

New Rules for Fair Work in the Gig Economy

by Joellen Riley*

Abstract

The Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024 (Cth) introduced a new statutory scheme allowing the Fair Work Commission to make 'minimum standards orders' to provide for basic pay and entitlements for workers engaged by digital platforms such as UberEats, Door Dash, and others. In late 2025 and early 2026, the Fair Work Commission has been considering the first applications brought under these new provisions. This article explains the rationale for the Fair Work Commission's new jurisdiction, and the current process for determining minimum standards orders for food delivery platform workers.

Key words

Gig economy; digital labour platforms; food delivery workers; platform work; independent contractors; employee-like workers; rideshare workers; Fair Work Commission; minimum standards orders; Fair Work Act 2009 (Cth); Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024 (Cth); labour law reform; employment classification; unfair deactivation; minimum pay rates; workplace rights; transport workers; Road Transport and Distribution Award 2020; regulatory reform; collective representation; workers' compensation; algorithmic management; labour market inequality; Australia.

* Professor Emerita, University of Sydney.

Meals on wheels 2.0

Walk the streets around a university campus in the early evening, and you will see flocks of cyclists in hi-vis vests peddling furiously with a large hot-box on board. Some bear logos: Menulog, Hungry Panda, Uber Eats, Deliveroo. A smart phone will be strapped to the handlebars, delivering instructions on where to pick up, where to deliver, how to get there by the fastest route possible to ensure that the pizza or pad thai is delivered hot to a waiting customer. Cold food means poor ratings, and a poor rating could cost the cyclist their job.

On any view, these workers are among the most precarious in the contemporary Australian labour market. They are paid by delivery, but are guaranteed no work. Presently, there is no guaranteed minimum hourly rate for their work, and certainly no right to be paid for waiting time, so they often earn significantly less than the lowest paid employees.¹ Some cyclists have lost their lives doing this kind of work, and yet their dependants have received none of the compensation paid to employees killed or injured on the job.² Why is this so? Because until now, our so called ‘fair’ work system has decided that workers engaged to perform this kind of work through digital platforms are not ‘employees’ covered by the minimum employment standards in the *Fair Work Act 2009* (Cth).³

Many of their customers are in a very different position. People who are employed in continuing positions are likely to be entitled to a minimum wage, set by an occupation-based modern award stipulating not only an hourly rate for up to 38 ordinary hours of work, but penalty rates for working

¹ P Karp P ‘Food Delivery bike couriers in Australia being underpaid by up to \$322 a week’ *The Guardian* (Online, 19 November 2019) <<https://www.theguardian.com/australia-news/2019/nov/20/food-delivery-bike-couriers-in-australia-being-underpaid-by-up-to-322-a-week>>.

² See U Malone ‘Hungry Panda Food Delivery Company under Scrutiny over Riders’ Insurance, Failure to Report Death to SafeWork NSW’, *ABC News* (online, 23 February 2021) <https://www.abc.net.au/news/2021-02-23/hungry-panda-scrutiny-over-delivery-riders-safety-gig-economy/13182772>; N Bonyhady and L Chung ‘Fifth Food Delivery Driver Dies’ *Sydney Morning Herald* (Sydney, 24 November 2020). For a thorough discussion of the work health and safety issues related to this kind of gig work, see E Bluff, R Johnstone and M Quinlan ‘Regulating Health and Safety in Work for Digital Labor Platforms in Australia: The Example of Food Deliverers’ (2023) 1(1) *Journal of Work Health and Safety Regulation* 92.

³ See *Kaseris v Rasier Pacific VOF* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Nawaz v Rasier Pacific Pty Ltd T/A Uber BV* [2022] FWC 1189; *Gupta v. Portier Pacific VOF* [2020] FWC 1698; *Deliveroo Australia Pty Ltd v. Franco* (2022) 317 IR 253.

unsociable hours in the evening or on weekends or public holidays.⁴ If they work in an industry where a trade union is active, they may well have the benefit of more generous pay and conditions, negotiated in an enterprise bargain. Permanent employees will be entitled to up to 10 days paid leave each year if they are too sick to work, and maybe more if they work for an enterprise with more generous personal leave provisions.⁵ For at least four weeks of the year, plus about 11 extra days of public holidays, permanent employees will be entitled to paid time off for recreation.⁶ And once they have been employed for six months (or a year in small business jobs) they will be entitled to fair procedures before being dismissed from a job for poor performance or bad behaviour.⁷ Any injury or illness contracted in the course of employment will be compensable under a state workers' compensation scheme.⁸ In February 2024, Australian employees acquired a 'right to disconnect' to protect their leisure time from unreasonable intrusion from work.⁹

