



# Road Transport

Business Guide



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Chamber of Commerce  
and Industry



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# 1. Introduction

- 1.1 The Fair Work Legislation Amendment (Closing Loopholes) Act 2024 introduces new functions into the Fair Work Act 2009 relating to road transport which include:
  - a. the creation of a Road Transport Expert Panel and Road Transport Advisory Group.
  - b. a new ability for the Fair Work Commission to make road transport minimum standards orders similar to the 'employee-like' minimum standards orders which have also been introduced.
  - c. a new ability for the Fair Work Commission to ratify Road Transport collective agreements.
  - d. a new ability for the Fair Work Commission to arbitrate unfair terminations for Road Transport regulated workers.
  - e. the new power for the Minister to introduce laws regulating the 'road transport industry contract chain' and its participants.
- 1.2 This guide is intended to help employers and businesses navigate these changes. It is important that employers and businesses are familiarised with these changes. These changes will affect a wide range of businesses across different sectors.
- 1.3 The guide should serve as a starting point for understanding new obligations and considering potential vulnerabilities for individual businesses. It does not cover every single aspect of the legislative changes, but rather the substantive provisions. Further advice should always be sought for the resolution of specific issues.
- 1.4 When reading the guide, it is important to check the commencement date under the title at the top of each section or in the table below. The footnotes throughout this guide assume that the provisions have commenced and reference the resulting section of the Fair Work Act 2009 (FW Act).
- 1.5 The guidance in this document was finalised on 6 August 2024 and may be subject to future revision.

## Summary of Advice and Commencement

Topic	Change	Commencement	Advice	Page
<b>Minimum Standards Orders</b>	The Fair Work Commission will be empowered, on its own initiative, or on application, to make binding minimum standards orders for regulated workers. There are certain terms which may or may not be included.	26 August 2024	Monitor the progress of the FWC in making Minimum Standards Orders. Some employers or businesses may wish to participate in the proceedings which will give rise to the Minimum Standards Orders.	12
<b>Minimum Standards Guidelines</b>	Introduction of a system for the creation of minimum standards guidelines for regulated workers. These are similar to minimum service orders, however, are non-binding.	26 August 2024	Monitor the progress of the FWC in making Minimum Standards Guidelines. Some employers or businesses may wish to participate in the proceedings which will give rise to the Minimum Standards Guidelines.	24
<b>Road Transport Contractual Chain Orders and Guidelines</b>	The Fair Work Commission will be empowered, on its own initiative, or on application, to make road transport contractual chain orders and guidelines for regulated road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain. There are certain terms which may or may not be included.	26 August 2024	Monitor the progress of the FWC in making road transport contractual chain orders and guidelines. Some employers or businesses may wish to participate in the proceedings which will give rise to the orders and guidelines.	29
<b>Collective Agreements</b>	The Fair Work Commission will also now be able to register Collective Agreements made by consent between regulated road transport contractors and employer or business representatives.	26 August 2024	Consider whether there is any benefit to pursuing a collective agreement and/or whether there is a likelihood that workers and/or a union may pursue one.	39
<b>Unfair termination of regulated workers</b>	The Fair Work Commission will receive a new jurisdiction to deal with 'unfair terminations' which are in essence an unfair dismissal jurisdiction for regulated road transport contractors.	26 August 2024	Businesses should review their termination policies and practices to ensure they are compliant with the new regime.	49

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

## Terms used

Term	Meaning
<b>Bill</b>	Fair Work Legislation Amendment (Closing Loopholes No.2) Bill 2023
<b>Closing Loopholes</b>	The name of new legislation (laws) introducing changes to the Fair Work Act and other workplace laws
<b>Expert Panel</b>	Expert panel for the road transport industry
<b>FW Act</b>	Fair Work Act 2009
<b>FWC</b>	Fair Work Commission
<b>FWO</b>	Fair Work Ombudsman
<b>Minister</b>	Minister for Employment and Workplace Relations
<b>MSG</b>	Minimum Standards Guideline
<b>MSO</b>	Minimum Standards Order
<b>Organisation</b>	An organisation registered under the Registered Organisations Act
<b>President</b>	President of the Fair Work Commission
<b>RTAG</b>	Road Transport Advisory Group
<b>RTCCG</b>	Road Transport Contractual Chain Guidelines
<b>RTCCO</b>	Road Transport Contractual Chain Order
<b>RTMSO</b>	Road transport Minimum Standards Order

## 2. Key concepts and coverage of the new laws

**Commencement:** 26 August 2024

**What to do next:** Businesses and employers should familiarise themselves with the new regulatory bodies and requirements.

### Highlights

- The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* introduces minimum standards for regulated workers into the *Fair Work Act 2009* (the Act). The amendments also introduce arrangements applying specifically to the road transport industry.
- Under the umbrella of the road transport industry are two types of workers, 'regulated road transport contractors' and 'road transport employee-like' workers.
- The FWC can make road transport minimum standards orders (RTMSOs) and guidelines for road transport contractors.
- The Closing Loopholes legislation also introduces new bodies responsible for regulating Road Transport.
- There is to be a new Road Transport Expert Panel. The Expert Panel must include FWC President, a Vice-President or Deputy President as a Chair, a member with knowledge of the Road Transport Industry and other FWC members as appropriate.
- There will also be a Road Transport Advisory Group (RTAG) who are to advise the FWC in relation to matters that relate to the road transport industry including but not limited to the making and varying of modern Awards, RTMSOs and Road Transport Guidelines (and the prioritisation by the Fair Work Commission of matters relating to the road transport industry
- Membership of the RTAG is made up of persons nominated by the Transport Workers Union (TWU) and by business/employer groups representing road transport businesses. Members are to be appointed for three years.

### Changes

#### Coverage

- 2.1 These changes cover the road transport industry which has been defined broadly and includes the industries covered by:
- a. the road transport and distribution industry within the meaning of the Road Transport and Distribution Award 2020 (as in force on 1 July 2024);
  - b. the long-distance operations in the private road transport industry within the meaning of the Road Transport (Long Distance) Award 2020 (as in force on 1 July 2024);
  - c. the waste management industry within the meaning of the Waste Management Award 2020 (as in force on 1 July 2024);
  - d. the cash in transit industry within the meaning of the Transport (Cash in Transit) Award 2020 (as in force on 1 July 2024);
  - e. the passenger vehicle transportation industry within the meaning clause 4.2 of the Passenger Vehicle Transportation Award 2020, but not including paragraph 4.2 (c)), (as in force on 1 July 2024); and
  - f. any other industry (however described) prescribed by the regulations.<sup>1</sup>

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1 FW Act s15S

### Who is a regulated road transport contractor?

- 2.2 The new jurisdiction will regulate 'Regulated Road Transport Contractors' and 'Regulated Road Transport Businesses' who engage them.

Regulated Road Transport Contractors are workers (not employees) who are either:

<b>Individual</b>	the individual performing work under the contract
<b>Body corporate</b>	an individual who is either a director of the body corporate, or a member of the family of a director of a body corporate, and who performs work under the contract
<b>Trustee of a Trust</b>	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;
<b>Partnership</b>	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

The worker must also perform all or a significant majority of the work to be performed under the contract, in order to be considered a Regulated Road Transport Contractor.

This will essentially capture workers who are similar to traditional 'owner-drivers' within the category of work regulated by Chapter Six of the Industrial Relations Act 1996 (NSW).<sup>2</sup>

### What is a regulated business in road transport?

- 2.3 A person is a road transport business if the person:
- receives services under a services contract, where the services contract provides for the performance of work in the road transport industry; or
  - is a constitutional corporation, or is included in a class of constitutional corporations, prescribed by the regulations for the purposes of this paragraph.<sup>3</sup>

### What are services contracts?

- 2.4 A services contract is a contract for services that relates to the performance of work under the contract by an individual and has the requisite constitutional connection in section 248(15H) of the FW Act.<sup>4</sup>
- 2.5 To have the requisite constitutional connection, the contract needs to be either:
- be one where a constitutional corporation is a party to the contract (e.g. a Pty Ltd company or other company incorporated under the *Corporations Act 2001*); or
  - be one where one of the parties is incorporated in a Territory in Australia (e.g. ACT or NT); or
  - wholly or principally be performed in a Territory in Australia; or
  - entered into in a Territory in Australia; or
  - be one where one of the parties is a natural person who is a resident in a Territory in Australia; or
  - be one where one of the parties is a business that has its principal place of business in a Territory in Australia.

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2 FW Act s15Q

3 FW Act s15R

4 FW Act s 248(15)(n)

### Who is a road transport employee-like worker?

2.6 A road transport employee-like worker means an employee-like worker who performs work in the road transport industry.<sup>5</sup>

2.7 To determine if a person is an employee-like worker, the following criteria must be met:

a. the person is one of the following:

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

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

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

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

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

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

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

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

iv. the person has such other characteristics as are prescribed by the regulations.<sup>6</sup>

### Low bargaining power and low authority

2.8 Of the above factors, most contest is anticipated around whether a person has 'low bargaining power' during contract negotiation or a 'low degree of authority' over the performance of the work.

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

a. how much control the worker has over when, where and how the work is performed. In this regard, the Explanatory Memorandum to the new laws indicates that it is not intended that skilled tradespersons be covered as they have high degrees of control over these matters;<sup>7</sup> and

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

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

5 FW Act s15RB

6 FW Act s 15P

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

### What is a digital labour platform?

- 2.11 A 'digital labour platform' is an online enabled application, website or system that operates to arrange, allocate or facilitate the provision of labour services. This will essentially capture platforms that meet the common understanding of the 'gig-economy' (e.g. app-based meal delivery, ad-hoc services etc.) but will not capture the forums that do not process payments (e.g. Facebook Marketplace).
- 2.12 A digital labour platform is an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services, where:
- a. the operator of the application, website or system:
    - i. engages independent contractors directly or indirectly through or by means of the application, website or system; or
    - ii. acts as an intermediary for or on behalf of more than one distinct but interdependent sets of users who interact with the independent contractors or the operator via the application, website or system; and
  - b. any of the following processes payments referable to the work performed by the independent contractors:
    - i. the operator of the application, website or system;
    - ii. and associated entity of the operator;
    - iii. a person contracted, whether directly or through one or more interposed entities, by the operator or an associated entity of the operator to process the payments (e.g. a third party such as a bank or financial institution is contracted by the operator of the application to process payments).<sup>8</sup>
- 2.13 Digital labour platforms could include operators like Uber and Menulog, which provide a payment platform to secure the services of an independent contractor. By contrast, apps such as Airtasker, or online services such as Compare the Market, which do not provide a service that collects payments on behalf of independent contractors would likely not be considered digital labour platforms. The key distinction is that the apps need to be collecting payment from the user on behalf of the independent contractor (either by collecting the payment through the app itself or through a 3rd party that they have contracted).

