

Australian Industry Group

Road Transport Advisory Group
Advice on Applications by the
Transport Workers' Union of
Australia and Menulog Pty Ltd

Submission

(MS2024/1, MS2024/2, MS2024/3,
MS2024/4 and AM2021/72)

8 January 2025

1. INTRODUCTION

1. In August and September 2024, the Transport Workers' Union of Australia (**TWU**) lodged four applications in the Fair Work Commission (**Commission**) seeking orders related to employee-like workers and road transport contractors under the legislative framework in the *Fair Work Act 2009* (Cth) (**FW Act**) concerning regulated workers. These are:
 - (a) MS2024/1 – an application for an employee-like worker minimum standards order (**MSO**) regarding 'last mile package delivery';
 - (b) MS2024/2 – an application for a road transport MSO regarding 'last mile package delivery';
 - (c) MS2024/3 – an application for an employee-like worker MSO regarding food and beverage delivery; and
 - (d) MS2024/4 – an application for a road transport contractual chain order (**RTCCO**)
2. On 24 June 2021, Menulog Pty Ltd made an application for a modern award to cover the on-demand service industry (AM2021/72).
3. By various statements issued in late 2024, Justice Hatcher, President of the Commission, directed the Road Transport Advisory Group (**RTAG**) to provide advice in relation to the five applications on the following matters:
 - (a) How Justice Hatcher should determine the priorities for the work of the Commission in relation to the five matters?
 - (b) A proposed process for the RTAG to provide advice in relation to the matter or matters it identifies as priorities including:
 - (i) a timeframe for when consultation will occur;
 - (ii) whether any additional entities should be served each application;

- (iii) whether subcommittees will be formed; and
 - (iv) if so, how those subcommittees will be composed and operated.
 - (c) How the RTAG proposes to conduct itself more generally, including any proposed terms of reference or similar document that could form the basis for a written direction Justice Hatcher may make pursuant to s.40F(5), taking into account the need for the RTAG to be open and transparent in the way it conducts itself.
- 4. The RTAG provided its advice to the Commission on 11 December 2024 (**RTAG Advice**). In a statement¹ issued on 13 December 2024, Justice Hatcher invited interested parties to make submissions regarding the RTAG Advice and further steps that should be taken in the conduct of the five applications.² This submission of the Australian Industry Group (**Ai Group**) addresses the RTAG Advice. Unless otherwise indicated, the views that follow are intended to be broadly applicable to each application, rather than being directed towards a particular matter.
- 5. This submission should be read with other Ai Group submissions made in relation to the applications in 2024.³

¹ *Applications by Transport Workers' Union of Australia; Application by Menulog Pty Ltd* [2024] FWC 3470.

² *Applications by Transport Workers' Union of Australia; Application by Menulog Pty Ltd* [2024] FWC 3470 at [5].

³ Ai Group Submission dated 3 October 2024; Ai Group Submission dated 25 October 2024.

2. PRIORITISATION

6. Relevantly for the purposes of the five applications, the President of the Commission is required to give a direction as to how the Commission is to prioritise its work under parts 3A-2 and 3B-2 of the FW Act.⁴ The FW Act does not prescribe a timeframe within which such a direction must be issued. No such direction has yet been issued in respect of the applications in question here.
7. In the RTAG Advice, the RTAG has set out a provisional view in relation to prioritisation of the five applications as follows (in order of priority):⁵
 - (a) MS2024/3 – application for an employee-like worker MSO regarding food and beverage delivery;
 - (b) MS2024/4 – application for a RTCCO;
 - (c) MS2024/1 and MS2024/2 – applications for an employee-like worker MSO and a road transport MSO regarding last mile package delivery (to be dealt with together, at least in the preliminary stages of consultation); and
 - (d) AM2021/72 – application by Menulog Pty Ltd.
8. The RTAG has also proposed that a simultaneous consultation process be undertaken in relation to the applications, on the basis that this will maximise opportunities to identify synergies and common interests across the applications.⁶ It has also indicated that this consultation will assist it to reach a final view in relation to prioritisation of the applications.⁷
9. We agree with the logic underpinning the proposal to conduct preliminary consultation in relation to all matters simultaneously. In particular, it is foreseeable that there may be a degree of overlap between the matters arising for consideration in the context of each of the applications, and that matters dealt

⁴ Section 582(4D) of the FW Act.

