

27 June 2024

Australian Government
Department of Employment and Workplace Relations
Via online submission: <https://consultations.dewr.gov.au/>

Submission to the Department of Employment and Workplace Relations: Digital Labour Platform Deactivation Code

Thank you for providing the opportunity to make a submission to the Department of Employment and Workplace Relations (**the Department**) regarding the Digital Labour Platform Deactivation Code (**the Code**).

This submission focuses on questions 2-8, outlined in the Digital Labour Platform Deactivation Code Discussion Paper (**the Discussion Paper**) and makes the following 10 recommendations:

1. The definition of 'valid reason' in the Code should mirror the definition of 'valid reason' in the Fair Work Commission's (**the FWC**) unfair dismissal jurisdiction.
2. The Code should require digital platform operators to develop internal dispute resolution processes that have clear processes and contact points, and which are fair, transparent and solution focused.
3. The Code should require that digital platform operators maintain detailed records of any complaints or concerns about employee-like workers, and provide complete information to employee-like workers if they are at risk of deactivation (and that access to information should survive deactivation).
4. The Code should provide for a meaningful deactivation review process that requires digital platform operators to:
 - a. give genuine consideration to an employee-like worker's response and
 - b. advise employee-like workers if their response has been accepted or not, and the reasons why.
5. The Code should specify minimum notice periods for deactivation in line with the minimum notice periods in the National Employment Standards.
6. Digital labour platforms must ensure communication is clear, centralised, and can be understood by gig workers through use of translated information and interpreters.
7. Information about deactivation should be made available to employee-like workers on the FWC's website, on the websites of digital platform operators, and be provided by digital platform operators to employee-like workers when notifying them of a deactivation.
8. The FWC should develop a bench book about unfair deactivations and the Code.
9. Information should be made accessible by ensuring they are available in multiple relevant languages other than English, in Easy English, and Auslan, ideally with videos that can be easily viewed on a phone or tablet.
10. The Department should invest in community outreach to educate vulnerable employee-like workers about their rights under the new laws.

About Westjustice

This submission is made by the Employment and Equality Law Program (**EELP**) of the Western Community Legal Centre Ltd, known as Westjustice. We are a community legal centre providing free legal help, financial counselling and support to people in the Western suburbs of Melbourne. We are a member of Community Legal Centres Australia, the Federation of Community Legal Centres (Victoria) (**FCLC**), and we co-chair the FCLC Victorian Employment Law Working Group with South-East Monash Legal Service and JobWatch Inc.

Westjustice believes in a just and fair society where the law and its processes don't discriminate against vulnerable people and where those in need have ready and easy access to quality legal education, information, advice and casework services. Our Western suburbs community, comprising almost a million people, is one of the fastest growing areas in Australia and is highly diverse, comprising many newly arrived refugee and migrant communities, significant representation from Asia, Africa and the Pacific Islands, and a growing Aboriginal and Torres Strait Islander community.

Our Gig Worker Support Service work

The Westjustice EELP was established in 2014 and offers legal advice, representation and work rights education to international students, young people, women, newly arrived migrants and refugees, people experiencing family violence, and other people within the community experiencing economic disadvantage or hardship. Westjustice has previously made joint submissions about gig workers with JobWatch Inc and South-East Monash Legal Service (**SMLS**) to the Victorian state government (Fair Conduct and Accountability Standards for the On-Demand Workforce Submission, Westjustice, JobWatch, SMLS, 18 February 2022),¹ and to the Federal government (Employee-Like Forms of Work and Stronger Protections for Independent Contractors Submission, Westjustice, JobWatch, SMLS, 18 May 2023).² We refer to and rely on the issues outlined in those submissions insofar as they are relevant to the development of the Code.

In July 2023, Westjustice received funding from Industrial Relations Victoria (part of the Victorian Department of Premier and Cabinet) to provide legal support to gig workers³ referred by the Gig Worker Support Service (GWSS), particularly for low-paid workers, young workers, migrant workers and women. The focus was particularly to help those gig workers access support, advocacy, and dispute resolution, including litigation.

Through this project, we have assisted independent contractors who perform digital platform work in the gig economy, including drivers who have been unfairly deactivated on digital platforms. These gig workers faced significant challenges in understanding, responding to, and challenging opaque platform deactivation processes. We worked with them to educate, empower, and represent them in dispute resolution processes with platforms when they faced deactivation or termination of their contracts.