### What is a 'digital labour platform operator'?

- 2.14 A digital labour platform operator is the party that enters into or facilitates a service contract under which work is performed by employee-like workers.<sup>9</sup>

### What is 'digital platform work'?

- 2.15 Digital platform work is work performed by an independent contractor under a services contract through a digital labour platform. Alternatively, if the contract relating to the work was arranged through the digital labour platform, then this can be considered digital labour platform work.<sup>10</sup>

**For more information about employee-like workers, please see the ACCI Business Guide on Employee-Like Workers.**

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8 FW Act s 15L

9 FW Act s 15M

10 FW Act s 15N

### Illustrative example: Meaning of a road transport contractor

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.

### The road transport objective

- 2.16 The Closing Loopholes legislation sets out a road transport objective. In establishing a function or exercising powers under the FW Act, the Expert Panel for the road transport industry must consider the need for an appropriate safety net of minimum standards for both regulated road transport workers and employees in the road transport industry, having regard to:
- a. the need for standards that ensure that the road transport industry is safe, sustainable and viable;
  - b. the need to avoid unreasonable adverse impacts upon:
    - i. sustainable competition among road transport industry participants;
    - ii. road transport industry business viability, innovation and productivity;
    - iii. administrative and compliance costs for road transport industry participants;
  - c. the need to avoid adverse impacts on the sustainability, performance and competitiveness of supply chain and the national economy;
  - d. the need for minimum standards in road transport contractual chains.<sup>11</sup>

### What is the Expert Panel for the road transport industry?

- 2.17 An Expert Panel is to be established for the road transport industry. RTMSOs and guidelines and road transport contractual chain orders (RTCCOs) and guidelines (see section 5 of this document) must be made, varied and revoked by an Expert Panel for the road transport industry. The Expert Panel must include:
- a. the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
  - b. at least one Expert Panel Member or other Commission Member who has knowledge or, or experience in, the road transport industry; and
  - c. such number (if any) of other Commission Members as the President considers appropriate.<sup>12</sup>

11 FW Act s40D

12 FW Act s245(1E)

### What is the Expert Panel responsible for?

- 2.18 The Expert Panel will be responsible for performing functions and exercising powers relating to the road transport industry, including in relation to modern Awards and road transport MSOs, having regard to the road transport objective. The Expert Panel could also be directed to deal with other matters that the President considers may relate to the road transport industry. This would ensure that the FWC has the expertise it needs to better assess minimum standards and conditions for both employees and contractors working in the road transport industry. The expertise required for the new Expert Panels would be provided by either part-time Expert Panel members or appropriately qualified FWC members.<sup>13</sup>
- 2.19 Section 617(10B) states the matter types that the Expert Panel must be formed to decide on. These matters include:
- a. a modern Award made under Part 2-3 that the President considers might relate to the road transport industry;
  - b. a determination made under subsection 157(1) varying or revoking a modern Award that the President considers might relate to the road transport industry;
  - c. a road transport MSO made under paragraph 536JY(1)(b) or a determination made under subsection 536KQ(1) varying or revoking a road transport MSO;
  - d. a deferral determination made under subsection 536KQJ(1) in relation to a road transport MSO;
  - e. a suspension determination made under subsection 536KQ(1) varying or revoking a road transport MSO to give effect to a decision to vary or revoke the MSO under paragraph 536KQS(2)(a) or (b);
  - f. a decision made under paragraph 536KQS(2)(a)(b) or (c) as to whether or not to vary or revoke a road transport MSO;
  - g. RTGs made under subsection 536KR(1) or a determination made under subsection 536KZ(1) varying or revoking RTGs;
  - h. a RTCCO made under section 536PD or a determination made under 536PT varying or revoking a RTCCO;
  - i. road transport contractual chain guidelines made under section 536QP or a determination made under section 536QW varying or revoking road transport contractual chain guidelines;
  - j. a deferral determination made under subsection 536QB(1) in relation to a RTCCO;
  - k. a suspension determination made under subsection 536QG(1) in relation to a RTCCO;
  - l. a determination made under subsection 536PT(1) varying or revoking a RTCCO to give effect to a decision to vary or revoke the RTCCO under paragraph 536QK(2)(a) or (b);
  - m. a decision made under paragraph 536QK(2)(a), (b) or (c) as to whether or not to vary or revoke a RTCCO;
  - n. such other instruments as are prescribed that the President considers might relate to the road transport industry.<sup>14</sup>

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13 Revised EM 1126-1127

14 FW Act s617(10B)

## Road Transport Advisory Group

- 2.20 There will be a Road Transport Advisory Group (RTAG). The RTAG will be responsible for the making and varying of modern Awards that relate to the road transport industry, along with RTMSOs and guidelines, RTCCOs and guidelines; the prioritisation by the FWC of matters relating to the road transport industry and other matters prescribed by the regulations.<sup>15</sup>
- 2.21 The RTAG members will be appointed by the Minister. Members need to either be members of, or nominated by, an organisation entitled to represent the industrial interests of one or more regulated road transport contractors (i.e., a Union), or an organisation entitled to represent the industrial interests of one or more road transport businesses (i.e. an employer or business association). Membership must not exceed a 3-year period and the Minister is entitled to revoke a person's appointed to the RTAG.<sup>16</sup>
- 2.22 The President may give the RTAG directions as to the way in which the body is to carry out its functions and may appoint a member of the Expert Panel to be the chair of the RTAG.<sup>17</sup>
- 2.23 The RTAG may establish subcommittees to advise on different matters. Subcommittees can include people who aren't members of the RTAG, but subcommittees must be chaired by a member.<sup>18</sup>
- 2.24 Where a proposed RTMSO or a proposed RTCCO covers owner drivers, or if the FWC performs a function in relation to a RTMSO or a road contractual chain order that has, or must have, an effect upon owner drivers, then the relevant RTAG subcommittee must consist of a majority of owner drivers or their representatives.<sup>19</sup>

## Prioritisation of road transport matters

- 2.25 The President will be required to give a direction as to how the FWC will prioritise its work under Chapter 3A, Part 3A-2 (minimum standards orders and guidelines for regulated workers) and Chapter 3B, Part 3B-2 (RTCCO and RTCCGs). The direction must prioritise types of orders under those Parts and specified cohorts of workers (see section 582(4D)).
- 2.26 The FWC may refuse to consider an application if it is not consistent with a prioritisation direction of the President (see sections 536KG and 536QR).

## Implementation of regulated worker standards functions

- 2.27 The FWC plans to implement the new regulated worker functions, including proposed case management processes and engagement activities.
- 2.28 The new standards jurisdictions will require new case management processes and will be supported by FWC staff. New matters will initially be allocated to the President who will constitute an Expert Panel for road transport matters.
- 2.29 The process workflows for MSOs and RTCC matters have been designed to be broadly similar to the procedures currently undertaken by the FWC in dealing with pay equity and modern award matters. It is proposed that all applications will be published to the FWC website similar to the 'create or change a modern award matters list'.

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15 FW Act s40E(2)

16 FW Act s40F(2-3)

17 FW Act s40E(5-6)

18 FW Act s40G

19 FW Act s40G(3)

# 3. Minimum Standards Orders

**Commencement:** 26 August 2024

**What to do next:** Monitor the progress of the FWC in making Minimum Standards Orders.

## Highlights

- The Fair Work Commission will be empowered, on its own initiative or on application, to make 'Minimum Standards Orders' for 'Regulated Road Transport Contractors'.
- A Road Transport Minimum Standards Order (RTMSO) must include:
  - a term identifying who is covered by the order (which could be a class of contractor, type of road transport work or a particular road transport operator); and
  - a term about settling disputes.
- A RTMSO may include terms about payment, deductions, working time, record keeping, insurance, consultation, representation, delegates rights and cost recovery.
- A RTMSO can only include a term to the extent necessary to achieve the Minimum Standards Objective which is an appropriate safety net of minimum standards for Regulated Road Transport Contractors.
- The RTMSO also cannot deal with matters otherwise dealt with by the Heavy Vehicle National Laws. This avoids significant duplication in regulatory obligations (which was one of the concerns that previously arose under the now abolished Road Safety Remuneration Tribunal).

## Changes

### What are they?

- 3.1 Minimum standards orders (MSOs) are set by the FWC to establish an appropriate safety net of minimum standards. MSO's can apply to:
  - a. employee-like workers; or
  - b. regulated road transport contractors.<sup>20</sup>
- 3.2 An MSO for employee-like workers is an employee-like worker minimum standards order (ELMSO) and for regulated road transport contractors is a road transport minimum standards order (RTMSO).<sup>21</sup>
- 3.3 The objectives of MSOs are that they:<sup>22</sup>
  - a. are clear and simple.
  - b. are fair and relevant.
  - c. recognise the perspectives of regulated workers, including their skills, the value of the work they perform and their preferences about their working arrangements.
  - d. do not change the form of the engagement of regulated workers from independent contractors to employees — that is, the terms should not be of the kind that would vary the nature of the relationship to such an extent that the engagement becomes one of employment. No one single term is likely to do this.
  - e. do not give preference to one business model or working arrangement over another.

