EXPLANATORY STATEMENT

Issued by authority of the Minister for Employment and Workplace Relations

Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024

AUTHORITY

The *Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024* is made under subsection 536LJ(1) of the *Fair Work Act 2009*.

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Fair Work Act 2009* (the Act) provides a framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion. Part 3A-3 of the Act establishes quick, flexible and informal procedures for dealing with the unfair deactivation of employee-like workers (workers) in a manner that balances the needs of digital labour platform operators and workers. It also provides remedies where a deactivation is found to be unfair, with an emphasis on reactivation.

Subsection 536LJ(1) of the Act provides that the Minister must, by legislative instrument, make a code to be known as the Digital Labour Platform Deactivation Code (the Code).

The Code is made for the purposes of supporting the practical application of the unfair deactivation framework in Part 3A-3 of the Act. The Code is integral to the Fair Work Commission's (the Commission) determination of whether a worker has been unfairly deactivated under Part 3A-3 of the Act. In particular:

- Section 536LF provides that a person has been unfairly deactivated if
    - the person has been deactivated from a digital labour platform
    - the deactivation was unfair, and
    - the deactivation was not consistent with the Code.
- Subsection 536LH(1) sets out the criteria for considering whether a worker's deactivation was unfair. Amongst other things, the Commission must take into account whether any relevant processes specified in the Code were followed.
- Subsection 536LJ(3) provides that a person's deactivation was consistent with the Code if, at the time of the deactivation, the digital labour platform operator complied with the Code in relation to the deactivation.

The Code is intended to ensure that deactivation processes of operators are transparent, accessible and fair, but can be exercised in a manner that recognises the unique nature of digital platform work and affords operators appropriate discretion to manage their platforms efficiently and safely.

In accordance with subsection 536LJ(2) of the Act, the Code deals with the following mandatory matters:

- the circumstances in which work is performed on a regular basis
- matters that constitute or may constitute a valid reason for deactivation

- rights of response to deactivations
- the internal processes of digital labour platform operators in relation to deactivation
- communication between the worker and the digital labour platform operator in relation to deactivation
- the accessibility in practice of the internal processes of digital labour platform operators in relation deactivation, and
- the treatment of data relating to the work performed by employee-like workers.

The Code relies on definitions of terms from both the Act and the *Fair Work Regulations 2009* (the Regulations), as amended from time to time. The Code also makes reference to a number of other Commonwealth, State and Territory laws (see sections 5 and 17). These references are to the acts as in force from time to time (see sections 10 and 10A of the *Acts Interpretation Act 1901* as applied by paragraph13(1)(a) of the *Legislation Act 2003*). The Code also refers to legislative instruments that are mandatory industry codes of conduct (see subsection 19(10)). For those instruments that are disallowable, the references are to those instruments as in force from time to time (see subsection 14(3) of the *Legislation Act 2003*). The Code does not incorporate any other documents by reference.

The Code is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Code commences the later of 25 February 2025 and the day after the instrument is registered on the Federal Register of Legislation.

Details of the Code are set out in Attachment A.

CONSULTATION

Subsection 536LJ(2A) of the Act requires that before the Minister makes a code under subsection (1), the Minister must be satisfied that there has been such public consultation in relation to the development of the Code as the Minister considers appropriate. The Department of Employment and Workplace Relations (the department) in May 2024 released a public discussion paper on the Code. Submissions in response to this process informed the development of the Code, which constituted appropriate public consultation.

In addition to the public consultation paper outlined above, the department conducted targeted consultations with a range of stakeholders, including unions, employer groups, digital labour platform operators and staff from the Commission.

The department consulted with all states and territories under the *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*. The department also consulted with the Committee on Industrial Legislation (a subcommittee of the National Workplace Relations Consultative Council, established under the *National Workplace Relations Consultative Council Act 2002*).

IMPACT ANALYSIS

The Office of Impact Analysis has advised that an Impact Analysis is not required for this Code, as it is covered by the Impact Analysis Equivalent: Minimum standards and increased access to dispute resolution for independent contractors (OBPR22-2873).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility with Human Rights has been completed for the Code in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. A copy of the Statement is at Attachment B.

Senator the Hon Murray Watt, Minister for Employment and Workplace Relations

ATTACHMENT A

NOTES ON SECTIONS

Part 1 — Preliminary

Section 1 – Name

2. This section provides that the title of the Code is the *Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024*.

Section 2 – Commencement

3. This section provides that the Code commences on the later of 25 February 2025 and the day after registration.

4. Due to eligibility requirements, the earliest date a worker could make an application for an unfair deactivation remedy is 26 February 2025 (see clause 124 of Schedule 1 to the Act).

Section 3 – Authority

5. This section provides that the Code is made under the Act.

Section 4 – Simplified outline

6. This section provides a general simplified outline. The simplified outline sets out the legislative context and also makes clear that the Code constitutes the Digital Labour Platform Deactivation Code referred to in section 536LJ of the Act.

Section 5 – Definitions

7. Section 5 provides a list of definitions relevant to the Code. A note to section 5 alerts the reader to the fact that several terms used in the Code are defined in the Act, including:

- deactivated – section 536LG
- digital labour platform – section 15L
- digital labour platform operator – section 15M
- employee-like worker – section 15P, and
- services contract – section 15H.

8. Section 5 also defines the following terms that are used in the Code:

- ***Act***, which means the *Fair Work Act 2009*.
- ***code process***, which means the process for the deactivation of a worker from a digital labour platform set out in Part 2 of the Code.
- ***deactivation warning***, which is defined in subsection 8(1) of the Code.
- ***final deactivation notice***, which is defined in subsection 14(5) of the Code.

- ***law enforcement or regulatory agency***, which means:
  (a) the Australian Federal Police or
  (b) police force or a police service of a State or Territory or
  (c) any other authority or person responsible for the enforcement of the laws of the Commonwealth or of a State or Territory.
- ***preliminary deactivation notice***, which is defined in subsection 11(1) of the Code.

9. Paragraph (c) of the definition of ***law enforcement or regulatory agency*** is intended to encompass Commonwealth, State or Territory entities that are responsible for administering, investigating contraventions of, or ensuring compliance with, other criminal or civil laws that may apply to digital labour platform operators or employee-like workers. This includes but is not limited to the NDIS Quality and Safeguards Commission and the Aged Care Quality and Safety Commission.

Section 6 – References to modification of access to digital labour platform

10. This section provides that a reference in the Code to the modification of a worker's access to a digital labour platform means a modification of access having the result that the worker is deactivated from the platform within the meaning of section 536LG of the Act (which sets out the meaning of 'deactivated').

11. This section makes clear that references to 'modification' in the Code only capture circumstances where the operator modifies the person's access to the platform, such that the worker is no longer able to perform work under an existing or prospective services contract, or the ability of the person to do so is so significantly altered that in effect the person is no longer able to perform such work.

12. The framework allows an operator to retain discretion to modify a worker's access to a platform in a manner that does not reach this threshold. For example, to reduce access to certain platform features or to give a worker lower preference for particular work, in response to poor ratings or user feedback.

13. Other examples could include where an operator may restrict a driver from accepting orders from a specific restaurant following a complaint by the restaurant, but the worker remains able to accept work from other partner businesses through the platform. Alternatively, a driver may have contravened requirements for the collection and delivery of an order for alcohol by a user of the platform. The operator may decide to restrict the driver from accepting deliveries for alcohol but permit them to keep using the platform to deliver other food and groceries.

