour platform or under the services contract on a regular basis for at least 6 months) and to order reactivation or payment for lost pay; and
- deal with claims relating to **adverse action** taken by digital labour platform operators, employee-like workers, and industrial associations.

Digital Platform Consultative Committee

A Digital Platform Consultative Committee (**Platform Committee**) will be established. The purpose of the Platform Committee is to provide, in the '*public interest*,' a '*regular and organised means*' by which representatives of the Government, digital labour platform operators, employee-like workers, and other persons or organisations/bodies can consult on digital platform work.

The Platform Committee will consist of the Minister, six Minister-appointed digital labour platform operator representatives, and six Minister-appointed members that represent employee-like workers. Such members must also represent the care economy, on demand delivery, and rideshare sectors. Subcommittees may also be constituted by the Platform Committee, but the composition of such subcommittee is not prescribed.

The Platform Committee must meet at least twice a year during the first 24 months of these provisions commencing operation, and once a year thereafter.

It is stated that the Platform Committee '*will not interfere with the proper performance of the functions of industrial tribunals*.'

The definition of an '*employee-like worker*'

An independent contractor is an employee-like worker if they satisfy four criteria:

(i) **Capacity** - they are a party to a services contract in a prescribed capacity;

(ii) **Performance of work** - they perform all or a significant majority of the work under the services contract (and do not perform any such work as an employee);

(iii) **Digital platform work** - the work they perform under the services contract is '*digital platform work*', and

(iv) **Employee-like characteristics** - they have at least two prescribed employee-like characteristics (see below).

The definition of '*employee-like worker'* is not intended to capture persons that have a high degree of bargaining power, are comparatively well paid and have a significant degree of authority over their work, regardless of whether they perform work on a digital platform. It is not intended, for example that it would capture skilled tradespeople.

It is noted that an employee-like worker who performs work in the road transport industry is defined as a '*road transport employee-like worker'* – which we detail further in the Road Transport section.

Criterion 1: Capacity

To satisfy the definition of employee-like worker, the independent contractor needs to enter into the services contract in a prescribed capacity. The definition of '*employee-like worker*' in the Bill prescribes the following entity types:

- an individual who is a party to a '*services contract*' in their capacity as an individual (other than as a principal), and performs work under the contract;
- if a body corporate is a party to a services contract (other than as a principal) – an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract;
- if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal) – an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or
- if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal) – an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract.

Relevantly, '*services contract*' means a contract for services that:

- relates to the performance of work under the contract by an individual; and
- has the requisite constitutional connection

Conditions or collateral arrangements relating to a services contract would also be taken to meet the definition of a services contract. The Revised Explanatory Memorandum states that this is intended to capture side agreements that refer to the operation of the services contract and seeks to prevent technical distinctions from being drawn between the services contract and other agreements that may likely impact on the operation of services contract.

However, the Revised Explanatory Memorandum states this will be interpreted broadly as this criteria is intended to capture individuals performing work under a '*services contract*' regardless of the entity type adopted.

The Revised Explanatory Memorandum further states that the definition of a services contract is intended to capture operators of '*horizontal'* or '*marketplace'* digital labour platforms which may intermediate a services contract made between a worker and an individual but is not itself a party to it.

Criterion 2: Performance of Work

An employee-like worker must perform all or a significant majority of the work themselves, rather than it be performed by contractors that subcontract the work or through the engagement of other employees (except those who are family members of a director of the company) to perform the work.

The person must also not perform work referable to the service contract as an employee.

Criterion 3: Digital platform work

An employee-like worker must perform '*digital platform work'*.

Digital platform work is work performed by an independent contractor under a services contract '*through or by means of a **digital labour platform***' or that is '*arranged or facilitated through or by means of a **digital labour platform***' and payment is made for that work. This is a very broad definition.

A ***digital labour platform*** means

- '*an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services'*, where:
    - the operator:
        - engages independent contractors directly or indirectly through or by means of the application, website or system; or
        - 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
    - payments referable to the work performed by the independent contractors are processed by any one of the following:
        - the operator of the application, website or system;
        - an associated entity of the operator;
        - 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.
    - The Addendum to the Revised Explanatory Memorandum provides that the above '*is intended to capture a variety of corporate structures and ensure all relevant digital labour platform operators are covered by the definition, regardless of how they structure the processing of payments. This amendment is intended to operate only in respect of digital labour platforms that engage employee like workers or facilitate their entry into services contracts.*'

Regulations may also:

- prescribe and/or exclude other work by name or classes of work that can be considered as digital platform work; and
- prescribe and/or exclude an online application, website or system by name, class, or form of work that can be considered as a digital labour platform.

This leaves open the possibility that the already broad definitions of digital platform work and digital labour platform can be further expanded by regulations without legislative amendments being passed by Parliament.

A **digital platform operator** means an operator of a digital labour platform, being an operator that enters into or facilitates a services contract under which work is performed by employee-like workers.

The Revised Explanatory Memorandum provides an example of an independent contractor that is performing digital platform work for a digital labour platform.

Illustrative example

Jim works as an independent contractor providing services on a gig platform in the care sector called GigCare. GigCare operates as an online-enabled marketplace, where contractors pay a fee to operate on the platform and must agree to terms of service that place obligations on how they use the platform and interact with clients found on the platform. GigCare's platform provides a platform for communications between the parties and processes payments from clients to Jim.

GigCare's platform is a digital labour platform because it acts as an intermediary between Jim (and other contractors) and clients, and it processes payments. If a union representing Jim and similar contractors applies to the FWC for a minimum standards order in relation to work that he and those similar contractors performs through the GigCare platform, the FWC will also need to consider whether those similar contractors are employee-like workers, including because they have low bargaining power, comparatively low pay or a low degree of authority over their work.

Criterion 4: Employee-like characteristics

An employee-like worker must have at least two of the following employee-like characteristics:

- have low bargaining power in negotiations in relation to the services contract under which the work is performed;
- receives remuneration at or below the rate of an employee performing comparable work;
- the person has a low degree of authority over the performance of the work; or
- the person has such other characteristics as are prescribed by the regulations. Such regulation may specify that a person must have all or some of the characteristics prescribed.

A person needs to meet two of the above characteristics as part of the definition of an employee-like worker.

The Explanatory Memorandum states that the definition of an employee-like worker is not intended to capture those who have a high degree of bargaining power, are comparatively well paid and have a significant degree of authority over their work, regardless of whether they perform work on a digital platform. It is intended, for example, that skilled tradespeople would not be captured even if they work on a digital platform.

Minimum Standards Orders' and 'Minimum Standards Guidelines'

New powers to prescribe minimum conditions for employee-like workers

The FWC has been empowered to make what are essentially award-like minimum conditions through:

(i) **Minimum standards orders** (**MSO**). (MSOs for employee-like workers are called '*employee-like worker minimum standards orders*' (**ELMSO**)).

(ii) **Minimum standards guidelines** (**MSG**). (MSGs for employee-like workers are called '*employee-like worker guidelines*' (**ELG**)).

MSOs – General provisions as they apply to regulated workers

What is a MSO?

A MSO will set binding minimum standards for '*regulated workers*' and '*regulated businesses*' that it covers.

A '*regulated worker*' is defined as an employee-like worker and a road transport contractor (**regulated worker**). This definition also extends to prospective employee-like workers and road transport contractors.

A '*regulated business*' is defined as a digital labour platform operator and a road transport business (**regulated business**).

It is important to note that the general provisions relating to MSOs (as detailed below) will apply to both employee-like workers and road transport contractors. There are, however, additional provisions which apply depending on whether the MSO applies to employee-like workers or road transport contractors. These additional provisions are set out in the relevant sections of the Guide below.

A MSO comes into operation on the day specified in the order, but must not be earlier than the day in which it is made. It continues to operate until it is revoked.

Who can apply for, vary or revoke a MSO?

The following may apply to the FWC for a MSO to be made:

- an organisation that is entitled to represent the industrial interests of one or more regulated workers or regulated businesses that would be covered by the proposed MSO;
- a regulated business that would be covered by the proposed MSO; and
- the Minister.

The FWC may also make a MSO on its own initiative. In addition, the FWC may decide (if appropriate) to make a MSG instead of a MSO. The FWC may refuse to consider an application if it is not consistent with a direction of the FWC President.

MSOs can also be varied or revoked by the FWC, the same parties described above, and national councils that represent a significant number of regulated workers or businesses, for example, Ai Group will have express rights to make such application as we represent a significant number of regulated businesses.

Notably, the FWC will also be given the power to vary a MSO on account of an ambiguity, uncertainty or error in the MSO – similar to the existing power in s.160(1) of the FW Act in respect of varying a modern award.

A MSO can only be varied with prospective effect and cannot be varied retrospectively

How is a MSO made?

The FWO has been empowered to make MSOs.

However, when making a MSO, the FWC must take into account the '*minimum standards objective*'. This requires the FWC take into account the need for an appropriate safety net of minimum standards for regulated workers, having regard to the following factors:

a) the need for standards;

- that are clear, simple, fair and relevant;
- recognise the perspectives of regulated workers, including their skills, the value of the work they perform and their preferences about their working arrangement;
- do not change the form of the engagement of regulated workers from independent contractor to employee;
- do not give preference to one business model or working arrangement over another;
- are tailored to the relevant industry, occupation or sector and the relevant business models;
- are tailored to the type of work, working arrangements and regulated worker preferences;
- reflect the differences in the form of engagement of regulated workers as independent contractors to the form of engagement of employees;
- 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;

b) the need for standards that deal with minimum rates of pay:

- that take into account all costs for regulated workers necessarily incurred in the performance of the services contract;

  Note: the Supplementary Explanatory Memorandum says this does not include costs which workers would ordinarily incur regardless of the work performed under a services contract, such as fixed costs for vehicles that also are for personal use.

- that take into account safety net minimum standards that apply to employees performing comparable work; and
- which do not change the form of the engagement of regulated workers;

c) the need to avoid unreasonable adverse impacts upon the:

- sustainable competition among industry participants
- business costs, regulatory burden, sustainability, innovation, productivity or viability

- administrative and compliance costs for industry participants;
- the national economy; and
- persons or bodies that use or rely on the work performed by regulated workers, or the services received under services contracts for the performance of that work;

d) the need to consider other orders or instruments made under this new jurisdiction and avoid overlaps of such orders or instruments.

What terms must a MSO include?

A MSO must include a term dealing with dispute resolution and must only include terms that achieves the minimum standards objective outlined above.

What terms can a MSO include?

A MSO may include terms about the following:

- payment terms;
- deductions;
- record-keeping (i.e. in relation to matters covered by or required by the FW Act, or order/instrument made under it, as concerning regulated workers or businesses);
- insurance;
- consultation;
- representation;
- delegates' rights; and
- cost recovery.

The list of terms above is non-exhaustive. That means the MSO may include other terms, including as prescribed by regulations.

What terms cannot be included in a MSO?

A MSO must not include terms about any of the following matters:

- overtime rates;
- rostering arrangements;
- matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the minimum standards order;
- a term that would change the form of the engagement or the status of regulated workers covered by the minimum standards order including, but not limited to, a term that deems a regulated worker to be an employee;
- a matter relating to work health and safety that is otherwise comprehensively dealt with by Commonwealth, State or Territory legislation; and
- a matter or class of matter prescribed by the regulations.

Employee-Like Minimum Entitlement Standards Orders (ELMSOs)

What is an ELMSO?

An ELMSO is a MSO that applies to employee-like workers. The matters set out above in relation to MSOs are therefore equally applicable to ELMSOs, save for the following differences:

- If an application for an ELMSO or a variation to an ELMSO is made, or if the FWC is considering making or varying an ELMSO on its own initiative, it must first consider whether as a whole, the persons to be covered, are employee-like workers. If the FWC is not satisfied, it must refuse to consider the application or not make or vary the ELMSO.
- Additionally, the FWC:
    - must not make or vary an ELMSO unless there has been genuine engagement with the parties to be covered; and
    - must not make or vary an ELMSO unless the prescribed consultation process has been followed (see below); and
    - must have regard to, '*choice and flexibility*' in working arrangements in making or varying the ELMSO.

      Note: the Supplementary Explanatory Memorandum says this ensures the FWC has regard to the unique nature of digital of digital platform worker where they have choice and flexibility about 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.

What terms must be included in an ELMSO?

In addition to the mandatory terms that must be included in an ELMSO (i.e. dispute resolution), an ELMSO must also include a term relating to coverage setting out the digital platform work, digital labour platform operator(s), and employee-like workers in respect of whom it covers. Digital labour platform operators and employee-like workers must be specified by inclusion in a specified class(es).

An employee-like worker to whom a ELMSO applies in relation to particular digital platform worker, will not be an employee of any person in relation to that work.

An ELMSO must also specify the digital labour platform operator(s) that are primarily responsible for providing the entitlements of specified employee-like workers

What terms must not be included in an ELMSO?

In addition to the mandatory terms that must not be included in a MSO, the following terms are also prohibited from being included in an ELMSO:

- penalty rates for work performed at particular times or on particular days (including but not limited to loadings and shift allowances);
- payment for the time before the acceptance of an engagement;
- payment for time in between the completion of an engagement and the commencement of the next engagement; and
- minimum periods of engagement or a minimum payment referable to a period of minimum engagement.

Notwithstanding the above, the FWC may include a term above in an ELMSO if it is satisfied that the inclusion is appropriate having regard to:

- the type of work performed by the employee-like workers covered by the ELMSO; and
- the digital labour platform operators covered by the ELMSO.

Consultation process for ELMSOs

Before the FWC makes an ELMSO it must comply with the following consultation process:

- *First*, the FWC is to prepare and publish a notice of intent advising that it proposes to make an ELMSO and the relevant draft ELMSO on its website or other appropriate means.
- *Second*, the FWC must ensure that the affected entities have a reasonable opportunity to make written submissions to the FWC for its consideration in relation to the published draft ELMSO and must publish those submissions unless they include information which is confidential or commercially sensitive.