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20 FW Act s536JY

21 FW Act s536JY

22 FW Act s536JX

- f. are tailored to the relevant industry, occupation or sector and the relevant business models.
  - g. are tailored to the type of work, working arrangements and regulated worker preferences.
  - h. reflect the differences in the form of engagement of regulated workers as independent contractors to the form of engagement of employees.
  - i. have regard to the ability of regulated workers to perform work under services contracts for multiple businesses, and the fact that the work may be performed simultaneously.
- 3.4 The need to provide “fair and relevant” terms involves a broad evaluative assessment from the Commission. This concept has been applied for 15 years in the modern awards context and experience suggests that the Commission will consider all matters that might affect the engagement including matters pertaining to ensuring sufficient take-home pay, ensuring work is safe and ensuring that terms do not unnecessarily or excessively increase the burden of regulation / productivity.
- 3.5 Terms can only be included in an MSO to the extent necessary to achieve the minimum standards objective. That is, terms cannot be included that might generally have merit if they aren’t needed to ensure the MSO objectives are met. Whilst this appears to provide some limit on the extent to which terms may be included in MSOs, this concept has also applied in the modern awards context for the past 15 years and the broad nature of the test (including the requirement to have “fair and relevant” terms) means that the diversity and extent of terms that might be included can still be quite broad.
- 3.6 The MSOs issued will likely vary depending on the industry involved. By way of example, in the courier industry and passenger transport industries, significant focus will be placed on the cost of running a vehicle to transport goods or persons and ensuring sufficient remuneration is paid to the worker to cover the costs of running the vehicle (including finance, depreciation, fuel, repairs and maintenance and insurance). On the other hand, in industries where the worker is not providing a significant asset (for instance ad-hoc tasks or provision of personal labour), the cost of the providing the labour/running the business will attract less focus in the MSO.
- 3.7 In relation to minimum rates, the Commission needs to take into account the following:<sup>23</sup>
- a. costs necessarily incurred by regulated workers directly arising from the performance of a services contract
  - b. safety net minimum standards that apply to employees performing comparable work
  - c. not to change the form of engagement of the workers.

### Impact of MSOs

- 3.8 It is intended that the FWC would need to consider the type of adverse impacts that could be imposed by MSOs in setting them. This would include considering:
- a. adverse impacts on sustainable competition amongst industry participants  
*Examples include: provisions that do not allow competitors to differentiate their offering. For instance, provisions that require workers to all follow the same route, work at the same times, etc.*
  - b. business costs, regulatory burden, sustainability, innovation, productivity or viability  
*Examples include: provisions that impose cost (e.g. high remuneration, penalty rates, reimbursement obligations), provisions that impose administrative burden (e.g. record keeping, monitoring of hours), provisions that require minimum work periods or resourcing levels that might exceed what is needed to perform the work, etc.*
  - c. administrative and compliance costs for industry participants  
*Examples include: record keeping obligations.*
  - d. the national economy  
*Examples include: provisions that would affect an industry holistically to such an extent that the economy is affected as a whole. Most provisions would not have this effect, but it is possible that material changes to the way contractors are engaged could have this impact.*
  - e. persons or bodies that use or rely on the work performed by regulated workers, or the services received under service contracts.<sup>24</sup>  
*Examples include: restaurants or shops who rely on regulated workers to deliver goods and services and consumers who receive these types of goods and services.*

23 Revised EM 1294

24 FW Act 536JX(c)

**Reminder:**

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

Guidelines are not binding and do not attract penalties if they are not complied with.

### Flowchart 1 — Process for making Road Transport Minimum Standards Orders



### Who do they apply to?

- 3.9 MSOs apply to workers and contractors who are identified in the MSO's coverage clause.
- 3.10 A road transport MSO applies to a road transport business if:
- the road transport MSO covers the road transport business; and
  - the road transport MSO covers regulated cover road transport contractors; and
  - the road transport business received the services under a services contract of a regulated road transport contractor covered by the road transport MSO; and
  - the road transport MSO is in operation; and
  - no other provision of the FW Act provides, or has the effect, that the road transport MSO does not apply to the road transport business.<sup>25</sup>

### What can they contain?

- 3.11 MSOs must contain terms relating to:
- coverage<sup>26</sup>
  - procedure for settling disputes<sup>27</sup>
- 3.12 MSOs may contain terms relating to:
- payment terms (that is, over what periods payments should be made)
  - deductions (that is, when an operator can or cannot deduct money from payments owing to the contractor. For instance, the MSO might contain provisions limiting the extent to which an operator can deduct money from payments owing to the contractor)
  - Record keeping, in relation to matters covered by or required by the Act, or by an order or instrument made under the Act
  - insurance
  - consultation (usually consultation will be required where major changes arise that are likely to have a significant impact on the contractor. The types of circumstances that would trigger consultation obligations (and the extent of consultation required) can be included in the MSO)
  - representation (usually for the purposes of consultation or disputes in relation to the application of the MSO or the engagement)
  - delegates' rights (this pertains to union delegate rights to represent contractors); and
  - cost recovery<sup>28</sup>
- 3.13 It is important to note that this list doesn't limit the terms that may be included in a minimum standards order. A minimum standards order may include terms that it is permitted to include and must include terms that it is required to include to achieve the minimum standards objective.<sup>29</sup>

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25 FW Act s536JD(3)

26 FW Act s 536KJ

27 FW Act s 536KK

28 FW Act s 536KL

29 FW Act s 536KO

### What can't they contain?

- 3.14 MSOs can't contain terms relating to:
- a. overtime rates
  - b. rostering arrangements
  - c. commercial matters that are not about the engagement or workers covered by the minimum standards order
  - d. terms that would deem a worker an employee (this includes terms that are so incompatible with the nature of independent contracting that to comply with them would cause the regulated worker to be treated as if they were an employee)<sup>30</sup>
  - e. WHS matters that are addressed by other State or Territory law
  - f. other prescribed matters.<sup>31</sup>
- 3.15 MSOs are subject to State and Territory laws prescribed by the regulations. This means a road transport MSO could not diminish, but could supplement, rights and obligations under these laws.<sup>32</sup> However, these State and Territory laws need to be prescribed by Regulations to have effect. To date, no laws have yet been prescribed.
- 3.16 Further terms that must not be included in road transport MSOs include:
- a. a matter relating to road transport that is otherwise dealt with by the Heavy Vehicle National Law as set out in the Schedule to the Heavy Vehicle National Law Act 2012 (QLD); or
  - b. by another law of the Commonwealth, a State or a Territory.<sup>33</sup>

### Penalties for the breach

- 3.17 A person must not contravene a term of an MSO. This section is a civil remedy provision. A person does not contravene a term of an MSO unless the order applies to the person. The penalty for a serious contravention is 600 penalty units or otherwise 60 units. From 1 July 2023 a penalty unit was \$313. That means 60 penalty units = \$18,780.<sup>34</sup>

### Who can apply for Minimum Standards Orders?

- 3.18 An application for an MSO can be made by:
- a. an organisation that is entitled to represent the industrial interests of one or more regulated workers or businesses who would be covered by the proposed MSO.
  - b. a regulated business that would be covered by the proposed MSO; or
  - c. the Minister.<sup>35</sup>

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30 Revised EM 1358

31 FW Act s 536KM

32 FW Act s 536KM

33 FW Act s 536KN

34 FW Act s 536JB

35 FW Act s 536JZ

### Process in detail

- 3.19 Before making or varying a decision a RTMSO, the FWC must be satisfied that genuine engagement and consultation has occurred with the parties to be covered and that the RTAG have been consulted. The FWC must also have regard to the commercial realities of the road transport industry; and be satisfied that making or varying the RTMSO will not unduly affect the viability and competitiveness of owner drivers or similar persons.<sup>36</sup>
- 3.20 Before making a RTMSO, the FWC must do the following:

Process step	Content of step FWC must take
<b>Notice of intent</b>	Publish a notice (a notice of intent) stating that the FWC proposes to make an RTMSO and publish a draft of the RTMSO.
<b>Publication of notice</b>	Publication would occur on the FWC website and any other considered relevant by the FWC. <sup>37</sup>
<b>Written response to draft order</b>	The FWC is to ensure that affected entities have a reasonable opportunity to make written submissions to the FWC in relation to the draft of a RTMSO. Submissions (other than those which contain confidential or commercially sensitive information) are to be published by the FWC. Those which contain confidential or commercially sensitive information may either not be published or be published in a summary form without confidential or commercially sensitive information. <sup>38</sup>
<b>Hearing optional but not mandatory</b>	The FWC may hold a hearing in relation to a draft RTMSO but is not required to do so. <sup>39</sup>
<b>Finalising draft order</b>	The FWC may make any changes it thinks appropriate to a draft RTMSO however, if these changes are significant, the FWC must commence a new statement of intent in relation to the revised draft RTMSO and follow a new consultation process with respect to the newly drafted RTMSO. <sup>40</sup> RTMSOs take effect 12 months after the FINAL notice of intent is published.
<b>Decision not to make MSO</b>	The FWC may decide that no RTMSO is to be made based on the draft. If the FWC does so, the FWC must publish notice of the decision on its website and by any other means the FWC considers appropriate. <sup>41</sup>

### Varying Minimum Standards Order

- 3.21 To vary or revoke MSOs, any of the following may apply to the FWC for a determination:
- an organisation entitled to represent, or another body that represents, the industrial interests of one or more regulated workers covered by the minimum service order or who would be covered by the minimum service order proposed to be varied (i.e. a union);
  - an organisation that is entitled to represent, or another body that represents, the industrial interests of one or more of the regulated businesses covered by the minimum service order or that would be covered by the minimum service order proposed to be varied (i.e. an association of employers or businesses);
  - a regulated business covered by the minimum service order proposed to be varied;
  - a national or State council or federation that is effectively representative of a significant number of organisations; or
  - the Minister<sup>42</sup>

36 FW Act s 536KB

37 FW Act s 536KB

38 FW Act s 536KC

39 FW Act s 536KAC

40 FW Act s 536KAD

41 FW Act s 536KF

42 FW Act s 536KP

- 3.22 The FWC may make a determination varying or revoking an RTMSO if consistent with the road transport objective. This determination does not need to include all of the elements of the variation sought in an application. This includes refusing to make a variation to the extent that it would result in the order covering persons who are not regulated workers.<sup>43</sup> A determination varying or revoking a RTMSO would operate on the day specified in that determination.<sup>44</sup> Furthermore, a determination varying or revoking a RTMSO must not be earlier than the day on which the determination is made.<sup>45</sup>
- 3.23 The reasons a RTMSO might be varied are likely to differ depending on the entity that has sought the variation:
- a. If the variation is proposed by a union or employee-like workers, the variation is likely to be motivated by some concern that the RTMSO is still not ensuring sufficient compensation for the relevant workers or by some concern that business practices are giving rise to unsafe work or insufficiently secure or certain work patterns.
  - b. If the variation is proposed by a road transport operator or an employer or business association, the variation is likely to be motivated by some concern that the RTMSO is in practice imposing unrecoverable costs, too rigid rostering or engagement rules that are preventing businesses from effectively running or some other burden that is impeding the efficient running of the business.
  - c. Variations by the FWC are most likely to arise where a significant or prominent (and most likely public) issue has arisen (i.e. a major hurdle to the businesses operating effectively or a major hole in the remuneration structure) such that the FWC is motivated to vary the RTMSO on its own motion. Variations by the FWC on its own motion sometimes also arise where technical or drafting issues are identified in other disputes and the FWC identifies a need to fix these technical/drafting matters.
- 3.24 RTMSOs operate until revoked.<sup>46</sup>

### **Deferring Minimum Standards Orders, and the role of the FWC**

- 3.25 The FWC may make a determination deferring the operation or application of a RTMSO deferring the operation of a RTMSO or the application of specified, or all of the terms, of the RTMSO, to all persons, or specified class(es) of persons.<sup>47</sup>
- 3.26 Any deferral decisions are effective the day that they are made and cease to be in operation on the day which the FWC decides.<sup>48</sup>
- 3.27 Deferral decisions are likely to be very rare. This provision appears directed at ensuring that if a significant public outcry arises out of a particular RTMSO, the Minister can intervene to prevent the RTMSO from commencing operation whilst the relevant parties can then address the FWC on any concerns arising from the RTMSO. The provision has no doubt been influenced by the experience of the former Road Safety Remuneration Tribunal (RSRT) — which issued minimum payment determinations in 2016 that caused an outcry amongst ‘owner-drivers’. The then Federal Government abolished the entire RSRT in response to the outcry. This deferral power is intended to provide a circuit breaker than can minimise public outcry over RTMSO terms without threatening the viability of the whole employee-like worker jurisdiction. Having regard to this history, it is very unlikely a Minister will intervene to defer a RTMSO unless a particular class of regulated businesses generate substantial public outcry over a particular RTMSO or some of its specific terms.

