

## **EXPLANATORY STATEMENT**

Issued by authority of the Minister for Employment and Workplace Relations

*Fair Work (Road Transport Industry Termination Code) Instrument 2024*

### **AUTHORITY**

The *Fair Work (Road Transport Industry Termination Code) Instrument 2024* is made under subsection 536LN(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 unfair termination of regulated road transport contractors in a manner that balances the needs of both road transport businesses and contractors. It also provides remedies where a termination is found to be unfair, with an emphasis on reinstatement. The Fair Work Commission (Commission) may order compensation if it is satisfied it is appropriate to do so, in all the circumstances of the case.

Subsection 536LN(1) of the Act permits the Minister to make a code to be known as the Road Transport Industry Termination Code (the Code).

The Code is made for the purposes of supporting the practical application of the unfair termination framework in Part 3A-3 of the Act. The Code is integral to the Commission's determination of whether a road transport business has unfairly terminated a services contract with a regulated road transport contractor. In particular:

- Section 536LK provides that a person has been unfairly terminated if:
  - the person was performing work in the road transport industry
  - the person has been terminated, and
  - the termination was unfair and inconsistent with the Code.
- Subsection 536LM(1) sets out the criteria for considering whether the termination of a services contract with a regulated road transport contractor was unfair. Amongst other things, the Commission must take into account whether any relevant processes in the Code were followed.
- Subsection 536LN(3) provides that a person's termination was consistent with the Code if, immediately before the time of termination, or at the time of the termination, the road transport business complied with the Code in relation to the termination.

The intent of the Code is to ensure the termination processes of road transport businesses are transparent, fair and provide for a genuine right of response, while respecting the nature of the relationship as one of independent contractor and principal.

The Code prescribes the following matters, as required by subsection 536LN(2) of the Act:

- matters that constitute or may constitute a valid reason for termination
- rights of response to terminations

- the internal processes of road transport businesses in relation to termination, and
- communication between the regulated road transport contractor and the road transport business in relation to termination.

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 makes reference to a number of other Commonwealth, State and Territory laws (see sections 10(1)(b)(ii), 13, 14(4)). 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 paragraph 13(1)(a) 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**

Public consultation was conducted by the release of a public discussion paper on the Code in May 2024. Submissions in response to the paper were requested by 27 June 2024. These submissions were considered in the development of the Code. The Department of Employment and Workplace Relations (the department) consulted on the text of the Code through targeted consultation with key stakeholders in the road transport industry including unions, industry representatives and employer groups. Staff from the Commission were also consulted.

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*).

## **REGULATORY IMPACT**

The Office of Impact Analysis has advised that an Impact Analysis is not required for this Instrument, 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**

## NOTES ON SECTIONS

### Part 1 — Preliminary

#### Section 1 – Name

1. This section provides that the title of the Code is the *Fair Work (Road Transport Industry Termination Code) Instrument 2024*.

#### Section 2 – Commencement

2. This section provides that the Code commences on the later of 25 February 2025 and the day after registration.
3. Due to eligibility requirements, the earliest date a regulated road transport contractor could make an application for an unfair termination remedy is 26 February 2025 (see clause 124 of Schedule 1 to the Act).

#### Section 3 – Authority

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

#### Section 4 – Simplified outline

5. This section provides a general simplified outline. The simplified outline sets out the legislative context and also makes clear that the Code constitutes the Road Transport Industry Termination Code referred to in section 536LN of the Act.

#### Section 5 – Definitions

6. 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:
  - regulated road transport contractor – section 15Q
  - road transport business – section 15R
  - road transport industry – section 15S
  - services contract – section 15H and
  - terminated – section 536LL.
7. Section 5 also defines the following terms:
  - *Act*, which means the Act.
  - *code process*, which means the process leading up to and including the termination by a road transport business of a services contract with a regulated road transport contractor set out in Part 2 of the Code.
  - *warning* means a warning given, or required to be given, under section 7 of the Code.