Part 2—Code process for deactivation

Division 1—Application of code process

14. Paragraph 536LJ(2)(d) of the Act provides that the Code must deal with the internal processes of digital labour platform operators in relation to deactivation.

15. Part 2 of the Code deals with this matter by prescribing a process that must be followed by an operator if they want to comply with the Code when considering deactivating a worker from the digital labour platform in specified circumstances. Section 5 of the Code defines this process as the code process.

16. The code process reflects the unique nature of digital platform work, which is inherently different from an employment relationship. The code process acknowledges that employee-like workers are independent contractors, who choose how and when to undertake their work. Operators will therefore have limited visibility over the performance of the work and may be reliant on reports from clients or third parties which sometimes might be difficult or not reasonable to verify. Accordingly, the code process sets out a risk-based process which enables an operator to exercise discretion in how to appropriately respond to conduct or capacity issues, while protecting community safety and maintaining user confidence.

17. The code process focuses on fair, transparent and accessible communication between operators and workers. It provides workers with a right of response to preliminary deactivation notices, which must be considered by the operator. This is designed to address the challenges that employee-like workers can face when seeking to understand and respond to a deactivation from a platform.

18. The code process is integral to the Commission's determination of whether a deactivation is fair. In particular, paragraphs 536LF(b) and (c) of the Act provide that a person has been unfairly deactivated if the Commission is satisfied that the deactivation was unfair, and the deactivation was not consistent with the Code.

19. Paragraph 536LH(1)(b) of the Act also provides that the Commission must take into account whether any relevant processes specified in the Code were followed, in considering whether it is satisfied that a person's deactivation was unfair.

20. Subsection 536LU(3) of the Act provides that an application for unfair deactivation must be made within 21 days after the deactivation took effect, or within such further period as the Commission allows. The length of time an operator takes to complete the code process is a discretionary matter, however, provided the operator uses reasonable endeavours to conduct it within a reasonable time (in accordance with section 15 of the Code).

<u>Section 7 – When code process for deactivation must be followed</u>

21. Subsection 7(1) provides that to be taken to comply with the Code, a digital labour platform operator must follow the code process in relation to the proposed deactivation of a worker, who is protected from unfair deactivation, from a digital labour platform if:

- the operator is considering deactivating the worker from the platform and
- the reason for the deactivation is:
    1. a matter related to the worker's conduct in performing work through or by means of the platform (except in cases of serious misconduct by the worker – see subsection (2)) or
    2. a matter related to the worker's capacity to perform work through or by means of the platform.

22. Note 1 to subsection 7(1) references the eligibility requirement in paragraph 536LD(c) of the Act, which provides that a worker must have performed work through or by means of the platform on a regular basis for at least six months to be protected from unfair deactivation.

23. Note 2 to subsection 7(1) cross-references section 18 of the Code, which provides for circumstances in which work is performed on a regular basis.

24. Subsection 7(2) provides that the code process does not apply to the deactivation of a worker by an operator for serious misconduct by the worker.

25. The legislative notes under subsection 7(2) alert the reader to provisions of the Act and Regulations that are relevant to the operation of the subsection.

- Note 1 notes that a deactivation that occurs because of serious misconduct of the worker who is deactivated is not unfair, per subsection 536LH(2) of the Act.
- Note 2 alerts the reader to the fact that serious misconduct has the meaning prescribed by the Regulations. Serious misconduct has its ordinary meaning under subregulation 1.07(1). Subregulation 1.07(4) identifies examples of conduct of employee-like workers that amount to serious misconduct.
- Note 3 references subsections 536LH(3) and (4) of the Act, which provide that certain short-term deactivations are not unfair.

26. The Commission is not required to consider the criteria in section 536LH of the Act (including whether any relevant processes specified in the Code were followed under subsection 536LH(1)) where a deactivation occurs because of serious misconduct of the worker, or where a worker's access to a platform is temporarily suspended or modified for no longer than 7 business days due to a specified ground. This is because a deactivation in these circumstances is not unfair.

27. The effect of these provisions is that an operator is not required to comply with the code process in Part 2 of the Code when it deactivates a worker from the platform for these reasons. If an unfair deactivation application is made by a worker who has been deactivated in these circumstances, it would be a matter for the Commission to determine whether the deactivation was due to serious misconduct or a ground specified in subsections 536LH(3) and (4) of the Act.

Division 2—Deactivation warnings

Section 8 – Deactivation warning generally required before deactivation

28. When an issue with a worker's conduct or capacity arises, the code process provides that digital labour platform operators must generally first issue a warning to the worker, unless the operator determines there are reasonable grounds to immediately suspend or modify the worker's account (at section 9). This is intended to reflect current practice among many operators, where an operator would generally notify the worker that their capacity or conduct (if continued) risks deactivation, before taking steps to terminate the worker's access to the platform. The code process provides an operator discretion to assess which

matters related to a worker's capacity or conduct may require a warning, and which are more serious, warranting immediate suspension or modification instead.

29. Many operators also use other types of communication in supervising their workforce. For example, an operator may provide general performance feedback to assist a worker to improve their behaviour or service delivery. This type of feedback is outside the code process and may continue to be provided at an operator's discretion. In contrast, a deactivation warning issued under section 8 is a mechanism specific to the code process and must be issued before the operator can take steps to deactivate the worker under the Code (subject to the exception in section 9 where deactivation is not required).

30. There is no limit on the number of deactivation warnings an operator may issue to a worker before deciding to move to the next stage of the code process.

31. Subsection 8(1) provides that before deactivating a worker from a digital labour platform, the digital labour platform operator must give the worker a notice in writing (the ***deactivation warning***) stating that the worker risks being deactivated from the platform for a reason related to their conduct or capacity.

32. Subsection 8(2) sets out the content requirements for the deactivation warning. These are designed to ensure that the recipient will be provided with the reasons for the warning, the risk of deactivation if the specified issues are not remedied, and the support or assistance that the worker may seek in relation to the warning.

33. Note 1 to subsection 8(2) references the definition of 'organisation' in section 12 of the Act, which means an organisation registered under the *Fair Work (Registered Organisations) Act 2009* and would include any union registered under that Act entitled to represent the industrial interests of the worker.

34. Note 2 to subsection 8(2) cross-references section 16 of the Code, which provides that a worker may appoint a person (other than a lawyer acting in a professional capacity) to provide the worker with support or representation in relation to the deactivation.

Illustrative example: Representation by an employee of an organisation

A rideshare driver has been issued a deactivation warning. As required by paragraph 8(2)(c), the operator explains in the warning that the worker can seek assistance or support, including from an employee or delegate of a registered organisation (such as a trade union).

The driver is concerned about the warning and whether it could risk their opportunity to earn an income via the platform. The driver is a member of a union and decides to contact them to ask for assistance.

A union representative explains the implications of receiving a deactivation warning under the Code and provides advice on what could happen next if another conduct or capacity issue arises in relation to the worker. The union representative further explains there is also a right to appoint a person to provide support or representation in relation to deactivations from a digital labour platform and advises the worker that they may contact the union again if they receive a preliminary deactivation notice.

35. Related to this, section 20 of the Code sets out requirements about communications relating to deactivation. The operator may decide to issue the deactivation warning to the worker either via the platform (subject to the worker having sufficient access), and/or an appropriate alternative method determined by the operator acting reasonably. Providing a warning is a key method by which the operator may communicate to a worker that their conduct or matters associated with their capacity to perform work may risk their deactivation if not resolved. This satisfies the mandatory requirements in paragraphs 536LJ(2)(e) (communication between the worker and operator in relation to deactivation) and 536LJ(2)(f) (accessibility in practice of internal processes) of the Act.