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43 FW Act s 536KQ (2)  
 44 Revised EM 1229  
 45 Revised EM 1230  
 46 Revised EM 1233  
 47 FW Act s 536KQJ(1)  
 48 FW Act s 536KQJ(4)

- 3.28 Deferral declarations must not be made to a RTMSO that has already come into operation<sup>49</sup> and the FWC may only make one full deferral determination in relation to a particular RTMSO.<sup>50</sup> However, the FWC may make more than one part deferral determination in relation to a particular RTMSO.<sup>51</sup>
- 3.29 An RTMSO is not in operation during any period when a full deferral determination is in place but is in operation when a part deferral determination is in operation.<sup>52</sup>
- 3.30 If an application for a deferral determination in relation to a RTMSO is made, the FWC must consider the application as soon as practicable and also consult the RTAG before making a decision on the application. The FWC may decide to make, or not to make a deferral determination and must publish a deferral determination on the FWC's website and by any other means the FWC considers appropriate.<sup>53</sup>

#### **Illustrative example: Deferral determination in relation to a RTMSO**

Travels Together, a registered organisation entitled to represent the industrial interests of regulated road transport contractor Jai, applies for a deferral determination in relation to an RTMSO. In the application, they provide significant new facts or evidence that has come to light, in particular unanticipated market forces resulting in the price of business doubling in recent months.

The FWC assesses the application and finds that the RTMSO will not provide an appropriate safety net for parties in the road transport industry, having regard to the minimum standards objective and road transport objective.

The FWC decides it is appropriate to defer the operation of the RTMSO.

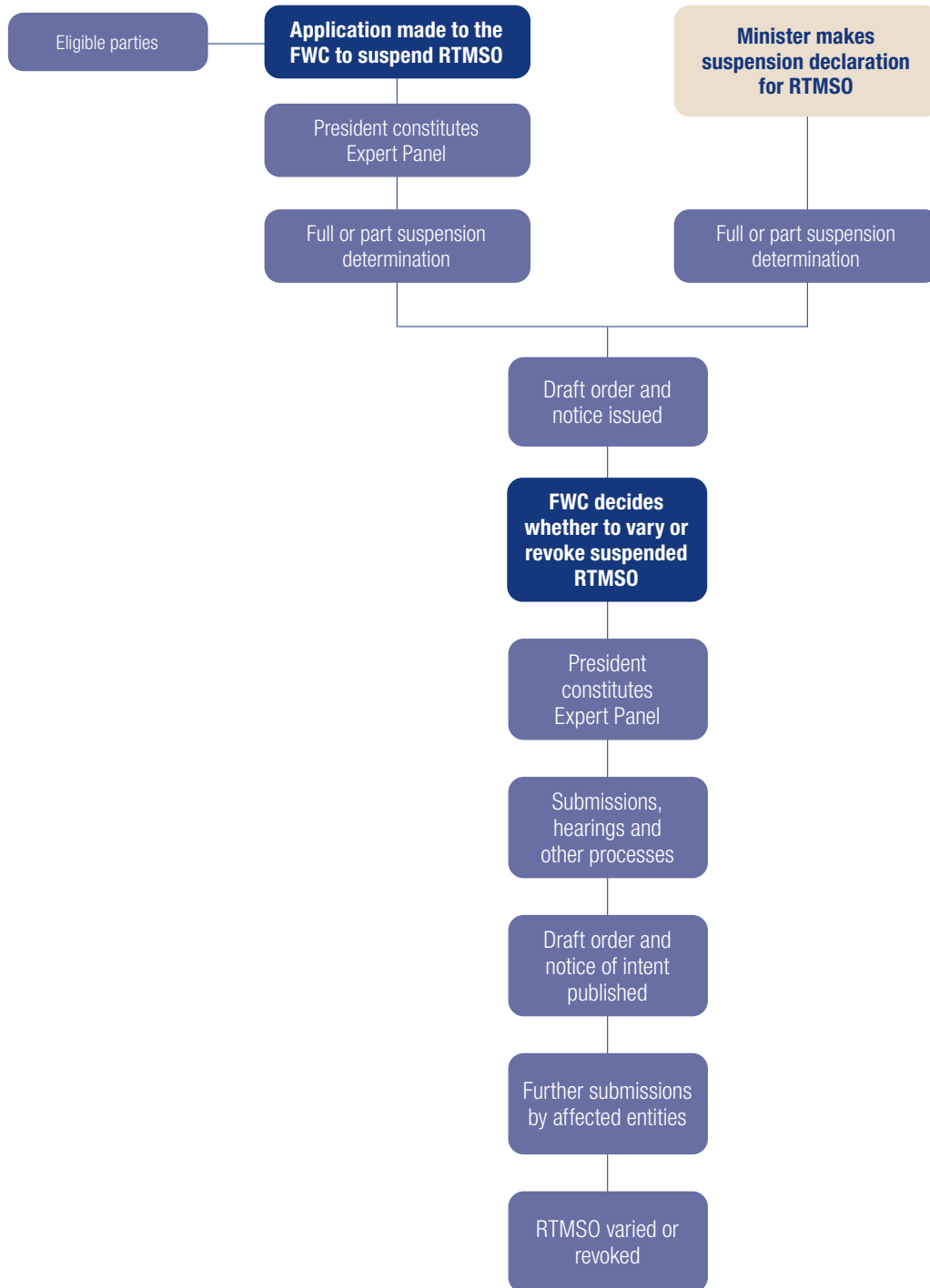
#### **Suspension determinations for an RTMSO**

- 3.31 An application may be made to the FWC for a determination (a suspension determination) under subsection 536KQP(1) in relation to RTMSOs.<sup>54</sup>
- 3.32 Eligible persons may apply to the FWC for a suspension determination:
- a. suspending the operation of an order, or
  - b. suspending the application of all of the terms (or specified terms) of an order to a specified class or specified classes or persons; or specified terms of an order to all persons.<sup>55</sup>
- 3.33 If the FWC makes a suspension determination in relation to a RTMSO, the suspension determination must not be for a period of more than 12 months.<sup>56</sup>
- 3.34 If an application for a suspension determination in relation to a RTMSO is made, the FWC must consider the application as soon as practicable and consult the RTAG before making a decision on the application.<sup>57</sup>
- 3.35 A RTMSO is not in operation during any period when a full suspension determination is in place but is in operation when a part suspension determination is in operation.<sup>58</sup>

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49 FW Act s 536KQK(1)  
 50 FW Act s 536KQK(2)  
 51 FW Act s 536KQK(4)  
 52 FW Act s 536KQL  
 53 FW Act s 536KQM  
 54 FW Act s 536KQN  
 55 FW Act s 536KQP  
 56 FW Act s 536KQP  
 57 FW Act s 536KQQ  
 58 FW Act s 536KQR

## Flowchart 2 — Process for full or part suspension determinations/ declarations for RTMSOs



# 4. Minimum Standards Guidelines

**Commencement:** 26 August 2024

**Transitional arrangements:** Monitor the progress of the FWC in making Minimum Standards Guidelines.

## Highlights

- The legislation also introduces a system for the creation of 'Minimum Standards Guidelines' (MSGs) for Regulated Road Transport Contractors.
- MSGs are subject to similar rules to MSOs however would set non-binding minimum standards.
- An MSG cannot be made where an MSO covers the same subject matter.
- In making MSGs for the road transport industry, the FWC must take into account the 'road transport objective' (section 40D). MSGs will be made under section 536KR.

## Changes

### What are MSGs?

- 4.1 The FWC may make MSGs that set standards for regulated workers who perform work under a services contract. The FWC may make MSGs on its own initiative or on application under section 536KS.
- 4.2 The Guidelines are likely to establish best practice for operators and set out behaviours/conditions that are 'desirable' without being mandatory in all contexts.
- 4.3 Given that MSOs are legally binding and the breach of MSOs gives rise to fines, the FWC will adopt a very considered and cautious approach regarding what provisions are included in an MSO. By contrast, allowing the FWC to set Guidelines gives the FWC the flexibility to provide significantly greater guidance as to what is desirable without being concerned that their guidance might not be able to be complied with in all circumstances. It also minimises the prospect of public outcry if some provisions are difficult to comply with because the operator can elect not to comply, should they wish.
- 4.4 In practice, Guidelines are also likely to have a 'precursor' or 'trial' characteristic. That is, if the FWC was not satisfied whether to include a particular term into an MSO, the FWC might include the term into a Guideline to monitor how the term operates in practice. If the term appears over time to be adopted successfully in practice, it is likely that subsequent applications might be made by parties to include the term into MSOs.

### Who do they apply to?

- 4.5 MSGs apply to the regulated workers who are identified in the MSG's coverage clause.
- 4.6 There are two types of MSGs. These are:
  - a. employee-like worker guidelines (see subsection 536KR(2))
  - b. road transport guidelines (see subsection 536KR(3)).<sup>59</sup>
- 4.7 The coverage clause of an MSG might be expressed:
  - a. to apply to classes of operators or workers (i.e. described by reference to their activities); or
  - b. to apply to specifically named regulated businesses and their relevant regulated workers (i.e. described by referencing the business that is covered).