## **Part 2 — Code process for termination**

### **Division 1 — Application of code process**

8. Paragraph 536LN(2)(c) of the Act provides that the Code must deal with the internal processes of road transport businesses in relation to a termination.
9. Part 2 of the Code prescribes a process that must be followed by a road transport business, in order to be taken to comply with the Code, if it is considering terminating the services contract of a regulated road transport contractor for reasons related to their capacity or conduct (other than in cases of serious misconduct). This is defined in section 5 as the ‘code process’.
10. The code process is focused on steps prior to a termination taking effect and includes a warning process (which can be forgone in certain circumstances) and a show cause process, discussed further below.
11. The code process reflects the nature of work in the road transport industry performed by regulated road transport contractors, including their status as independent contractors. It seeks a balance between providing road transport businesses flexibility in how they conduct their business and affording regulated road transport contractors procedural fairness and reasonable information in relation to any proposed termination.
12. The code process is integral to the Commission’s determination of whether a termination is fair and whether the Code has been complied with. In particular, paragraphs 536LK(c) and (d) of the Act provide that a person has been unfairly terminated if the termination was unfair, and the termination was not consistent with the Code. Paragraph 536LM(1)(b) of the Act also provides that in determining whether the Commission is satisfied that a contractor’s termination was unfair, the Commission must consider whether any relevant processes specified in the Code were followed.
13. Section 536LL of the Act sets out the circumstances in which a person is taken to be terminated, being if:
  - the person performed work as a regulated road transport contractor under a services contract
  - the road transport business received services under the services contract, and
  - the services contract was terminated by, or as a result of conduct of, the road transport business.
14. A person will not be terminated if the services contract entered into with a road transport business has expired.
15. The length of time a business takes to complete the code process is a discretionary matter, provided the business uses its best endeavours to ensure that the process is carried out within a reasonable time (as per section 11 of the Code).
16. Subsection 536LU(3) of the Act provides that an application for unfair termination must be made within 21 days after the termination took effect, or within such further period as the Commission allows under subsection 536LU(4).

## Section 6 – When code process for termination must be followed

17. Subsection 6(1) provides that, to be taken to comply with the Code, a road transport business must follow the code process in relation to the proposed termination of a services contract of a regulated road transport contractor who is protected from unfair termination if:
- the road transport business is considering terminating the services contract, and
  - the reason for termination is:
    - subject to subsection 6(2), a matter related to the contractor’s conduct in performing work in the road transport industry for the business under the contract or
    - a matter related to the contractor’s capacity to perform work under the contract.
18. The note to subsection 6(1) references the eligibility criteria for unfair termination under the Act. The note explains that to be protected from unfair termination by a road transport business, a regulated road transport contractor must have performed work for the business under one or more services contracts for at least six months, referencing paragraph 536LE(c) of the Act.
19. Subsection 6(2) provides that the code process does not apply to the termination by a road transport business of a services contract of a contractor for serious misconduct by the contractor.
20. The two legislative notes under the subsection alert the reader to the provisions of the Act that are relevant to the interpretation of the subsection. Note 1 explains that a termination that occurs because of serious misconduct of a regulated road transport contractor is not unfair, referencing subsection 536LM(2) of the Act.
21. 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(5) provides non-exhaustive examples of conduct of regulated road transport contractors that would be serious misconduct for the purposes of the Act. These examples include engaging in theft, fraud, assault or harassment or being intoxicated while performing work or conduct that causes serious and imminent risk to the health and safety of a person.
22. If an unfair termination application to the Commission is made by a contractor terminated in this circumstance, it would be a matter for the Commission to determine whether the termination was due to serious misconduct.

## Section 7 – Warning generally required before termination

23. When an issue with the contractor’s conduct or capacity arises, the code process provides that a road transport business must generally issue a warning to a contractor. This provides a contractor with an opportunity to rectify the issue or improve their performance under the services contract.

