



STATEMENT

Fair Work Act 2009

s.536JY—Commission may make a minimum standards order

s.536PD—Commission may make a road transport contractual chain order

s.158—Application to make a modern award

s.40F(5)—President may give the Road Transport Advisory Group directions as to the way in which it is to carry out its functions

Applications by Transport Workers’ Union of Australia

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

Application by Menulog Pty Ltd

(AM2021/72)

Application by Lawrence Hines

(AM2024/35)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 22 JANUARY 2025

Applications from the Transport Workers’ Union of Australia to make employee-like worker minimum standards orders, a road transport minimum standards order and a road transport contractual chain order – application from Menulog to make a modern award to cover the on demand delivery services industry – Road Transport Advisory Group’s advice – submissions received – advice adopted – consultation process to commence – s 158 application by Lawrence Hines re Road Transport (Long Distance Operations) Award 2020 to be added to matters for consultation.

[1] On 13 December 2024, I issued a Statement and Direction (December Statement)¹ inviting submissions concerning advice received from the Road Transport Advisory Group (RTAG) and also as to the further steps that should be taken regarding the conduct of four Transport Workers’ Union of Australia (TWU) applications, MS2024/1, MS2024/2, MS2024/3, MS2024/4, and an application by Menulog Pty Ltd (Menulog), AM2021/72.

[2] This Statement confirms the Commission’s acceptance and adoption of the RTAG advice as to priorities and the consultation process in relation to the applications. It also sets out the next steps in relation to the conduct of those matters.

Road Transport Advisory Group

[3] On 6 September 2024, I issued a Statement (September Statement)² setting out my provisional views in relation to the consultation process for the TWU applications MS2024/1, MS2024/2 and MS2024/3, and the role of the RTAG. These views were, with respect to the role of the RTAG, as follows:

RTAG

3. I propose to seek the advice of the RTAG in relation to matters MS2024/1, MS2024/2, and MS2024/3. To allow time for the RTAG to consult, through subcommittees or otherwise, and formulate its advice, I will ask that the RTAG provide this advice not later than 12:00 pm (AEDT) on Friday, 6 December 2024 (subject to any request for further time to be allowed). Further advice from the RTAG may be sought in the course of these matters.
4. I propose to seek the advice of the RTAG in relation to determining priorities for the work of the Commission in relation to matters MS2024/1, MS2024/2, and MS2024/3.³

[4] I also sought views from interested persons as to the functioning of the RTAG and whether the RTAG should be subject to a direction pursuant to my power under s 40(F)(5) of the *Fair Work Act 2009* (Cth) (FW Act).

[5] On 18 October 2024, I issued a further Statement (October Statement)⁴ outlining a process for obtaining prioritisation advice from and engaging in initial consultation with the RTAG, as well as setting out my provisional views in relation to (then) new application MS2024/4⁵. On 24 October 2024 I directed the RTAG to provide advice on the following matters:

1. How I should determine the priorities for the work of the Commission in relation to matters MS2024/1, MS2024/2 and MS2024/3.
2. A proposed process for the RTAG to provide advice in relation to the matter or matters it identifies as priorities, including:
 - a. a timeframe for when consultation will occur;
 - b. whether any additional entities should be served each application;
 - c. whether subcommittees will be formed; and
 - d. if so, how those subcommittees will be composed and operated. The RTAG was directed to take an inclusive and broadly representative approach in determining the membership of any subcommittee.

Conduct of RTAG

3. 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 I 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.

[6] On 7 November 2024 I issued a further direction to the RTAG with the addition of MS2024/4 as one of four matters about which the RTAG was to provide prioritisation advice.⁶

[7] On 11 December 2024 I received the RTAG's advice. On 13 December 2024 I issued the December Statement seeking submissions from interested parties on the RTAG's advice and on what further steps should be taken in the five applications.

Summary of RTAG advice

[8] The RTAG’s *provisional* view in relation to how the Commission should prioritise the five applications is as follows:

1. MS2024/3 — application for an employee-like minimum standards order in relation to delivery of food and beverages.
2. MS2024/4 — application for road transport industry contractual chain order.
3. MS2024/1 and MS2024/2 — applications for an employee-like minimum standards order and a road transport minimum standards order respectively, both in relation to ‘last mile’ package delivery.
4. AM2021/72 — application by Menulog for an award to cover the on-demand delivery service industry.

[9] However, the consultation process proposed by the RTAG would involve the five applications moving forward together. This is so consultation on each of the applications can proceed without delay and will optimise opportunities to identify any common interests and best practice initiatives relevant to each application.

[10] The RTAG also intends to consult with affected persons and organisations about its *provisional* view on the prioritisation of the applications as part of its consultation process. Following the commencement of its consultation process, the RTAG will either confirm its *provisional* view in relation to prioritisation or advise the Commission if that view has changed as a result of any views expressed by interested persons or organisations during the consultation process.