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59 FW Act s15D

## Example

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

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

### What can they contain?

4.8 MSGs must include terms setting out the same matters in relation to MSOs.<sup>60</sup>

### What can't they contain?

4.9 MSGs must not include terms about any of the matters that must not be included in relation to MSOs.<sup>61</sup>

### Process for making MSGs

4.10 Applications for MSGs may be made by:

- an organisation entitled to represent (i.e. a union), or another body that represents, the industrial interests of one or more regulated workers covered by the proposed MSGs;
- an organisation that is entitled to represent the industrial interests of one or more of the regulated businesses that would be covered by the proposed MSGs;
- a regulated business that is included in a class of regulated businesses that would be covered by the proposed MSGs;
- the Minister.<sup>62</sup>

4.11 An application for MSGs needs to specify the class of regulated workers to be covered by the guidelines, along with the class of regulated businesses to be covered. Note, the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.<sup>63</sup>

4.12 Before making a decision to make or vary, or not to make or vary, guidelines, the FWC must consider whether the class of regulated road transport contractors to be covered by the proposed MSG, or guidelines as proposed to be varied, are regulated road transport contractors. If the FWC aren't satisfied that the persons aren't in the class of regulated road transport contractors then the FWC may decide to refuse to consider the application, or not to make or vary the guidelines.<sup>64</sup> Circumstances where this might arise is where the workers don't meet the relevant test set out above. For instance, there might be significant doubt as to whether the workers have low bargaining power or authority over how they perform the work. The types of bargaining power/authority over how the workers perform their work might be quite varied across an industry making it impossible to define or treat the class in the same way.

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

- refuse to consider the application; or
- make MSGs; or
- not make MSGs; or
- instead make an order under section 536JY(1), as if the application had been an application for an order in relation to regulated workers.<sup>65</sup>

4.14 The FWC must not make MSGs that cover the same regulated workers and the same regulated businesses where an MSO is in operation.<sup>66</sup>

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60 FW Act s 536KW)

61 FW Act s 536KY

62 FW Act s 536KS

63 FW Act s 536KS

64 FW Act s 536KT

65 FW Act s 536KV

66 FW Act s 536KU

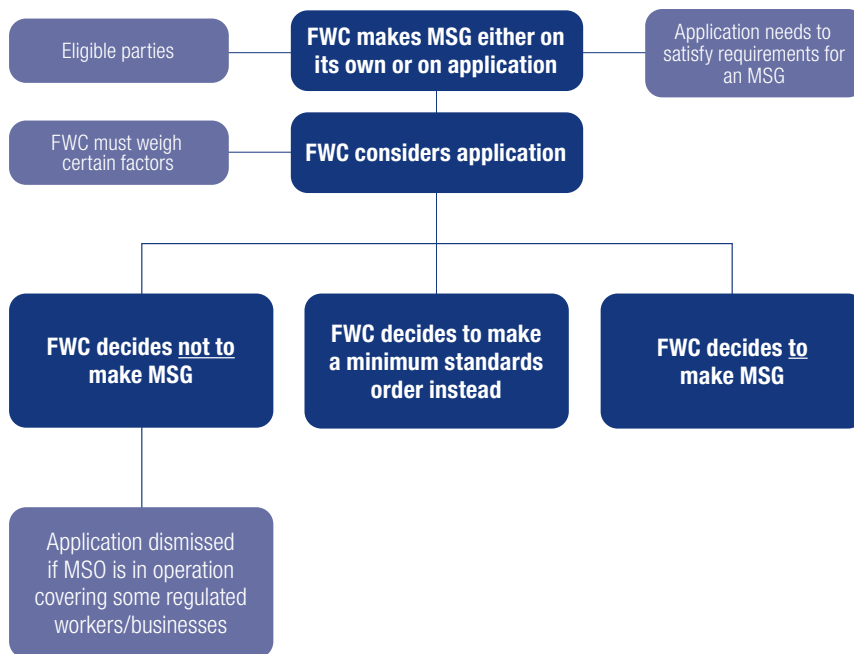
4.15 The FWC may make a determination varying or revoking guidelines if the FWC is satisfied that making the determination is consistent with the minimum standards objective; and if it relates to the road transport industry, the road transport objective. Not all of the elements of the variation might be included in a determination.<sup>67</sup>

**Process on varying or revoking minimum standards guidelines**

- 4.16 The following organisations can make an application to the FWC to vary or revoke MSGs:
- a. an organisation entitled to represent, or another body that represents, the industrial interests of one or more regulated workers covered by the proposed MSGs (i.e. a union);
  - b. an organisation that is entitled to represent the industrial interests of one or more of the regulated businesses that would be covered by the proposed MSGs (i.e. an employer or business association);
  - c. a regulated business that is included in a class of regulated businesses that would be covered by the proposed MSGs;
  - d. the Minister.<sup>68</sup>

4.17 A determination for revoking MSGs would operate on the day specified in that determination; which must not be earlier than the day on which the determination is made.<sup>69</sup>

4.18 MSGs continue to operate until they are revoked.<sup>70</sup>



67 FW Act s 536KZ  
 68 FW Act s 536KS  
 69 Revised EM 1242.  
 70 Revised EM 1243

# 5. Contractual Chain Orders and Guidelines

**Commencement:** 26 August 2024

**Transitional arrangements:** Monitor the progress of the FWC in making road transport contractual chain orders and guidelines.

## Highlights

- The new legislation provides power to the Minister to introduce laws regulating the 'road transport industry contract chain' and its participants.
- It also provides for the FWC to make road transport contractual chain orders and guidelines for road transport contractors and road transport employee-like workers. These powers include:
  - empowering the FWC to make orders known as Road Transport Industry Contract Chain Orders that confer rights and impose obligations on road transport industry contracted chain participants;
  - empowering the FWC to vary, suspend or revoke Road Transport Industry Contract Chain Orders;
  - empowering the FWC to deal with disputes between Road Transport Industry Contract Chain participants covered by Road Transport Industry Contract Chain Orders;
  - providing for the interaction between the Road Transport Industry Contract Chain Orders, Fair Work instruments and other instruments under the FW Act or the Regulations.

## Changes

### What is a road transport contractual chain (RTCC)?

- 5.1 A RTCC means a chain or series of contracts or arrangements:
- a. under which work is performed for a party to the first contract or arrangement in the chain or series by a regulated road transport contractor or road transport employee-like worker under a services contract, or by an employee; and
  - b. in which at least one party to the first contract or arrangement in the chain or series is a constitutional corporation.<sup>71</sup>
- 5.2 Constitutional corporations that receive services under a road transport contract which pertain to the road transport industry are the types of principal contractors who will be subject to MSOs.

### Exclusion of certain State and Territory Laws

- 5.3 The rights, entitlements, obligations and liabilities of a person in a RTCC are not affected by a law of a State or Territory that is specified in regulations made for the purposes of the RTCC.<sup>72</sup> A road transport contractual chain prevails over a law of a State or Territory, to the extent of any inconsistency.<sup>73</sup>

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<sup>71</sup> FW Act s15RA(1)

<sup>72</sup> FW Act s536NW

<sup>73</sup> FW Act s536NZ

### Who is in the RTCC?

- 5.4 A person is in a RTCC if:
- the person is a party (primary party) to the first contract or arrangement in the road transport contractual chain; or
  - the person is a party (secondary party) to a subsequent contract or arrangement in the road transport contractual chain, being a contract or arrangement under which work is performed for the secondary party by a regulated road transport contractor or a road transport employee-like worker under a services contract, or by an employee; or
  - the person is a regulated road transport contractor or a road transport employee-like worker who performs work under a services contract in the road transport contractual chain.<sup>74</sup>
- 5.5 An individual is not in a road transport contractual chain if the delivery or consignment is solely for the individual's private or domestic purposes.<sup>75</sup>

### Road Transport Contractual Chain Orders (RTCCO)

- 5.6 The Minister has been granted power to make regulations regulating the RTCC in section 536PD. This includes:
- empowering the FWC to make orders known as Road Transport Industry Contract Chain Orders that confer rights and impose obligations on road transport industry contracted chain participants;
  - empowering the FWC to vary, suspend or revoke Road Transport Industry Contract Chain Orders;
  - empowering the FWC to deal with disputes between Road Transport Industry Contract Chain participants covered by Road Transport Industry Contract Chain Orders;
  - providing for the interaction between the Road Transport Industry Contract Chain Orders, Fair Work instruments and other instruments under the FW Act or the Regulations.
- 5.7 The FWC must have regard to the minimum standards objective and road transport objective in making RTCCOs (sections 536NN and 40D). Refer to section 2.7 of this document for further information.

### Who do they apply to?

- 5.8 The persons that will be able to apply for a RTCCO to be made under section 536PE are:
- 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.

### Who can they contain?

- 5.9 Terms that must be included in a RTCCO include those related to coverage.<sup>76</sup> For example, this would include the work and people in the road transport industry or RTCC covered by the RTCCO.
- 5.10 Terms that may be included in a road transport contractual chain order (RTCCO) would be:
- payment times;
  - fuel levies;
  - rate reviews;
  - termination, including one way termination for convenience;
  - cost recovery.<sup>77</sup>
- 5.11 Other matters not listed above would be able to be included in a RTCCO provided they are not terms that must not be included in an order.

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74 FW Act s15RA(2)

75 FW Act s15RA(3)

76 FW Act s536PM

77 FW Act s536PQ

## What can't they contain?

5.12 Terms that must not be included in a RTCCO are:

- a. overtime rates
- b. rostering arrangements
- c. a term that would change the form of engagement
- d. a matter relating to work health and safety
- e. matters prescribed by the regulations
- f. matters relating to road transport that are otherwise dealt with by the Heavy Vehicle National Law as set out in Heavy Vehicle National Law Act 2012 (Qld); or by another law of the Commonwealth, a State or a Territory.<sup>78</sup>

### Illustrative example: Terms that may be included in a RTCCO

The FWC makes an order applying to participants in contractual chains for the transport of canned vegetables from producers/manufacturers to supermarkets where the trip originates and terminates in New South Wales, Victoria or Queensland. The order requires (the fuel levy requirements):

- relevant contracts to include a fuel price adjustment clause, or otherwise provide for compensation for fuel costs incurred in performing the contract;
- the clause or compensation to take into account the amount of the Road User Charge, including (where a contract is of more than 6 months duration) the capacity to make an adjustment for any changes in the charge no later than 6 months after commencement of the contract; and
- the clause or compensation to provide for a proportionate adjustment for a part load.