  Note: an affected entity would include an employee-like worker and digital platform operator that would be covered by the ELMSO and registered organisations entitled to represent them. Regulations may prescribe other affected entities or a class of persons/bodies who are affected entities.
- *Third* and *optionally*, the FWC *may* hold a hearing in relation to the draft ELMSO.
- *Fourth*, the FWC may make appropriate changes to the ELMSO, however, if those are significant the FWC must not make the order, and it must then publish a subsequent notice of intent and publish a revised draft, and follow the consultation process outlined above.
- *Finally*, the FWC may decide no ELMSO will be made based on the draft. In this case the FWC must publish a notice of its decision on its website or other appropriate means.

Unlike the consultation provisions for the making of a MSO for the road transport industry, there is no minimum consultation period required when making a MSO for employee-like workers. The consultation period only needs to be of a '*reasonable period*' having regard to the '*unique nature of digital platform work.*'

Power for the Minister to defer the operation or application of an ELMSO

If the Minister considers it is in the public interest, the Minister may make a deferral declaration that defers:

a) the commencement of a MSO (but can only do so once); or

b) the application of all or some of the terms of a MSO to a specified class(es) of persons (including by reference a particular industry/sector or kind of work) or to all persons. Such declaration can be made more than once by the Minister.

The Minister can only make a deferral declaration before the ELMSO has commenced operation. The Minister is not required to consult any one before making such declaration.

Despite the above, if the FWC has previously deferred the commencement of the particular ELMSO in question, the Minister cannot make a deferral (either in full or in part) in relation to that ELMSO.

Power for the Minister to suspend the operation or application of an ELMSO

If the Minister considers it is in the public interest, the Minister may make a suspension declaration that:

a) suspends the operation of the ELMSO; or

b) suspends the application of all or some of the terms of the ELMSO to a specified class(es) of persons (including by reference a particular industry/sector or kind of work) or to all persons.

A suspension declaration must or provide for a suspension period that is longer than 12 months or provide for retrospective suspension. The making of a suspension declaration does not affect any right or liability that a person acquired, accrued or incurred before the suspension declaration is made.

There are also limitations on when a suspension declaration may be made. Generally speaking, such declaration may only be made by the Minister within 12 months of the ELMSO coming into effect, however certain specific rules apply when the MSO is partly suspended in the manner described in (b) above.

The Minister is not required to consult any one before making such declaration.

The FWC however, may make any orders it considers appropriate to ensure that no person is unfairly affected by the suspension.

No powers for the FWC to defer or vary an ELMSO

The FWC also has powers to defer or suspend a MSO, but only in respect of MSOs for the road transport industry and road transport contractual chain orders. The FWC cannot defer or suspend an ELMSO. See the below section regarding the Road Transport Industry.

FWC must consider whether to vary or revoke an ELMSO

If a deferral or suspension declaration is made by the Minister, the FWC must, as soon as practicable, consider whether to vary or revoke the ELMSO. The FWC must not vary or revoke the ELMSO unless:

- there has been genuine engagement with the parties to be covered;
- in the case of an ELMSO, it must have regard to '*choice and flexibility*' in working arrangements; and
- the FWC has followed a consultation process for which a reasonable opportunity to make submissions and comment on the proposed variation or revocation has been afforded to the affected entities.

Impact of a digital labour platform operator's compliance with an ELMSO and the statutory definition of employment

For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between an individual and a person under the statutory definition of employment (see section on Statutory definition of employment), any steps taken by a digital labour platform operator to comply with its obligations under any of the following in relation to the individual are to be disregarded:

- Part 3A-3 (Unfair deactivation or unfair termination);
- the Digital Labour Platform Deactivation Code (being the code made by the Minister under section 536LJ); or
- an order made under, or for the purposes of, Chapter 3A.

Specifically, an employee-like worker to who an ELMSO applies in relation to particular digital platform work is not an employee in relation to that work.

According to the Supplementary Explanatory Memorandum, this provides certainty for digital labour platform operators about the status of their workers for the purpose of determining the workers' rights and entitlements. This ensures that steps taken by a digital platform operator to comply with its obligations cannot be considered when determining whether the true nature and practical reality of the employment relationship is one of employment. This '*avoids a perverse outcome whereby acts of a digital labour platform operator to comply with the new employee-like provisions or orders made under them may otherwise have the effect of inadvertently creating an employment relationship*'. It also ensures that workers covered by MSOs cannot later bring proceedings to recover unpaid employment entitlements.

Civil liability penalty amounts

Contravening a MSO or ELMSO gives rise to a civil liability penalty of up to 60 penalty units or 600 penalty units for a serious contravention.

Minimum Standards Guidelines (MSGs)

What is a MSG?

The FWC has a new power to make MSGs, which sets guidelines for regulated workers performing work under a services contract. Unlike MSOs, MSGs are not binding in nature.

MSGs (as detailed below) will apply to both employee-like workers and road transport contractors. There are, however, additional provisions which apply depending on whether

the MSG applies to employee-like workers or road transport contractors. These additional provisions are set out in the relevant sections of the Guide below.

A MSG comes into operation on the day specified in the guidelines but must not be earlier than the day in which it is made. It continues to operate until it is revoked. A MSG can also be varied, but not with retrospective effect.

Who can apply for a MSG?

The following persons may apply to the FWC for a MSG to be made:

- an organisation that is entitled to represent the industrial interests of one or more regulated workers or regulated businesses that would be covered by the proposed MSG;
- a regulated business that would be covered by the proposed MSG; and
- the Minister.

The FWC may also make a MSG on its own initiative. In addition, the FWC may decide to make a MSO instead of a MSG if it considers it appropriate to do so. However, the FWC cannot make a MSG if a MSO covering the same regulated workers and regulated businesses is in operation.

The FWC may refuse to consider an application for a MSG if it is not consistent with a direction of the FWC President.

What terms must be included in MSGs?

A MSG must include the same terms that are required for an ELMSO, namely in respect of coverage and specifying those digital labour platform operator(s) that are primarily responsible for providing the entitlements of specified employee-like workers (see above section titled '*What is an ELMSO?*').

What terms can and cannot be included in MSGs?

A MSG can include the same terms as those specified for MSOs (see above section titled '*What terms can a MSO include?*')

A MSG cannot include any terms relating to the excluded matters set out above in relation to MSOs (see above section titled '*What terms cannot be included in a MSO?*')

Employee-like Worker Guarantees (ELGs}

An ELG is a MSG for employee-like workers and therefore the matters set out above in relation to MSGs are equally applicable to ELGs. An ELG:

- must include a coverage term and a term specifying those digital labour platform operator(s) that are primarily responsible for providing the entitlements of specified employee-like workers;
- may include the same discretionary terms as a MSO; and
- must not include the same prohibited terms as a MSO and ELMSO.

Consent-based collective agreements between digital platform operators and unions

FWC can approve collective agreements for regulated workers

The FWC has been empowered to approve '*collective agreements'* made between a regulated business (i.e. a digital labour platform operator or a road transport business) and an employee organisation (i.e. a union).

These collective agreements provide terms and conditions for the regulated workers to whom it applies.

Who can a collective agreement apply to/cover?

A collective agreement, which is in operation, will apply to a regulated worker or regulated business if the collective agreement is expressed to cover them, unless a provision of the FW Act, FWC order or court order provides (or has the effect) that the collective agreement does not apply to such worker.

A collective agreement may also apply to a regulated worker or regulated business if a provision of the FW Act, an FWC order, or court order provides (or has the effect) that such worker or business is covered by the collective agreement.

When does a collective agreement come into operation/terminate?

A collective agreement comes into operation on the day it is registered or on a later date specified in the agreement. A collective agreement is terminated at the end of the period of operation specified in that agreement or an earlier date as specified in a termination notice that is registered and published on the FWC's website.

How does a collective agreement interact with other MSOs or legislation?

A term of a collective agreement has no effect to the extent that it is detrimental to the regulated worker in any respect, when compared to an applicable MSO or state/territory law.

Notice of consultation period for a proposed collective agreement

The following parties may initiate a consultation period for a proposed collective agreement by giving a consultation notice:

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

The consultation notice must specify the following matters:

- that the entity giving the notice intends to try and make a collective agreement;
- if the regulated business notifies, the name of the organisation to which the notice is being given or otherwise, the name of the organisation giving the consultation notice;
- the matters to be dealt with by the proposed collective agreement;
- the regulated business that will be covered by the proposed collective agreement;

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

The consultation notice will be published on the FWC's website.

After a consultation notice has been given, either negotiating party for the collective agreement must, with the consent of the other negotiating party, make reasonable efforts to give a notice to each '*eligible employee-like worker*' or '*eligible regulated road transport contractor*' for the proposed collective agreement.

An eligible employee-like worker includes an employee-like worker who, at any time during the period of 28 days before the consultation notice was given, was performing work under a services contract, arranged or facilitated through, or by means of a digital labour platform operated by the digital labour platform operator that will be covered by the proposed collective agreement.

Dispute resolution regarding a proposed collective agreement

If the negotiating parties for a proposed collective agreement are unable to resolve a dispute about the making of the agreement, either negotiating entity may apply (without the need to seek the consent of the other party) to the FWC for it to deal with the dispute. The FWC must deal with the dispute (other than by arbitration).

The FWC may dismiss a dispute application if there are no reasonable prospects of the negotiating entities making a collective agreement.

Requests to sign a proposed collective agreement

A negotiating party for a proposed collective agreement may request the other negotiating entity for the agreement to sign the agreement. Such request must not be made earlier than 30 days after the last day on which a consultation notice was given to an employee-like worker or road transport contractor. A collective agreement is '*made'* when the negotiating parties sign the agreement.

Registering a collective agreement

If a collective agreement is made, a negotiating party, with the consent of the other negotiating party, may apply to the FWC to register the agreement. An application for registration must be accompanied by the relevant documents, including:

- a signed copy of the collective agreement;
- a declaration signed by the regulated business and the union stating that the regulated business and the union explained the terms of the agreement and their effect to the regulated workers covered by the agreement, and a description of the explanation; and
- that the regulated business or the union, made reasonable efforts to give a consultation notice to the relevant regulated workers; and
- state that none of the relevant parties were subject to any form of duress in relation to the making of the collective agreement;
- specification of any applicable MSO and each matter dealt with by the collective agreement that is also dealt with by a term of the MSO and how the term of the collective agreement is more beneficial to the regulated workers.

Before the FWC can register the collective agreement, it must also be satisfied that the agreement:

- includes a dispute resolution term;
- includes a term for its period of operation and termination; and
- would not be contrary to the public interest, taking into account the object of providing a '*simple, flexible and fair framework that enables collective agreements to be made by consent*'.

  The Addendum to the Revised Explanatory Memorandum provides the following in respect of the concept of the '*public interest*':

> '*…the public interest would also generally be broader than and distinct from the interests of the negotiating entities. While it would not be limited in its considerations, factors that the FWC could consider when satisfying itself that the operation of an agreement would not be contrary to the public interest could involve whether the agreement would:*
>
> *• encourage establishment of fair terms and conditions of engagement for people in emerging forms of work; or*
>
> *• adversely affect competition in a particular market or industry, or result in entities engaging in conduct which may substantially lessen competition between entities.*

The FWC must finally, publish a copy of the collective agreement and the declaration referred to above on the FWC's website.

Varying a collective agreement

A collective agreement can be varied upon application by a regulated business or union covered by the agreement. The application must be accompanied by relevant materials, including:

- the signed agreement that identifies the relevant parties covered by the agreement;
- a declaration that the effect of the variation had been explained to the regulated workers and how the proposed term to be varied is more beneficial to the regulated workers as compared to an applicable MSO; and
- that no relevant party was subject to any form of duress in relation to the variation.

If the above requirements are met, the FWC must also be satisfied that varying the agreement would not be contrary to the public interest, taking into account the object of providing a '*simple, flexible and fair framework that enables collective agreements to be made by consent*'.

Procedural rules may further prescribe other declarations required for a variation.

The FWC must register the agreement as varied if the above requirements are met.

Terminating a collective agreement

If a collective agreement is terminated in accordance with the process specified in the agreement before its end date, the regulated business or union must, with the consent of the other party, notify the FWC of the termination on the date it is terminated. The notification must also be accompanied by a signed declaration stating that the collective agreement has been terminated and the date of termination.

Procedural rules may further prescribe other declarations required for termination.

What terms in a collective agreement can be made between a digital labour platform operator and a union?

A collective agreement may be made between a digital labour platform operator and a union entitled to represent industrial interests of one or more employee-like workers about:

- the terms and conditions on which employee-like workers, covered by the collective agreement perform digital platform work:
    - 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
- how the collective agreement will operate.

A term of a collective agreement has no effect to the extent that it is a term about a matter other than those set out immediately above, including matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the agreement. However, if a collective agreement includes a term that has no effect, the inclusion of the term does not prevent the agreement from being a collective agreement.

(For information about the terms which may be included in a collective agreement between a road transport business and a union, see the section on Road Transport).

The Revised Explanatory Memorandum provides an example of how agreement making may take place which is replicated below:

Illustrative example: Agreement-making framework

Platform A is a digital labour platform operator that engages delivery partners under services contracts to perform parcel delivery services via its digital labour platform. The Delivery Network is an organisation entitled to represent the industrial interests of one or more of the delivery partners engaged via the Platform A digital labour platform. The delivery partners are employee-like workers.

The Delivery Network 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 delivery partners, and The Delivery Network provides the consultation notice to the FWC, which in turn publishes the notice on its website (section 536MM).

With the agreement of The Delivery Network, Platform A provides a notice under section 536MN about the proposed collective agreement to its delivery 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. Delivery partners engage with Platform A and The Delivery Network over the proposed terms and implications of the collective agreement.

After three months of negotiation, The Delivery Network requests Platform A sign the collective agreement. Once both parties have signed the agreement, it is made.

The Delivery Network, 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 delivery partners have had the terms of the agreement explained to them, that the parties made reasonable efforts to give a notice to eligible delivery 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 minimum standards order 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 minimum standards order, how the term of the collective agreement is more beneficial to the delivery partners covered by the agreement than the terms of the minimum standards order.