36. Subsection 8(3) provides that the deactivation warning must include sufficient information to enable a reasonable person in the position of the employee-like worker to understand the matters mentioned in subsection (2).

37. The note to subsection 8(3) cross-references section 17 of the Code, which provides that in giving a deactivation warning, an operator is not required to disclose information about an individual if the operator considers, on reasonable grounds, that the disclosure may pose a risk to the safety or security of the individual.

38. Subsection 8(3) is designed to balance the right of a worker to receive sufficient information about the reason for, and the potential consequences of, the warning to enable them to understand it, and the need for operators to manage any safety risks that may arise from disclosing information about platform users, or representatives of third-party businesses involved in the matters that were the subject of the warning.

39. Additionally, it is not intended that the operator must set out in full or verbatim the matters in subsection 8(2) in the deactivation warning, only that the substance of these matters is contained in the deactivation warning. It may be appropriate for the operator to stipulate these matters in simplified language that enables a reasonable person in the worker's position to understand them, consistent with subsection (3).

Section 9 – Exception—circumstances when deactivation warning not required

40. The code process acknowledges there are circumstances where a digital labour platform operator may need to immediately suspend or modify a worker's access to a digital labour platform without first issuing a warning. For example, there may be an operational, safety or security need to immediately suspend or modify the worker's access to the platform until a decision whether to permanently deactivate the worker can be made. Unlike in an employment context, a platform operator is generally not otherwise able to control when a worker may choose to accept work via the platform.

41. These circumstances are also likely to arise where an operator requires more than the 7 business day suspension period provided for by subsection 536LH(3) of the Act to properly investigate whether it is safe or appropriate to allow the worker to continue to perform work via the platform.

42. Subsection 9(1) provides that, despite section 8, a digital labour platform is not required to give an employee-like worker a deactivation warning before deactivating under Division 3, if the operator considers on reasonable grounds that the matter relating to the worker's conduct or capacity is such that:

- it warrants immediate modification or suspension of the worker's access to the digital labour platform, or
- it is not reasonable to expect the operator to allow the worker to continue to perform work through or by means of the platform.

43. A note to subsection 9(1) sets out some examples of when subsection (1) may apply.

44. Subsection 9(2) provides that for the purposes of subsection (1), one or more reports or complaints made to the operator may constitute reasonable grounds for the operator's opinion about the worker's conduct or capacity.

45. Subsection 9(3) provides that subsection (2) does not limit the matters that may constitute reasonable grounds for such an opinion.

46. Section 9 provides the operator with discretion to determine whether the threshold in subsection 9(1) has been met, having regard to the nature of the conduct or capacity issue, the type of platform it operates, and the type of users or businesses that use its platform. A worker who has their access to a platform suspended or modified in this circumstance will have the ability to make an unfair deactivation application to the Commission, which will operate as a safeguard against the inappropriate use of this mechanism.

Illustrative examples: Circumstances when a warning is not required

Example 1

An operator receives a complaint from a restaurant that a worker physically assaulted a restaurant staff member while waiting to collect an order that was late. The operator has sought a copy of the restaurant's CCTV footage to verify the allegation. Based on paragraph 9(1)(a) of the Code, the operator decides that while it could not determine at that time that the alleged conduct occurred, the nature of the alleged conduct meant that platform users and the wider community could be exposed to potential risk if the worker continues to perform work through the platform. As a result, the operator decides to immediately suspend the worker's access to the platform and proceeds with the process for deactivation in Division 3 of Part 2 of the Code.

Example 2

An operator of a care platform receives a complaint from a client that a worker has stolen items from their house. This is contested by the worker, and the client is not responding to the operator's attempts at further contact to clarify the allegation. Based on paragraph 9(1)(a) of the Code, the operator determines that the nature of the alleged dishonest conduct means that an immediate suspension of the worker's access to the platform is warranted to avoid further risk to the worker's clients, while the platform investigates further before making a final decision. The platform proceeds with the steps outlined in Division 3 of Part 2 of the Code.

Example 3

An operator of a rideshare platform notifies a worker that their driver's licence is about to expire and reminds the worker to provide a copy of their renewed licence. The worker's licence expires and they do not provide a copy of their renewed licence or contact the operator. Based on paragraph 9(1)(b), the operator determined that because it does not have evidence that the worker has a legal right to perform work via the platform, it would not be reasonable to continue to allow the worker to perform work via the platform. As a result, the operator decides to immediately suspend the worker's access to the platform and proceeds with the steps outlined in Division 3 of Part 2 of the Code.

Division 3—Process for deactivation

Section 10 – Application of Division

47. Section 10 sets out when Division 3 applies. Broadly, this is where the platform operator is not required to give a deactivation warning, because the exception in section 9 applies, or where the operator has given the worker a warning but considers on reasonable grounds that deactivation is justified on a ground specified in paragraphs 10(b)(i)-(iii).

48. If, after issuing one or more deactivation warnings to a worker under section 8 of the Code, or immediately suspending or modifying the worker's access to the platform under section 9, the operator considers that deactivation of the worker is justified, the operator must only take steps to deactivate the worker in accordance with Division 3 of Part 2 of the Code.

49. Subsection 10(b) sets a threshold which requires an operator to exercise judgement as to whether matters related to the worker's conduct or capacity provide reasonable grounds to justify deactivation. In relation to paragraphs 10(b)(ii) and (iii), this would necessarily involve considering the worker's conduct and capacity over time, and the circumstances and timing of prior warning(s). In some cases, if a worker has received one deactivation warning a long time prior to the current matter related to their conduct or capacity under consideration, an operator may not have reasonable grounds to determine that deactivation is justified.

Section 11 – Operator must give preliminary deactivation notice

50. Subsection 11(1) provides that if Division 3 of Part 2 applies, the digital labour platform operator must give the worker a notice (the preliminary deactivation notice) that specifies the following matters:

- the reason, relating to the conduct or capacity of the worker, for which the notice is given;
- that the digital labour platform operator is considering terminating the worker's access to the digital labour platform;
- that the worker has a right to respond to the notice within the period specified in the notice (which must be reasonable);
- that the worker has a right to request, within the period specified in the notice, a discussion with a representative of the operator; and
- that the worker may appoint a person to provide the worker with support or representation (which is provided for in section 16 of the Code).

51. Subsection 11(2) provides that the preliminary deactivation notice must include sufficient information to enable a reasonable person in the position of the worker to understand the matters mentioned in subsection (1).

52. The note to subsection 11(2) cross-references section 17 of the Code, which provides that in giving a preliminary deactivation notice, an operator is not required to disclose information about an individual if the operator considers, on reasonable grounds, that the disclosure may pose a risk to the safety or security of the individual.

53. The requirement to issue a preliminary deactivation notice as a step in the code process ensures sufficient communication by the operator to the worker about a proposed deactivation, thereby satisfying the mandatory requirement in paragraph 536LJ(2)(e) of the Act.

54. Informing the worker via this notice that they have a right to provide a response to the notice, request a discussion with a representative of an operator within the period specified in the notice and appoint a person for support or representation in those discussions also satisfies the mandatory requirements in paragraphs 536LJ(2)(c) and (f) of the Act. This is achieved by dealing with the rights of response to deactivations and the accessibility in practice of the code process in relation to deactivation.

Section 12 – Modification or suspension of access to platform

55. Subsection 12(1) provides that if Division 3 of Part 2 applies, a digital labour platform operator may modify or suspend the employee-like worker's access to the digital labour platform.