Viennamart supermarket contracts Yvie Foods to deliver pallets of tinned tomatoes from its manufacturing facilities to Viennamart distribution centres in Queensland. Yvie Foods contracts Wolfox to deliver the pallets. Wolfox performs some of the work itself, using employee drivers, and subcontracts the rest of the work to transport company Diesel's Deliveries, which further subcontracts certain deliveries to independent contractor Sofie. Sofie uses their own truck to collect pallets from a Yvie Foods facility in Toowoomba and deliver them to Viennamart distribution centres in Brisbane.

In this scenario, Viennamart, Yvie Foods, Wolfox, Diesel's Deliveries and Sofie are participants in a contractual chain for the delivery of tinned tomatoes. The primary parties to the original contract for road transport work are Viennamart and Yvie Foods. The secondary parties in the contractual chain are Wolfox and Diesel's Deliveries. The driver who performs the work is Sofie.

The coverage of the order is the transport of canned vegetables from producers/manufacturers to supermarkets where the trip originates and terminates in New South Wales, Victoria or Queensland. Transporting pallets of tinned tomatoes from the Yvie Foods facility in Toowoomba to Viennamart Distribution centres in Brisbane falls within this coverage.

The order requires Viennamart, Yvie Foods, Wolfox and Diesel's Deliveries to include a clause in their contracts with each other and the driver that meets the fuel levy requirements. As Sofie works for Diesel's Deliveries on rolling 12-month contracts, their contract must include a clause to allow for adjustment for any changes in the Road User Charge at 6 months after commencement.

On one job to deliver tinned tomatoes from Yvie Foods to Viennamart, Sofie's trailer is only 70% full. To fill up the remaining 30% of the trailer, Sofie secures another contract to take on a part load of canned corn from a dairy company in Toowoomba and deliver to a Mike's Market distribution centre in Brisbane.

Under the contract, Diesel's Deliveries compensates Sofie for their fuel costs for the trip from Toowoomba to Brisbane, including compensation for the cost incurred by Sofie as a result of the Road User Charge. Because the trailer is only 70% full, the amount is adjusted under the contract to compensate at a 70% rate. The contract to deliver canned corn to Mike's Market is also covered by the order and so also include a clause that meets the fuel levy requirements. The fuel compensation for that part of the load is calculated on a proportionate 30% basis, again taking into account the road user charge.

78 FW Act s536PR

## Process in detail

- 5.13 Consultation requirements for making RTCCOs are similar to those apply to MSOs (see section 3 of this guide). Chapter 3B, Part 3B-1, Subdivision D of the FW Act also sets out the decisions that the FWC can make in regard to a RTCCO application, again, which mirror the provisions for Chapter 3A, Part 3A-2, including:
- refusing to consider the application
  - making an order
  - not making an order and
  - making guidelines instead of an order.
- 5.14 Before making RTCCOs, the FWC must:

Process step	Content of step FWC must take
<b>Notice of intent</b>	Publish a notice (a notice of intent) stating that the FWC proposes to make a RTCCO and publish a draft of the RTCCO. <sup>79</sup>
<b>Publication of Notice</b>	Publication would occur on the FWC website and any other considered relevant by the FWC. <sup>80</sup>
<b>Written response to draft order</b>	The FWC is to ensure that affected entities have a reasonable opportunity to make written submissions to the FWC in relation to the draft of a RTCCO. Submissions (other than those which contain confidential or commercially sensitive information) are to be published by the FWC. Those which contain confidential or commercially sensitive information may either not be published or be published in a summary form without confidential or commercially sensitive information.
<b>Hearing optional but not mandatory</b>	The FWC may hold a hearing in relation to a draft RTCCO but is not required to do so. <sup>81</sup>
<b>Finalising draft order</b>	The FWC may make any changes it thinks appropriate to a draft RTCCO however, if these changes are significant, the FWC must commence a new statement of intent in relation to the revised draft RTCCO and follow a new consultation process with respect to the newly drafted RTCCO. <sup>82</sup> RTCCOs take effect 12 months after the FINAL notice of intent is published. <sup>83</sup>
<b>Decision not to make MSO</b>	The FWC may decide that no RTCCO is to be made based on the draft. If the FWC does so, the FWC must publish notice of the decision on its website and by any other means the FWC considers appropriate. <sup>84</sup>

## When a road transport contractual chain order RTCCO is in operation

- 5.15 A RTCCO comes into operation on the day specified in the order. The specified day must not be earlier than 12 months after the relevant notice of intent for the order was published.<sup>85</sup>
- 5.16 There are further provisions relating to Ministerial declarations to defer or suspend RTCCOs and provisions relating to FWC determinations to defer or suspend. These largely mirror the provisions outlined above in relation to MSOs.

## When a determination varying or revoking a RTCCO comes into operation

- 5.17 A determination varying or revoking a RTCCO comes into operation on the day specified in the determination. The specified day must not be earlier than the day the determination is made.<sup>86</sup>
- 5.18 Section 536PF will require the FWC to take particular matters into account in deciding whether to make or vary a RTCCO. The FWC:
- must not make or vary the RTCCO unless there has been genuine engagement and consultation with the parties to be covered;

79 FW Act s 536PG  
 80 FW Act s 536PH  
 81 FW Act s 536PH  
 82 FW Act s 536PJ  
 83 FW Act s 536PH  
 84 FW Act s 536PK  
 85 FW Act s536NT  
 86 FW Act s536NT(6)

- b. ensure that the RTAG has been consulted regarding to the RTCCO;
- c. must have regard to the commercial realities of the road transport industry;
- d. be satisfied that the making or varying of the RTCCO will not unduly affect the viability and competitiveness of parties;
- e. must take into account any current or proposed RTCCO and any current or proposed MSOs; and
- f. ensure that the coverage of the RTCCO is clear.<sup>87</sup>

## Road Transport Contractual Chain Guidelines (RTCCGs)

- 5.19 The FWC is also empowered to make road transport contractual chain guidelines that set standards for regulated road transport contractors, road transport employee-like workers and other persons in a road transport contractual chain.<sup>88</sup>
- 5.20 The FWC must have regard to the minimum standards objective and road transport objective in making RTCCGs (sections 536NN and 40D).
- 5.21 The FWC must not make RTCCGs that cover the same persons in a RTCC in relation to the same matters as a RTCCO that is in operation.<sup>89</sup>

### Who do they apply to?

- 5.22 The persons that will be able to apply for a RTCCO to be made under section 536QQ are:
  - a. an organisation that is entitled to represent the industrial interests of one or more persons in a road transport contractual chain;
  - b. a regulated business in a road transport contractual chain;
  - c. a person who is a primary party to the first contract or arrangement in a road transport contractual chain;
  - d. the Minister; or
  - e. a person or body prescribed by the regulations.<sup>90</sup>

### What can they contain?

- 5.23 Terms that must be included in RTCCGs include terms setting out the same matters as RTCCOs in section 536PM of the FW Act.<sup>91</sup> See the section above on RTCCOs.
- 5.24 Terms that may be included in RTCCGs include terms about any of the matters that may be included in RTCCOs under section 536PQ of the FW Act.<sup>92</sup> See the section above on RTCCOs.

### What can't they contain?

- 5.25 Terms that must not be included in RTCCGs include terms about any of the matters that must not be included in RTCCOs as set out in 536PR of the FW Act.<sup>93</sup> See the section above on RTCCOs.

### Process in detail

- 5.26 If an application for RTCCGs is made to the FWC, the FWC may decide to:
  - a. refuse to consider the application
  - b. make RTCCGs under subsection 536QP
  - c. not make RTCCGs or
  - d. make an order instead of guidelines

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87 FW Act s536PF  
 88 FW Act s536QP  
 89 FW Act s536QS  
 90 FW Act s536QQ  
 91 FW Act s536QT  
 92 FW Act s536QU  
 93 FW Act s536QV

**When a road transport contractual chain guidelines (RTCCG) in operation**

5.27 RTCCGs come into operation on the day specified in the guidelines. The specified day must not be earlier than the day on which the road transport contractual chain guidelines are made.<sup>94</sup>

**When a determination varying or revoking a RTCCG come into operation**

5.28 A determination varying or revoking RTCCGs comes into operation on the day specified in the determination. The specified day must not be earlier than the day the determination is made.<sup>95</sup>

**Flowchart 4 — Process for making RTCC Orders or Guidelines**



94 FW Act s536NV(1-2)

95 FW Act s536NV(3-4)

# 6. Collective Agreements

**Commencement:** 26 August 2024

**Transitional arrangements:** Consider whether there is any benefit to pursuing a collective agreement and/or whether there is a likelihood that workers and/or a union may pursue one.

## Highlights

- The Fair Work Commission will now be able to register collective agreements made by consent between Regulated Road Transport Contractors and organisations entitled to represent such contractors.
- The Fair Work Commission must register agreements lodged with it by consent. There is, however, a requirement that any collective agreement made is more beneficial to the Regulated Road Transport Contractors than any Minimum Standards Order that might otherwise apply to them.
- Collective Agreements can only be terminated pursuant to an arrangement recorded in the collective agreement which enables the agreement's termination. Such termination provisions are compulsory, but their precise operation can be negotiated by the parties.
- The legislation would also expressly permit all conduct associated with the making of a collective agreement as well as all conduct incidental to or in preparation for the making of a collective agreement for Regulated Road Transport Contractors for the purposes of competition and consumer laws. This has the effect of ensuring that such conduct does not breach the Competition Code. However, boycott conduct is not permitted by the legislative reforms and may still breach the Competition Code (subject to whether its provisions are triggered in a specific case).

## Changes

### Who can a collective agreement apply to?

- 6.1 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, in respect of the following:
  - a. the terms and conditions on which regulated road transport contractors covered by the collective agreement work, under services contracts to which the road transport business is a party; and
  - b. how the collective agreement will operate.<sup>96</sup>
- 6.2 These types of collective agreements are referred to as a road transport collective agreement.<sup>97</sup>
- 6.3 A collective agreement is effectively a set of terms and conditions that apply collectively as a minimum safety net to the whole group of contractors specified in the agreement. It does not operate as a contract for each regulated road transport contractors, but rather as a minimum set of terms that the individual contracts must comply with.
- 6.4 The process for making collective agreements is addressed in detail further below.