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 agreed 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 delivery partner or The Delivery Network 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 delivery 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.

Proposed civil liability penalty amounts

Contravening a term of a collective agreement gives rise to a civil liability penalty of up to 60 penalty units or 600 penalty units for a serious contravention.

Disputes over an employee-like worker's '*unfair deactivation*' from a '*digital labour platform*'

Who can make an unfair deactivation claim?

The FWC has been given an *'unfair deactivation'* jurisdiction for employee-like workers. A person is protected from unfair deactivation if at the time the person is an employee-like worker and:

- they performed work through or by means of a digital labour platform operated by a digital labour platform operator; or
- they performed 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
- the person has been performing work through or by means of that 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. Note, periods which precede the commencement of these provisions do not count towards this 6 month eligibility period.

A person who has been deactivated may apply to the FWC for a remedy, unless the sum of their annual rate of earnings and such other amounts (if any), exceeds the contractor high income threshold, which is yet to be prescribed by regulations.

A person cannot commence multiple proceedings in relation to an unfair deactivation from a digital labour platform and unfair termination of a road transport services contract. However, if the other proceeding was discontinued or failed for want of jurisdiction, the person will not be precluded from commencing a proceeding under this jurisdiction.

Overview of the unfair deactivation claim process

The application must be made within 21 days after the deactivation took effect unless an extension of time is granted by the FWC.

The FWC must decide several initial matters before considering the merits of the application, including whether the application was made within time, whether the person was a person protected from unfair deactivation, and whether the deactivation was consistent with the Digital Labour Platform Deactivation Code (**Deactivation Code**).

However, if the matter involves contested facts, the FWC must hold a conference or hearing.

The FWC may, dismiss an application if the FWC is satisfied that the applicant has unreasonably:

- failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or
- failed to comply with a direction or order of the FWC relating to the application; or
- failed to discontinue the application after a settlement agreement has been concluded.

The FWC may also make an order for costs if the applicant's failure causes the other party to incur costs.

What are the elements for establishing unfair deactivation?

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

(i) the person has been '*deactivated'* from a digital labour platform; and

(ii) the deactivation was unfair; and

(iii) the deactivation was not consistent with the Deactivation Code.

Element 1: Deactivation

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

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

Element 2: The deactivation was unfair

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

- whether there was a valid reason for the deactivation related to the person's capacity or conduct; and
- whether any relevant processes specified in the Deactivation Code were followed; and
- any other matters that the FWC considers relevant.

The following matters will not constitute unfair deactivation:

- the deactivation occurs because of serious misconduct;
- the deactivation is constituted by 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 the operator believed on reasonable grounds that one or more of the following matters had arisen:
  - (i) the deactivation was necessary to protect the health and safety of a user or member of the community;
  - (ii) that the person engaged in fraudulent or dishonest conduct including, misrepresenting or falsifying information provided to the operator;
  - (iii) that the person had not complied with licensing and accreditation requirements under law, including requirements relating to the person and requirements of the operator and where the person's conduct caused, or may have caused, the operator to breach those requirements; or
  - (iv) that the deactivation of the person was necessary to enable the operator to investigate or refer the matter to a law enforcement agency for the purposes set out in (i), (ii) or (iii) above.

Element 3: The Deactivation Code

The Minister must make a Deactivation Code, which must deal with, at least, the following matters:

- the circumstances in which work is performed on a regular basis;
- matters that constitute or may constitute a valid reason for deactivation;
- rights of response to deactivations;
- the internal processes of digital labour platform operators in relation to deactivation;
- communication between the employee-like worker and the digital labour platform operator in relation to deactivation;
- the accessibility in practice of the internal processes of digital
- labour platform operators in relation to deactivation;
- the treatment of data relating to the work performed by employee-like workers.

A deactivation is consistent with the Deactivation Code if, at the time of the deactivation, the digital labour platform operator complied with the Deactivation Code.

Before making the Deactivation Code, the Minister must be satisfied that there has been such public consultation in relation to its development, that the Minister considers appropriate.

The Minister may, by legislative instrument, vary or revoke the Deactivation Code, but must be satisfied that there has been such public consultation in relation to the variation or revocation, that the Minister considers appropriate. This consultation requirement however does not apply to minor or technical variations.

Remedies for unfair deactivation

The following remedies are available for successful claimants under the new unfair deactivation jurisdiction.

Reactivation

The FWC may make an order for reactivation.

A reactivation order is an order that the digital labour platform operator who operated the digital platform at the time of the deactivation take measures to restore the person to the position they would have been in but for the deactivation, including:

- by removing the suspension;
- by reinstating the person's access to the digital labour platform; and
- by modifying the person's access to the digital labour platform so that the access is as it was before the person's access to the digital labour platform was terminated or suspended.

If the original digital labour platform from which the person was deactivated no longer exists; and a similar digital labour platform (**the second digital labour platform**) is operated by an associated entity of the operator of the original digital labour platform the order for reactivation may be imposed on the associated entity to provide access to the second digital labour platform on '*terms and conditions no less favourable*' than those immediately before the person's access to the original digital labour platform was terminated or suspended.

Order to restore lost pay

The FWC may make an order to restore lost pay.

If the FWC makes an order for reactivation and considers it appropriate to do so, the FWC may also make an order to cause the digital labour platform operator or the associated entity to pay an amount for '*the remuneration lost, or likely to have been lost, by the person because of the deactivation'*. In determining this amount, the FWC must consider:

- the amount of any remuneration earned by the person from work of any kind during the period between the deactivation and the making of the order for reactivation; and
- the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reactivation and the actual reactivation.

Civil liability penalty amounts

Contravening an order made in respect of an unfair deactivation claim, including failure to provide the relevant remedies above, gives rise to a civil liability penalty of up to 60 penalty units.

FWO's ability to seek a notice to investigate an unfair deactivation

The FWO will be given the ability to apply to the Administrative Appeals Tribunal (**AAT**) for a FWO notice to investigate an unfair deactivation, including potentially to investigate whether relevant orders made as a result of a successful claim has been implemented by the regulated business. Such notice, if made, could require a person to give information, produce documents and/or attend before the FWO to answer questions relevant to a FWO investigation. Non-compliance with such notice may give rise to a civil penalty.

The Addendum to the Revised Explanatory Memorandum explains that these provisions are intended to assist the FWO where '*there are no relevant documents that appear to be available and subsequently the investigation into these matters has stalled'.* It also states that the existing FWO notice regime has '*safeguards'*, namely:

- The FWO will have to state in an affidavit that it believes on reasonable grounds that a person has informational documents relevant to an investigation and is capable of giving evidence.
- The AAT member can only issue the FWO notice if satisfied that there are reasonable grounds to believe the person has information or documents or is capable of giving evidence relevant to the investigation and that attempts in obtaining information, documents or evidence have been unsuccessful or are not appropriate.
- There are existing protections from liability relating to FWO notices.
- There is an existing requirement that the FWO notify the Commonwealth Ombudsman of the issuance of a FWO notice and provide a report about the examination.

General protections expansion to digital labour platform operators

The general protections regime under the FW Act has been expanded to include '*adverse action'* taken by:

- a digital labour platform with respect to an employee-like worker by terminating a contract, injuring the employee-like worker in relation to the terms and conditions of their contract, altering their position to their prejudice, refusing to make use of the services offered by the worker or refusing to provide the worker with access to the digital labour platform; and
- a digital labour platform that proposes to enter into a contract with an employee-like worker for the use of a digital labour platform by refusing to give them such access, discriminating against them in relation to the terms and conditions of their access, or refusing to make use of their services; and
- an employee-like worker against a digital labour platform operator, by taking industrial action against the digital labour platform operator; and

- an industrial association (or an officer or member of an industrial association) against an employee-like worker by taking action that has the effect of prejudicing the worker in relation to their use or access to a digital labour platform.

The prohibitions in the general protections regime on a person inducing an independent contractor to take (or propose to take) membership action have also been extended to employee-like workers.

Transitional provisions

- The provisions dealing with unfair deactivation of employee-like workers applies to a deactivation that occurs after commencement.
- When determining whether an employee-like worker has been performing work for a period of at least 6 months for the purposes of an unfair deactivation claim, a period or periods before commencement are not to be counted..

To go back to this section in the Executive Summary, click here.

12. Regulation of road transport contractors

Guide to this section

This section is comprised of the following sub-sections which are hyperlinked below:

Commencement

These provisions commence on the date on which a proclamation is issued or 26 August 2024, whichever is earlier.

See also the Table of Commencement Dates which can be found here.

FWC has been empowered to regulate road transport contractors

The FWC has been empowered to:

- make binding **road transport minimum standards orders** and non-binding **road transport guidelines** for road transport contractors;
- make binding road transport **contractual chain orders** and non-binding road transport **contractual chain guidelines** for road transport contractors and road transport employee-like workers;
- approve, vary and terminate **collective agreements** between road transport businesses and unions entitled to represent the industrial interests of '*road transport contractors*'; and
- deal with an **unfair termination** claim by a road transport contractor (that has performed work for at least 6 months under a services contract or a series of service contracts) and to order reinstatement of the contract (or compensation in lieu) and payment for lost pay. Note, periods which precede the commencement of these provisions do not count towards this 6 month eligibility period.

To assist the FWC in this regard, an Expert Panel for the road transport industry will be established. The Expert Panel must have regard to the road transport objectives when performing functions and exercising powers in relation to employees and employers, and regulated road transport contactors and road transport businesses.

The Road Transport Advisory Group will also be established which will be comprised of representatives from the road transport industry appointed by the Minister. It has advisory functions in relation to road transport minimum standards orders and guidelines, road transport contractual chain orders and guidelines, and the prioritisation of the FWC's work so far as it relates to the road transport industry.

Before setting out the details of how this will likely operate, it is important to first understand who will be covered by the FWC's new powers. We set this out below accordingly.

Who is a '*road transport contractor*'?

The FWC's new powers to deal with and regulate digital platform work extends to '*road transport contractor[s]*'.

The definition of '*road transport contractor'* is comprised of three distinct elements:

(i) the individual falls within one of the **prescribed entity** types;

(ii) the individual performs all or a **significant majority of the work** under the services contract and does not perform any such work as an employee or employee-like worker; and

(iii) the work that is performed under the services contract is work in the '***road transport industry***'.

We set out each of these three distinct elements below.

Element 1: Entity type

An independent contractor is a road transport contractor if they are a party to a services contract in a prescribed capacity. However, The Revised Explanatory Memorandum states that the provisions are intended to capture individuals performing work under a '*services contract*' regardless of the entity type adopted.

The prescribed entity types are as follows:

- an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract;
- if a body corporate is a party to a services contract (other than as a principal) – an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract;
- if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal) – an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or
- if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal) – an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract.

Element 2: The individual performs all or a significant majority of the work under the services contract and does not perform any such work as an employee or employee-like worker

This limb of the road transport contractor definition captures independent contractors that perform all or a significant majority of the work themselves, rather than contractors that subcontract the work or that engage other employees (except those who are family members of a director of the company) to perform the work, or perform such work themselves as an employee.

Element 3: The work that is performed under the services contract is '*work in the road transport industry*'

Definition of work in the road transport industry

'**Road transport industry'** is defined by reference to industry definitions found in several modern awards, namely the:

- 'road transport and distribution industry' as defined in the Road Transport and Distribution Award 2020;
- 'long distance operations' in the private road transport industry within the meaning of the Road Transport (Long Distance Operations) Award;
- 'waste management industry' in the Waste Management Award 2020;
- 'cash in transit industry' in the Transport (Cash in Transit) Award 2020; and
- 'passenger vehicle transportation industry' in the Passenger Vehicle Transportation Award 2020, but excluding the reference to the transport of passengers by 'electric tramway, monorail or light rail'; and
- any other industry prescribed by the regulations.

This approach means that the FWC's proposed new powers may have very wide application.

Regulations can:

- modify the extent to which the industry definitions referenced in the modern awards above applies to this new jurisdiction; and
- prescribe '*any other industry*' that may be captured by this new definition of '*road transport industry*', including by applying, adopting or incorporating '*any matter contained in a modern award*'.

Definition of a road transport business

Whilst the phrase '*work in the road transport industry*' is adopted in the definition of a '*road transport business*' (namely one that receives services under a services contract, where such contract provides for the performance of '*work in the road transport industry*'), it also captures a '*business or undertaking*' that is a *'constitutional corporation, or is included in a class of constitutional corporations, prescribed by the regulations*' (**road transport business**).

This leaves open the possibility that the definition of a '*road transport business*' can be further expanded by regulations to cover businesses and organisations (such as not-for-profits engaged in a particular undertaking) that are not actually in the road transport industry. This does not provide any certainty to businesses and organisations as to who might be considered a road transport business captured by this new jurisdiction.

Expert Panel for the Road Transport Industry & the Road Transport Objectives

Establishing an Expert Panel for the Road Transport Industry

An Expert Panel for the Road Transport Industry (**RT Expert Panel**) will be established, similar to the existing Expert Panel that exists for reviewing annual wages.

The RT Expert Panel is established for various purposes, including to advise the FWC in relation to the road industry in making, varying, or revoking a modern award, road transport minimum standards order or guideline, road transport contractual chain order or guideline, or another matter prescribed by regulations.

In addition to taking into account the minimum standards objective (which we set out earlier in the Employee-like Worker section of this Guide), the RT Expert Panel must also take into account, in exercising a function or power conferred to it, the need for an '*appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry*', having regard to:

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

- the need for minimum standards in road transport contractual chains.

(**RT objectives**).

The RT objectives must be taken into account by the FWC (in addition to the minimum standards objective which we outline in the Employee-like Worker section), in making, varying or revoking a RTMSO, road transport guideline, or road transport contractual chain order or guideline.

It is further noted that the RT objectives must also be considered by the RT Expert Panel when making or varying a modern award relating to the road transport industry (in addition to considering the modern awards objective).