Our funding for this project ceased on 30 April 2024 with the closure of the GWSS. However, issues faced by employee-like workers are still prevalent within the community we service, across Victoria and throughout Australia. Our experience working with these clients, and the development of previous submissions on these issues, has meant that we have developed a

¹ https://www.westjustice.org.au/cms_uploads/docs/220218-gig-economy-joint-submission.pdf

² https://www.westjustice.org.au/cms_uploads/docs/2023.05.18-attachment-a--employee-like-forms-of-work_.pdf

³ The gig workers referred to throughout this submission are 'employee-like workers' within the meaning of section 15P of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

close understanding of the common issues experienced by employee-like workers when facing deactivation – an understanding that informs this submission.

Case study: Peter (Ride Share Driver)

Peter commenced driving with a ride-share platform in May 2023. After a short driving period, he became a victim of fraudulent activity that compromised his platform account. An unauthorised user accessed his account, stole his identity, and took over the account without his knowledge or consent. Peter's account was compromised through no fault of his own; but irrespective of this, the platform deactivated his account without warning. Peter was given little information about why his account had suddenly been deactivated. The platform also failed to:

- *provide Peter with support, insight, and sufficient information about why his account had been deactivated;*
- *particularise the conduct which was said to have breached the platform's guidelines, meaning that Peter did not have a meaningful opportunity to respond to the deactivation;*
- *act transparently in decision-making processes;*
- *provide Peter with options to challenge the deactivation; and*
- *provide Peter with information about how long the deactivation would last.*

These failures resulted in a fundamental lack of procedural fairness as Peter wasn't given the opportunity to meaningfully respond to the allegation that he'd breached the platform's guidelines. In addition, the platform also failed to pay Peter for trips he had completed throughout the driving period before his account was deactivated.

Peter had few legal options to challenge the deactivation, so he rang the platform's support centre to seek help. He was told that if he completed two driving courses, his account would be reactivated. After paying for and completing those courses, the platform still refused to reactivate his account.

Westjustice provided Peter with legal advice and wrote a letter to the platform requesting a reactivation of Peter's account and payment of money owed for trips he completed before deactivation. The platform responded and said that Peter had breached the platform's conduct and behaviour guidelines - something that had never been raised with Peter before his account was deactivated. His account remains deactivated indefinitely, and the platform has made no real effort to resolve the dispute.

Barriers to justice in the digital platform economy

As highlighted in the case study above, significant barriers exist in accessing justice for employee-like workers in the digital platform economy. The precarity of employee-like workers – in terms of their low pay, job insecurity, and safety risks – is well documented,⁴ and that is why a Code that protects these workers from capricious deactivation is so important. Currently, employee-like workers have limited options to challenge deactivation decisions made on digital platforms, because of a number of factors:

- There is a lack of ongoing and sustainable funding for community legal centres to provide legal advice, information, and representation for employee-like workers who have had their accounts deactivated.

⁴ <https://www.twu.com.au/doorDash/gig-workers-survey-unmasks-the-flexibility-myth/>

- No internal and external dispute resolution processes are available to employee-like workers who have had their accounts deactivated on digital platforms.
- There is a lack of information, support, resources, and legal avenues available to employee-like workers.
- Digital platform operators demonstrate a consistent lack of transparency and procedural fairness in their deactivation and decision-making processes.
- Digital platform operators have a high level of discretion and power over the use of their platforms, which leads to an imbalance of power and unfavourable outcomes for employee-like workers.
- There is a failure by digital platform operators to recognise and address intersectional experiences of sexual harassment and sexual violence experienced by employee-like workers.

Our submission below identifies ways to address some of these barriers and provides a response to some of the questions proposed in the Discussion paper.

Question 2. What should be matters that constitute or may constitute a ‘valid reason’ for deactivation?

We recommend that the definition of a ‘valid reason’ for deactivation in the Code should mirror unfair dismissal legislation and jurisprudence. Mirroring the FWC’s unfair dismissal jurisprudence in defining ‘valid reason’ would not ‘recreate existing employment protections’, but rather enshrine a set of universal principles that relate to reasonableness in decision making in order to ensure fair and consistent decisions.

