



STATEMENT

Fair Work Act 2009

s 536JY—Commission may make minimum standards orders for employee-like workers and regulated road transport contractors

Applications by Transport Workers’ Union of Australia

(MS2024/1, MS2024/2 and MS2024/3)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 6 SEPTEMBER 2024

Fair Work Act 2009, Chapter 3A – Commission may make employee-like minimum standards orders and road transport minimum standards orders – Applications from the Transport Workers’ Union of Australia – last mile package delivery – food and beverage delivery – Road Transport Advisory Group – consultation process.

Background

[1] Amendments to the *Fair Work Act 2009* (Cth) (FW Act) following the passage of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) commenced on 26 August 2024. These amendments, among other things, confer functions on the Fair Work Commission in relation to the making of minimum standards orders and guidelines. [Attachment A](#) provides extracts of the amendments relevant to this Statement.

[2] On 28 August 2024, the Transport Workers’ Union of Australia (TWU) made three applications to the Commission under s 536JZ of the FW Act:

- an application to make an employee-like worker minimum standards order to cover certain employee-like workers who perform work that involves the transport by road of goods, wares or other things (other than food, beverages and other like things) and the digital labour platform operators that enter into or facilitate a services contract for the performance of that work (MS2024/1);¹
- an application to make a road transport minimum standards order to cover certain regulated road transport contractors who perform work that involves the transport by road of goods, wares or other things (other than food, beverages and other like things) and the road transport businesses that engage those regulated road transport contractors under services contracts to perform that work (MS2024/2);² and
- an application to make an employee-like worker minimum standards order to cover certain employee-like workers who perform work that involves the transport by road of food, beverages and other like items and the digital labour platform operators that enter into or facilitate a services contract for the performance of that work (MS2024/3).³

[3] Dedicated case pages have been created on our website and the applications were published on 28 August 2024.⁴

[4] There are two forms of minimum standard orders that the Commission may make (ss 15D and 536JY):

- employee-like worker minimum standards orders, setting standards for employee-like workers performing digital platform work (including in the road transport industry); and
- road transport minimum standards orders, setting standards for regulated road transport contractors.

Legislative requirements

[5] Applications MS2024/1, MS2024/2, and MS2024/3 seek orders under s 536JY of the FW Act. MS2024/2 is an application for a road transport minimum standards order⁵ and matters MS2024/1 and MS2024/3 are applications for employee-like worker minimum standards orders.⁶

[6] Section 617(10B) of the FW Act requires that a road transport minimum standards order be made by an Expert Panel constituted for that purpose. Section 620(1E) contains requirements for the constitution of such an expert panel (Expert Panel for the road transport industry).

[7] Section 616(4B)(a) of the FW Act requires that, subject to ss 582(4A) and 617(10D), an employee-like worker minimum standards order must be made by a Full Bench of the Commission. Section 617(10D)(a) provides that I may direct (among other things) that an employee-like worker minimum standards order matter be dealt with by an Expert Panel constituted for that purpose if I consider that the order might relate to the road transport industry or sector. Section 582(4A) deals with how the Commission must or may be constituted should I give a direction that two or more matters be dealt with jointly and one of those matters must or may be dealt with by an Expert Panel for the road transport industry.

[8] The Commission must take into account the minimum standards objective in dealing with applications for minimum standards orders.⁷ Where an Expert Panel for the road transport industry is performing a function or exercising a power, it must also take into account the road transport objective.⁸

[9] The ‘road transport industry’ is defined at s 15S of the FW Act as follows:

15S Meaning of *road transport industry*

(1) The road transport industry means:

- (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, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- (b) the *long distance operations in the private road transport industry* within the meaning of the Road Transport (Long Distance Operations) Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and

- (c) the *waste management industry* within the meaning of the Waste Management Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- (d) the *cash in transit industry* within the meaning of the Transport (Cash in Transit) Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- (e) the *passenger vehicle transportation industry* within the meaning of clause 4.2 of the Passenger Vehicle Transportation Award 2020, not including paragraph 4.2(c)), as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and
- (f) any other industry (however described) prescribed by the regulations for the purposes of this paragraph.