The President of the FWC also has a discretion to direct the Expert Panel to deal with a matter related (or potentially related) to the road transport industry.

Road transport minimum standards orders, contractual chain orders and guidelines

New powers for the FWC

As noted in the Employee-like Worker section of this Guide, the FWC has been empowered to make MSOs and MSGs for regulated workers and businesses, which includes road transport contractors and businesses, as well as road transport contractual chains.

We have earlier set out in the Employee-like Worker section, the general provisions relating to MSGs and MSOs which apply similarly to road transport contractors and businesses.

There are, however, additional provisions which apply to MSOs, MSGs and road transport contractual chain orders made for road transport contractors which we set out below.

What is a RTMSO?

A Road Transport Minimum Standards Order (**RTMSO**) is a MSO that sets binding minimum standards for road transport contractors and road transport businesses covered by it.

A road transport contractor to whom a RTMSO applies in relation to particular work in the road transport industry, will not be an employee of any person in relation to that work.

Whilst the general provisions which apply to MSOs (as set out in the Employee-like Worker section of this Guide) are equally applicable to RTMSOs, there are several differences.

In particular, the FWC must not make an RTMSO unless all these following elements are satisfied:

(i) there has been genuine engagement with the parties to be covered; and

(ii) the Road Transport Advisory Group (**RT Advisory Group**) has been consulted; and

(iii) the required consultation process has been followed; and

(iv) the FWC has had regard to the commercial realities of the road transport industry; and

(v) the FWC is satisfied that making the RTMSO will not unduly affect the viability and competitiveness of owner drivers or other similar persons.

An RTMSO cannot commence earlier than 12 months after the relevant notice of intent for the order is published unless there are circumstances '*urgently requir[ing]*' an earlier day to be specified (but this cannot be earlier than 6 months from the notice of intent being published).

What terms must, must not, and may be included in an RTMSO?

An RTMSO must include a term relating to dispute resolution and coverage setting out the work in the road transport industry, the road transport contractor(s), and road transport business(es) that will be covered by it.

In addition to the terms that MSOs must not include (see Employee-like Worker section, the following terms cannot be included in an RTMSO:

- a matter relating to road transport that is otherwise comprehensively dealt with in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld) or another Commonwealth or State/Territory law; and
- a matter (or class of matter) prescribed by the regulations.

An RTMSO may include the same discretionary terms as those set out for MSOs (see Employee-like Worker section).

How is a RTMSO made?

Element 1: genuine engagement with the parties to be covered by a RTMSO

Before the FWC can make an RTMSO, it must be satisfied that there has been genuine engagement with the parties to be covered by the proposed RTMSO.

The Revised Explanatory Memorandum does not provide any guidance as to what would be considered '*genuine engagement*'. However, it seems the level of engagement with the relevant parties would be informed by the consultation process that the FWC has to follow before making an RTMSO – see element 3 below.

Element 2: the RT Advisory Group has been consulted

The FWC must consult the RT Advisory Group before making a RTMSO.

As set out above, the RT Advisory Group will be established to advise the FWC in relation to road transport industry matters, including the making and varying of modern awards, RTMSOs and RTGs, prioritisation of road transport industry matters before the FWC, and other matters to be prescribed by regulations.

Before advising the FWC in relation to a matter, the RT Advisory Group must first consult with the relevant subcommittee (if any). Subcommittees may be established by the RT Advisory Group. The subcommittee may include members who are not part of the RT Advisory Group, however, it must be chaired by a member of the RT Advisory Group.

Members of the RT Advisory Group are to be appointed by the Minister. The Minister must ensure that the membership consists of:

- a union that is entitled to represent the industrial interests of one or more road transport contractor(s);
- an organisation that is entitled to represent the industrial interests of one or more road transport business(es).

A member of the RT Advisory Group can hold office up to 3 years and will be eligible for reappointment. The Minister may revoke a person's appointment and has additional powers to direct the RT Advisory Group as to the way it carries out its functions.

The FWC President may appoint a member of the Expert Panel for the Road Transport Industry to chair the RT Advisory Group. We provide further details regarding the Road Transport Expert Panel below.

The Road Transport Advisory Group must establish a subcommittee of which a majority of the members are owner drivers or representatives of owner drivers:

- if a proposed RTMSO or road transport contractual chain order will cover owner drivers; or
- if the FWC proposes to perform a function or exercise a power in relation to a RTMSO or road transport contractual chain order that has, or may have, an effect upon owner drivers that is more than minor or technical.

Element 3: the required consultation process has been followed

The following consultation process must be followed before a RTMSO to be made:

(1) The FWC must ensure that affected persons (i.e. those likely to be affected by the proposed RTMSO) have a reasonable opportunity to make written submissions in relation to the draft proposed RTMSO. Such submissions are to be published on the FWC website (and by any other means the FWC considers appropriate).

If the information is confidential or commercially sensitive, the FWC may decide not to publish the information and publish a summary instead. If a summary is not practicable either, the FWC is to make a statement that such information has not been published.

(2) The FWC may, but is not required to, hold a hearing in relation to a draft RTMSO.

(3) The FWC may make any changes it thinks appropriate to a draft RTMSO. If the changes are significant, the FWC must:

- decide not to make the RTMSO based on the draft; and
- publish a subsequent notice of intent in relation to the revised draft RTMSO and publish the revised draft; and
- follow the process set out above in relation to the revised draft RTMSO with the period of consultation to be no shorter than 12 months (starting when the subsequent notice of intent and revised draft were published).

No further detail or guidance has been provided in the Revised Explanatory Memorandum as to what changes may be considered significant.

(4) Before making a RTMSO, the FWC must publish on the FWC website (and by any other means the FWC considers appropriate) a notice of intent stating that the FWC proposes to make a RTMSO and a draft of the proposed RTMSO. If the FWC decides to not make the proposed RTMSO, it must publish a notice of this decision on its website and any other means it considers appropriate.

Element 4: the FWC has had regard to the commercial realities of the road transport industry

The FWC must also have regard to the commercial realities of the road transport industry.

The impact analysis annexed to the Revised Explanatory Memorandum indicates that the intent of this element is to address a key criticism of the former Road Safety Remuneration Tribunal, namely that the tribunal did not take into account the commercial realities of the road transport industry before issuing orders which resulted in significant costs to the economy.

Element 5: the FWC is satisfied that making the RTMSO will not unduly affect the viability and competitiveness of owner drivers or other similar persons

Before making a RTMSO, the FWC must be satisfied that making the RTMSO will not unduly affect the viability and competitiveness of owner drivers or similar persons

The impact analysis annexed to the Explanatory Memorandum states that during consultation, road transport stakeholders (including Ai Group), expressed that it is necessary that the fairness, viability and competitiveness of the industry is taken into account in setting standards for the industry.

Ministerial Powers to defer and suspend a RTMSO

The Minister will have powers to defer and suspend a RTMSO. Those powers are explained in the section above regarding Employee-like Workers.

FWC powers to defer a RTMSO

On application by relevant parties, the FWC will also have powers to defer the commencement of a RTMSO prior to it coming into operation. The FWC can defer:

> (a) the commencement of a RTMSO; or
>
> (b) the application of all or some of the terms of a RTMSO to a specified class(es) of persons (including by reference a particular industry/sector or kind of work) or to all persons.

The FWC can only make one deferral determination of the kind described in (a) above , but can make more than one deferral determination of the kind described in (b), subject to certain limitations. The FWC must also consult the RT Advisory Group before making a decision.

The FWC must make a deferral determination if, and must not make the deferral determination unless, it is satisfied that:

- the applicant has provided significant new facts or evidence that was not available at the time the FWC decided to make the RTMSO; and
- the significant new facts or evidence demonstrate that the RTMSO will not provide, or has not provided, an appropriate safety net of minimum standards for parties in the road transport industry, having regard to the minimum standards objective and the RT objective.

In considering the above matters, the FWC may have regard to whether one or more previous applications for variation or revocation of the RTMSO have previously been made.

The RT Advisory Group will also have to be consulted before a decision to defer is made.

If an Expert Panel is constituted for the purpose of considering the deferral of the MSO, then a majority of members of the Expert Panel must not be members of the Expert Panel that made the MSO in question.

FWC powers to suspend a RTMSO

The matters set out above in respect deferring a RTMSO, is broadly similar to the provisions relating to suspending all or part of a RTMSO. As such, the matters above in respect of deferring a RTMSO, also apply to suspending a RTMSO, except that:

- an application to suspend is made *after* the RTMSO has commenced, but not more than 12 months after it commenced;
- the period of suspension must not be more than 12 months and cannot apply retrospectively, as a suspension determination cannot affect any right or liability that a person acquired, accrued or incurred before the suspension determination was made.

The RT Advisory Group will also have to be consulted before a decision to suspension is made.

If an Expert Panel is constituted for the purpose of considering the suspension of the MSO, then a majority of members of the Expert Panel must not be members of the Expert Panel that made the MSO in question.

FWC must consider whether to vary or revoke a RTMSO

If a RTMSO is deferred or suspended, the FWC must also, as soon as practicable, consider whether to vary or revoke the RTMSO. The FWC must not vary or revoke the minimum standards order unless:

- there has been genuine engagement with the parties to be covered;
- the RT Advisory Group has been consulted;
- regard is had to the commercial realities of the road transport industry; and
- it is satisfied that the variation or revocation of the RTMSO will not unduly affect the viability and competitiveness of owner drivers or other similar persons; and
- in relation to a deferral determination only, the FWC has followed a consultation process for which a reasonable opportunity to make submissions and comment on the proposed variation or revocation has been afforded to the affected entities.

Proposed civil liability penalty amounts

Contravening a RTMSO gives rise to a civil liability penalty of up to 60 penalty units or 600 penalty units for a serious contravention.

What is a Road Transport Guideline (RTG)?

An RTG sets non-binding guidelines for road transport contractors and road transport businesses covered by it.

Whilst the general provisions which apply to MSGs (as set out in the Employee-like Worker section of this Guide) are equally applicable to RTGs, there are a number of differences:

- In making an RTG, the FWC must first be advised by the RT Advisory Group.
- In making, varying, or revoking an RTG, the FWC Expert Panel must be constituted.

An RTG:

- must include a coverage term;
- may include the same discretionary terms as a MSO; and
- must not include the same prohibited terms as a MSO and RTMSO.

Road transport contractual chain orders and guidelines

The FWC has been empowered to make:

- road transport contractual chain orders (**RT Chain Orders**)**;** and
- road transport contractual chain guidelines (**RT Chain Guidelines**),

for road transport contractors and road transport employee-like workers in a '*road transport contractual chain*'.

The Supplementary Explanatory Memorandum provides that these broad and wide-reaching provisions are intended to reflect the '*nature of the road transport industry that may see a range of parties throughout the contractual chain that affect the working conditions of road transport workers and the operating conditions of road transport businesses.*'

The Supplementary Explanatory Memorandum further indicates the road transport contractual chain:

> *… would cover a person or business that requires the delivery of freight by road, the driver who makes the delivery and sub-contracting or other arrangements that sit between them. It would not cover entities in the broader supply chain who may come into possession of goods via road transport but are not party to a contract for the supply of road transport. For example, a port, intermodal facility, or a storage warehouse.*

What is a road transport contractual chain?

A road transport contractual chain is a '*chain or series of contracts or arrangements'*:

- under which work is performed for a party to the first contract or arrangement in the chain by:
  - a road transport contractor; or
  - a road transport employee-like worker under a services contract, or by an employee; and
- in which at least one party to the first contract or arrangement in the chain is a constitutional corporation. Contractual

When is a person considered to be in a road transport contractual chain?

A person is in a road transport contractual chain if:

- the person is a party (a **primary party**) to the first contract or arrangement in the chain; or
- the person is a party (a **secondary party**) to a subsequent contract or arrangement in the chain, under which work is performed for the secondary party by a road transport contractor or a road transport employee-like worker under a services contract, or by an employee; or

- the person is a road transport contractor or a road transport employee-like worker who performs work under a services contract in the road transport contractual chain.

A person is not in a road transport contractual chain if it relates to:

- A **delivery** of a thing to the individual, as made by a road transport contractor, a road transport employee-like worker or an employee, and the thing is solely for the individual's '***private or domestic purposes***'. The Addendum to the Revised Explanatory Memorandum provides the following example:

  Stuart orders sporting equipment from online retailer iBuy, and a road transport contractor then delivers it to his house.

- The **consignment** of a thing by the individual for delivery by a road transport contractor, a road transport employee-like worker or an employee, and the thing is solely for the individual's '***private or domestic purposes***'. The Addendum to the Revised Explanatory Memorandum provides the following example:

  'Erica's Emporium consigns an antique chair purchased at auction to Adelyn via a road transport contractor, for use in her home)'.

- Work performed by the individual in the **capacity of an employee**, or that is done in an industry prescribed by regulations.

Who is a road transport employee-like worker?

In addition to an employee-like worker and road transport contractor, a third category of worker has been introduced by the Closing Loopholes No.2 Act, namely a '*road transport employee-like worker*', i.e. an employee-like worker who performs work in the road transport industry. Such workers can be covered by a RT Chain Order.

What is a RT Chain Order?

A RT Chain Order sets binding minimum standards for **road transport contractors, road transport employee-like workers** and other individuals **in a road transport contractual chain**.

Significantly, a RT Chain Order can apply to individuals simply because they are '*in a road transport contractual chain*'. This occurs where a road transport contractor, road transport employee-like worker, or an employee **performs work for this individual.**

As described above, this other individual can include the **primary** and **secondary** party in a chain of contracts.

An illustrative example of how a RT Chain Order works can be seen in the scenario below, which has been extracted from the Addendum to the Revised Explanatory Memorandum.

In considering the below scenario, the following key concepts and the relevant individuals/roles in the scenario extracted below should be borne in mind:

- The **RT Chain Order** applies to any person in a contractual chain where the work involves the transport of goods by road between supermarket distribution centres and stores in Victoria.