24. Before terminating the services contract of a regulated road transport contractor, a road transport business must warn the contractor that the business is considering terminating the contract for a reason relating to the contractor's conduct or capacity. An exception to this requirement is included in section 8, which enables a road transport business to proceed directly to the show cause process without issuing a warning, in certain circumstances.
25. Subsection 7(1) provides that before terminating a services contract, a road transport business must warn the contractor in accordance with subsection 7(2).
26. Subsection 7(2) provides that the warning must provide sufficient information to enable a reasonable person in the position of the regulated road transport contractor to understand:
  - the reason, relating to the regulated road transport contractor's conduct or capacity, for which the warning is given and
  - that the services contract is at risk of being terminated if:
    - the contractor does not, within a reasonable time, remedy the matters that are the subject of the warning or
    - the reason for giving the warning continues or is repeated or
    - another issue, relating to the contractor's conduct or capacity, arises, and
  - that the contractor may, within a specified period (which must be reasonable), provide a response to the warning.
27. Providing a warning is a key method by which a business may communicate to a worker that their conduct or matters associated with their capacity to perform work may risk their termination if not resolved, or another issue arises. A warning should usually be the result of a prior discussion with a contractor, in which they are given the opportunity to respond to any allegations or concerns.
28. While it is best practice to provide information in writing, this subsection recognises the reality that interactions in the road transport industry may be through oral discussion. The requirements of this subsection can be complied with whether this information is communicated orally or in writing. Separately, section 15 requires a road transport business to ensure that all communications relating to the termination of the services contract of a regulated road transport contractor are conveyed clearly to the contractor.
29. Along with other parts of the code process, this section satisfies the mandatory requirements for the code to deal with the internal processes of road transport businesses in relation to a termination (paragraph 536LN(2)(c) of the Act) and communication between the contractor and business in relation to termination (paragraph 536LN(2)(d)).
30. Nothing in the Code limits the number of warnings that a road transport business may give to a regulated road transport contractor, whether in respect of the same or different reasons relating to the contractor's conduct or capacity.
31. A road transport business therefore has discretion to follow Division 1 of Part 2 of the Code as many times as it considers appropriate before deciding whether to progress to the show cause process in section 9.

## Section 8 – Exception — circumstances when warning not required

32. The code process acknowledges there may be circumstances where it is appropriate for a business to terminate a services contract without first issuing a warning to the contractor.
33. Subsection 8(1) provides that, despite section 7, a road transport business is not required to give a regulated road transport contractor a warning before terminating the services contract if the business considers on reasonable grounds that the matter relating to the contractor’s conduct or capacity is such that:
- it warrants taking of immediate steps to terminate the contract or
  - it is not reasonable to expect the business to allow the contractor to continue to perform work in the road transport industry for the business.
34. The notes to subsection 8(1) provide non-exhaustive examples of when the subsection might apply: when the termination of a regulated road transport contractor is required for a serious safety breach; or where a regulated road transport contractor’s driver licence is suspended or cancelled.
35. The circumstances mentioned in subsection 8(1) and the conduct mentioned in the examples may also constitute serious misconduct. A road transport business must make its own determination, based on the information available to it, about whether serious misconduct has occurred and therefore whether or not it must follow the code process in Part 2, when terminating a contractor. For example, there may be circumstances where a road transport business does not have a sufficient level of evidence to be satisfied there has been serious misconduct, such that immediate termination is warranted, but where a warning would not be appropriate.
36. Subsection 8(2) provides that, in such circumstances, the road transport business may proceed directly to the show cause process in section 9.