56. Subsection 12(2) provides that the modification or suspension may take effect before or after the operator gives a preliminary deactivation notice.

57. Subsection 12(3) provides that if the operator modifies or suspends the worker's access to the platform, the operator must notify the worker, in writing, of the following matters:

- the time and day from which the modification or suspension took effect;
- the consequences of the modification or suspension for the worker's access to the platform.

58. Subsection 12(4) provides that the matters under subsection (3) must be notified as follows:

- if the modification or suspension takes effect before the digital labour platform operator gives a preliminary deactivation notice to the worker—as part of the preliminary deactivation notice to be given to the worker as soon as reasonably practicable after the modification or suspension takes effect;
- if the modification or suspension takes effect at the same time as the preliminary deactivation notice is given—as part of the preliminary deactivation notice;
- if the modification or suspension takes effect after the preliminary deactivation notice is given—before the modification or suspension takes effect.

59. Section 12 of the Code recognises that while the deactivation process is on foot, there may be circumstances where the operator determines it is necessary to temporarily suspend or modify the worker's access to the platform until completion of the process.

60. Section 12 provides the operator discretion to modify or suspend a worker's access to a platform at any time before, after or concurrently with the issuing of a preliminary deactivation notice. This is provided that the operator informs the worker of the time and day the modification or suspension takes effect and the consequences of such modification or suspension, as part of the preliminary deactivation notice. An operator is not obligated to suspend or modify the worker's access to the platform and may permit the worker to continue to perform work via the platform while the remaining steps in the code process are undertaken

61. Modification or suspension of a worker's access to a platform under this section may also constitute a deactivation from the platform under section 536LG of the Act, providing the worker a right to make an unfair deactivation application at the Commission within 21 days after the suspension or modification took effect, or such further period as the Commission allows (see subsection 536LU(3) of the Act).

62. Applying to the Commission at this time may assist workers who are experiencing an unreasonably long suspension or modification with little transparency over the progress

of any investigation underway. If a worker applies to the Commission after a suspension or modification, the Commission will be able to discuss an appropriate path forward with the parties in the initial conciliation conference.

63. If the worker does not make an application at this point and the platform continues the code process in relation to the worker, and the worker's access is ultimately terminated in accordance with section 14 of this Code, this would be a new deactivation for the purposes of section 536LU of the Act. The worker would have 21 days to apply to the Commission for an unfair deactivation remedy in relation to the termination or such further period as the Commission allows.

Section 13 – Steps after preliminary deactivation notice is given

Worker's response to preliminary deactivation notice

64. Subsection 13(1) provides that an employee-like worker may respond to a preliminary deactivation notice given to the worker by a digital labour platform operator.

65. Subsection 13(2) provides that the response must be given within the period specified in the preliminary deactivation notice (or within a longer period as agreed between the operator and worker).

66. Subsection 13(3) provides that the response may be in writing or may be given orally (including as part of the discussion between the worker and the operator's representatives provided for in subsections 13(4) to (6)).

67. The worker's right to respond to the preliminary deactivation notice satisfies the mandatory requirement in paragraph 536LJ(2)(c) of the Act (rights of response to deactivations). The flexibility afforded to workers to respond either in writing or orally reflects the nature of digital platform work in that matters may be more efficiently communicated via an app or a conversation, or a combination of these, in the way that best suits workers' needs. This also demonstrates the accessibility of the code process undertaken by operators, satisfying the mandatory matter in paragraph 536LJ(2)(f) of the Act (the accessibility in practice of the internal processes of operators in relation to deactivation).

Discussion with operator's representative

68. Subsection 13(4) provides that a worker may, within the period mentioned in paragraph 11(1)(d) (being a period of time specified by the operator in the preliminary deactivation notice issued to the worker), request the digital labour platform operator to make its representative available to discuss the preliminary deactivation notice. If the worker requests a discussion with the operator, then the request must be made within the specified period, but the discussion does not need to be held within that period.

69. Subsection 13(5) provides that if a worker makes such a request, the digital labour platform operator must make a representative available for the discussion within a reasonable time.

70. Subsection 13(6) provides that a person appointed by the worker for support or representation (under section 16) may participate in the discussion.

71. The right of a worker to request a discussion with a human representative of an operator is integral to ensuring the code process is accessible. It is intended to address the lack of transparency and support that workers have reported they experience during deactivation processes. The discussion may take place via any appropriate method to be decided between the worker and the operator's representative, such as over the phone, via videoconference, or a meeting in person. The intention is that the worker should be able to speak to, and be heard by, a human representative of the operator that can meaningfully discuss the preliminary deactivation notice with them. These factors satisfy the mandatory criteria in paragraphs 536LJ(2)(e) (communication between the worker and the operator in relation to the deactivation) and (f) (the accessibility in practice of the internal processes of operators in relation to deactivation).

Operator to consider response and make inquiries

72. Subsection 13(7) provides that a human representative of the digital labour platform operator must consider the employee-like worker's response (if any), including the discussion (if any) between the worker and the digital labour platform operator's representative.

73. Subsection 13(8) provides that the digital labour platform operator must make such further inquiries (if any) as are reasonably warranted after considering the worker's response, for the purpose of determining whether a valid reason for deactivation has been established.

74. The Code is intended to provide operators with flexibility to determine objectively which inquiries may be warranted in the circumstances of each matter. Whether further inquiries are reasonably warranted (and what they might entail) must be considered in the particular context of platform work. This requirement is not intended to impose the same obligation on operators that would be expected of an employer in similar circumstances. Some operators will generally have limited tools available to inquire into a matter between a worker and a user of the platform, as it may not directly supervise the worker and cannot compel a user to provide it with information.

75. For example, if there is information that could be obtained to verify an allegation that has been refuted by a worker, such as seeking video or audio footage from a third-party business who has made allegations against a worker, it may be reasonably warranted for a platform to seek this information. The nature of the alleged conduct will also impact the reasonableness of any further inquiries. If a user has had a sensitive or traumatic experience on a platform, it may not be appropriate to request further information from that user.

76. In most cases, platform users would generally not expect to be contacted by an operator to discuss or substantiate their feedback. If a platform user provides negative performance feedback about a service received by a worker, it would generally not be reasonably warranted or appropriate for the platform to contact that user to seek further information. However, a platform could reasonably inquire into the profile of that user and assess whether any of their past feedback provided on the platform raises concerns about the truthfulness or reasonableness of the feedback.

77. If the operator has referred the matter to an appropriate law enforcement or regulatory agency (or is aware that a platform user or another involved person has referred the matter), it would not be reasonably warranted for the platform to undertake any further inquiries.

78. These subsections reinforce the accessibility of the code process (satisfying the mandatory criteria in paragraph 536LJ(2)(f) of the Act) by ensuring that a worker's response to a preliminary deactivation notice is afforded human consideration and judgment, as opposed to processing by automated decision-making tools or artificial intelligence.

Status of user reports or complaints

79. Subsection 13(9) provides that if:

- a preliminary deactivation notice is issued to a worker after a report or complaint about the worker is made, and
- the report or complaint concerns a matter that, if true, would constitute a valid reason for the deactivation of the worker, and
- either:
  (i) the worker's response to the notice under this section does not provide adequate information to address the report or complaint; or
  (ii) the worker provides no response to the notice under this section

then, if the digital labour platform operator terminates the worker's access to the platform, the termination is taken, for the purposes of subsection 14(4), to be termination for a valid reason that the operator considers on reasonable grounds has been established.

80. Complaints or reports about the worker may be made by users of the platform, other workers who perform work through or by means of the platform, third party businesses who engage with the platform and members of the community.