- The **primary party** in this chain is Supermellon, who has a service contract with Hugo's Haulage to undertake the relevant work.

- The **secondary party** is Geoffrey Transport, who has been subcontracted by Hugo's Haulage to undertake the relevant work.
- The **road transport contractor** who actually performs the relevant work is Kelly.
- Each of the three parties above, are considered to be part **in a road transport contractual chain**, and therefore the RT Chain Order applies to them when the relevant work is undertaken.

Illustrative example: Circumstances the FWC must consider in determining the amount of compensation

The FWC makes an order applying to persons in a contractual chain where the work to be performed is the transport by road of goods between supermarket distribution centres and stores in Victoria. The order requires contracts between parties covered by the order to provide for payment within 30 calendar days of a trip being completed.

Supermellon contracts Hugo's Haulage to deliver goods from its distribution centre to stores in regional Victoria. Hugo's Haulage then subcontracts to transport company Geoffrey Transport, which further subcontracts certain deliveries to independent contractor Kelly. Kelly uses her own truck to collect goods from the distribution centre and deliver them to stores in the eastern part of regional Victoria. In this scenario, Supermellon, Hugo's Haulage, Geoffrey Transport and Kelly are persons in a contractual chain for the transport of goods between supermarket distribution centres and stores. The primary parties to the first contract for the road transport work are Supermellon and Hugo's Haulage. The secondary party is Geoffrey Transport. The driver who performs the work is Kelly.

The coverage of the order is the transport of goods between supermarket distribution centres and stores in Victoria – in this case transporting goods from Supermellon's distribution centres to Supermellon stores in Victoria falls within this coverage. The order requires Supermellon, Hugo's Haulage and Geoffrey Transport to include a clause in their contracts with each other and the driver providing for payment within 30 days of delivery. This order will require the driver at the end of the chain, Kelly, to get paid promptly (within 30 days) for her work.

On the return leg of a trip to deliver goods for a supermarket, Kelly transports a part load of machine parts for a manufacturing business back to Melbourne. Kelly's contract with the manufacturing business is not captured by the supermarket order because it is not part of a contractual chain for the transport of goods from a supermarket distribution centre to a store. There is no requirement for Kelly's contract with the manufacturer to include the 30-day payment clause

Who can apply, vary and revoke a RT Chain Order?

The following parties can apply to the FWC for the making of a RT Chain Order:

- an organisation that is entitled to represent the industrial interests of one or more persons in a road transport contractual chain;
- a regulated business in a road transport contractual chain;
- a person who is a primary party to the first contract or arrangement in a road transport contractual chain;
- the Minister; or
- a person or body prescribed by the regulations.

The FWC can also make or vary a RT Chain Order on its own initiative.

RT Chain Orders can also be varied or revoked by the FWC and the same parties described above. Notably, the FWC will also be able to vary a RT Chain Order to remove an ambiguity,

uncertainty or error – similar to the existing power in s.160(1) of the FW Act in respect of varying a modern award on this basis.

How is a RT Chain Order made?

Before making a RT Chain Order, the FWC must:

- *First*, publish a notice of intent advising that it proposes to make an RT Chain Order, as well as publish the proposed draft RT Chain Order.
- *Second*, ensure that the affected entities have a reasonable opportunity to make written submissions to the FWC for its consideration and must publish those submissions unless they include information which is confidential or commercially sensitive.
- *Third* and *optionally*, the FWC *may* hold a hearing in relation to the draft RT Chain Order.
- *Fourth*, the FWC may make appropriate changes to the RT Chain Order, however, if those are significant the FWC must not make the order, and it must then publish a subsequent notice of intent and publish a revised draft, and follow the consultation process outlined above.
- *Finally*, the FWC may decide that no RT Chain Order will be made based on the draft. In this case the FWC must publish a notice of its decision on its website or other appropriate means.

A RT Chain Order cannot commence earlier than **12 months** after the relevant notice of intent for the order was published, unless the FWC is satisfied that there are circumstances which '***urgently require it***' (in which case this can be no earlier than **6 months** after the notice of intent was published).

What matters must the FWC take into account in considering whether to make or vary a RT Chain Order?

The FWC must have regard to the minimum standards objective and the RT objectives, whether in making, varying, revoking, deferring or suspending a RT Chain Order.

In considering whether to make or vary a RT Chain Order, the FWC must not make or vary the RT Chain Order, unless:

- there has been **genuine engagement** with the parties to be covered;
- the RT Advisory Group has been consulted;
- the prescribed **consultation process** set out above has been followed; and
- it has had regard to the **commercial realities** of the road transport industry, including commercial practices in relation to part load, mixed load, no load, multi-leg and return trips; and
- it is satisfied that doing so, will not unduly affect the **viability and competitiveness** of road transport businesses, owner drivers or other similar persons; and
- it has taken into account any current or proposed RT Chain Orders and MSOs; and

- it has taken reasonable steps to ensure that the **coverage** of the RT Chain Order is **clear**.

Further details regarding the requirements for genuine engagement and consultation is set out in the section above in respect of making RTMSOs.

What terms must be included in a RT Chain Order?

A RT Chain Order must include:

- A **coverage** term setting out:
    - the work in the road transport industry that is to be covered by the order, namely road transport contractors, road transport employee-like workers or others specified by name or class; and
    - the persons in a road transport contractual chain that will be covered by the order.
- An **interaction term**, which specifies the extent to which it prevails over, or is subject to, a MSO to the extent of any inconsistency.
- A dispute resolution term.

What terms may be included in a RT Chain Order?

A RT Chain Order can set standards for regulated road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain. This can include terms about any of the following matters:

- payment times;
- fuel levies;
- rate reviews;
- termination, including one way termination for convenience; and
- cost recovery.

This is not however an exhaustive list of matters about which terms can be made.

A road transport contractual chain order cannot however confer or rights or impose obligations on an employee.

What terms must not be included in a RT Chain Order?

A RT Chain Order must not include terms about any of the following matters:

- overtime rates;
- rostering arrangements;
- a term that would change the form of the engagement or the status of a road transport contractor or road transport employee-like worker covered by the RT Chain Order, including terms which deem such workers to be an employee;
- a matter relating to work health and safety that is otherwise comprehensively dealt with by Commonwealth, State or Territory legislation;
- a matter relating to road transport that is otherwise comprehensively dealt with in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld) or another Commonwealth or State/Territory law; and
- a matter or class of matter prescribed by the regulations.

Powers for the Minister and the FWC to defer or suspend RT Chain Orders

The Minister will have powers to defer and suspend a RT Chain Order, in a manner that is broadly similar to the powers to defer and suspend a RTMSO. Those powers are explained in the sections above regarding RTMSOs.

The FWC will also have powers to defer and suspend a RT Chain Order, again similar to those in respect of deferring and suspending a RTMSO. Those powers are explained in the sections above regarding RTMSOs.

Where a RT Chain Order has been deferred or suspended either by the FWC or the Minister, the FWC must consider whether the order should then be varied or revoked. These powers and processes of the FWC are broadly similar to the powers earlier described in relation to RTMSOs in the sections above.

FWO Notices to investigate suspected underpayments under a RT Chain Order

The FWO will be given the ability to apply to the AAT for a notice in respect of a suspected underpayment of monetary entitlements under a RT Chain Order. Such notice, if made, may require that a person to give information, produce documents and/or attend before the FWO to answer questions relevant to a FWO investigation. Non-compliance with such notice may give rise to a civil penalty.

The Addendum to the Revised Explanatory Memorandum explains that:

> *"[t]he ability to use these powers would be particularly important where there are no relevant documents that appear to be available and subsequently the investigation into these matters has stalled. These powers would also be important to enable the FWO to establish whether a contravention of an RTCCO would constitute a serious contravention by determining whether the conduct was deliberate"*

We have earlier set out the existing FWO notice regime in the section dealing with unfair deactivations for Employee-like Workers.

Proposed civil liability penalty amounts

Contravening a RT Chain Order gives rise to a civil liability penalty of up to 60 penalty units.

What are RT Chain Guidelines?

Unlike RT Chain Orders, RT Chain Guidelines are non-binding standards for road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain. The FWC may make RT Chain Guidelines on its own initiative or on application by a relevant party prescribed by the legislation or regulations. Such guidelines cannot be made where a RT Chain Order applies to the same matters and/or parties.

The terms that must, may, and must not be included in a RT Chain Guideline are the same as those which apply to RT Chain Orders – see section immediately above.

Consent-based collective agreements between road transport businesses and unions

The FWC has been empowered to approve '*collective agreements'* between road transport businesses and union(s) entitled to represent the industrial interests of one or more road transport contractors.

As noted in the Employee-like Worker section of this guide, the general provisions relating to collective agreements will also apply to road transport contractors.

A collective agreement may be made between a road transport business and an organisation that is entitled to represent the industrial interests of one or more regulated road transport contractors about:

- the terms and conditions on which road transport contractors perform work under a services contract to which the road transport business is a party; and
- how the collective agreement will operate.

A consultation notice for a proposed collective agreement must be given to each '*eligible regulated road transport contractor*'. An *eligible regulated road transport contractor* means one who was performing work under a services contract to which a road transport business who will be covered by the proposed collective agreement is a party, at any time during the 28 days before the giving of the consultation notice.

Contravening a term of a collective agreement gives rise to a civil liability penalty of up to 60 penalty units or 600 penalty units for a serious contravention.

FWC's new power to deal with disputes over a road transport contractor's '*unfair termination'*

Who can make an unfair termination claim?

The FWC has a new *'unfair termination'* jurisdiction for road transport contractors.

A person is protected from unfair termination if at the time the person is a road transport contractor and:

- a road transport business receives services under a services contract (whether or not the business is a party to the services contract) under which the person performs work in the road transport industry; and
- the person has been performing work in the road transport industry under a services contract (or a series of service contracts) under which that road transport business receives services for a period of at least 6 months.

A person whose engagement has been terminated may apply to the FWC for a remedy, unless the sum of their annual rate of earnings and such other amounts (if any), exceeds the contractor high income threshold, which is yet to be prescribed by regulations.

A person cannot commence multiple proceedings in relation to an unfair deactivation from a digital labour platform and unfair termination of a road transport services contract. However, if the other proceeding was discontinued or failed for want of jurisdiction, the person will not be precluded from commencing a proceeding under this jurisdiction.

What is the unfair termination claim process?

The application must be made within 21 days after the termination took effect unless an extension of time is granted by the FWC.

The FWC must decide several initial matters before considering the merits of the application, including whether the application was made within time, whether the person was a person protected from unfair termination, and whether the termination was consistent with the '*Road Transport Industry Termination Code'*, if made (**RT Termination Code**).

However, if the matter involves contested facts, the FWC must hold a conference or hearing.

The FWC may, dismiss an application if the FWC is satisfied that the applicant has unreasonably:

- failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or
- failed to comply with a direction or order of the FWC relating to the application; or
- failed to discontinue the application after a settlement agreement has been concluded.

The FWC may also make an order for costs if the applicant's failure causes the other party to incur costs.

What are the elements for establishing unfair termination?

A person's engagement will be unfairly terminated if the FWC is satisfied that:

- the person was performing work in the road transport industry;
- the person's engagement has been terminated and the termination was unfair; and
- the termination of engagement was not consistent with the RT Termination Code.

Element 1: Termination of engagement

A person's engagement has been terminated if:

- the person performed work as a road transport contractor under a services contract;
- a road transport business received services under the services contract; and
- the services contract was terminated by, or as a result of conduct of, the road transport business.

Element 2: The termination of engagement was unfair

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

- whether there was a valid reason for the termination related to the person's capacity or conduct; and
- whether any relevant processes specified in the RT Termination Code were followed; and
- any other matters that the FWC considers relevant.

A termination that occurs because of serious misconduct of the person who was terminated is not unfair.

Element 3: The RT Termination Code

In contrast to the employee-like workers unfair activation jurisdiction, the Minister is not required to make (but may make) a RT Termination Code. If such code is made, it must deal with, at least, the following:

- matters that constitute or may constitute a valid reason for termination;
- rights of response to termination;
- the internal processes of road transport businesses in relation to a termination;
- communication between the regulated road transport contractor and road transport business in relation to a termination.

A termination is consistent with the RT Termination Code if, immediately before the time of the termination, or at the time the person was given notice of the termination of engagement (whichever happened first), the road transport business that terminated the services contract concerned or as a result of whose conduct the services contract concerned was terminated, complied with the RT Termination Code.

Remedies for unfair termination

The following orders may be made in favour of successful claimants under the new unfair termination jurisdiction:

Reinstatement

The FWC may make a reinstatement order, which is an order that the road transport business at the time of the termination enter into a new contract in the same terms as the services contract at the time of the termination or with such variations as the FWC considers appropriate.

If the road transport business at the time of the termination is no longer a road transport business and an associated entity of the road transport business is a road transport business, the FWC may order that the associated entity enter into the new contract on terms and conditions no less favourable than the services contract immediately before the termination, with such variations as the FWC considers appropriate.

Order to restore lost pay

The FWC may make an order to restore lost pay if the FWC makes an order for reinstatement and considers it appropriate to do so. The order may be that a road transport business must pay an amount for the remuneration lost, or likely to have been lost, by the person because of the termination of engagement.

In determining the amount, the FWC must take into account matters including:

- the amount of any remuneration earned by the person from work of any kind during the period between the termination and the making of the order for reinstatement; and
- the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

Order for compensation

The FWC may make an order compensation, where the road transport business at the time of the termination must pay compensation to the person in lieu of entering into a new services contract.

In determining an amount of compensation, the FWC must take into account all the circumstances of the case including:

- the effect of the order on the viability of the road transport business; and
- the remuneration that the person would have received, or would have been likely to receive, if the person's engagement had not been terminated; and
- the efforts of the person (if any) to mitigate the loss suffered because of the termination; and
- the amount of any remuneration earned by the person from work of any kind during the period between the termination and the making of the order for compensation; and
- the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- any other matter that the FWC considers relevant.