(2) For the purposes of paragraph (1)(f), the regulations may prescribe an industry by applying, adopting or incorporating any matter contained in a modern award as in force or existing from time to time.

[10] Regulation 1.08B of the *Fair Work Regulations 2009* modifies the operation of sub-ss 15S(1)(a) and (b) as follows:

1.08B Meaning of road transport industry—exclusion of livestock industry

(1) For the purposes of paragraph 15S(1)(a) of the Act, the Road Transport and Distribution Award 2020, as in force on 1 July 2024, is taken not to apply in relation to transporting or otherwise dealing with livestock covered by subregulation 1.08A(2).

(2) For the purposes of paragraph 15S(1)(b) of the Act, the Road Transport (Long Distance Operations) Award 2020, as in force on 1 July 2024, is taken not to apply in relation to transporting or otherwise dealing with livestock covered by subregulation 1.08A(2).

[11] Section 582(4D) provides that I must give a direction as to how the Commission is to prioritise its work under Part 3A-2 (concerning minimum standards for regulated workers) and Part 3B-2 (concerning minimum standards for persons in road transport contractual chains) of the FW Act including, but not limited to, prioritising types of orders under those Parts and specified cohorts of workers.

Consultation and the role of the Road Transport Advisory Group

[12] Section 40E(1) establishes the Road Transport Advisory Group (RTAG). The members of the RTAG are appointed by the Minister.⁹ The Minister has appointed Mr Peter Anderson, National Secretary of the Australian Road Transport Industrial Association and Mr Richard Olsen, National Vice President of the TWU as part-time members to the RTAG.

[13] As President, under s 40(F)(6), I can appoint a member of the Expert Panel for road transport to chair the RTAG. As President I determine which Commission Members form part of Expert Panels (s 620(2)), taking into account that the constitution of an Expert Panel for the road transport industry must fulfil the requirements of s 620(1E) in relation to seniority and expertise.

[14] I have constituted an Expert Panel for the road transport industry for the purpose of facilitating the consultation processes outlined at paragraphs 17 and 18 below. I have appointed

Vice President Asbury as a member of this Expert Panel and as Chair of the RTAG. Commissioner Connolly, Commissioner Tran and Commissioner Sloan will assist with these consultation processes as part of this Expert Panel. This Expert Panel is constituted for the purposes of consultation only. My provisional views in relation to the constitution of Expert Panels to determine these applications are set out at paragraph 21 below.

[15] The function of the RTAG is set out in s 40E(2):

(2) The function of the Road Transport Advisory Group is to advise the FWC in relation to matters that relate to the road transport industry including, but not limited to the following:

- (a) the making and varying of modern awards that relate to the road transport industry;
- (b) the making and varying of road transport minimum standards orders and road transport guidelines;
- (ba) the making and varying of road transport contractual chain orders and road transport contractual chain guidelines;
- (c) the prioritisation by the FWC of matters relating to the road transport industry;
- (d) such other matters as are prescribed by the regulations.

[16] Section 536KA(2)(b) provides that the Commission:

- (b) must not make or vary the road transport minimum standards order unless the Road Transport Advisory Group has been consulted.

[17] Accordingly, the FW Act requires that the Commission consult the RTAG in relation to MS2024/2. While there is not a corresponding requirement in relation to MS2024/1 and MS2024/3,¹⁰ being applications for employee-like worker minimum standards orders, given the RTAG has a broad function to ‘advise the FWC in relation to matters that relate to the road transport industry’¹¹ and that the applications overlap as to subject matter, my *provisional* view is that these applications should also be referred to the RTAG for advice.

[18] Section 40E(4) provides that I ‘must consult, and have regard to the views, of the RTAG in determining priorities for the work of the Commission in relation to matter affecting the road transport industry’. My further *provisional* view is therefore that I will consult with the RTAG in relation to priorities for the work of the Commission in relation to these applications.