81. Subsection 13(9) recognises that, due to the nature of digital platform work, an operator may not easily be able to determine the veracity of complaints or reports made by digital labour platform users. In relation to complaints or reports that, if true, would constitute a valid reason for deactivation (see section 19), and where the worker has not provided an adequate response to a preliminary deactivation notice, subsection 13(9) deems that any subsequent termination of access satisfies the test for termination in subsection 14(4), i.e. it is taken to be termination for a valid reason that the operator considers on reasonable grounds has been established.

<u>Section 14 – Outcome of digital labour platform operator's consideration and inquiries</u>

82. Subsection 14(1) provides that after giving a preliminary deactivation notice and complying with any applicable requirements in section 13, a digital labour platform operator must decide whether to:

- take no further action in relation to the worker (for example, choose not to terminate the worker's access to the platform, or lift the suspension or remove the modification), or

- terminate the worker's access to the platform.

83. Subsection 14(1) does not require an operator to comply with a requirement in section 13 that does not apply to the circumstances (for example, if the worker has not responded to the preliminary deactivation notice or requested a discussion with the operator's representative).

84. Subsection 14(2) provides that the digital labour platform operator must, as soon as reasonably practicable, notify the employee-like worker in writing of the operator's decision.

Decision to take no further action

85. Subsection 14(3) provides that if the digital labour platform operator decides to take no further action in relation to the worker (that is, choose not to terminate their access to the platform), the operator must lift any modification or suspension of the worker's access to the digital labour platform imposed under Division 3 of Part 2 of the Code. In the event of reinstatement of the worker's access to the platform, section 21 of the Code imposes additional requirements on the operator with respect to the worker's data and platform access following the reinstatement.

86. An operator is only required to remove any modification imposed under Division 3 of Part 2 of the Code. Section 6 also provides that 'modification' means a modification of access which results in the worker being deactivated from the platform within the meaning of section 536LG of the Act. Together, these provisions mean that the operator would be required to remove any modification imposed under Division 3 of Part 2 of the Code that would constitute a deactivation under section 536LG.

87. An operator would not be required to remove other modifications that are not captured by the above. For example, subsection 14(3) would not require an operator to remove a modification preventing a worker from accepting tasks at a business that made a complaint about them.

Decision to terminate access

88. Subsection 14(4) provides that the digital labour platform operator may terminate the worker's access to the digital labour platform only if:

- the reason for the termination is a valid reason, and
- the operator considers on reasonable grounds that the reason has been established.

89. Subsection 14(5) provides that where such a decision to terminate access has been made, the operator must, as soon as reasonably practicable, give the worker a written notice (the ***final deactivation notice***) that:

- states that the operator has decided to terminate the worker's access to the digital labour platform,
- specifies the reason for the termination,

- specifies the time and day on which the termination will take effect (which may be immediately), and
- specifies when and how any final payments owing to the worker will be made.

90. Subsection 14(6) provides that the final deactivation notice must contain sufficient information to enable a reasonable person in the position of the worker to understand the matters mentioned in subsection (5).

91. The note to subsection 14(6) cross-references section 17 of the Code, which provides that in giving a final deactivation notice, an operator is not required to disclose information about an individual if the operator considers, on reasonable grounds, that the disclosure may pose a risk to the safety or security of the individual.

92. Subsection 14(6) and section 17 are designed to balance the right of a worker to receive sufficient information about the deactivation, to aid their understanding of the matters in the notice, and the right of a third party to maintain their privacy in the event that they may be involved in the matters the subject of the notice.

93. Notifying the worker of the operator's decision to terminate their access to the platform via a final deactivation notice, and requiring the notice to meet minimum content requirements, is key to ensuring effective communication between the worker and the operator in relation to the deactivation, and that the code process remains accessible to the worker, consistent with the mandatory requirements in paragraphs 536LJ(2)(e) and (f) of the Act.

Illustrative example: Outcome of code process

An employee-like worker works via a rideshare platform and has been receiving below average ratings and reviews from users over the past three months. Although the platform has provided the driver with consistent feedback to prompt the driver to improve their performance, the below average reviews and reports have continued. The operator is considering deactivating the worker from the platform due to the worker's conduct in performing work via the platform.

The operator issues the worker a deactivation warning under section 8 of the Code which outlines the mandatory information in subsection 8(2) of the Code. Despite this, the below average reports and reviews from platform users continue and the operator considers on reasonable grounds that deactivation of the worker is justified because the worker has not, within a reasonable time, remedied the matters that were the subject of the warning.

The operator then issues the worker a preliminary deactivation notice under subsection 11(1) of the Code. The operator does not consider it necessary to also suspend or modify the worker's access to the platform under section 12 of the Code.

The worker responds to the notice and also requests a discussion with a representative of the operator within the period specified in the notice. The driver also invites a support person to attend the discussion.

During the discussion, the operator's representative talks through the reasons for the preliminary deactivation notice and explains the process the operator is following under the Code. The driver, with the help of their support person, explains that they had not understood the information provided by the platform in the earlier communications or the deactivation warning, and was not clear on the steps that were required to meet the operator's service standards.

The discussion helps the driver to assure the operator's representative that they can rectify their conduct. The operator considers the worker's response and considers objectively that no further inquiries about the matter are reasonably warranted. The operator decides to provide the driver a further two weeks to remedy the conduct issues. Over this period, the driver's ratings and reviews from users improve. The operator decides to take no further action in relation to the worker and notifies the worker in writing of this through the app, as soon as reasonably practicable after making that decision.

Division 4—Matters relating to code process generally

94. Divisions 2 and 3 of Part 2, above, outline specific steps digital labour platform operators must take as part of the code process to deactivate an employee-like worker. Division 4 of Part 2 sets out other matters that apply to the code process generally.

Section 15 – Time frame for conducting code process

95. Section 15 provides that a digital labour platform operator must use reasonable endeavours to ensure that:

- a process required to be conducted in accordance with Part 2 of the Code is carried out within a reasonable time frame, and
- a worker is given a reasonable time to exercise their right of response under sections 8 or 13 (which provide the worker an opportunity to respond to a deactivation warning, or preliminary deactivation notice respectively).

96. When using reasonable endeavours to ensure the matters at paragraphs (a) and (b) above are addressed, an operator should consider any reasonable requests from a worker for additional time to exercise their right of response. However, an operator is not expected to accommodate all requests from a worker, and delays deliberately caused by the worker or failures by the worker to respond within specified timeframes should not be seen as a failure on the operator's part to conduct the code process in a reasonable time frame.

Section 16 – Representation of employee-like workers

97. Subsection 16(1) provides that an employee-like worker may appoint a person (other than a lawyer acting in a professional capacity) to provide the worker with support or representation in relation to the deactivation of the worker from a digital labour platform.

98. Subsection 16(2) provides that the person may be a delegate or an employee of an organisation. A note to subsection 16(2) references the definition of 'organisation' in section 12 of the Act, which means an organisation registered under the *Fair Work (Registered Organisations) Act 2009* and would include any union registered under that Act entitled to represent the industrial interests of the worker.

99. Section 16 is intended to assist the worker to better engage with the code process in the event of a proposed or actual deactivation, therefore satisfying the mandatory requirement in paragraph 536LJ(2)(f) of the Act.

Section 17 – Information disclosure and law enforcement or regulatory obligations

100. Subsection 17(1) provides that nothing in Part 2 of the Code requires a digital labour platform operator to disclose any information about an individual if the operator considers, on reasonable grounds, that the disclosure may pose a risk to the safety or security of the individual.