## Section 9 – Show cause process before termination

37. Section 9 sets out the show cause process prior to termination. Subsection 536LN(3) of the Act provides that termination is consistent with the Code if immediately before the time of the termination, or at the time the person was given notice of termination (whichever happened first) the road transport business that terminated the services contract complied with the Code. In line with this, the show cause process is intended to provide procedural fairness for initiating termination. The intention behind this process is to give the contractor an opportunity to demonstrate why they should not be terminated and for the road transport business to genuinely consider their response.
38. Subsection 9(1) provides that the section applies if either:
- section 8 means that the business is not required to give the contractor a warning before terminating the services contract or
  - the business has given the contractor a warning and the business considers, on reasonable grounds, that termination of the services contract is justified because:
    - the contractor has not, within a reasonable time, remedied the matters that were subject of the warning

- the reason for giving the warning has continued or been repeated or
  - another issue, relating to the contractor's conduct or capacity, has arisen.
39. Subsection 9(2) provides that the business must give the contractor an opportunity to show cause why the contract should not be terminated before the business terminates the services contract.
40. Subsection 9(2) satisfies the mandatory requirement in paragraph 536LN(2)(b) of the Act by providing a contractor a right of response to a proposed termination.
41. Subsection 9(3) provides that as part of the opportunity to show cause the business must provide in subsection 9(2), the business must provide sufficient information to enable a reasonable person in the position of the contractor to understand:
- that the business proposes to terminate the services contract
  - the reason for the termination
  - that the contractor has the opportunity, within a specified period, to show cause why the business should not terminate the contract, and
  - what the steps the business intends to take next (subject to the contractor's show cause response, if any).
42. It is intended that paragraph 9(3)(d) would require a road transport business to inform the contractor of the procedural steps it will take after the contractor responds to the show cause opportunity (or does not respond). For example, this could include notifying the contractor that the business will consider the matters provided in the response and make a decision that will be communicated to the contractor. It does not require the business to pre-determine its decision before receiving the response.
43. As outlined in relation to section 7, while it is best practice to provide information in writing, this subsection recognises the reality that interactions in the road transport industry are often through oral discussion. The requirements of this subsection can be complied with whether this information is communicated orally or in writing. Separately, section 15 requires a road transport business to ensure that all communications relating to the termination of the services contract of a regulated road transport contractor are conveyed clearly to the contractor.
44. Subsection 9(4) provides that the regulated road transport contractor may, before the end of the specified period to respond mentioned in paragraph 9(3)(c), request the business to make a representative of the business available to discuss the proposed termination of the contractor's services contract.
45. Subsection 9(5) provides that if the regulated road transport contractor makes a request under subsection 9(4):
- the road transport business must make a representative available for the discussion within a reasonable time, and
  - the representative must have knowledge about the reasons for the proposed termination.



46. The right of a regulated road transport contractor to meet with a representative of a road transport business under subsections (4) and (5) is integral to ensuring the code process remains accessible to the contractor and also establishes another avenue for communication between the business and the contractor in relation to the termination.

#### Section 10 – Decision about termination of services contract

47. Subsection 10(1) provides that in considering whether to terminate the services contract of a regulated road transport contractor after the show cause process in section 9 is complete, a road transport business must have regard to the following matters (where applicable):

- the contractor’s response to the opportunity to show cause why the contract should not be terminated
- whether the circumstances that led to the show cause process:
  - were within the control of the contractor or
  - resulted from the contractor meeting its obligations under the Heavy Vehicle National Law (as set out in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld)) or any other State or Territory law that regulates the use of vehicles on roads
- the financial investment that the contractor has made in vehicles and other equipment necessary to perform work under the contract
- the history of performance of services by the contractor for the business under the contract
- the length of time the contractor has performed work in the road transport industry for the business, and
- any other relevant matters.

48. The factors listed in subsection 10(1) are intended to encourage proportionate decision making by road transport businesses. In relation to subparagraph 10(1)(b)(ii), these laws can contain duties to ensure the safety of transport activities, which can include managing risks and hazards associated with fatigue. This may be a relevant consideration for a road transport business that is considering terminating the services contract of a regulated road transport contractor who has failed to meet a contractual deadline or other requirement. If the failure to meet the deadline was a result of the contractor meeting an obligation under the Heavy Vehicle National Law (for example, fatigue management obligations), the road transport business should have regard to this under subparagraph 10(1)(b)(ii).