⁵ RTAG Advice at [5].

⁶ RTAG Advice at [6].

⁷ RTAG Advice at [7]-[8].

with in respect of one application may impact upon the way similar matters are dealt with in another. This would likely include, in particular, the scope of the coverage or application of the relevant orders. For completeness, we nonetheless note that we maintain and reiterate our previously ventilated view that, in effect, consultation of this nature should occur through proceedings before the Commission rather than through meetings of the RTAG (which merely has an advisory role under the scheme of the FW Act) or its subcommittees. We will address this issue further below.

10. As to the RTAG's provisional view regarding prioritisation, we do not support the proposed order of prioritisation. We note that no reasoning is provided in the RTAG Advice which indicates how this provisional view was reached.
11. In particular, we do not support the application for a RTCCO (MS2024/4) being prioritised ahead of any of the other three MSO applications (MS2024/1, MS2024/2 and MS2024/3). The content of the proposed RTCCO being sought through MS2024/4 clearly interconnects with the content of MS2024/2 and *potentially* MS2024/1 and MS2024/3. The merits of the making of a RTCCO, which would apply to the whole supply chain, would be impacted by any of the MSO applications succeeding. Our ability to determine the precise extent of any overlap is somewhat limited given that the applications fail to make clear what the terms of the orders envisaged by the TWU would be. Nonetheless, we envisage that, by way of example, the proposed compulsory rate review provision (see item 6 on page 6 of the application in MS2024/4), and prohibition of automatic reduction or setoff terms (see item 5 on page 6 of the application in MS2024/4) would overlap with provisions dealing with minimum rates set as a product of MS2024/2. The content of the MSOs should be determined prior to considering any application for a RTCCO. Dealing with MS2024/2 after MS2024/4 would not be sensible or fair.
12. We also foreshadow that we envisage that the making of a RTCCO with as broad coverage as appears to be contemplated by the TWU application in MS2024/4 would necessitate engagement with a vast number of parties and consideration of an extremely diverse range of contractual chains. The likely resulting

magnitude of the proceedings needs to be carefully considered in determining the prioritisation of matters. This should include consideration of whether it is either fair or feasible for such an application to be considered at the same time as any of the other applications for MSOs, having regard to the resources and capacity of both the Commission and parties.

13. A mere position proposed by the RTAG in relation to prioritisation should not be given any particular weight beyond that of the views of other interested parties. It is the substantive content or reasoning of any advice from RTAG or others that should be given the most weight by the President.
14. We here also observe that role of the RTAG (and by extension RTAG members) under the statutory scheme is as an advisory body to assist the Commission.⁸ In the context of the development recent changes to the statutory the RTAG was conceived of as one of the ‘guardrails’ that would address industry concern over the operation of the Road Safety Remuneration Tribunal. The RTAG’s functions do not include making any relevant determination, facilitating consultation with industry broadly (beyond subcommittees) or gathering evidence or material to be put before the Commission. The RTAG undertaking such functions would not only exceed its statutory remit, it would be unfair given that members of the RTAG are appointed by the Minister under s.40F of the FW Act (and are not Commission members under the FW Act) as well as the fact that one of the members is one of the most senior officers of the applicant in four out of five applications.
15. We stress that we do not seek to impugn the knowledge or character of the individuals appointed to the RTAG (or any subcommittees) in any way, but observe that members of the RTAG and its subcommittees are of course not independent appointees akin to members of the Commission (excepting of course the Vice President). They are employees of organisations representing particular interests, who have, in the case of the RTAG been appointed at the

⁸ Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 at [1103] – [1105]; Section 40E(2) of the FW Act.