These principles are derived from decades of case law in the FWC. They include that a ‘valid reason’ must be ‘sound, defensible or well founded’,⁵ and that a reason which is ‘capricious, fanciful, spiteful or prejudiced’ cannot be a valid reason.⁶ In considering what constitutes a ‘valid reason’ for deactivation, the deactivation should be defensible or justifiable on an objective analysis of the relevant facts.⁷ It should not be enough for platform operators to say that they acted in the belief that there was a valid reason for the deactivation.

In addition, given the serious impact that deactivation can have on vulnerable employee-like workers, digital platform operators should treat it as a last resort, and first consider alternatives. In any deactivation process, the employee-like worker should also be provided with procedural fairness and access to a fair and transparent process (see below our response to Question 3).

It is important to remember that ‘valid reason’ is only one part of what may make a deactivation unfair. The Code should also consider a deactivation unfair if a digital platform operator deactivates an employee-like worker’s account without first taking reasonable steps to investigate the misconduct allegations and giving the employee-like worker a fair and reasonable chance to respond. This is a critical procedural fairness protection, especially given the well-documented opacity of existing digital platform deactivation processes.⁸

Recommendation 1: the definition of ‘valid reason’ in the Code should mirror the definition of ‘valid reason’ in the FWC’s unfair dismissal jurisdiction.

⁵ *Selvachandran v Peteron Plastics Pty Ltd* [1995] IRCA 333 (7 July 1995), [(1995) 62 IR 371 at p. 373].

⁶ *Ibid.*

⁷ *Rode v Burwood Mitsubishi*, Print R4471 (AIRC FB, Ross VP, Polites SDP, Foggo C, 11 May 1999) at para 19.

⁸ <https://documentedny.com/2023/02/24/uber-lyft-deactivated-account-drivers-fight/>

This recommendation is consistent with the Department's guiding principles, set out in the Discussion Paper. It would ensure that "*Dealings between digital labour platform operators and workers [are] confidential, fair, transparent, proportionate, respectful, and timely.*" And would emphasise "*fair deactivation decisions, clear communication, and fair right of response mechanisms.*"

Question 3. What internal deactivation processes should digital labour platform operators follow in relation to deactivation?

As mentioned in our response above to question 2, there should be internal dispute resolution processes that allow employee-like workers to challenge decisions that affect their earnings or access to the platform, such as a deactivation.

The Code should require digital platform operators to adopt fair, transparent, and solution focused deactivation processes. These processes should provide for:

- Procedural and substantive fairness including:
 - prior notification of the allegations or issues that could lead to deactivation;
 - provision of copies of relevant policies or guidelines that are alleged to have been breached;
 - the opportunity to respond to those complaints or allegations; and
 - an explanation by the platform if their response has been accepted and if not, why not.
- A fair and impartial investigation of any allegations and complaints against the employee-like worker.
- The right to be represented and to have a support person throughout the process.
- Information about the process for employee-like workers, and resources to assist them in seeking advice and legal representation.
- Internal and external dispute resolution processes for employee-like workers to challenge decisions which affect their earnings or access to the platform.

The disputes process must be in writing and publicly available, and include information about:

- How, where and to whom disputes can be made;
- Who will handle disputes and how to contact them directly;
- How the dispute will be handled, and the steps involved;
- What factors are considered in handling disputes and making decisions to deactivate;
- Expected response times and consequences for the platform if timeframes are not met;
- Possible or likely outcomes available in the process;
- Clear escalation pathways and mechanisms for review if the employee-like worker is dissatisfied with the outcome; and
- Information about when and how an employee-like worker can contact the FWC for assistance during this process.

This will ensure that all employee-like workers will know what process will be used, and have the same standards applied to them across platforms.

In addition, digital platform operators should keep detailed records about any complaints received regarding an employee-like worker, warnings that digital platform operators have issued to an employee-like worker and any other concerns regarding the employee-like worker. This documentation must be accessible on the digital platform so the employee-like worker can have access to those complaints and the detail of what is alleged against them, particularly during a deactivation dispute.

Recommendation 2: the Code should require digital platform operators to develop internal dispute resolution processes that have clear processes and contact points, and which are fair, transparent and solution focused.

Recommendation 3: The Code should require that digital platform operators maintain detailed records of any complaints or concerns about employee-like workers, and provide complete information to employee-like workers if they are at risk of deactivation (and that access to information should survive deactivation).