49. Paragraph 10(1)(c) recognises that some regulated road transport contractors may have made financial investments in order to obtain or perform the contract with the road transport business. This could include the purchase of a specific vehicle, or the purchase of specialised equipment that cannot be easily redeployed if the contract is terminated. In some cases, regulated road transport contractors may be required to sign write or brand the vehicle or trailer used to provide the services to the road transport business, which may impact its ability to be immediately redeployed elsewhere in the industry. The road transport business should have regard to such matters under paragraph 10(1)(c).

50. Subsection 10(2) provides that after considering the matters in subsection 10(1), the road transport business must decide whether or not to terminate the contractor's services contract.
51. Subsection 10(3) provides that the road transport business may only decide to terminate the services contract if the reason for the termination is a valid reason, and the business considers on reasonable grounds that the reason has been established.
52. Subsection 10(4) provides that if the road transport business decides not to terminate the services contract, the business must, as soon as reasonably practicable, give notice to the regulated road transport contractor to that effect.
53. Subsection 10(5) provides that if the road transport business decides to terminate the services contract, the business must, as soon as reasonably practicable, notify the regulated road transport contractor about the following matters:
- that the business has decided to terminate the contract
  - the reason for the termination
  - the day on which the termination will take effect, and
  - when and how any final payments owing to the contractor will be made.

## **Division 2 — Matters relating to code process generally**

### Section 11 – Time frame for exercising right of response under code process

54. Section 11 provides that a road transport business must use its best endeavours to ensure that:
- a process required to be conducted in accordance with Part 2 is carried out within a reasonable time frame, and
  - a regulated road transport contractor is given a reasonable time frame in which to exercise a right of response under the code process.
55. This is intended to ensure flexibility for businesses and possibility for a tailored timeframe depending on the circumstances, as well as fairness for regulated road transport contractors.
56. It is intended that a reasonable timeframe would involve prompt consideration by a road transport business and minimise avoidable or deliberate delays that result from the conduct of the road transport business. A reasonable timeframe should also ensure that a contractor has enough time to consider and respond to information received from the road transport business, which might include time to formulate a response or obtain advice.

### Section 12 – Representation of regulated road transport contractor

57. Subsection 12(1) provides that a regulated road transport contractor may appoint a person to provide the contractor with support or representation in relation to the proposed termination, under the code process, of the contractor's services contract by a road transport business.

58. Subsection 12(2) provides that the person appointed may be a delegate or an employee of an organisation.
59. The note to subsection 12(2) refers the reader to the definition of ‘organisation’ in section 12 of the Act, being an organisation registered under the *Fair Work (Registered Organisations) Act 2009*.
60. The support available to the regulated road transport contractor under this provision is intended to assist the contractor to better engage with the code process in the event of a proposed termination.
61. The appointed person may be a legal representative. This is intended to reflect the commercial nature of the relationship between parties and recognise that contractors may require a legal representative to assist with this process.

### Section 13 – Privacy obligations

62. This section provides that nothing in Part 2 requires a road transport business to contravene any obligations that the business has in relation to the protection of personal information (within the meaning of the *Privacy Act 1988* (Privacy Act)).
63. The section is intended to strike a balance between the need to provide a regulated road transport contractor with sufficient information that a reasonable person in the contractor’s position could understand the reason for any warning, opportunity to show cause or termination decision, but acknowledge that relevant privacy obligations may still apply and are not overridden.
64. For example, a road transport business is not required to include personal information about a third party in a warning or during the show cause process with a regulated road transport contractor if doing so would breach the business’s obligations under the Privacy Act.