101. Common forms of digital platform work can involve a worker knowing the home address and other identifying information of platform users. In addition, some types of digital platform work can involve low barriers to entry and limited or no background checks. These factors give rise to unique safety and security risks which operators must manage to maintain user confidence in their platforms. Subsection 17(1) is intended to strike a balance between the requirement of an operator to provide the worker with sufficient information to enable a reasonable person in the worker's position to understand matters related to the deactivation, and the need to protect the safety and security of a third party, whose complaint or report may have led to a worker being deactivated.

102. For example, an operator may receive a complaint that a worker has threatened a platform user, including using knowledge of the user's home address in the threat. In such circumstances, the operator could believe that the user's safety and privacy may be at risk if the worker was to approach them after being notified of their deactivation. In this case, an operator may withhold information that it considers, on reasonable grounds, may pose a risk to the safety or security of that user.

103. Subsection 17(2) also provides that nothing in Part 2 of the Code requires a digital labour platform operator to contravene:

- a lawful direction given by a law enforcement or regulatory agency to the operator (for example, to suspend a worker's access to the platform pending a state police investigation), or
- any obligations that the operator has in relation to the protection of personal information (within the meaning of the *Privacy Act 1988* (Privacy Act)).

104. Paragraph 17(2)(b) recognises that the collection, use, and disclosure of a worker or user's personal information by a digital labour platform operator may be subject to requirements under the Privacy Act. No element of the code process (including the issuing of a deactivation warning, or preliminary or final deactivation notice) requires the operator to contravene its obligations in relation to the protection of personal information under that Act. By dealing with the treatment of data relating to the work performed by employee-like workers, subsection 17(2) of the Code also satisfies the mandatory requirement in paragraph 536LJ(2)(g) of the Act.

Part 3—Matters relating to deactivation generally

Section 18 – Circumstances in which work is performed on a regular basis

105. Subsection 18(1) sets out, for the purposes of paragraph 536LJ(2)(a) of the Act, some circumstances in which work is taken to be performed by an employee-like worker on a regular basis.

106. A note to subsection 18(1) references the 6-month eligibility requirement in paragraph 536LD(c) of the Act for a person to be protected from unfair deactivation.

107. Part of the object of Part 3A-3 of the Act (Unfair deactivation or unfair termination of regulated workers) is to establish a framework for dealing with unfair deactivation of employee-like workers that balances the needs of regulated businesses and regulated workers (see paragraph 536LC(1)(a) of the Act).

108. Section 536LP of the Act provides that the Commission may order a person's reactivation if it is satisfied that the person was protected from unfair deactivation at the time of deactivation and the person has been unfairly deactivated.

109. Section 536LD sets out when a person is protected from unfair deactivation. A person is protected from unfair deactivation if, at that time, the person has been performing work through or by means of a digital labour platform, or under a contract or a series of contracts, arranged or facilitated through or by means of the digital labour platform, on a regular basis for a period of at least 6 months. The Act does not define the term 'regular basis' and it therefore adopts its ordinary meaning, having regard to the context in which it appears.

110. The overarching framework in which paragraph 536LJ(2)(a) sits is intended to protect employee-like workers who perform work through or by means of a digital labour platform sufficiently often, or in a readily identifiable pattern of work. It is not intended that workers who only perform work through or via a platform occasionally, or on an ad hoc basis, should be protected from unfair deactivation under the Act.

111. Subsection 18(2) provides that an employee-like worker who completes, on average, 60 hours of paid work each month through or by means of a digital labour platform is taken to perform that work on a regular basis.

112. Subsection 18(3) provides that an employee-like worker who completes, on average, paid work on 3 days of each week through or by means of a digital platform is taken to perform that work on a regular basis.

113. Subsection 18(4) provides that a reference in this section to time spent completing paid work is a reference to the time spent in undertaking the work for which the employee-like worker is entitled to be paid.

114. A note to subsection 18(4) states that an effect of this subsection is that time spent waiting for work, or between tasks constituting the work, is not counted. For example, where an employee-like worker remains logged onto an app between jobs, waiting to accept the next job, the time spent waiting does not constitute paid work.

115. Subsection 18(5) provides that an employee-like worker may be taken to perform work on a regular basis through or by means of a digital labour platform even though the worker elects, in some weeks, not to perform any work through or by means of the platform. For

example, an employee-like worker who typically performs works on 3 days each week over a 6-month period may be juggling many responsibilities in addition to work via the platform. The fact that the worker may not perform work in a few weeks in this period due to having a break or meeting caring responsibilities or study requirements does not mean that the worker has not been performing work on a regular basis. This reflects the way in which workers engage with digital platform work.

116. Subsection 18(6) provides that this section does not limit the circumstances in which work is taken to be performed by an employee-like worker on a regular basis.

Illustrative examples: Circumstances in which work is performed on a regular basis

Example 1 – employee-like worker performs work on a regular basis

An aged care worker performs work through a care platform to supplement their income as a casual employee of an aged care provider. The worker registers with the platform in January and agrees to perform work for three separate clients under services contracts with each of them. The worker performs approximately 15 hours of paid work for all but two of the weeks in the period from January to August prior to the worker being deactivated. The worker did not perform any work in these two weeks because either they or their client was unwell. The number of hours and the days on which work was performed differed each week. However, the worker still performed work sufficiently often (approximately 15 hours a week) so that the worker has performed work on a regular basis for a period of at least 6 months.

Example 2 – employee-like worker performs work on a regular basis

A rideshare driver registers with a digital labour platform in February. Over the next 9 months, the driver performs work on 3-4 days each week, before the driver is deactivated in November. Each week, the days on which the driver works differ, as do the number of hours of work performed on each day. Despite these differences, there is a readily identifiable pattern to the manner in which the driver performs work (ie, on a weekly basis). The driver has therefore performed work on a regular basis for a period of at least 6 months.

Example 3 – employee-like worker does not perform work on a regular basis

A food delivery driver performs work through a food delivery platform. The driver registers with the platform in January but only logs on and performs work via the platform once in January, three times in March and once in May. The driver commences working more regularly and performs at least 15 hours of paid tasks per week in June before being deactivated in July.

As the driver is only performing work on an ad hoc basis, with no readily identifiable pattern to the work, the driver has not been performing work on a regular basis for a period of at least 6 months.

Section 19 – Matters that may constitute a valid reason for deactivation

117. Paragraph 536LJ(2)(b) of the Act provides that the Code must deal with matters that constitute or may constitute a valid reason for deactivation. Section 19 satisfies this requirement by providing a non-exhaustive list of circumstances that may constitute a

valid reason for deactivation. This list does not limit the matters that may constitute a valid reason. The Commission will consider whether there was a valid reason related to the person's conduct or capacity when considering whether it is satisfied that the deactivation was unfair under paragraph 536LH(1)(a).

118. Subsection 19(1) provides a matter set out in any of the following subsections may constitute a valid reason for the deactivation of an employee-like worker from a digital labour platform if it arises in the course of, or in relation to, the worker performing work through or by means of the platform.

119. A note to this subsection informs the reader that if the matter constitutes serious misconduct, the digital labour platform operator is not required to follow the code process in relation to the deactivation of the employee-like worker (referencing subsection 7(2) of the Code).

120. Subsections 19(2) to (16) provide a range of circumstances that may constitute a valid reason for deactivation, related to: failure to meet platform obligations; health and safety matters; the misuse of customer or client information; fraud, dishonesty or deliberate damage; breach of law or regulatory requirements; licensing, accreditation and screening requirements; and inactivity. Subsection 19(17) also provides that matters outside this list may also constitute valid reasons for deactivation of a worker from a platform.