Gig work compared with employment

If the average food delivery cyclist were to be treated as an employee – even as a casual employee with no rights to paid leave – they would be demonstrably better off, as a glance at the entitlements set out in the *Road Transport and Distribution Award 2020* ('RTDA') shows. This is the award that the Fair Work Commission decided would apply to this kind of work if undertaken by an employee.¹⁰ Like all modern awards, the RTDA reflects certain assumptions, derived from typical 20th century, pre-digital economy forms of worker engagement. In that world, 'ordinary hours' of work were usually the (roughly) eight hours of daylight, Monday to Friday, and any work done in the evenings or

⁴ See the list of modern award on the Fair Work Commission's website: www.fwc.gov.au.

⁵ See *Fair Work Act 2009* (Cth) ss 96-99.

⁶ *Fair Work Act 2009* (Cth) s 87, ss 114-115.

⁷ *Fair Work Act 2009* (Cth) ss 385-387.

⁸ In NSW, see the *Work Health and Safety Act 2011* (NSW) and *Workplace Injury Management and Workers Compensation Act 1988* (NSW).

⁹ *Fair Work Act 2009* (Cth) ss 333M-333W.

¹⁰ See *Menulog Pty Ltd* [2022] FWCFB 5, [55].

on weekends attracted penalty rates to compensate the worker for time away from family, rest and recreation. So under the RTDA clause 13.6, ‘ordinary hours’ attracting the basic hourly rate of \$25.65 an hour are limited to the hours between 5.30am and 6.30pm. Work performed outside of those hours must be paid at penalty rates of 150 per cent for the first two hours (up to 8.30pm) and 200 per cent thereafter.¹¹ That means that the minimum hourly rate for work done after 8.30pm at night is \$51.30 per hour. Another clause 23.1(c) states that an employee undertaking shifts on weekends must be paid for a minimum of four hours. Saturday and Sunday work is paid at 200 per cent of the basic rate. A little basic arithmetic shows that a rider who delivered pizzas within the peak time of 8pm till 9pm on a Saturday evening must be paid a minimum of \$205.20 for that hour of work. That is very expensive pizza. Is it any wonder that the digital platforms have drafted their contracts so as to avoid classification of these workers as employees? And is it any wonder that it is often consumers who are most deaf to cries for fairer treatment of delivery riders?

There is a terrible inequality in our labour market, and it is not just that wealthy industrialists and stockbrokers are billionaires while the rest of us work for modest wages. Even wage earners are significantly better off than the delivery cyclists who bring them their food. There is an apartheid in the labour market, between employees who have the benefit of mandatory minimum conditions, and so-called ‘independent contractors’ who are assumed to be capable of negotiating their own terms. Genuine independent contractors who do run their own business and set their own prices may well be left out of a system of mandatory employment entitlements, because they really do not need any paternalistic interference in their prerogative to run their own genuinely entrepreneurial businesses. One look at those delivery-riders reveals the nonsense of assuming that they are running their own micro-businesses. Many are recent migrants, or international students scratching together funds to survive in an expensive city.¹²

¹¹ *Road Transport and Distribution Award 2020*, Clause 21.1.

¹² See generally S Clibborn and C Wright ‘COVID 19 and the Policy-Induced Vulnerabilities of Temporary Migrant Workers in Australia (2020) 85 *Journal of Australian Political Economy* 62.

There is nothing entrepreneurial about this work. They have fallen outside of the definition of employment because courts and tribunals, and also the Fair Work Ombudsman,¹³ have found that the way they are engaged, and the nature of their work, does not reflect the common law definition of employment that underpins our employment laws. They have ostensible discretion over their working hours, whereas an employee works under the control and supervision of the employer. They can log on or off the app at their own discretion, while the employee must adhere to the shift times dictated by the employer, exercising the prerogative to manage the business. They bring their own vehicle, smart phone, and often their own hi-vis vest and hot-box, to work, whereas an employee can generally expect the employer to provide the tools for undertaking the work, or at least guarantee reimbursement of any work expenses. They can ‘multi-app’, meaning that they can have several applications open at the same time, and toggle between them to pick up as many deliveries as they can to maximise their meagre earnings. An employee will be committed to loyal service to a single employer, at least for the hours during which they are employed. Put simply, these features of the work of the typical 21st century gig worker do not match the 20th century definition of employment and its underpinning assumption of subservience to a single employer who dictates work times and tasks.¹⁴

Some surveys of riders themselves suggest that the flexibility of this form of work is a benefit that they do not want to surrender in order to become tied employees of one platform. A survey conducted for the Transport Workers’ Union found that only 47.6 per cent of gig workers wanted to be employees, possibly because they preferred the liberty of choosing their own working patterns, to fit in with other commitments and activities.¹⁵ The platforms themselves regularly assert the benefits to workers of the

¹³ *Kahin v Uber Australia Pty Ltd* [2020] NSWCC 118, [81].