If the FWC is satisfied that misconduct of a person contributed to the road transport business's decision to terminate the person's engagement, the FWC must reduce the amount of compensation it would have otherwise ordered by an appropriate amount on account of the misconduct.

The amount of compensation must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's termination.

The Revised Explanatory Memorandum provides an example of what the FWC may consider when determining the amount of compensation which is replicated below:

> ***Illustrative example: Circumstances the FWC must consider in determining the amount of compensation***
>
> *The FWC is deciding the amount of compensation to order for a tipper truck driver, Ewin. In addition to the matters listed in section 536LT, the FWC can consider Ewin's conduct following the termination of his contract, such as his social media posts about the incident. It can also consider costs that Ewin has not had to bear during this time – which are likely to be primarily variable rather than fixed costs. An example of a variable cost borne by Ewin is the cost of diesel to operate the tipper truck.*

FWO's ability to seek a notice to investigate an unfair termination

The FWO will be given the ability to apply to the AAT for a FWO Notice to investigate an unfair termination, including potentially to investigate whether relevant orders made as a result of a successful claim has been implemented by the regulated business. Such notice, if made, could require a person to give information, produce documents and/or attend before the FWO to answer questions relevant to a FWO investigation. Non-compliance with such notice may give rise to a civil penalty.

The Addendum to the Revised Explanatory Memorandum explains that these provisions are intended to assist the FWO where 'there are no relevant documents that appear to be available and subsequently the investigation into these matters has stalled'.

We have earlier set out the existing FWO notice regime in the section dealing with unfair deactivations for Employee-like Workers.

Civil liability penalty amounts

Contravening an order made in respect of an unfair termination claim, including failure to provide the relevant remedies above, gives rise to a civil liability penalty of up to 60 penalty units.

Transitional provisions

The transitional provisions are as follows:

- The provisions dealing with unfair termination of road transport contractors applies to a termination that occurs after commencement.
- When determining whether a road transport contractor has been performing work for a period of at least 6 months for the purposes of an unfair termination claim, a period or periods before commencement are not to be counted.

To return to this section in the Executive Summary, go here.

13. Regulated workers and industrial action

Commencement

These provisions commence on the date on which a proclamation is issued or 26 August 2024, whichever is earlier.

See also the Table of Commencement Dates which can be found here.

Expansion of industrial action to regulated workers

The FW Act has expanded the definition of industrial action under the FW Act so that it applies in relation to regulated workers and businesses covered by a MSO (or where there is an application for a MSO).

This includes employee-like workers and digital labour platform operators, as well as road transport contractors and road transport businesses.

What types of industrial action?

The following kinds of industrial action taken by regulated workers and businesses is included in the existing definition of industrial action in the FW Act:

- perform work in a manner different to which it is customarily performed;
- a ban, limitation or restriction on the performance of work;
- a failure or refusal to attend for work or to perform any work at all; and
- digital platform operators locking out employee-like workers.

A *lock out* is defined as a situation where the regulated business prevents the regulated worker from performing work under a services contract without terminating the contract. For digital labour platform operators, this would involve an employee-like worker's access being modified, limited or suspended.

What is not industrial action?

The circumstances in which action taken by a regulated business or worker is not industrial action include:

- action by regulated workers that is authorised or agreed to by a regulated business covered by the same MSO as the regulated workers;
- lockout of the regulated workers by the regulated business if it is authorised or agreed to by, or on behalf of, regulated workers who are covered by the same MSO as the regulated business;
- action by regulated worker if:
    - the action was based on a reasonable concern of the regulated worker about an imminent risk to their health or safety; and

- the regulated worker did not unreasonably fail to comply with a direction of the regulated business that engaged the regulated worker to perform other available work, whether at the same or another workplace, that was safe and appropriate for the regulated worker to perform.

How does this affect other sections of the FW Act?

The Revised Explanatory Memorandum states the extended definition of industrial action has consequences for several provisions in the FW Act.

It provides the example of s.347 of the Act. Sections 346 and 347 of the Act prohibit a person taking adverse action against another person because the other person:

- engages in certain forms of lawful "industrial activity" (as specified in s.347(a) and (b)); and
- does not engage in certain forms of unlawful industrial activity (as specified in s.347(c) to (g)).

The extended definition of industrial action would also have consequences for the unfair contracts jurisdiction as discussed in the Unfair contracts terms for independent contractors section of this Guide, and for the new general protections provisions for digital labour platform operators as discussed in the Employee-like Workers section of this Guide.

To return to this section in the Executive Summary, go here.

14. Unfair contract terms

Commencement

These provisions commence on the date on which a proclamation is issued or 26 August 2024, whichever is earlier.

See also the Table of Commencement Dates which can be found here.

A new unfair contracts jurisdiction in the FWC

The FWC has been empowered to deal with disputes about unfair contract terms in service contracts.

Who is eligible to make an application?

Persons who may apply for a remedy include:

- a person who is party to a services contract (e.g., eligible independent contractor or a principal); and
- an organisation that represents the interests of a party to the services contract;
- an inspector.

However, a person cannot make an application unless in the year the application was made, the sum of the person's annual rate of earnings, and any other relevant amounts worked out

in accordance with the regulations, is less than the *contractor high income threshold*. The contractor high income threshold will by prescribed by (or worked out in the manner prescribed by) the regulations.

If a person is not eligible to make an application under the FW Act, they may be eligible to make an application under the *Independent Contractors Act 2006* (Cth).

The Revised Explanatory Memorandum provides an example of how a contractor can determine if they are eligible which is replicated below.

Illustrative example: Contractor high income threshold

Teresa is a construction worker who provides her services as an independent contractor. Teresa makes an application to the FWC to dispute a contract term. However, the FWC finds that her rate of earnings in the year of her application was more than the contractor high income threshold, making her ineligible to access the FW Act UCT protections. Teresa decides to apply to a Court for a review of her contract under the IC Act instead.

When can the FWC make an order?

The FWC may make an order in relation to an unfair contract term of a services contract, being if:

- the FWC is satisfied that a services contract includes one or more unfair contract terms which, in an employment relationship, would relate to *workplace relations matters*; and
- an application has been made by a person who is a party to the services contract or an organisation that represents their industrial interests.

However, when considering whether it will make an order, the FWC must take into account fairness between the parties concerned in deciding whether to make an order and what kind of order to make.

What are 'workplace relations matters'?

'Workplace relations matters' means:

- remuneration, allowances or other amounts payable to employees;
- leave entitlements;
- hours of work;
- making, enforcing or terminating contracts of employment;
- making, enforcing or terminating agreements (not being contracts of employment) determining terms and conditions of employment;
- disputes between employees and employers, or the resolution of such disputes;
- industrial action by employees or employers;
- any other matter that is substantially the same as a matter that relates to employees or employers and that is dealt with by or under the FW Act (or specified in regulations), a State or Territory industrial law or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009;*
- any other matter specified in regulations.

However, *'workplace relations matters'* are not matters relating to:

- prevention of discrimination or promotion of equal employment opportunity, but only if the State or Territory law concerned is neither a State or Territory industrial law nor contained in such a law;
- superannuation;
- workers' compensation;
- occupational health and safety;
- child labour;
- the observance of a public holiday, except the rate of payment of an employee for the public holiday;
- deductions from wages or salaries;
- industrial action affecting essential services;
- attendance for service on a jury;
- professional or trade regulation;
- consumer protection;
- taxation;
- any other matter specified in regulations.

How does the FWC decide a term is unfair?

When determining whether a term of a services contract is an unfair contract term the FWC may consider the following non-exhaustive matters:

- the relative bargaining power of the parties;
- whether the services contract displays a significant imbalance between the rights and obligations of the parties;
- whether the contract term is reasonably necessary to protect the legitimate interests of a party to the contract;
- whether the contract term imposes a harsh, unjust or unreasonable requirement on a party to the contract;
- whether the services contract as a whole provides total remuneration for performing work less than regulated workers performing the same or similar work would receive under a MSO or MSG, or less than employees performing the same or similar work would receive (i.e., 'total remuneration' includes all payments and income paid to an independent contractor); and
- any other matter the FWC considers relevant.

The concepts of 'harsh', 'unjust' and 'unreasonable' take their common law meanings.

The matters described above, except for the relative bargaining power of the parties, are to be assessed at the time the FWC considers the application.

The Revised Explanatory Memorandum provides an example of how the FWC may make this assessment which is replicated below:

> ***Illustrative example: FWC assessment at time it considers application***
>
> *Thanh works as an independent contractor providing graphic design services to businesses. One of his clients, PriceCo, is a large retail business with stores across Australia. At the time Thanh first entered into the services contract with PriceCo, it was a small business with only one store. The contract sets out Thanh's terms and conditions of engagement, including PriceCo's ability to unilaterally vary certain terms.*
>
> *One day PriceCo informs Thanh that it will vary a term in his contract. Thanh applies to the FWC for an UCT remedy on the basis that the contract term allowing PriceCo to unilaterally vary the contract is unfair.*
>
> *In determining whether the contract term is unfair, the FWC may take into account matters such as whether the contract term is reasonably necessary to protect PriceCo's legitimate interests and whether the contract term would impose a harsh, unjust or unreasonable requirement on Thanh. As the FWC is required to consider the contract at the time of the application rather than at its commencement when determining whether the term is unfair, PriceCo's current business size and circumstances will be relevant to the FWC's consideration*

What orders can the FWC make?

The FWC is empowered to make the following orders:

- setting aside all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter; or
- amending or varying all part of a services contract which, in an employment relationship, would relate to a workplace relations matter.

If a person contravenes an order, an application may be made to the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court. The maximum penalty which may be imposed is 60 penalty units.

Transitional provisions

An application may only be made in relation to a services contract if it was entered into on or after the commencement of these provisions.

To go back to this section in the Executive Summary, click here.

Part D – Underpayments measures and serious contraventions

15. Exemption certificates for suspected underpayments

Commencement

These provisions commence on 1 July 2024.

See also the Table of Commencement Dates which can be found here.

Amending right of entry provisions for suspected underpayments

The right of entry provisions in the FW Act have been amended to:

- enable an organisation to obtain (in certain circumstances) an exemption certificate from the FWC to waive the minimum 24 hours' notice requirement for entry if they reasonably suspect a member of their organisation has been or is being underpaid;
- empower the FWC to take action in relation to the future issue of such exemption certificates if those rights are misused (for example, by imposing conditions, or banning their issue for a specified period);
- protect permit holders who are exercising their rights from improper conduct by others; and
- empower the FWC to impose conditions on a permit, as an alternative to revoking or suspending an entry permit in certain circumstances.

Applications are likely to be dealt with on an ex parte basis, which means a party may apply for an exemption certificate without notifying or involving the employer.

When must the FWC issue an exemption certificate?

The FWC must issue an exemption certificate for an entry to investigate a suspected contravention if:

- the FWC reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence; or
- the FWC is satisfied that the suspected contravention, or contraventions, involve the underpayment of wages, or other monetary entitlements, of a member of the organisation whose industrial interests the organisation is entitled to represent and who performs work on the premises, and the FWC reasonably believes that advance notice of the entry given by an entry notice would hinder an effective investigation into the suspected contravention or contraventions.

If the entry relates to the underpayment of wages or other monetary entitlements, the exemption certificate must specify the names of permit holders who are permitted to enter under the certificate.

What conditions may the FWC impose if rights are misused?

If the FWC is satisfied an organisation or officials of the organisation have misused their rights under the exemption certificate, the FWC may:

- impose specific conditions on some or all future exemption certificates for a specified period; or
- ban the issue of exemption certificates for a specified period for everyone in the organisation or to specified permit holders.

The FWC may also revoke or suspend the person's entry permit.

Obligations of permit holders holding exemption certificates

A permit holder exercising entry without notice because they have an exemption certificate must provide a copy of the exemption certificate to the occupier of the premises and any affected employer either before or as soon as practicable after entering the premises.

As is the case for right of entry permits, holders of an exemption certificate:

- may only enter workplaces during working hours;
- are restricted to accessing member records;
- must not intentionally hinder and obstruct any other person when exercising rights of entry, or otherwise act in an improper manner;
- must only use information or documents obtained for a purpose related to the investigation or rectifying the suspected underpayment contravention;
- must not enter any part of premises used mainly for residential purposes.

Access to records may also be regulated under the *Privacy Act 1988 (Cth)*, if applicable.

A new obligation on persons regarding conduct towards permit holders

Currently, a person must not hinder or obstruct a permit holder when they exercise rights under their entry permit, whether they hold an exemption certificate or not.

An additional obligation has been added which prohibits persons acting in an improper manner towards a permit holder when they are exercising their rights. This covers a wider range of conduct and may include swearing, making offensive, racist, sexist or homophobic comments or acting in a physically aggressive or intimidatory manner towards a permit holder.

Transitional provisions

These provisions apply in relation to each entry permit held by a permit holder whether issued before, on or after the commencement of these provisions.

To go back to this section in the Executive Summary, click here.

16. Compliance notice measures

Commencement

These provisions commence on 27 February 2024.

See also the Table of Commencement Dates which can be found here.

What is a compliance notice?

The FW Act provides the FWO with simple enforcement mechanisms to deal with possible contraventions of the Act quickly and efficiently.

A compliance notice is a statutory notice issued by a Fair Work Inspector which requires a person to address alleged breaches of the FW Act, instead of commencing court proceedings.

Under s.716 of the FW Act, a compliance notice can be issued if a Fair Work Inspector reasonably believes that a person has contravened a provision of the NES; a term of a modern award, enterprise agreement, workplace determination, national minimum wage order or equal remuneration order or contravening obligations in relation to advertising rates of pay.

Under s.716(2) of the FW Act, a Fair Work Inspector may give a person a compliance notice requiring the person to take the action specified in the notice to remedy the direct effects of the identified contravention/s.

Section 716(2) of the FW Act has been amended to clarify that the specified action to remedy the direct effect of the contravention may include requiring a person to calculate and pay the amount of any underpayment.