discretion of the Minister under s.40F of the FW Act, and in the case of subcommittees, established by the RTAG under s.40G. Notably, Mr Olsen is a leader of the TWU and will presumably share the TWU's views on the merits of the TWU's applications and prioritisation. Similarly, meetings of the RTAG or its subcommittees are not comparable to the conduct of proceedings before the Commission. Further, while acknowledging our respect for each of the appointed members of the RTAG, it must be observed that the RTAG is not subject to regulation in the same manner as the Commission under the FW Act regarding how it conducts itself. Accordingly, the views or advice from the RTAG ought not be unfairly elevated above the perspectives of other interested parties.

16. Ultimately, given that the RTAG has proposed to undertake consultation before putting forward a final view on prioritisation, we suggest that the Commission is not required to reach a concluded view on prioritisation at this stage. This could be addressed once final advice is provided by the RTAG or upon conclusion of the consultation process.
17. Should the RTAG provide final advice on prioritisation at a later point, interested parties should be afforded an opportunity to comment on that advice before it is acted upon by the Commission.⁹

⁹ See, eg, Ai Group Submission dated 25 October 2024 at [10].

3. RTAG PROCESS

18. At the outset, we make the following further overarching observations about the legislative framework establishing the RTAG, and the manner in which it must perform its functions.
19. The RTAG is established under the FW Act, pursuant to amendments made by the *Fair Work Legislation Amendment (Closing Loopholes (No 2)) Act 2024 (Cth)*. As mentioned above, the FW Act contemplates that the RTAG is an advisory body, with the primary function of advising the Commission in relation to matters that relate to the road transport industry, including but not limited to various matters listed in s.40E(2). These relevantly include the making and varying of MSOs and RTCCOs, and the prioritisation by the Commission of matters relating to the road transport industry.
20. The Commission is required to consult the RTAG before making or varying a road transport minimum standards order.¹⁰
21. The RTAG may establish subcommittees under s.40G of the FW Act. The role of a subcommittee is to advise the RTAG in relation to matters relevant to the performance of RTAG's functions.¹¹ Before advising the Commission, the RTAG is required to consult any relevant subcommittee that has been established.¹²
22. If the RTAG decides to establish a subcommittee, its members may include persons who are not RTAG members, but the subcommittee must be chaired by an RTAG member.¹³ The RTAG is required to establish a subcommittee of which the majority of members are owner drivers (or representatives of owner drivers) if a proposed road transport MSO or RTCCO will cover owner drivers, or the

¹⁰ Section 536KA(2)(b) of the FW Act.

¹¹ Section 40G(1) of the FW Act.

¹² Section 40E(4) of the FW Act.

¹³ Section 40G(2) of the FW Act.

Commission proposes to exercise a power that may have more than a minor or technical impact on owner drivers.¹⁴

23. Against this background, we make the following submissions in response to the RTAG Advice regarding how the RTAG proposes to conduct itself with respect to these applications.
24. The RTAG Advice indicates that the principal mechanism that the RTAG will utilise in advising the Commission is establishing subcommittees. This is appropriate. It proposes to establish one subcommittee for each TWU application, with a single subcommittee for the two 'last mile' applications (MS2024/1 and MS2024/2).¹⁵ Subcommittees will be broadly representative, and we support the ability for subcommittee members to nominate other interested parties for membership.¹⁶ This will help to ensure that subcommittees remain as representative as possible. Consultation with subcommittees is proposed to continue for a period of six months.¹⁷ Ai Group has been invited to participate in all subcommittees, and has accepted that invitation. We are committed to making a constructive and active contribution to each of the subcommittees.
25. While the RTAG has not proposed to establish a subcommittee for AM2021/72, we note it has indicated an intention to consult with the parties.¹⁸
26. The RTAG has prepared Terms of Reference, including draft Guiding Principles for Subcommittees, and appended these to the RTAG Advice. We acknowledge that the approach proposed to be adopted by the RTAG addresses some of the concerns we had previously ventilated regarding the RTAG in the context of these applications, however we remain concerned in relation to some issues. We will raise these directly with the RTAG in accordance with the indication in the

¹⁴ Section 40G(3) of the FW Act.