In the recent decision *Singh v Rasier Pacific Pty Ltd [2024] NSWCATCD 4*, the NSW Civil and Administrative Tribunal considered reasonableness in the context of digital platform operator Uber's deactivation process at [145]:

... Further, it is necessary for there to be an implied term that any internal review of the decision to deactivate is conducted with genuine consideration of the merits. Otherwise, the review process is meaningless. It is Uber who has identified in its contractual provisions that a driver may seek review of the decision to deactivate (permanently or temporarily). The term review has no meaning if it is construed in a way that means that Uber is not required to have any genuine consideration of the drivers response to the alleged breaches by the driver of the terms of the agreement (including the Community Guidelines).

In line with this reasoning, we recommend that the Code similarly require digital platforms to provide for a meaningful review process that involves genuinely considering employee-like workers' responses to any allegations.

Recommendation 4: The Code should provide for a meaningful deactivation review process that requires digital platform operators to:

- a) **give genuine consideration to an employee-like worker's response and**
- b) **advise employee-like workers if their response has been accepted or not, and the reasons why.**

Question 4. How should employee-like workers be able to respond to deactivation?

As highlighted in Peter's case study above, when digital platform operators deactivate accounts, there is currently no requirement for them to provide information to the employee-like worker. There is a lack of transparency in communication and decision-making processes and what factors are considered by who before an account is deactivated. In order to ensure that employee-like workers can meaningfully respond to deactivation, we reiterate Recommendation 2 and stress the importance of procedural fairness measures in the context of responding to deactivations.

Question 6. Should the Deactivation Code specify a minimum notice period for deactivation?

Yes, the Deactivation Code should specify a minimum notice period. Because of the significant impact deactivation can have on employee-like workers who rely on a digital platform for their income, minimum notice periods should mirror those in the National Employment Standards.

Recommendation 5: The Code should specify minimum notice periods for deactivation in line with the minimum notice periods in the National Employment Standards.

Question 7. How should digital labour platform operators and employee-like workers communicate fairly and clearly in relation to deactivation?

As noted above, there is a significant lack of procedural fairness in relation to the deactivation of accounts for employee-like workers, which creates a barrier to effective and fair communication.

To achieve fair, transparent, and honest communications between digital platform operators and employee-like workers, platforms must put in place the transparency and procedural fairness measures we've outlined above in response to Question 3 to allow employee-like workers to meaningfully respond to allegations or complaints made about them.

Our clients have told us that contacting their host platform(s) can also be difficult, with multiple chats/messages, email and phone pathways with different people, they often have no clear contact person for their dispute about deactivation and responses from platform providers often come across as automated or pro-forma. Moreover, many gig workers speak English as a second or other language and have poor language proficiency but are not offered assistance to understand what is happening.

Digital labour platforms need to have dedicated deactivation dispute contacts who use one form of messaging, in a consistent manner, and ensure that the gig worker is able to understand their communication through use of translated information or interpreters.

Recommendation 6: Digital labour platforms must ensure communication is clear, centralised, and can be understood by gig workers through use of translated information and interpreters.

Question 8. How can information and processes about deactivation be accessible to employee-like workers?

Information should be readily available to employee-like workers online on the FWC's website, on the websites of digital platform operators, and a bench book about unfair deactivations should be developed by the FWC.

An employee-like worker who receives notice of deactivation from a digital platform operator should also include information about how to challenge the deactivation. This information should be made available in multiple relevant languages other than English and in Easy English and Auslan, potentially with videos that can easily be viewed on a phone or tablet, and shared across social media platforms. The Department should invest in community outreach to educate vulnerable employee-like workers about their rights under the new laws.

Recommendation 7: Information about deactivation should be made available to employee-like workers on the FWC's website, on the websites of digital platform operators, and be provided by digital platform operators to employee-like workers when notifying them of a deactivation.

Recommendation 8: The FWC should develop a bench book about unfair deactivations and the Code.

Recommendation 9: Information should be made accessible by ensuring they are available in multiple relevant languages other than English, in Easy English, and Auslan, ideally with videos that can be easily viewed on a phone or tablet.

Recommendation 10: The Department should invest in community outreach to educate vulnerable employee-like workers about their rights under the new laws.

Please contact us by email (elp@westjustice.org.au) if you have any questions about this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J. Jones', written in a cursive style.

Jennifer Jones
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