¹⁴ For explanations of the common law definition, see J Riley, ‘The Definition of the Contract of Employment and Its Differentiation from Other Contracts and Other Work Relations’ in M Freedland et al (Eds) *The Contract of Employment* (OUP, 2016) 321; P Bomball, ‘The “Entrepreneurship Approach” to Determining Employment Status: A Normative and Practical Critique’ (2021) 44(4) *UNSWLJ* 1336.

¹⁵ Transport Workers’ Union, Submission No 30 to Legislative Council Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales, Parliament of New South Wales, *Inquiry into Impact of Technological and Other Change on the Future of Work and Workers in New South Wales* (14 October 2020) 16.

kinds of flexibility and autonomy supposedly offered by this kind of work.¹⁶ Dominic Taylor, General Manager of Uber Australia, described the workers as ‘delivery partners’ who were highly ‘entrepreneurial’ in managing the expenses of their micro-businesses to be able to take home ‘as much as they can at the end of the week’.¹⁷ Speaking of the rideshare arm of Uber’s business, he said that he regularly met drivers who were doing the work to supplement retirement incomes, or support their studies, or make profitable use of evenings when they were not obliged to care for their children after divorce.

What strikes me is that ... it’s all around flexibility. To be able to do a new type of work that fits in their lifestyle, where they can work within the needs of their life, whether it be their employment status or whether it be where their children are, is quite a unique proposition.¹⁸

New rights for gig workers – protection from dismissal

Despite this ‘unique proposition’ of ultimate flexibility, drivers and riders do regularly assert a need for one right that was until recently reserved for employees: the right to contest an allegedly unfair dismissal.¹⁹ This is where the injustice in our Fair Work system has been most obvious. Employed workers, sitting at home waiting for the pizza or pad thai, have the power to cut off a delivery cyclist’s livelihood by posting mean-spirited ratings. An algorithm tallying up those ratings can ‘decide’ (if ‘decision’ is the correct term for an artificially intelligent process) to ‘deactivate’ the worker’s access to the app allocating tasks. The employees wielding this power will themselves have access to a cheap, quick process to contest a dismissal which is ‘harsh, unjust or unreasonable’, and can seek reinstatement

¹⁶ See the submissions of Evidence to Senate Select Committee on Job Security, Parliament of Australia, Sydney, 12 April 2021, 20.

¹⁷ Evidence to Senate Select Committee on Job Security, Parliament of Australia, Sydney, 12 April 2021, 20.

¹⁸ Ibid 17.

¹⁹ The cases noted above (n 3) were all unfair dismissal applications which failed on the threshold question of whether the worker was an employee.

to their job, or failing that, up to 26 weeks wages as compensation.²⁰ But bad ratings can mean penury for the delivery cyclist dependent upon the meagre earnings from this work, because until the enactment of the Fair Work *Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) there was no avenue for them to complain of unfair dismissal. Now deactivated platform workers who meet the eligibility requirements in *Fair Work Act 2009* (Cth) s 536LD can bring a complaint to the Fair Work Commission under s 536LU, and some applications have already been brought and heard.

Prior to the enactment of these provisions, platform workers were in the same position as other independent contractors, whose contractual rights under general commercial law do not extend to any right of fair process in decisions to cut their access to the platform. This much was made very clear in *Oze-Igiehon v Rasier Operations BV*,²¹ where it was held that Uber's standard contract terms allowed the platform operator to block a rideshare driver's access to the app, and terminate the entire contract completely, without following any fair process.

New rights for gig workers – minimum pay and conditions

In February 2024, the Albanese government finally managed to secure the passage of legislation to address some of these inequities in our labour market regulation. At the time of writing the Fair Work Commission was hearing a number of applications for 'minimum standards orders' to be made to deal with certain classifications of transport workers engaged through digital platforms.²² These new instruments will *not* be able to include any of the kinds of provisions typical in modern awards to regulate unsociable working hours or rostering more generally. There can be no overtime penalty rates, or minimum shift provisions such as those outlined above in the RTDA.²³ There is, however, capacity

²⁰ *Fair Work Act 2009* (Cth) s 387.

²¹ [2016] WADC 174.

²² *Fair Work Act 2009* (Cth) Chapter 3A. 'Employee-like' worker is defined in *Fair Work Act 2009* (Cth) s 15P.