[19] Section 40F(5) provides that I may give directions to the RTAG as to the way it carries out its functions. For completeness, I note that the RTAG may establish sub-committees under s 40G(1), and must establish a subcommittee ‘of which a majority of the members are owner drivers or representatives of owner drivers:

- (a) if a proposed road transport minimum standards order or a proposed road transport contractual chain order will cover owner drivers; or
- (b) if the FWC proposes to perform a function or exercise a power in relation to a road transport minimum standards order or a road transport contractual chain order that has, or may have, an effect upon owner drivers that is more than minor or technical.’¹²

[20] Section 40E(3) requires the RTAG to consult any relevant subcommittee before advising the Commission in relation to a matter. These subcommittees must be chaired by a member of the RTAG (40G(2)).

Provisional views

[21] My provisional views are as follows:

Conduct of the matters

1. An Expert Panel for the road transport industry is required to be constituted for the hearing and determination of matter MS2024/2 and I propose to constitute such a panel in due course.
2. Matters MS2024/1 and MS2024/3 relate to the *road transport industry* as defined. I propose to direct that those applications be heard and determined by an Expert Panel for the road transport industry. Given that matters MS2024/1 and MS2024/2 both relate to ‘last mile package delivery’ (in relation to employee-like workers and regulated road transport contractors respectively), I invite the views of interested persons as to whether these two applications should be dealt with jointly by a single Expert panel for the road transport industry.

RTAG

3. I propose to seek the advice of the RTAG in relation to matters MS2024/1, MS2024/2, and MS2024/3. To allow time for the RTAG to consult, through subcommittees or otherwise, and formulate its advice, I will ask that the RTAG provide this advice not later than **12:00 pm (AEDT) on Friday, 6 December 2024** (subject to any request for further time to be allowed). Further advice from the RTAG may be sought in the course of these matters.
4. I propose to seek the advice of the RTAG in relation to determining priorities for the work of the Commission in relation to matters MS2024/1, MS2024/2, and MS2024/3.

[22] I also invite the views of interested persons as to whether the requests outlined in items 3 and 4, and any other relevant matters in relation to the functioning of the RTAG should be the subject of a direction to the RTAG, pursuant to my power under s 40(F)(5). This may include views about whether directions concerning the appropriate documentation of the RTAG’s consultation processes should be made.

[23] As a further matter, while the three applications have been made widely available through publication to the Commission’s website and notifications sent via our Regulated worker subscription service, and as such are available to the world at large, the Commission invites stakeholders to express a view as to what, if any, directions should be made in relation to service of the applications.

Next steps

[24] Interested parties are invited to make submissions regarding my provisional views expressed at [21]. All submissions should be sent to rws@fwc.gov.au by **12:00 pm (AEST) on Friday, 20 September 2024**. The email address can also be used for enquiries about these matters.

[25] Subject to those submissions, my intention is to then write to the RTAG seeking its advice about the applications and providing directions where relevant as noted in paragraph 21. I propose that further directions be issued in relation to these matters once advice from the RTAG is received. Any advice and directions will be made available on the Commission's website.

[26] All documents relating to the applications will be published on the relevant case page of our website. Interested parties are encouraged to subscribe to the [Regulated worker subscription service](#) to receive updates on the cases.



PRESIDENT

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Attachment A

40D The road transport objective

In performing a function or exercising a power under this Act, the Expert Panel for the road transport industry must take into account the need for an appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry, having regard to the following:

- (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 the following:
 - (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 chains and the national economy;
- (d) the need for minimum standards in road transport contractual chains.

This is the *road transport objective*.