New orders

Subsection 545(1) of the FW Act affords a broad discretion to a relevant court to grant an 'appropriate' remedy which meets the circumstances of the contravention of a civil remedy provision under the FW Act.

Without limiting subsection (1), s.545(2) provides examples of the orders the court may make, including:

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
- an order awarding compensation for loss that a person has suffered because of the contravention;
- an order for reinstatement of a person.

Section 545(2) of the FW Act has been amended to add a new example to the list to include '*an order requiring a person to comply, either wholly or partly, with a notice (other than an infringement notice) given to the person by a Fair Work Inspector or the FWO'*.

The reference to a notice includes:

- a notice to produce issued by a Fair Work Inspector (s.712)
- a compliance notice issued by a Fair Work Inspector (s.716); and
- a FWO notice given to a person by the FWO (or their delegate) (s.712AD).

In circumstances where a person has failed to comply with a compliance notice and civil remedy proceedings have commenced, this amendment aims to resolve the difficulties the FWO has experienced in obtaining an order from the court to require a person to comply with the compliance notice (by taking the specified action set out in the notice, which may include making payment of any identified underpayment amount).

Proposed increase to civil liability penalty amounts

A failure to comply with a compliance notice is a civil remedy provision under the FW Act.

The maximum civil pecuniary penalty amount has been increased from 30 to 60 penalty units for a failure to comply with a compliance notice.

Transitional provisions

The increased pecuniary penalty applies to a breach of a compliance notice on or after commencement.

Otherwise, these provisions apply on and after commencement.

To go back to this section in the Executive Summary, click here.

17. Increased pecuniary penalties for breaches of selected civil remedy provisions

Commencement

These provisions commence 27 February 2024.

See also the Table of Commencement Dates which can be found here.

Civil pecuniary penalties

The court, on application, may order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

If the person is an individual, the maximum number of penalty units is as set out in the FW Act and detailed below in relation selected civil remedy provisions. However, if a person is a body corporate, the maximum penalty is 5 times the number of maximum penalty units.

A court may order a pecuniary penalty to be paid to the Commonwealth, a particular organisation or a particular person. It will usually be paid to the person who has made the application. For example, if an individual makes an application, the penalty will usually be paid to that individual.

Pecuniary penalties are only one of the remedies available for civil remedy contraventions and may be made in addition to any other order.

Increased maximum penalties for breaching 'selected civil remedy provisions' – except for small business employers

The maximum pecuniary penalty amounts for "*selected civil remedy provisions*" has been **increased by 5** for body corporate employers, except for small business employers.

Currently, one penalty unit is $313 for contraventions on and from 1 July 2023 (i.e., this penalty unit value is automatically adjusted every three years, unless otherwise increased).

The maximum penalties that may be imposed on medium and large body corporate employers (except for small business employers) for contraventions of *selected civil remedy provisions* is set out in the table below:

Penalties for medium and large body corporate employers		
Selected civil remedy provisions	**Detail of provision**	**Increased maximum penalty for medium and large body corporate employers**
44	National Employment Standard	For a serious contravention — 3000 penalty units; or otherwise—300 penalty units

45	Modern award	For a serious contravention — 3000 penalty units; or otherwise—300 penalty units
50	Enterprise agreement	For a serious contravention — 3000 penalty units; or otherwise—300 penalty units
280	Workplace determination	For a serious contravention — 3000 penalty units; or otherwise—300 penalty units
293	National minimum wage order	For a serious contravention — 3000 penalty units; or otherwise—300 penalty units
305	Equal remuneration pay order	For a serious contravention — 3000 penalty units; or Otherwise —300 penalty units
323(1), (3)	Method and frequency of payment	For a serious contravention — 3000 penalty units; or otherwise—300 penalty units
325(1)	Unreasonable requirement to spend or pay amount	For a serious contravention — 3000 penalty units; or otherwise—300 penalty units
328(1)-(3)	Guarantee of annual earnings	For a serious contravention — 3000 penalty units; or otherwise—300 penalty units
325(1A)	Unreasonable requirement to spend or pay amount – prospective employees	For a serious contravention — 3000 penalty units; or otherwise—300 penalty units
357(1), 358 and 359	Sham arrangements	300 penalty units
535(1)-(2), (4)	Employer obligations in relation to employee records	For a serious contravention— 3000 penalty units; or otherwise—300 penalty units
536(1)-(3)	Employer obligations in relation to pay slips	For a serious contravention— 3000 penalty units; or otherwise—300 penalty units
536AA(1)-(2)	Employer obligations in	300 penalty units

	advertising pay	
558B(1)-(2)	Franchisor/holding company responsibilities	300 penalty units
712(3)	Person fails to produce records or documents in respect to a Fair Work Inspector notice	300 penalty units
716(5)	Compliance notice	300 penalty units
s.718A(1)	Giving false or misleading information or documents to the Fair Work Ombudsman	300 penalty units
s.745	Extended parental leave provisions	300 penalty units
s.760	Extended notice of termination provisions	300 penalty units

Pecuniary penalty may be 3 x the underpayment amount

A quantum-based pecuniary penalty may be alternatively applied on application if:

- the person is a body corporate; and
- when the application for the order is made, the person is not a small business employer; and
- the contravention is *associated with an underpayment amount*; and
- the application specifies that the applicant wants the maximum penalty to be calculated based on a multiple of the underpayment amount; and
- the person is not taken to have contravened the civil remedy provision under section 550 (person involved in a contravention).

In these circumstances, the maximum pecuniary penalty will be the greater of:

- the maximum penalty amounts (as set out above); or
- 3 times the *underpayment amount*.

What is "associated with an underpayment amount"?

A contravention of a civil remedy provision is *associated with an underpayment amount* if:

- an employer is required to pay an amount (a **required amount**) to, on behalf of, or for the benefit of, an employee under the FW Act, a fair work instrument or a transitional instrument (as applicable); and
- the employer engages in conduct; and
- the conduct results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment; and
- the failure is related to the contravention.

This means that the alternative quantum-based penalty may apply to contraventions that directly *or indirectly* result in underpayments. For example, failure to pay minimum rates under an applicable modern award is an example of a contravention that *directly* results in an underpayment. A sham contracting misrepresentation, or a failure to keep employee records, are examples of contraventions that may *indirectly* result in an underpayment. The effect of this new provision is that an '*amount of the underpayment*' penalty may be available in either of these circumstances.

What is an "underpayment amount"?

The *underpayment amount* the contravention is associated with is, to the extent it can be determined by the court, the difference between:

- the required amount; and
- the amount (including a nil amount) the employer actually paid to, on behalf of, or for the benefit of, the employee on account of the required amount.

This approach is consistent with that take for the wage theft offence in the FW Act (which has not yet commenced).

Relevantly, if there are two or more contraventions of single civil remedy provision as specified in s.557 of the FW Act and these are committed by the same person out of a single course of conduct and 'grouped', the corresponding 'underpayment amount' for each relevant contravention would also likewise be aggregated

Transitional provisions

The key transitional provisions are set out below:

- the provisions apply to conduct engaged in after commencement;
- conduct before commencement cannot be 'grouped' as the same course of conduct with that which is engaged in after commencement.

To go back to this section in the Executive Summary, click here.

18. Changes to serious contraventions of civil remedy provisions

Commencement

These provisions commence 27 February 2024.

See also the Table of Commencement Dates which can be found here.

Historical application

Previously, a contravention of a civil remedy provision was a serious contravention if:

- the person **knowingly** contravened the provision (s.557(1)(a)); **and**
- the person's conduct constituting the contravention was part of a **systematic pattern of conduct** relating to one or more other persons (s.557(1)(b).

Broadening of provisions

The threshold of what will constitute a serious contravention has been changed such that a contravention is a serious contravention if either:

- the person **knowingly** contravenes the provision; **or**
- The person was **reckless** as to whether the contravention would occur.

It is no longer necessary for a serious contravention for there to be a systematic pattern of conduct relating to one or more persons.

For example, if an employer failed to pay an employee the full amount payable to the employee in relation to the performance of work as required s.323(1) it will be a serious contravention if:

- the employer **knowingly** does not pay the employee in full; or
- is **reckless** as to whether the failure would occur.

In this example, it will be a serious contravention even if the employer does not know the exact amount of the underpayment (Note to s.557A(1)).

What does reckless mean?

A person will be **reckless** as to whether a contravention would occur if:

- the person is aware of a substantial risk that the contravention would occur; and
- having regard to the circumstances known to the person, it is unjustifiable to take the risk.

The FW provides an example of how this provision may apply in the context of s.323(1) of the FW Act

s.323(1) of the FW Act generally requires an employer to pay an employee the full amount payable to the employee in relation to the performance of work. A contravention of subsection 323(1) is a serious contravention if the employer knowingly does not pay the employee in full or is reckless as to whether the failure would occur. It does not matter if the employer does not know the exact amount of the underpayment.

Transitional provisions

The amendments to serious contraventions apply in relation to conduct engaged in after commencement of the legislation. Conduct engaged in before commencement cannot constitute the same course of conduct as conduct engaged in after commencement.

This means that that the proposed increased penalties, or new rules for establishing 'serious contraventions' cannot apply retrospectively to any relevant conduct that occurred before commencement of the relevant new provisions.

To go back to this section in the Executive Summary, click here.

Part E – Enterprise agreements, bargaining, franchisees, model terms and unions

19. Transitioning from multi-enterprise agreements

Commencement

These provisions commence 27 February 2024.

See also the Table of Commencement Dates which can be found here.

General rule – no transitioning from in-term agreements

Under the FW Act, the general rule is that a later enterprise agreement cannot apply to an employee in relation to a particular employment until the earlier agreement passes its nominal expiry date, at which time that earlier agreement will never apply again.

Special rule for supported bargaining agreements

Despite the general rule, if a supported bargaining agreement comes into operation a special rule provides that a single-enterprise agreement which covers an employee ceases to apply

to that employee, regardless of its nominal expiry date. This supports the anti-avoidance mechanism which applies to making of supported bargaining authorisations. Relevantly, FWC may include an employer covered by an existing in-term single enterprise agreement in circumstances where the employer's intention in making that single enterprise agreement was to avoid being specified in the supported bargaining authorisation.

Two new special rules

Two new special rules have been added as an exception to the general rule.

These provide that if a single interest employer agreement or a supported bargaining agreement (each of which is an old agreement) applies to an employee in relation to particular employment, and a single-enterprise agreement later comes into operation that covers that employment, the single-enterprise agreement will apply to that employee in relation to that employment, and the old agreement can never apply again.

A new pathway out of in-term multi-enterprise agreements

Under the FW Act, there is now a pathway to transition out of an in-term single-interest or supported bargaining agreement to a new single-enterprise agreement.

However, employers cannot request employees to approve the proposed single-enterprise agreement by voting for it while they are covered by an in-term single-interest or supported bargaining agreement unless:

- each employee organisation to which an existing single interest or supporting bargaining agreement applies has provided the employer with written agreement to the making of the request; or
- if written agreement is not provided, a voting request order made by the FWC permits the employer to make the request.

Voting request orders

A bargaining representative for a proposed single-enterprise agreement may apply to the FWC for an order (i.e., a voting request order) permitting an employer to make a request that employees approve the new agreement by voting for it if all of the following apply:

- a single interest employer agreement or a supported bargaining agreement (each of which is an old agreement) applies to one or more employees who will be covered by the new agreement;
- the old agreement has not passed its nominal expiry date;
- when the new agreement comes into operation, the old agreement will cease to apply to the employees;
- it is after the notification time for the new agreement;
- each employee organisation to which the old agreement applies has been asked to provide the employer with written agreement to the making of the request; and
- one or more of the employee organisations has failed to provide the written agreement.

Changes to how the BOOT is applied

The better off overall test (**BOOT**) is modified in the circumstance where an application has been made for approval of a single-enterprise agreement (new agreement) which covers at least one employee to whom a single interest employer agreement or supported bargaining agreement (each of which is an **old agreement**) applies.

When the BOOT is applied:

- Employees covered by the single-interest/supported bargaining agreement - the new agreement is to be assessed against the old agreement rather than relevant modern award, for each employee to whom the old agreement applies. The new agreement would pass the BOOT in relation to these employees where the employees are better off under the new agreement than the old agreement. This is aimed at ensuring that employees would be better off under the subsequent single-enterprise agreement than the old agreement.
- Award-covered employees - the BOOT analysis for award covered employees is unchanged and the new single enterprise agreement will pass the BOOT in relation to award covered employees where those employees are better off under the new agreement than the relevant award.
- Single-interest/supported bargaining agreement and award-covered - where an employee is both award covered and an old agreement applies to them, the BOOT analysis for that employee is to be undertaken in relation to the old agreement only.
- Employees who are award covered, and those to whom an old agreement applies, must all be better off overall under the new agreement for it to pass the BOOT.

When the FWC is assessing if a particular pattern or kind of work, or type of employment is **reasonably foreseeable** at the test time for the BOOT, the FWC must consider the views of covered employees to whom a supported bargaining agreement or a single interest employer agreement applies.

Previously, when reconsidering whether an enterprise agreement passes the BOOT, the FWC considered the patterns or kinds of work or types of employment of award-covered employees for the agreement. However, this has been amended so that if a supported bargaining or single-interest employer agreement applies, the FWC must **also** have regard to patterns or kinds of work or types of employment of those employees. Similar amendments have been made to the reconsideration process in s.238 to support this.

Majority support determinations and scope orders and multi-enterprise agreements

Applications for majority support determinations and scope orders cannot be made in relation to a proposed single-enterprise agreement which covers (among other employees) at least one employee to whom a single interest employer agreement or supported bargaining agreement that has not nominally expired, applies.

Parties have access to bargaining dispute applications under existing section 240.

The Revised Explanatory Memorandum states that preventing access to majority support determinations and scope orders would have the effect that bargaining representatives could not compel bargaining for a single-enterprise agreement where there is a supported

bargaining agreement or single interest employer agreement within its nominal term and in operation.