## **Part 3 — Matters relating to termination generally**

### Section 14 – Matters that may constitute a valid reason for termination

65. Paragraph 536LN(2)(a) of the Act provides that the Code must deal with matters that constitute or may constitute a valid reason for termination. Section 14 satisfies this requirement by providing a non-exhaustive list of matters that may constitute a valid reason for termination. The 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 the termination was unfair under paragraph 536LM(1)(a).
66. Subsection 14(1) provides that a matter set out in any of the following subsections may constitute a valid reason for termination.
67. The note to subsection 14(1) explains that if a matter constitutes serious misconduct, the code process does not apply to termination of the services contract with the contractor. The note cross references subsection 6(2).

68. The following matters may constitute a valid reason for termination:

- The regulated road transport contractor fails or refuses to meet standards or requirements for the performance of services that have been communicated to the contractor by the road transport business or of which the contractor is otherwise aware (see subsection 14(2)).
- The regulated road transport contractor engages in, or is engaged in:
  - a safety breach or
  - a series of safety breaches (see subsection 14(3)).
- The regulated road transport contractor engages in fraudulent or dishonest conduct including, but not limited to, misrepresenting or falsifying information provided to the road transport business (see subsection 14(5)).
- The regulated road transport contractor has not complied with licensing or accreditation requirements imposed on the contractor under a law of the Commonwealth, a State or Territory (see subsection 14(6)).
- The road transport business contravenes, or may contravene, licensing or accreditation requirements imposed on the business under a law of the Commonwealth, a State or Territory because of a matter relating to the conduct or capacity of the regulated road transport contractor (see subsection 14(7)).
- The matter is one for which the services contract allows for termination of the contract by the road transport business for breach of the contract by the regulated road transport contractor (see subsection 14(8)).

69. Subsection 14(4) provides that for the purposes of subsection 14(3), a safety breach includes, but is not limited to, a failure or refusal to comply with any one or more of the following laws:

- a work, health and safety law that applies to the contractor in providing services under the services contract
- the Heavy Vehicle National Law (as set out in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld)), and
- any other law of a State or Territory that regulates the use of vehicles on roads.

70. Notwithstanding that this list is non-exhaustive, paragraph 14(4)(b) is intended to capture any state and territory laws that adopt the Heavy Vehicle National Law, and paragraph 14(4)(c) is intended to capture, among other laws, laws that regulate similar or equivalent matters to those that are covered by the Heavy Vehicle National Law.

71. Subsection 14(9) provides that the section does not limit the matters that may constitute a valid reason for the termination, by a road transport business, of a services contract with a regulated road transport contractor. This makes clear that other matters that are not listed in this section may also constitute a valid reason for termination.

## Section 15 – Communications relating to termination

72. Subsection 15(1) provides that a road transport business must ensure that all communications relating to the termination of the services contract of a regulated road transport contractor are conveyed clearly to the contractor.
73. Subsection 15(2) provides that the road transport business must:
- use its best endeavours to make a written record of any oral communication as soon as practicable after it takes place, and
  - if requested by the contractor — provide written confirmation of any such oral communication.
74. These communication requirements in relation to the termination satisfy the mandatory criterion in paragraph 536LN(2)(d) of the Act and will ensure that the contractor receives clear information about the termination of the services contract from the road transport business (whether orally or in writing), with any oral information to be provided in writing upon request.
75. Appropriate record keeping is a safeguard that can assist businesses to provide procedural fairness to a contractor. For example, by ensuring that information provided in relation to reasons for termination is accurate. The section requires that the business use its best endeavours to make a record as soon as practicable, thereby recognising that it may not always be possible in the road transport industry to make a contemporary written record. The section does not specify any requirements for the form or content of written records, which is at the discretion of the road transport business.
76. Compliance with this Code is only assessed by the Commission when an application has been made. A road transport business may wish to keep records for so long as may be foreseeably relevant to any Commission proceedings to demonstrate compliance with the Code, but the Code otherwise does not contain any enduring record keeping obligations.