40E Establishment of Road Transport Advisory Group

- (1) There is to be a Road Transport Advisory Group.
- (2) The function of the Road Transport Advisory Group is to advise the FWC in relation to matters that relate to the road transport industry including, but not limited to the following:
 - (a) the making and varying of modern awards that relate to the road transport industry;
 - (b) the making and varying of road transport minimum standards orders and road transport guidelines;
 - (ba) the making and varying of road transport contractual chain orders and road transport contractual chain guidelines;
 - (c) the prioritisation by the FWC of matters relating to the road transport industry;
 - (d) such other matters as are prescribed by the regulations.
- (3) Before advising the FWC in relation to a matter, the Road Transport Advisory Group must consult any relevant subcommittee established under section 40G.
- (4) The President must consult, and have regard to the views of, the Road Transport Advisory Group in determining priorities for the work of the FWC in relation to matters affecting the road transport industry.

40F Membership of Road Transport Advisory Group

- (1) The Road Transport Advisory Group consists of such members as the Minister from time to time appoints.
- (2) In appointing the members of the Road Transport Advisory Group, the Minister must ensure that the membership consists of persons who are members of or who are nominated by the following:
 - (a) an organisation that is entitled to represent the industrial interests of one or more regulated road transport contractors;
 - (b) an organisation that is entitled to represent the industrial interests of one or more road transport businesses.
- (3) A member of the Road Transport Advisory Group holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.

Note: A member of the Road Transport Advisory Group is eligible for reappointment (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

- (4) The Minister may revoke a person's appointment to the Road Transport Advisory Group.
- (5) The President may give the Road Transport Advisory Group directions as to the way in which the body is to carry out its functions.
- (6) The President may appoint a member of the Expert Panel for the road transport industry to chair the Road Transport Advisory Group.

40G Road Transport Advisory Group subcommittees

- (1) The Road Transport Advisory Group may establish subcommittees to advise it in relation to matters relevant to the performance of its functions.
- (2) A subcommittee may include persons who are not members of the Road Transport Advisory Group, but a subcommittee must be chaired by a member.
- (3) The Road Transport Advisory Group must establish a subcommittee under subsection (1) of which a majority of the members are owner drivers or representatives of owner drivers:
 - (a) if a proposed road transport minimum standards order or a proposed road transport contractual chain order will cover owner drivers; or
 - (b) if the FWC proposes to perform a function or exercise a power in relation to a road transport minimum standards order or a road transport contractual chain order that has, or may have, an effect upon owner drivers that is more than minor or technical.

536JX The minimum standards objective

In performing a function or exercising a power under this Part, the FWC must take into account the need for an appropriate safety net of minimum standards for regulated workers, having regard to the following:

- (a) the need for standards that:
 - (i) are clear and simple; and
 - (ii) are fair and relevant; and
 - (iii) recognise the perspectives of regulated workers, including their skills, the value of the work they perform and their preferences about their working arrangements; and
 - (iv) do not change the form of the engagement of regulated workers from independent contractor to employee; and
 - (v) do not give preference to one business model or working arrangement over another; and
 - (vi) are tailored to the relevant industry, occupation or sector and the relevant business models; and
 - (vii) are tailored to the type of work, working arrangements and regulated worker preferences; and
 - (viii) reflect the differences in the form of engagement of regulated workers as independent contractors to the form of engagement of employees; and
 - (ix) have regard to the ability of regulated workers to perform work under services contracts for multiple businesses, and the fact that the work may be performed simultaneously;
- (b) in addition to the other matters provided for in this subsection, the need for standards that deal with minimum rates of pay that:
 - (i) take into account costs necessarily incurred by regulated workers directly arising from the performance of a services contract; and
 - (ii) take into account safety net minimum standards that apply to employees performing comparable work; and
 - (iii) do not change the form of the engagement of regulated workers;
- (c) the need to avoid unreasonable adverse impacts upon the following:
 - (i) sustainable competition among industry participants;
 - (ii) business costs, regulatory burden, sustainability, innovation, productivity or viability;
 - (iii) administrative and compliance costs for industry participants;
 - (iv) the national economy;
 - (v) persons or bodies that use or rely on the work performed by regulated workers, or the services received under services contracts for the performance of that work;
- (d) the need to consider other orders or instruments (however described) made under this Chapter and to avoid unnecessary overlap of such orders or instruments.

This is the *minimum standards objective*.