Removing an employer from a supported bargaining authorisations

Previously, the FWC was taken to have varied a supported bargaining authorisation (authorisation) to remove an employer's name only when they, and all of their employees that are listed on the authorisation, are covered by an enterprise agreement or workplace determination. There was no means for an employee to be removed from an authorisation.

Also, an employer covered by an authorisation was not able bargain for or make an enterprise agreement other than a supported bargaining agreement with employees specified on an authorisation.

However, the FW Act has now been amended to provide that the FWC is taken to have varied an authorisation to remove an employee when they are covered by an enterprise agreement or workplace determination that has come into operation. An employer is now permitted to make a single-enterprise agreement with a group of employees with whom the employer has previously made a supported bargaining agreement, where some of its employees that are specified on the authorisation are not covered by an agreement or workplace determination.

Transitional provisions

The key transitional provisions are as follows:

- the provisions as they relate to replacement single-enterprise agreements apply in relation to such agreements made after these changes commence, irrespective of whether the single interest employer or supported bargaining agreements were made before or after that commencement;
- the ability to vary supported bargaining authorisations applies to enterprise agreements and workplace determinations coming into operation before or after commencement; and
- the amended BOOT applies in relation to single-enterprise agreements made on or after commencement, irrespective of whether the single interest employer or supported bargaining agreement was made before or after commencement.

To go back to this section in the Executive Summary, click here.

20. Changes to intractable bargaining workplace determinations

Commencement

These provisions commence 27 February 2024.

See also the Table of Commencement Dates which can be found here.

FWC and intractable bargaining

The *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* introduced provisions enabling the FWC to make intractable bargaining declarations and intractable bargaining workplace determinations.

Enables the FWC to arbitrate an enterprise agreement

Essentially, this permits the FWC to arbitrate the terms of an agreement that had not been agreed in the context of protracted bargaining, subject to certain criteria being met.

The FWC can arbitrate if the parties have been unable to reach an enterprise agreement after at least nine months of negotiations but only if there is no reasonable prospect of agreement being reached and only if it is reasonable in all the circumstances for the FWC to intervene.

Changes made to address union concerns

The union movement raised concerns that the initially implemented intractable bargaining scheme enabled employers to change their position on matters that had been 'agreed' during the bargaining and that it could also result in arbitrated outcomes whereby employees were worse off than they would be under their current agreement.

To address the first of these issues, the meaning of an 'agreed term' for an intractable bargaining workplace determination has been amended. Agreed terms are not subject to arbitration but will be included in the determination.

The new definition of an 'agreed term' is:

- a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining concerned was made, should be included in the agreement;
- any other additional term that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and
- if there is a post-declaration negotiating period for the declaration – any other additional term that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.

The FW Act also now requires that where an enterprise agreement applies to one or more employees who will be covered by an intractable bargaining workplace determination dealing with a particular matter, the determination cannot include terms less favourable to the

employees or their bargaining representatives as compared to the particular term in the enterprise agreement dealing with that matter.

Transitional provisions

These provisions apply in relation to applications and determinations made on or after commencement (including determinations in relation to which the declaration or application for the declaration concerned was made before commencement).

In relation to an intractable bargaining workplace determination made before commencement, the provisions do not apply unless an employer, employee or employee organisation covered by the original determination makes an application and the FWC makes a determination varying the original determination to give effect to these provisions. Such applications must be made before the end of 12 months commencing on the day these provisions commence. Variations must be made by a Full Bench.

To go back to this section in the Executive Summary, click here.

21. Enabling multiple franchisees to access the single-enterprise stream

Commencement

These provisions commence 27 February 2024.

See also the Table of Commencement Dates which can be found here.

Previous limitations for multiple franchisees

Under previous provisions in the FW Act, franchisees:

- could make a single-enterprise agreement if they were *related employers*
- could make a multi-enterprise agreement if they were not *related employers*.

Franchisees only satisfied the definition of 'related employers' if they could show they were engaged in a common enterprise.

A choice of single-enterprise or multi-enterprise agreements for franchisees

The FW Act now provides that two or more employers will also be related employers if the employers carry on similar business activities under the same franchise and are:

- franchisees of the same franchisor; or
- related bodies corporate of the same franchisor; or
- any combination of the above.

The amendments enable franchisees of a common franchisor to bargain together for a single-enterprise agreement as ‘related employers’.

An amendment has also been made to enable franchisees to alternatively make a multi-enterprise agreement if they prefer to, despite now being ‘related employers’

To go back to this section in the Executive Summary, click here.

22. Model terms

Commencement

These provisions commence on the date on which a proclamation is issued or 26 February 2025, whichever is earlier .

See also the Table of Commencement Dates which can be found here.

FWC determinations

The FWC is required to determine model flexibility, consultation and dispute resolution terms for enterprise agreements, and the model dispute settlement term for copied State instruments. This will replace the terms currently prescribed in the FW Regulations.

A Full Bench will have 12 months to hear and consider submissions made in relation to the model terms and determine the model terms. It is intended the FWC would undertake detailed consultation, including with (but not limited to) national peak councils, during this period.

The FWC will have the power to vary its determinations. Responsibility for maintaining the currency of the model terms will be vested in the FWC and the ability to vary the terms in line with developments in workplace relations will ensure their ongoing relevancy.

In making its determinations, the FWC must consider:

- whether the model term is generally consistent with the common features of comparable terms in modern awards;
- what is best practice workplace relations;
- whether all persons and bodies have been provided with a reasonable opportunity to make submissions to ensure sufficient public consultation;
- the objects of the FW Act and this part of the FW Act as it deals with model terms; and
- other matters it considers to be relevant.

Effect of model terms

The model terms will not override terms agreed to between the parties to an agreement or instrument where those terms meet the requirements of the FW Act.

Transitional provisions

The FW Act prior to the Closing Loopholes (No.2) Act applies in relation to an enterprise agreement if the voting process commenced before these provisions come into operation, the employees approve the agreement and the FWC approves the agreement.

To go back to this section in the Executive Summary, click here.

23. Demergers

Commencement

These provisions commence 27 February 2024.

See also the Table of Commencement Dates which can be found here.

Changes

The Closing Loopholes (No.2) Act:

- repeals provisions of the *Fair Work (Registered Organisations) Act 2009* (**RO Act**) that enable the FWC to accept applications for a de-merger ballot to be made more than five years after the relevant amalgamation has occurred, to restore stability and certainty for amalgamated organisations;
- repeals part of the definition of 'separately identifiable constituent part' in the RO Act, to restore certainty about the part(s) of an organisation that may be subject to a de-merger ballot and de-merger from an amalgamated organisation;
- reverses various minor or technical amendments to the de-merger provisions including provisions about:
  - the conduct of ballots;
  - the proposed name of the relevant organisations and the proposed rules, or alterations of rules, of the relevant organisations and when they take effect at the conclusion of a de-merger process;
  - the FWC's power to accept undertakings to avoid demarcation disputes; and
  - membership of the newly registered organisation.

To go back to this section in the Executive Summary, click here.

Part F – Right to disconnect

Commencement

The commencement date is 26 August 2024 for medium and large business employers.

The commencement date is 26 August 2025 for small business employers. The assessment of 'small business employer' is made on the day of commencement. A 'small business employer' is an employer that has employs fewer than 15 employees at the relevant time, including employees of associated entities and 'regular' casual employees.

Employee right to disconnect

New rights

Two new rights have been inserted into the FW Act which entitle an employee to:

- refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable;
- refuse to monitor, read or respond to contact, or attempted contact, from a third party if the contact or attempted contact relates to their work and is outside of the employee's working hours unless the refusal is unreasonable.

However, if an employee is covered by an enterprise agreement which includes a right to disconnect term that is more favourable to the employee than the rights in the FW Act, the right to disconnect term in the agreement continues to apply to the employee

When is a refusal to connect unreasonable?

The FW Act provides a non-exhaustive list of matters that the FWC must consider when determining whether a refusal is unreasonable. These include:

- the reason for the contact or attempted contact;
- how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
- the extent to which the employee is compensated (including non-monetary compensation):
    - to remain available to perform work during the period in which the contact or attempted contact is made; or
    - for working additional hours outside of the employee's ordinary hours of work;
- the nature of the employee's role and the employee's level of responsibility;
- the employee's personal circumstances (including family or caring responsibilities).

A refusal to monitor, read or respond to contact or attempted contact, from their employer, or from a third party if the contact or attempted contact relates to their work, will be

unreasonable if the contact or attempted contact is required under a law of the Commonwealth, a State or a Territory.

Workplace right

The rights are 'workplace rights' within the meaning of Part 3-1 of the FW Act (i.e., general protections provisions).

Disputes

Matters for disputes

The FW Act provides a process for disputes about the employee right to disconnect if there is a dispute between an employer and an employee because the employee has refused to monitor, read or respond to contact or attempted contact.

This can include disputes that arise where:

- the employer reasonably believes that the refusal is unreasonable; or
- the employer has asserted that the refusal is unreasonable and the employee reasonably believes the refusal is not unreasonable; or
- there is another dispute between the employer and the employee about the operation of the right to disconnect.

Process

The parties to the dispute must first attempt to resolve the dispute at the workplace level through discussion.

If discussions do not resolve the dispute, a party may apply to the FWC to:

- make an order to stop refusing contact or to stop taking certain actions; and/or
- otherwise deal with the dispute (except it cannot order a pecuniary payment).

Representatives

The employer or employee to the dispute may appoint a person or industrial association (such as Ai Group) to provide the employer or employee (as the case may be) with support or representation for the purposes of:

- resolving the dispute; or
- applying to the FWC to make an order under section 333P (orders to stop refusing contact or to stop taking certain actions) or otherwise deal with the dispute; or
- the FWC dealing with the dispute.

A person may only be represented by a lawyer or paid agent (other than a lawyer of an association such as Ai Group) with the FWC's permission.

Orders

The FWC will only make an order in relation to a dispute about a right to disconnect if the FWC is satisfied that:

- an employee has unreasonably refused to monitor, read or respond to contact or attempted contact and there is a risk the employee will continue to do so; and/or
- an employee's refusal to monitor, read or respond to contact or attempted contact is not unreasonable and there is a risk that the employer will:
    - take disciplinary or other action against the employee because of the employer's belief that the refusal is unreasonable; or
    - continue to require the employee to monitor, read or respond to contact or attempted contact despite the employee's refusal to do so.

The FWC may make any order it considers appropriate (other than an order requiring the payment of a pecuniary amount) if the FWC is satisfied that the order is:

- to prevent the employee from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contact; or
- to prevent the employer from taking the action; or
- to prevent the employer from continuing to require the employee to monitor, read or respond to contact or attempted contact.

A contravention of an order is a breach of a civil penalty provision with a maximum penalty of up to 60 penalty units.

Arbitration by agreement in some circumstances

If an application is not solely for orders to stop refusing contact or to stop taking certain actions, the FWC must deal with the dispute as it considers appropriate but cannot arbitrate those additional matters unless the parties agree.

For example, the FWC may mediate, conciliate, make a recommendation or express an opinion in relation to those additional orders sought.

Dismissing the application

The FWC may dismiss an application for an order if it:

- is frivolous or vexatious (and the employer may apply for the application to be dealt with expeditiously and efficiently and a decision to be communicated by the FWC in a timely manner); or
- might involve matters that relate to certain matters, including defence, national security and prescribed existing or future covert or international operations; or
- is not make in accordance with the FW Act; or
- has no reasonable prospects of success.

Work health and safety laws

Proceedings can be commenced or an application made or continued under WHS laws in relation to relevant conduct despite an application also being made for an order in relation to the right to disconnect.

Guidelines

The FWC must make written guidelines on the operation of the right to disconnect under the FW Act.

New modern award term

A modern award must include a right to disconnect term whether made before, on or after the right the disconnect term.

The FWC must, by the day before commencement, make a determination varying certain modern awards to include a right to disconnect term which would come into operation before commencement. This applies in relation to modern awards if the award is made before commencement and is to be in operation on commencement.

To go back to this section in the Executive Summary, click here.

Part G – Commencement dates

Part	Commencement
Part 1 - Casual employment (definition, choice notification and sham arrangements)	26 August 2024
Part 3 - Enabling multiple franchisees to access the single-enterprise stream	27 February 2024
Part 4 - Transitioning from multi-enterprise agreements	27 February 2024
Part 5 - Model terms	The date on which a proclamation is issued or 26 February 2025, whichever is earlier
Part 5A – Changes to intractable bargaining workplace determinations	27 February 2024
Part 7(2) - Workplace delegates' rights (application to regulated workers)	The date on which a proclamation is issued or 26 August 2024, whichever is earlier
Part 8 – Right to disconnect	26 August 2024 - medium and large employers 26 August 2025 - small business employers
Part 9 - Sham arrangements (employment - changed to 'reasonable belief')	27 February 2024
Part 10 - Right of entry - exemption certificates for suspected underpayment	1 July 2024
Part 11(1) - Penalties for civil remedy provision - penalties	27 February 2024
Part 11(2) - Penalties for civil remedy provision - contingent amendments	27 February 2024
Part 11(3) - Penalties for civil remedy provisions - underpayments	27 February 2024
Part 12 - Compliance notices	27 February 2024
Part 13 - Withdrawal from amalgamations	27 February 2024

Part 15 - Definition of employment	The date on which a proclamation is issued or 26 August 2024, whichever is earlier (Opt-out commences 27 February 2024)
Part 16 - Provisions relating to regulated workers: road transport, expert panel for road transport, minimum standards for regulated workers	The date on which a proclamation is issued or 26 August 2024, whichever is earlier
Part 17 - Technical amendment	27 February 2024
Part 18 - Application and transitional provisions	27 February 2024
Schedule 5 – Amendment of the Coal Mining Industry (Long Service Leave) Administration Act 1992	The later of 27 February 2024 and the day the withdrawal of the Mining and Energy Division of the CFMMEU from that union takes effect, as determined by the Federal Court of Australia under paragraph 109(1)(a) of the *Fair Work (Registered Organisations) Act 2009*.

Disclaimer to this Guide

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