## **Statement of Compatibility with Human Rights**

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

### ***Fair Work (Road Transport Industry Termination Code) Instrument 2024***

The *Fair Work (Road Transport Industry Termination Code) Instrument 2024* (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 termination framework in Part 3A-3 of the Act. It is integral to the Commission's determination of whether a road transport business has unfairly terminated a services contract with a regulated road transport contractor. The Code is intended to guide road transport businesses to ensure that in the event that a regulated road transport contractor's services contract is terminated, such termination is done fairly.

The Code prescribes the following matters, as required by subsection 536LN(2) of the Act:

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

### **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 and also includes the right to not be deprived of work unfairly.

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 rights to work and rights in work by establishing safeguards against a road transport business unfairly terminating a services contract with a regulated road transport contractor, thereby protecting the regulated road transport contractor's right to work by preventing them from being deprived of work unfairly.

In particular, Part 2 of the Code prescribes a process that must be followed by a road transport business if it proposes to terminate the services contract of a regulated road transport contractor for reasons related to their capacity or conduct (other than in cases of serious misconduct by the regulated road transport contractor). The code process requires several steps before termination may occur to ensure fairness, including a warning and show cause process. Additionally, a road transport business can only terminate the contract of a regulated road transport contractor if the reason for termination is a valid reason, and the business considers on reasonable grounds that the reason for termination has been established.

The Code recognises that termination of a services contract by a road transport business may need to occur in certain circumstances. However, it allows for termination in a manner that ensures the regulated road transport contractor receives adequate communication from a business about issues that may arise in respect of their capacity or conduct in performing their work under the contract, and enables the contractor to respond to these issues, ensuring procedural fairness. Specifically:

- Subsections 7(2) and 9(3) of the Code provide that when a road transport business issues a warning that it is considering terminating the contract or initiates the show cause process, the notice of these matters must contain sufficient information to enable a reasonable person in the position of the contractor to understand the reason for the action and potential consequences.
- Paragraph 7(2)(c) of the Code requires that a warning provide sufficient information to enable a reasonable person in the position of the regulated road transport contractor to understand that the contractor may, within a specified period (which must be reasonable), provide a response to the warning.
- Subsection 9(2) of the Code provides the regulated road transport contractor an opportunity to show cause as to why they should not be terminated.
- Subsections 9(4) and 9(5) of the Code provide that a regulated road transport contractor may request a meeting to discuss the proposed termination of the services contract, and if they do, the business must make a representative available to do so. The representative must have knowledge about the reasons for the proposed termination.
- Section 15 of the Code also requires the road transport business to ensure that all communications relating to termination of the services contract are conveyed clearly to the contractor. The road transport business must use its best endeavours to make a written record of any oral communication as soon as practicable after the communication takes place. If requested by the contractor, the business must provide written confirmation of any oral communication.

The safeguards within the Code and the related obligations on road transport businesses to comply with the code process ensure that the regulated road transport contractor'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. The Article also prohibits unlawful attacks on a person's reputation.

The Code engages the right to privacy because it deals with the treatment of personal information. Section 13 of the Code provides that nothing in Part 2 (which sets out the code process a road transport business must follow if it wishes to terminate a services contract with a regulated road transport contractor) requires the business to contravene any obligations the business has in relation to the protection of personal information within the meaning of the *Privacy Act 1988* (Privacy Act). For example, a road transport business is not required to include personal information in a warning or provide it as part of the show cause process, if doing so would breach the business's obligations under the Privacy Act.

The Code aims to strike a balance between providing a regulated road transport contractor with sufficient information to enable them to understand and respond to a matter that may justify the termination of the services contract with the road transport business, and recognising any legal obligations the business might have in relation to protecting the personal information of a third party who may be involved in the matter warranting termination (for example, by having lodged a complaint about the contractor's conduct or capacity).

The right to privacy of a third party to have their personal information used and disclosed only in accordance with the Privacy Act is therefore 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**