²³ *Fair Work Act 2009* (Cth) s 536KM.

for setting a minimum hourly rate, and payments to allow workers to recover the costs of providing services. There can be terms providing for compulsory insurance against the risks of performing this kind of work. And as noted above there is now access to the Fair Work Commission for a worker who has served the same platform regularly for a minimum of six months to complain of an unfair deactivation or termination of contract.²⁴

Some scholars have written about the plight of gig workers, and have argued stridently that they ought to be brought within the full protections of employment laws.²⁵ For these critics, the Closing Loopholes measures will not go far enough to address the inequities in our Fair Work system. Defining all of these workers as employees would, however, disrupt this kind of work. No-one is going to be prepared to pay upwards of \$200 for that Saturday evening pizza. If the surveys noted above are reliable, and close to half of the workers undertaking this kind of work do want to keep doing it, and do want to set their own hours free of the restrictions embedded a modern award, then the creation of this new jurisdiction to create special instruments governing non-employed digital platform workers and tailored to the particular features of their working arrangements makes a great deal of sense.

The potential creation of new safety net instruments for digital platform work has been made possible by the enactment of a new Chapter 3A in the *Fair Work Act*. These provisions allow for the making of minimum standards orders ‘employee-like’ workers (defined in s 15P) who provide services to a digital platform (defined in s 15L), and ‘regulated road transport contractors’ (defined in s 15Q). ‘Employee-like’ workers must satisfy at least two of three conditions: they have low bargaining power, their remuneration falls below the minimum wage for an employee doing the same work, and they little authority over the performance of the work. There are also specific provisions for regulated road transport workers.²⁶ Chapter 3A is complex and does many more things, including facilitating potential

²⁴ *Fair Work Act 2009* (Cth) s 536LD.

²⁵ See A Stewart and S McCrystal ‘Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?’ (2019) 32(1) *Australian Journal of Labour Law* 4.

²⁶ For a thorough review of the provisions and the debate around their enactment, see Michael Rawling ‘Regulating beyond the Employment Relationship to Protect Road Transport and “Gig” workers: the Regulated Worker Provisions’ (2024) 37(2)

enterprise bargaining in this labour market sector. Here we focus on the making of minimum standards orders, and particularly on the prospect for such an order to be made to cover the food delivery workers described above.

In making minimum standards orders the FWC must regard the minimum standards objective set out in s 535JX, which requires the Commission to establish standards that are clear, simple and fair, and tailored to the relevant business model as well as the workers' needs. The prospect of 'multi-apping' must be accommodated: standards must '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'.²⁷

Minimum standards orders may include²⁸:

- (a) payment terms;
- (b) deductions;
- (d) record – keeping;
- (e) insurance;
- (f) consultation;
- (g) representation;
- (h) delegates' rights;
- (i) cost recovery.

Australian Journal of Labour Law 178.

²⁷ Fair Work Act s 536JX(a)(ix).

²⁸ Fair Work Act s 536KL.

Notably, minimum standards orders must *not* include overtime rates, rostering arrangements or any term that would turn the worker into an employee for the purpose of the common law definition.²⁹ So terms typically included in modern awards dealing with the span of ‘ordinary’ hours and penalty rates for overtime and weekend work cannot be included.

Before settling minimum standards orders the FWC must engage in the consultation procedures set out in *Fair Work Act* ss 536KAA-KAE (for employee-like minimum standards orders) or ss 536KB-KF for road transport minimum standards orders. Over the course of 2025 the FWC has indeed been engaging extensively in consultations with industry stakeholders. The consultation process includes receiving and considering applications, issuing draft orders, and calling for submissions.

Current applications

Promptly after the commencement of the new provisions on 26 August 2024, the Transport Workers Union (TWU) applied for a number of minimum standards orders, including one for food delivery workers, which is now designated as *MS2024/3 – Draft Minimum Standards Order for the on-demand delivery sector*. Notwithstanding that the TWU submitted this application in September 2024, claiming that it should be dealt with urgently given the low pay and ‘uniquely risky work environment’ of food delivery cyclists, the consultation and consideration of the application was still underway in February 2026.³⁰

By the time of writing this note, the TWU and two major platform operators, Uber Eats and Door Dash, had reached agreement on the terms of a draft minimum standards order. The interests of both the platform operators and the food delivery workers are apparent in the terms settled in this draft order. For instance, the draft anticipates the risk that workers may over-claim by stipulating that that they cannot be

²⁹ *Fair Work Act* s 536KM.