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<sup>96</sup> FW Act s 536MK

<sup>97</sup> FW Act s 536MK(5)

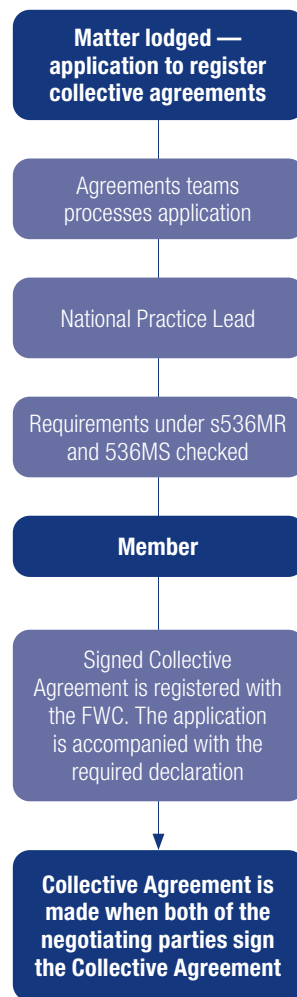
### When does a collective agreement cover a regulated worker, a regulated business or an organisation?

- 6.5 A collective agreement covers a regulated worker (e.g. a road transport contractor), a regulated business (e.g. a principal engaging the road transport contractor) or an organisation (e.g. a union) if the agreement is expressed to cover the regulated worker, the regulated business or the organisation.<sup>98</sup>
- 6.6 A collective agreement also covers a regulated worker, a regulated business or an organisation if any of the following provides, or has the effect, that the agreement covers the regulated worker, the regulated business or the organisation:
- a provision of the FW Act;
  - and FWC order made under a provision of the FW Act;
  - an order of a court.<sup>99</sup>

### When a collective agreement is in operation

- 6.7 A collective agreement comes into operation on the day that it is registered or if a later day is specified in the collective agreement — on that later day.<sup>100</sup>
- 6.8 A person must not contravene a term of a collective agreement. Civil remedies may be sought in relation to a contravention. A person does not contravene a term of a collective agreement unless it applies to them.<sup>101</sup>

## Flowchart 5 — Process for making Collective Agreements



98 FW Act s 536JM

99 FW Act s 536JM

100 RFW Act s 536JN

101 Revised EM 1244-46

## Process for making a collective agreement in detail

- 6.9 A regulated business that will be covered by the proposed collective agreement or an organisation that is entitled to represent the industrial interests of one or more regulated workers who will be covered by the proposed collective agreement may initiate a consultation period for a proposed collective agreement by giving a notice under section 536ML of the FW Act.<sup>102</sup>

### The consultation notice

#### What must go into the notice

- a. the notifying entity
- b. if the notifying entity is a regulated business — the name of the organisation, otherwise the name of the organisation giving the consultation notice
- c. matters to be dealt with by the proposed collective agreement
- d. the regulated business that will be covered by the proposed collective agreement
- e. the class of regulated workers who will be covered by the proposed collective agreement.<sup>103</sup>

### Serving the consultation notice

- 6.10 A consultation notice for a proposed collective agreement must be given on the same day to the FWC and to either:
- a. if the notifying entity is a regulated business to an organisation that is entitled to represent the industrial interests of the regulated road transport contractors who will be covered by the proposed collective agreement;
  - b. otherwise to the regulated business that will be covered by the agreement.<sup>104</sup>

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

### Notifying to regulated workers

- 6.11 After a consultation notice has been given for the proposed collective agreement, the negotiating entities must make reasonable efforts to give notice for a proposed road transport collective agreement to each eligible regulated road transport contractors for the proposed collective agreement.<sup>105</sup>
- 6.12 This would likely require the negotiating entities to communicate the notice in a manner that they would expect the contractors would be able to receive the communication. For instance, if the contractors have email addresses, the notice could be communicated by email. If the contractors do not have email addresses, then other forms of communication could be required like posting the notice to their homes or pushing notifications to the contractors through an app.
- 6.13 The notice must specify:
- a. the regulated business that will be covered by the proposed collective agreement;
  - b. the class of regulated workers that will be covered by the proposed collective agreement;
  - c. the organisation that will sign the proposed collective agreement; and
  - d. the matters proposed to be dealt with in the proposed collective agreement.<sup>106</sup>
- 6.14 For the purposes of this section above, an eligible regulated road transport contractor for a proposed road transport collective agreement is a regulated road transport contractor who, at any time during the period of 28 days before the consultation notice was given, was performing work under a services contract to which a road transport business that will be covered by the proposed collective agreement is a party.<sup>107</sup>

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102 FW Act s 536ML

103 FW Act s 536ML

104 FW Act s 536MM

105 FW Act s 536MM (2).

106 FW Act s 536MM

107 FW Act s 536MN(4)

### Disputes during the negotiation period

- 6.15 Either negotiating entity may apply to the FWC for the FWC to deal with a dispute regarding a proposed collective agreement. If an application is made by either negotiating entities, the FWC must deal with the dispute (other than by arbitration), in ways it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion.<sup>108</sup> The disputes that are likely to arise are almost entirely likely to relate to the terms that should be included in the collective agreement. By way of example, disputes might arise with respect to:
- rates of pay;
  - the right of union delegates to have access to workers for the purposes of induction;
  - rostering provisions;
  - training;
  - provision of equipment or uniforms;
  - duration of the collective agreement; and
  - any other term upon which the parties might not be able to reach agreement.
- 6.16 The FWC may dismiss an application for dispute resolution if satisfied that there are no reasonable prospects of the negotiating entities for the proposed collective agreement reaching agreement.<sup>109</sup>

### When is the collective agreement made?

- 6.17 The collective agreement is made when both of the negotiating parties for the agreement sign the collective agreement.<sup>110</sup>
- 6.18 Unlike the enterprise agreement making process, there is no voting requirement in relation to the collective agreement. Provided both negotiating parties sign the agreement, then the agreement is made.

### Registering the agreement with the FWC

- 6.19 If a collective agreement is made, a negotiating entity for the agreement that signed the agreement may apply to the FWC to register the agreement, with the consent of the other negotiating entity.<sup>111</sup>
- 6.20 The application must be accompanied by a signed copy of the collective agreement, which identifies the regulated business, organisation and class of regulated workers covered by the collective agreement.

#### **Pre-requisites for approval**

The application must also include a declaration signed by the regulated business and the organisation covered by the collective agreement which must:<sup>112</sup>

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

The FWC must also be satisfied that:

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

108 FW Act s 536MP

109 FW Act s 536MP

110 FW Act s 536MQ

111 FW Act s 536(MR)

112 FW Act s 536(MR)

6.21 The application must also be accompanied by any other declaration required by the procedural rules.<sup>113</sup>

6.22 The FWC must publish a copy of the collective agreement and the declaration on the FWC's website.<sup>114</sup>

### Process for varying collective agreements

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

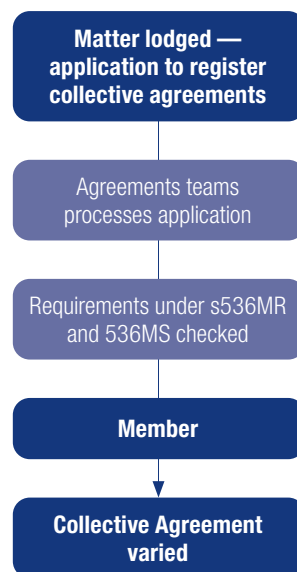
6.24 The application must be accompanied by a signed copy of the collective agreement as proposed to be varied, identifying the regulated business, organisation and class of regulated workers covered by the collective agreement, as proposed to be varied.<sup>115</sup>

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

- a. state that the regulated business and the organisation explained the terms of the agreement and their effect to the regulated workers covered by the agreement as proposed to be varied, and a description of the explanation;
- b. if an MSO is in operation covering the same class of workers, specify how the collective agreement as proposed to be varied, is more beneficial to the regulated workers covered by the collective agreement as proposed to be varied; and
- c. state that no parties were subject to any form of duress in relation to the variation of the agreement.

The application must also be accompanied by any other declaration required by the procedural rules.<sup>116</sup>

## Flowchart 6 — Process for varying Collective Agreements



6.26 The FWC must register the agreement if the requirements set out above (in accordance with section 536MT of the Act) are met in relation to the variation of the agreement. The FWC must also be satisfied that the variation of the agreement isn't contrary to public interest and must publish a copy of the collective agreement, as varied, on the FWC's website. The variation comes into operation when the agreement as varied is registered.<sup>117</sup>

113 FW Act s 536(MR).

114 FW Act s 536(MS).

115 FW Act s 536(MT)

116 FW Act s 536(MT)

117 FW Act s 536MS

### **When is a matter contrary to the public interest?**

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

The public interest may be affected where an agreement affects matters broader than the public. For example, an agreement might be contrary to the public interest if it:

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

### **Process for terminating collective agreements**

- 6.27 If a collective agreement has been terminated it must be done so in accordance with the process specified in the agreement for terminating the agreement before the end of its period of operation. The regulated business or the organisation covered by the collective agreement must, with the consent of the other, notify the FWC of the termination on the date the agreement is terminated. Notification must be accompanied by a declaration signed by the regulated business and the organisation covered by the collective agreement stating that the collective agreement has been terminated in accordance with the required process and specify the effective termination date. The application must also be accompanied by any other declaration required by the procedural rules.<sup>118</sup>
- 6.28 If a compliant notice is given to the FWC, the FWC must register the termination by publishing a notice on the FWC's website stating that the collective agreement has been terminated and specify the date of effect of the termination. The collective agreement ceases to operate on the date of effect of the termination specified in the declaration.<sup>119</sup>
- 6.29 A collective agreement would not cover a regulated worker, business or an organisation where it has ceased to operate.<sup>120</sup>
- 6.30 A collective agreement would continue in operation until it is terminated.<sup>121</sup>

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118 FW Act s 536MS

119 FW Act s 536MS

120 Revised EM 1256

121 Revised EM 1260

# 7. Unfair Termination

**Commencement:** 26 August 2024

**Transitional arrangements:** Regulated road transport contractors will be able to 'challenge' terminations from 26 August 2024. Operators should review their termination policies and practices to ensure they are compliant with the new regime.