121. Broadly, the valid reasons specified in this list include:

- The employee-like worker fails or refuses to meet one or more of the following requirements, to the extent that the requirement is reasonable and is known to the worker, as a result of communication from the digital labour platform operator or otherwise:
    - The conditions of use of the digital labour platform.
    - The operator's standards or requirements in relation to quality, service level or performance.
    - The operator's code of conduct for the platform.
    - Any other legally binding requirements on the worker's use of the platform not mentioned in an earlier paragraph of this subsection (subsection 19(2)). Examples of such requirements may include:
        - Maintaining reviews, ratings or work completion rates above a certain threshold.
        - Maintaining a clean vehicle, or a vehicle with certain specifications.
        - Adhering to food safety standards.
        - Rules around platform account sharing.
        - Rules around creating duplicate accounts.
- Health and safety reasons (subsections 19(3) to (5)). For example:
    - The employee-like worker engages in inappropriate physical or verbal conduct including, without limitation, conduct of a violent, threatening, harassing, discriminatory, sexual or abusive nature.

- The digital labour platform operator considers on reasonable grounds that the employee-like worker fails or refuses to comply with an applicable work health and safety duty of the worker, or deactivation of the employee-like worker is necessary to protect the health and safety of any person.
- The performance of work through or by means of the digital labour platform requires the employee-like worker to drive a motor vehicle and, in doing so, the worker engages in unsafe driving practices (including speeding).

- The employee-like worker misuses information about the operator, a customer or client of the platform, other workers who perform work through or by means of the platform or any other member of the public obtained by the worker in performing work through or by means of the platform (subsection 19(6)).
- Fraudulent or dishonest conduct, including theft of property or deliberately causing damage to another person's property by the worker (subsections 19(7) to (8)).
- Breach of law or regulatory requirements (subsections 19(9) to (11)). This includes where:
  - The worker engages in conduct that results in the referral or report of the worker's conduct to a law enforcement or regulatory agency
  - The worker fails or refuses to comply with a mandatory industry code of conduct that applies to work performed through or by means of the digital labour platform; or engages in conduct that causes, or may cause, the operator to breach such a code of conduct. Mandatory industry codes of conduct may include applicable legislative instruments such as the National Disability Insurance Scheme Code of Conduct.
  - The digital labour platform operator is requested by a law enforcement or regulatory agency to remove the employee-like worker from performing work through or by means of the digital labour platform.
- Licensing, accreditation and screening requirements (subsections 19(12) to (15)). This includes where:
  - The employee-like worker fails or refuses to comply with a licensing, accreditation or mandatory screening or registration requirement necessary for the worker to perform work through or by means of the platform and administered or enforced by a law enforcement or regulatory agency. This could encompass a worker's failure or refusal to obtain or comply with a Working with Children Check, a Working with Vulnerable Persons Check, a police check or a vehicle licence.
  - The employee-like worker loses a licence or accreditation necessary for the worker to perform work through or by means of the digital labour platform.
  - The employee-like worker fails or refuses to maintain the worker's tools or equipment so as to meet relevant licensing or accreditation requirements. For example, if performing work for a rideshare platform, ensuring that the worker's vehicle is road-worthy.
  - The employee-like worker fails or refuses to comply with a mandatory screening or registration requirement necessary to perform work through or by means of the digital labour platform. For example, complying with a requirement to hold a NDIS Worker Screening Check, working with children check, police check or working with vulnerable people check (however described).

- The employee-like worker fails or refuses to perform work through or by means of the digital labour platform for which payment is made to the worker for such period that the operator must deactivate the worker to comply with a requirement of a law enforcement or regulatory agency (subsection 19(16)). For example, where an operator has a regulatory obligation to maintain appropriate controls in relation to the privacy and confidentiality of client information. Such an obligation may require the operator to remove an inactive worker from platform to ensure it appropriately retains control over who can access personal and sensitive client information.

Section 20 – Communications relating to deactivation

122. Subsection 20(1) provides that a digital labour platform operator must ensure that, except as otherwise provided in the Code, all communications and information relating to the code process and the deactivation of an employee-like worker from the digital labour platform are made in writing using one or both of the platform or an appropriate alternative method determined by the operator acting reasonably. Such alternatives may include contacting the worker by text message or email.

123. Subsection 20(2) provides that if the digital labour platform operator uses the digital labour platform for communications and information, the operator must ensure that the employee-like worker has sufficient access to the platform to enable the worker to access and respond to the communications and information. To meet this requirement, while also preserving any modification, suspension or termination of a worker's access to a platform that may have occurred, an operator may prevent the worker from being able to access parts of the platform that enable them to perform work, but otherwise permit the worker to still access the parts of the platform that enable communication with the operator or to access their work and payment history.

124. These communication requirements in relation to the deactivation satisfy the mandatory criterion in paragraph 536LJ(2)(e) of the Act. Ensuring relevant parts of the platform remain accessible to the worker while the code process is being followed, to ensure that they can access and respond to any communications and information, also increases the accessibility of the code process, as per the mandatory criterion in paragraph 536LJ(2)(f) of the Act.

Section 21 – Data and platform access following reinstatement

125. Paragraph 536LJ(2)(g) of the Act provides that the Code must deal with the treatment of data relating to work performed by employee-like workers. Section 21 does this by stipulating the way in which such data must be treated in the event a worker is reinstated following a deactivation.

Scope

126. Subsection 21(1) provides that this section applies if a digital labour platform operator takes any of the following actions in relation to the deactivation of an employee-like worker's access to a digital labour platform:

- removes a modification
- lifts a suspension

- reinstates the worker's access to the platform after having previously terminated such access.

Full reinstatement required

127. Subsection 21(2) provides that the digital labour platform operator must ensure that, as soon as reasonably practicable after the operator takes the action mentioned in subsection (1):

- the employee-like worker has the same access to the digital labour platform (including to data and information relating to the worker's performance of work through or by means of the platform) that the worker had immediately before the deactivation, and
- in a case where the deactivation affected the worker's status or ranking on the platform—the worker retains a status or ranking no lower than that held by the worker immediately before the deactivation.

128. Section 21 is intended to ensure that a worker is not disadvantaged by their deactivation, should their access to the platform be reinstated. If reinstatement occurs, the worker must be able to view and access data relating to past work performed through the platform (including number of jobs completed, details of clients or users of the platform for whom such work was performed, and payment received for that work).

129. Digital labour platform operators may use status or ranking systems to preference or allocate work to employee-like workers. For example, depending on a worker's ranking or status earned through positive work performance, they may be entitled to fuel discounts, or receive priority customer support from the operator. The intention is that a worker that has been reinstated that had a high ranking prior to deactivation would not be penalised by starting again at the status or ranking of a new driver. Preservation of a worker's status or ranking also mitigates any reputational damage to the worker for current or future customers or clients of the platform, that may ensue from deactivation.

Section 22 – Record keeping for worker data and deactivation processes

130. Subsection 22(1) provides that a digital labour platform operator must make and keep records of the following matters to the extent that the operator considers reasonably necessary to demonstrate compliance with the Code:

- data relating to the work performed through or by means of the digital labour platform by an employee-like worker, and
- the processes followed, and the decisions made, in relation to the deactivation of each employee-like worker from the digital labour platform.

131. Subsection 22(2) provides that the records must be kept for so long as the digital labour platform operator considers reasonably necessary to demonstrate compliance with the Code.