³⁰ Transport Workers’ Union of Australia response to President’s Statement, (MS2024/1-4) 27 September 2024, 1.

paid for ‘non-engaged time’.³¹ Also, workers must pay their own parking fines, and cannot seek recovery of such costs from the platforms.³² Also, the minimum rates of pay proposed in clause 13 are by no means excessive. The table of safety net rates in clause 13.2 proposes a flat hourly rate of \$31.30 for ‘engaged time’ regardless of the time of day the work is performed. This is lower than the minimum rate provided to the lowest classification of fast food industry employee under the *Fast Food Industry Award 2020*. A casual worker engaged under that award is entitled to an ordinary time pay rate of \$33.19 per hour, and the rate rises to \$39.83 per hour for work on weekends. Given that the Minimum Standards Order contemplates that this minimum rate should compensate the worker for the provision and maintenance of their own vehicles and communication equipment (see clause 3.5) as well as their labour time, the MSO provides considerably more favourable terms for business operators than would apply if these workers were found to be employees.

A number of clauses in the draft deal with workers’ rights to representation in matters affecting their working conditions. Clauses providing for a Platform Feedback Forum (clause 5) and Workplace Delegate’s Rights provisions allow workers avenues to raise any issues arising in this type of work. These provisions make a great deal of sense in a labour market sector where the platform operators have limited oversight of the working conditions on the ground. Unlike many traditional employers who engage workers in their own factories and plants, the platform operators are remote from the places the workers undertake tasks. The workers have much better knowledge of the actual conditions in which work is undertaken than the platform operators themselves, so avenues to ensure that knowledge is fed back to the platforms is beneficial for many reasons, not the least being the encouragement of safer operating practices.

The provision of formal channels for this kind of worker participation (in addition to mandatory record keeping requirements in proposed clause 6) may also assist in ensuring the standards are enforced

³¹ See *MS2024/3 – Draft Minimum Standards Order for the on-demand delivery sector* clause 2.1(o).

³² *Ibid* clause 7.1.

in practice. Workers who undertake this kind of work are easily isolated from each other, and are readily exploited by those who would take advantage of their lack of knowledge about their entitlements. Channels that assist them in understanding their entitlements will promote better enforcement of standards. The proposal for a mandatory Gig Worker Information Statement (similar to the Fair Work Information Statement employers must give their employees) also speaks to the risk that individual workers may be unaware of their entitlements.

The MSO draft requires workers to take out comprehensive third party insurance for vehicles at their own expense (see clause 8.1), however insurance coverage for personal injury (which experience tells us may arise from incidents other than vehicle accidents) is to be provided by the digital labour platform operator (clause 8.2). Group-based insurance systems, such as workers' compensation, are the most efficient means of achieving adequate coverage of the risks of workplace injury.³³ Given the low earnings of these workers, it is not reasonable to expect them to take out personal accident and injury insurance policies themselves. The risks they incur in doing the work are risks created by the operation of the platforms' businesses, so it is appropriate that the platforms bear the cost of insuring these risks.

It remains to be seen whether this draft will ultimately be adopted by the Fair Work Commission. If made, it can be expected to provide improved conditions for food delivery cyclists, and may encourage applications on behalf of digital platform workers in other fields where vulnerable workers toil without the protection employment status.

No doubt some submissions to the Fair Work Commission's consultation process will argue that a minimum standards order will put this new sector of the labour market at risk, and may inconvenience consumers by raising prices of home delivered pizzas and pad thais. I would argue in response that the proposed minimum standards would still leave Australian platform workers in a worse position than

³³ See the TEACHO Report (above n 2) pp 27-30 for information on the existing application of state-based Workers Compensation insurance regimes to on-demand work.

those working in both the United Kingdom and New Zealand. Cases at the highest level in those jurisdictions have determined that workers with the same characteristics as food delivery workers in Australia are in fact entitled to legislated minimum wages and other protections.³⁴ In Australia, digital platform workers will still enjoy many fewer protections than the employees who use their services. Employees will still enjoy their guaranteed salaries, paid leave, controlled hours, and ‘rights to disconnect’. ‘Employee-like’ gig workers will be paid only at a flat rate for their ‘engaged time’, but at least they will have insurance against workplace accidents. Finally, they enjoy a modicum of job security to protect them from the capricious ratings of their employed customers, sitting at home in comfort in front of the television after a ‘busy’ day working from home, impatiently waiting for their pizza or pad thai. Making minimum standards orders may finally ameliorate some of the worst injustices in our inequitable system for regulating work outside of the boundaries of employment.

Declaration of interests

Nil.

Joellen Riley

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³⁴ see *Uber BV et al v Aslam et al* [2021] UKSC 5 and *Rasier Operations BV v E Tu Inc* [2025] NZSC 162.