536K Particular matters FWC must take into account in making a decision on an employee-like worker minimum standards order

- (1) This section applies to a decision to make or vary, or not to make or vary, an employee-like worker minimum standards order, other than a decision of the FWC to refuse to consider an application to make or vary such an order.
- (2) Before making a decision to which this section applies, the FWC must consider whether, on the whole, the persons included (or purportedly included) in the class of employee-like workers to be covered by the order, or the order as proposed to be varied, are employee-like workers.
- (3) If the FWC is not satisfied that, on the whole, the persons included (or purportedly included) in the class of employee-like workers to be covered by the minimum standards order, or the order as proposed to be varied, are employee-like workers, the FWC must decide to refuse to consider the application, or not to make or vary the order, as the case requires.
- (4) The FWC:
 - (a) must not make or vary the employee-like worker minimum standards order unless there has been genuine engagement with the parties to be covered; and
 - (b) must not make or vary the employee-like worker minimum standards order unless the consultation process set out in Subdivision BA has been followed; and
 - (c) must have regard to choice and flexibility in working arrangements in making or varying the employee-like worker minimum standards order.

536KA Particular matters FWC must take into account in making a decision on a road transport minimum standards order

- (1) This section applies if:
 - (a) an application is made for a road transport minimum standards order under subsection 536JZ(1) or for a variation of a road transport minimum standards order under section 536KP; or
 - (b) the FWC is considering making or varying a minimum standards order on its own initiative.
- (2) The FWC:
 - (a) must not make or vary the road transport minimum standards order unless there has been genuine engagement with the parties to be covered; and
 - (b) must not make or vary the road transport minimum standards order unless the Road Transport Advisory Group has been consulted; and
 - (c) must not make or vary the road transport minimum standards order unless the consultation process set out in Subdivision D has been followed; and
 - (d) must have regard to the commercial realities of the road transport industry; and
 - (e) must be satisfied that making or varying the road transport minimum standards order will not unduly affect the viability and competitiveness of owner drivers or other similar persons.

617 FWC's functions etc. that must be performed by an Expert Panel

...

(10B) The following must be made by an Expert Panel constituted for that purpose:

...

- (c) a road transport minimum standards order made under paragraph 536JY(1)(b) or a determination made under subsection 536KQ(1) varying or revoking a road transport minimum standards order;

...

- (e) such other instruments as are prescribed that the President considers might relate to the road transport industry.

Note 1: For the constitution of an Expert Panel for that purpose, see subsection 620(1E).

Note 2: The road transport objective is relevant to the functions of an Expert Panel referred to in this subsection, see section 40D.

President's considerations

...

(10D) The President may direct that the following matters be dealt with by an Expert Panel constituted for the purpose:

- (a) an employee-like worker minimum standards order or a determination varying or revoking an employee-like worker minimum standards order, if the President considers that the order might relate to the road transport industry or sector;

- (c) any other prescribed instrument or matter that the President considers might relate to the road transport industry;

whether or not the President considers that the matter might also relate to another industry or sector.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1E).

620 Constitution and decision-making of an Expert Panel

...

Constitution of Expert Panel for the road transport industry

- (1E) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(10B) or (10D) must include (except as provided by section 622):
- (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 FWC Member who has knowledge of, or experience in, the road transport industry; and
 - (c) subject to subsection (2A), such number (if any) of other FWC Members as the President considers appropriate.

¹ [MS2024/1](#).

² [MS2024/2](#).

³ [MS2024/3](#).

⁴ '[Regulated worker minimum standards applications](#)', *Fair Work Commission* (Web Page).

⁵ See FW Act s 536JY(3).

⁶ See *ibid* s 536JY(2).

⁷ See *ibid* s 536JX.

⁸ See *ibid* s 40D.

⁹ See FW Act s 40F(1); see also FW Act sub-ss 40F(2)–(3).

¹⁰ Section 536K of the FW Act does not include a provision to the same effect as s 536KA(2)(b).

¹¹ See FW Act s 40E(2).

¹² See FW Act s 40G(3).