132. Subsection 22(3) provides that to the extent that the records are or include personal information within the meaning of the Privacy Act, the records must be collected, used and disclosed only in accordance with that Act.

133. This provision is not intended to create new obligations in addition to standard business practice. Appropriate record keeping is a safeguard that can assist operators to provide procedural fairness for workers. For example, by ensuring that information provided in relation to the reasons for deactivation is accurate. An operator should ensure that records about an individual worker are retained for the duration of any deactivation process, including any subsequent Commission proceedings. Retention of any records beyond this would be a matter for the operator in accordance with any other record-keeping obligations that it may have.

134. Section 22 satisfies the mandatory requirement in paragraph 526LJ(2)(g) of the Act by providing that data relating to the work performed through or by means of the platform by a worker must be maintained through records, and must only be used, disclosed or dealt with in accordance with the operator's existing obligations under the Privacy Act.

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work (Digital Labour Platform Deactivation Code) Instrument 2024

The *Digital Labour Platform Deactivation Code* (the Code) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Code is made for the purposes of supporting the practical application of the unfair deactivation framework in Part 3A-3 of the *Fair Work Act 2009* (the Act). It is integral to the Fair Work Commission's (the Commission) determination of whether an employee-like worker (a worker) has been unfairly deactivated under Part 3A-3 of the Act. The Code is also intended to guide digital labour platform operators to ensure that in the event a worker's access to a digital labour platform needs to be deactivated, such deactivation is done fairly.

In accordance with subsection 536LJ(2) of the Act, the Code deals with the following mandatory matters:

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

Human rights implications

The definition of 'human rights' in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the core seven United Nations human rights treaties. The Code engages the following rights:

- the right to enjoyment of just and favourable conditions of work under Articles 6 and 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and
- the right to privacy and reputation under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

Right to work and rights in work

Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to work in Article 6(1) encompasses the need to provide the worker with just and favourable conditions of work.
Article 7 of the ICESCR requires the State Parties to the Covenant to recognise the right of everyone to the enjoyment of just and favourable working conditions.

The right to just and favourable conditions of work, as set out in the ICESCR, is not limited to workers within an employment relationship.

The Code promotes the rights to work and rights in work by establishing safeguards against an operator unfairly deactivating a worker from a platform thereby protecting the worker's right to continue performing work through or by means of a platform in appropriate circumstances.

In particular, Part 2 of the Code sets out a code process which an operator must follow to comply with the Code, where it is considering deactivating the worker from the platform for a matter related to the worker's conduct or capacity in performing work (other than serious misconduct).

The code process encompasses several protective steps which preserve the worker's ability to perform work through or by means of the platform throughout any investigation of the worker where appropriate and ensure that any final termination of a worker's access to a platform occurs because of established valid reasons. For example:

- Section 8 of the Code generally requires the digital labour platform operator to provide the worker a warning.
- Section 11 of the Code requires the operator to provide a preliminary deactivation notice to the worker should the matters the subject of the warning recur, or other matters arise. The notice must outline amongst other things, the reason for which it is given, that the worker may provide a response to it, request a discussion with a representative of the operator about the notice and be represented or supported in those discussions.
- Sections 13-14 of the Code require the operator to consider the worker's response and make further inquiries as are reasonably warranted before proceeding to termination (and issuing a final deactivation notice to this effect) or taking no further action. The operator may only terminate the worker's access to the platform if there is a valid reason for the termination and the operator considers on reasonable grounds that the reason has been established.

The Code recognises that deactivation of a worker from a platform may need to occur in certain circumstances. However, it allows for deactivation in a manner that protects the right of a worker to receive adequate feedback in an accessible manner from an operator about issues regarding their performance, and a right of the worker to respond to and rectify these issues, thereby promulgating safe and healthy working conditions. Specifically:

- Subsections 8(3), 11(2) and 14(6) of the Code provide that when an operator issues a deactivation warning, a preliminary deactivation notice or a final deactivation notice, the notice must contain sufficient information to enable a reasonable person in the position of the worker to understand the matters specified in the notices. Subsection

13(1) of the Code provides the worker a right to respond to a preliminary deactivation notice within a period specified in the notice (provided it is reasonable).

- Subsections 13(4) and (5) of the Code provide that a worker may request the operator to make a representative available to discuss the preliminary deactivation notice within a reasonable time.
- Subsection 13(7) of the Code provides that a human representative of the digital labour platform operator must consider the worker's response (if any) to the preliminary deactivation notice, including the discussion (if any) between the worker and the operator's representative.
- Section 20 of the Code also requires the digital labour platform operator to ensure that, except as otherwise provided by the Code, all communications and information relating to the code process and the deactivation of a worker are made in writing using either, or both of, the platform, or an appropriate alternative method determined by the operator acting reasonably.

The safeguards within the Code and the related obligations on the digital labour platform operator to comply with the Code ensure that the worker's rights to work and rights in work are upheld.

Right to privacy and reputation

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. This includes respect for informational privacy, including in respect of storing, using, and sharing private information and the right to control the dissemination of personal and private information. Privacy guarantees a right to secrecy from the publication of personal information. It also prohibits unlawful attacks on a person's reputation.

Subsection 17(1) of the Code provides that nothing in the code process requires an operator to disclose any information about an individual if the operator considers on reasonable grounds that the disclosure would pose a risk to the safety or security of the individual.

Paragraph 17(2)(b) of the Code also provides that nothing in the code process requires an operator to contravene any obligations the operator has in relation to the protection of personal information within the meaning of the *Privacy Act 1988* (Privacy Act).

The Code therefore aims to strike a balance between, on the one hand, providing a worker sufficient information to enable a reasonable person in their position to understand and respond to a matter that may justify their deactivation from a platform. On the other hand, protecting the personal information of a client, user the platform, or an employee of a supplier or business associated with the platform who may be involved in the matter warranting the worker's deactivation (for example, by having lodged a complaint about the worker's alleged conduct or capacity).

Additionally, the Code recognises that an operator may collect, deal with or disclose personal information of both workers and clients or users of the platform in the course of their business. The Code leverages an operator's existing Privacy Act obligations by explicitly providing that nothing in the code process requires them to contravene those obligations.

By limiting the ways in which the personal information of a client or user may be disclosed (that is, by requiring that these things are done consistently with existing privacy laws) the Code therefore protects against unnecessary disclosure of a client or user's personal information.

As a mandatory matter, the Code must also deal with the treatment of data relating to the work performed by workers under paragraph 536LJ(2)(g) of the Act. Sections 21 and 22 of the Code do this by requiring the operator to:

- ensure that where a worker is reinstated following deactivation, the worker has the same access to the platform (including to data and information relating to their performance of work) that the worker had before deactivation, and their status or ranking remains no less than it was prior to deactivation, and
- make and keep records of data relating to the work performed through or by means of the platform, processes followed, and decisions made, in relation to the deactivation of a worker from a platform, to the extent and for so long as the operator considers reasonably necessary to demonstrate compliance with the Code. To the extent that the records include personal information, they must be collected, used and disclosed in accordance with the Privacy Act.

Both sections oblige the operator to manage a worker's personal information collected by the operator appropriately, in accordance with applicable privacy laws and in a manner that respects the integrity of their personal information.

The right to privacy of the worker, and the right to privacy of a user of a platform is therefore engaged and protected by the Code.

Conclusion

The Code is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that it may limit human rights and freedoms, those limitations are reasonable, necessary, and proportionate in the pursuit of legitimate objectives.

Senator the Hon Murray Watt, Minister for Employment and Workplace Relations