¹⁵ RTAG Advice at [11].

¹⁶ RTAG Advice at [13].

¹⁷ RTAG Advice at [19]

¹⁸ RTAG Advice at [11].

RTAG Advice that further views on process and the Terms of Reference will be sought from subcommittee members.¹⁹

27. Notwithstanding that some of our concerns remain unaddressed, we acknowledge and support much of the RTAG Advice and draft Guiding Principles for Subcommittees. In particular, the indication that discussions of subcommittees will proceed on a without prejudice basis in an attempt to identify areas where consensus may be reached in relation to applications is appropriate. This likely to be conducive to constructive and unreserved engagement between subcommittee members.
28. Nonetheless, we note that the conduct of the RTAG and its subcommittees must be approached in a manner that is mindful of both the advisory role plated by the RTAG and fact that one of RTAG's members is a senior employee of the TWU, the applicant in the four applications for orders. In this vein, we acknowledge and support the RTAG's desire to involve members of the Expert Panel of the Commission established for the purposes of chairing consultation on the applications in each RTAG subcommittee.²⁰
29. We also acknowledge the suggestion that records of discussions of RTAG subcommittees will be published, however this should not undermine the benefits of the without prejudice nature of the subcommittee discussions.²¹
30. Any advice ultimately provided by the RTAG should not undermine the commitment that its processes will be conducted on a without prejudice basis. It is not entirely clear to us how this will be achieved. This is a difficulty that we suggest would likely have been avoided by having the Commission, rather than the RTAG or its subcommittees, facilitate conferencing between interested parties. In adopting such a course, the RTAG and / or its subcommittees could

¹⁹ RTAG Advice at [9] and [29].

²⁰ RTAG Advice at [27].

²¹ RTAG Advice at [31].

subsequently provide advice on any amended application that may be the ultimate product of such a process.

31. As to the suggestion that the RTAG subcommittees may establish working groups as required, we note that the FW Act does not contemplate subcommittees having such a function.²² Nor is the RTAG expressly afforded this power. The FW Act simply empowers the RTAG to establish subcommittees.²³
32. At [28] of the RTAG Advice, the RTAG foreshadows its intention to '*engage widely with persons, organisations, businesses and associations affected by the applications*'. It is not entirely clear what precisely is meant by this.
33. It would be obviously inappropriate and unfair to require (or expect) industry participants, through involvement in RTAG processes, to appear before a representative of the applicant or an employee of a registered organisation of employers or employees to which they may not wish to belong, for the purposes of 'engagement' with the Commission under ss.536K(4) and 536KA(4). Nor could they be expected to place potentially confidential or commercially sensitive material before any RTAG or subcommittee appointees who have a role outside of the Commission (such as a role with the TWU, or an employer or industry association) and are not subject to requirements imposed upon members of the Commission. The potential for there to be a perceived or actual conflict of interest is obvious. Further, as already indicated, the RTAG is an advisory body. The statutory scheme does not contemplate the RTAG consulting with industry beyond being advised by its subcommittee participants.
34. To the extent that there is a view that the RTAG or its subcommittees will be a vehicle for engagement with parties for the purposes of ss.536K(4) and 536KA(4) of the FW Act (which relevantly prohibit the Commission from making a MSO unless satisfied there has been genuine engagement with the parties to be covered), we express doubt over whether this is what is contemplated by these sections. To comply with these sections, the Commission itself would still be

²² RTAG Advice at [18].

²³ Section 40G(1) of the FW Act.

required to have 'genuine engagement' with all affected parties for the purposes of the above sections of the FW Act before making any order. Engagement with the RTAG would not satisfy this. Such engagement should ultimately be undertaken by the Commission.

35. To the extent that the RTAG does engage with parties to be covered by a proposed order, this should be limited to engagement with its subcommittees for the purposes of advising the Commission as directed.