## Highlights

- The Fair Work Commission will also receive a new jurisdiction to deal with 'unfair terminations', in essence, an unfair dismissal jurisdiction for Regulated Road Transport Contractors.
- A Regulated Road Transport Contractor is protected from unfair termination if they have been party to a service contract in the road transport industry and have been performing work on under the contract for a period of at least 6 months.
- An unfair termination is where:
  - the Road Transport Contractor's contract has been terminated;
  - the termination was unfair; and
  - the termination was not consistent with the Road Transport Industry Termination Code.
  - Like the current unfair dismissal regime for employees, the new jurisdiction is subject to a high-income threshold (yet to be published) and includes a 21-day filing limit.
- In order to determine whether a termination is unfair — the Fair Work Commission 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 Road Transport Industry Termination Code (to be drafted by the Minister) were followed.
- Remedies for unfair termination include:
  - reinstatement to a new contract;
  - restoration of lost pay, where an employee has been reinstated; and
  - where reinstatement to a new services contract would be inappropriate, compensation.

## Changes

### What is an unfair termination?

- 7.1 A person has been unfairly terminated if:
- a. the person was performing work in the road transport industry; and
  - b. the person has been terminated; and
  - c. the termination was unfair; and
  - d. the termination was not consistent with the Road Transport Industry Termination Code.<sup>122</sup>

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122 FW Act s536LK

## What is the Road Transport Industry Termination Code?

- 7.2 The Minister may make a code to be known as the Road Transport Industry Termination Code to deal with:
- matters that constitute or may constitute a valid reason for termination;
  - rights of response to terminations;
  - 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.<sup>123</sup>
- 7.3 A person's termination was consistent with the Road Transport Industry Termination Code if, immediately before the time of the termination, or at the time the person was given notice of the termination (whichever happened first), the regulated 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 Road Transport Industry Termination Code.<sup>124</sup>

## When is a person protected from unfair termination?

- 7.4 A person is protected from unfair termination at a time if, at that time:
- the person is regulated 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 services contracts, under which that road transport business receives services for a period of at least 6 months.<sup>125</sup>



## When is a termination unfair?

- 7.5 The FWC will take into account the following in considering whether a termination was unfair:
- whether there was a valid reason for the termination related to the person's capacity or conduct; and
  - whether any relevant processes outlined in the Road Transport Industry Termination Code were followed; and
  - any other matters that the FWC considers relevant.<sup>126</sup>

## Application process

- 7.6 A person who has been terminated may apply to the FWC for an order granting a remedy for unfair termination, and for application fees.<sup>127</sup> A person must not make an application unless their annual rate of earning is less than the contractor high income threshold, yet to be established at the time of writing.<sup>128</sup>
- 7.7 Applications are to be made within 21 days of the termination unless otherwise allowed by the FWC, in cases of exceptional circumstances.<sup>129</sup> An application fee may be prescribed.
- 7.8 The FWC must decide whether the application was made within the period required in subsection 536LU(3), whether the person was protected from unfair deactivation and whether the deactivation was consistent with the Road Transport Industry Termination Code.<sup>130</sup>

123 FW Act s536LN(1-2)

124 FW Act s536LN(3)

125 FW Act s 536LE.

126 FW Act s536LM

127 FW Act s 536(LU (1))

128 FW Act s 536(LU (2))

129 FW Act s 536(LU (4))

130 FW Act s 536(LW).

## Flowchart 7 — Unfair termination application process



### Remedies available

#### **Primary remedy is entry into new contract**

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

- 7.9 The FWC may order a person's reinstatement if satisfied that the person was protected from unfair termination and that the person has been unfairly terminated.<sup>131</sup>
- 7.10 Remedies include reinstatement and restoring lost pay.

### Reinstatement

- 7.11 An order for a person's new contract must be 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 is no longer operating at the time of the termination and an associated entity of the road transport business is a road transport business; the order may be an order to the associated entity to enter into a new contract on terms and conditions no less favourable than the services contract immediately before termination.<sup>132</sup>
- 7.12 The FWC may also make an order to restore lost pay for the remuneration lost, or likely to have been lost, by the person because of the termination.<sup>133</sup>

### Compensation

- 7.13 If it considers to be appropriate, the FWC may also make an order to cause the road transport business to pay compensation to the person who was terminated in lieu of entering into a new services contract. In determining an amount for the purposes of an order, the FWC will consider the effect of the order on the viability of the road transport business; the remuneration that the person would have received, or would have been likely to receive, if the person had not been terminated; the efforts of the person to mitigate the loss suffered because of the termination; the amount of any remuneration earned by the person from work of any kind during the period of termination; 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.<sup>134</sup>
- 7.14 If the FWC is satisfied that misconduct of a person contributed to the road transport business's decision to terminate the person, the FWC must reduce the amount it would otherwise order by an appropriate amount.<sup>135</sup>
- 7.15 Compensation must not exceed the lesser of half the amount of the contractor high income threshold immediately before the termination or the total amount of remuneration received by the person (or to which the person was entitled) whichever is higher, for any period during which the person performed work under the services contract during the 26 weeks immediately before the termination.
- 7.16 Workers covered by MSOs cannot later bring proceedings to recover unpaid employment entitlements that 'employees' would otherwise be entitled to apply for.<sup>136</sup>

131 FW Act s 536LR

132 FW Act s 536LS

133 FW Act s 536LS

134 FW Act s 536LT(2).

135 FW Act s 536LT(3).

136 FW Act s536LT(6)

## Conference and hearing process

- 7.17 The FWC must conduct a conference or hold a hearing into a matter if the existence of facts is in dispute. Conferences are to be conducted in private. The FWC must consider any differences, and wishes, in the circumstances of the parties in considering the application and informing itself in relation to the application.<sup>137</sup>
- 7.18 The FWC must not hold a hearing in relation to a matter unless the FWC considers it appropriate to do so, considering the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter. If the FWC holds a hearing it may decide not to hold the hearing in relation to parts of the matter. The FWC may decide at any time to hold a hearing into the matter, and this could include before, during or after conducting a conference.<sup>138</sup>
- 7.19 Applications may be dismissed by the FWC if applicants fail to attend a conference or hearing, fail to comply with a direction or order of the FWC or fail to discontinue the application after a settlement agreement has been concluded.<sup>139</sup>

## Appeal rights

- 7.20 The FWC must not grant appeal rights from a decision made by the FWC in relation to unfair terminations unless the FWC considers that it is in the public interest to do so.
- a. some considerations that the Commission may consider in assessing whether there is a public interest element include:<sup>140</sup>
- i. where a matter raises issues of importance and general application;
  - ii. where there is a diversity of decisions so that guidance from a Full Bench of the Commission is required;
  - iii. where the original decision manifests an injustice or the result is counter intuitive; or
  - iv. that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.
- 7.21 The public interest test is not satisfied simply by the identification of error or a preference for a different result.<sup>141</sup>
- 7.22 Where an appeal from a decision can relate to a question of fact, it must involve a significant error of fact for the FWC to consider the appeal.<sup>142</sup>

## Costs orders and when they are available

- 7.23 The FWC may make an order for costs against a party in relation to an unfair termination matter if satisfied that the first party caused those costs to be incurred because of a reasonable act of omission of the first party in connection with the conduct or continuation of the matter.<sup>143</sup>
- 7.24 The FWC may make an order for costs against a lawyer or paid agent (the representative) representing a person in an unfair termination matter if the FWC is satisfied that the representative caused those costs to be incurred because the representative either encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success; or of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.<sup>144</sup> This section is designed to deter lawyers and paid agents from encouraging others to bring speculative unfair termination claims.
- 7.25 An application for an order for costs must be made within 14 days after the FWC determines the matter or the matter is discontinued.<sup>145</sup>
- 7.26 A schedule of costs may be described relating to expenses incurred such as those described in points 6.20 and 6.21 above, but also including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis. If this occurs, the awarding of costs is not limited to the items of expenditure appearing in the schedule, but if an item does appear in the schedule must not award costs at a rate that exceeds the rate appearing in the schedule.<sup>146</sup>

137 FW Act s 536LY

138 FW Act s 536(LZ).

139 FW Act s 536(M).

140 *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWA 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at para. 27, [(2010) 197 IR 266].

141 See for example *Qantas Airways Limited v Carter* [2012] FWA 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012) at para. 57, [(2012) 223 IR 177]; *Kable v Bozelle, Michael Keith T/A Matilda Greenbank* [2015] FWC 3512 (Catanzariti VP, Watson VP, Gostencnik DP, 22 May 2015); *Harris v Home Theatre Group Pty Ltd T/A Home Theatre Group* [2011] FWA 2910 (Asbury C, 12 May 2011) at para. 18.

142 FW Act s 536(MB)

143 FW Act s 536(MA).

144 FW Act s 536(MC).

145 FW Act s 536(MD)

146 FW Act s 536(ME).

## 8. FAQs

### 8.1 **Does the change in law make regulated road transport contractors employees?**

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

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

No. Road transport operators will not be obligated to initiate a collective agreement for their road transport contractors. Minimum standards orders or guidelines may instead be in place. However, road transport contractors, or their representatives, may wish to initiate a collective agreement by way of issuing a consultation notice.

### 8.3 **If a regulated road transport contractor is unfairly terminated, what can they claim?**

If the FWC decides that a regulated road transport contractor has been unfairly terminated, remedies can include restoring lost pay. The operator could be required to pay the person an amount for remuneration lost, or likely to have been lost, by the regulated road transport contractors because of the termination.

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

### 8.4 **Are regulated road transport contractors entitled to access the National Employment Standards?**

No, regulated road transport contractors are not entitled to access the NES. Regulated road transport contractors are entitled to access those provisions listed in either the minimum standards order, minimum standards guidelines or collective agreement.

### 8.5 **When are RTMSOs likely to be made/take effect?**

At this point in time we don't have any guidance on when minimum standards orders are likely to be made or take effect. It is likely that the initial conferencing process will commence in late 2024 or early 2025.

We advise Operators to monitor the progress of the FWC in making RTMSOs.

Some Operators may wish to participate in the proceedings which will give rise to the RTMSOs. ACCI will also continue to monitor progress and provide advice to members.

## Further Guidance

- 8.6 The Fair Work Ombudsman provides some [advice](#) relating to independent contractor changes.
- 8.7 The Department of Employment and Workplace Relations (DEWR) has a [factsheet](#) on minimum standards in the road transport industry.
- 8.8 The relevant FWC forms can be accessed [here](#).

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