[11] The RTAG also proposes to seek the views of parties in relation to consultation in the Menulog matter in the context of consultations for the other four matters.

[12] The RTAG will establish a subcommittee for each application, with MS2024/1 and MS2024/2 initially involving a joint subcommittee, as its primary vehicle for consultation in respect of each of the applications. These subcommittees will be used by the RTAG to conduct broad engagement with persons and organisations affected by the applications. Through these subcommittees, the RTAG proposes establishing working groups to examine issues arising in consultation. The membership of these working groups will include subcommittee members and may include subject-matter experts nominated by affected parties and organisations.

[13] The RTAG intends that consultation with these subcommittees will start as soon as possible after formation and proposes an initial consultation period of six months with a review of effectiveness to be conducted at the end of the consultation period.⁷

[14] Members of the RTAG are appointed by the Minister under s 40F(1) of the FW Act and are either members of, or nominated by, an organisation entitled to represent the interests of road transport contractors or road transport businesses. The RTAG notes some organisations or persons affected by the applications have raised concerns about RTAG members chairing

subcommittee meetings due to the RTAG members representing certain affected contractors or businesses in the road transport industry. To alleviate these concerns, the RTAG proposes that the President of the Commission make Members of the Commission who are also Members of the Consultation Expert Panel available to act as facilitators for each subcommittee meeting. This would include being able to make procedural requests of the RTAG member chairing the subcommittee. The intent of the proposal is to ensure that subcommittee meetings are facilitated by a party seen as independent by all participants.

[15] The RTAG's Terms of Reference was published on the Commission's website on 30 September 2024 and have received no comments from interested parties. Following the Direction issued by the Commission on 24 October 2024, the RTAG revised its Terms of Reference to include Guiding Principles for the subcommittees. In its advice, the RTAG proposes that, subject to any further directions from the Commission, it will adhere to its Terms of Reference and its subcommittees will follow the Guiding Principles, including any amendments made by such subcommittees.

Submissions in response to the RTAG advice

[16] The December Statement invited interested persons to make submissions about the provisional views of the RTAG. The Commission received submissions from the following entities, which have been published on the Commission's website:

- Menulog⁸
- DoorDash⁹
- Amazon¹⁰
- Uber¹¹
- Australian Industry Group (Ai Group)¹²
- Australian Chamber of Commerce and Industry (ACCI).¹³

Prioritisation

[17] In relation to the RTAG's provisional view about prioritisation, there was little consensus as to which application or applications should be considered first, but parties generally agreed that prioritisation should be subject to consultation and prioritisation be confirmed after the consultation. DoorDash submitted that MS2024/1 be prioritised over MS2024/3 given the complexity of the engagements proposed to be covered in the application. Menulog submitted that it would be more efficient to consider their application, AM2021/72, after the minimum standards applications, particularly after consideration of MS2024/3. Uber submitted that MS2024/4 should be considered at the same time as or following AM2021/72. The Ai Group submitted that MS2024/4 should not be prioritised ahead of MS2024/1, MS2024/2 and MS2024/3 for subject-matter interaction and resourcing related reasons.

[18] ACCI submitted that prioritisation had occurred prematurely. The Ai Group submitted that it did not support prioritisation consistent with the RTAG's provisional view and that the RTAG did not provide reasoning for the view reached. Amazon submitted that common issues between each application needed to be addressed prior to the applications being prioritised.

[19] Menulog submitted that the RTAG advice should be limited to prioritisation only, and the ACCI did not support the RTAG being involved in applications outside of those specific to road transport (being MS2024/2 and MS2024/4).

Subcommittees

[20] In relation to the RTAG's proposed establishment of subcommittees as a consultation mechanism, DoorDash expressed support, with the qualification that consultation about the terms sought in the employee-like minimum standards order applications (MS2024/1 and MS2024/3) be conducted by the Commission rather than the RTAG. Uber made a submission concerning its preferred means of operation of any subcommittees. The Ai Group submitted that the establishment of subcommittees was appropriate, but reiterated its previous submission that any consultation on the five matters should occur before the Commission rather than through the RTAG or its subcommittees. DoorDash submitted that while the RTAG possessed expertise in the road transport industry, consultation requiring submissions and supporting materials from stakeholders would more comfortably and effectively occur through the Commission than the RTAG. The ACCI's view was that the RTAG should not be involved in any consultations led by the Commission for coverage and common issues between the applications and that the use of subcommittees should be postponed until after initial consultation on prioritisation occurs. Uber also submitted that clarity was needed on how subcommittees will observe confidentiality and professional privilege.

Commission Members to facilitate subcommittee meetings

[21] In relation to the RTAG's proposed use of Commission Members as facilitators for subcommittees, Menulog and Amazon submitted that the role of a Commission Member as a facilitator does not adequately address impartiality concerns raised with the RTAG. Amazon also submitted that the RTAG has been unclear on obligations of Commission Members as facilitators, and how possible conflicts of interests would be addressed. DoorDash agreed with the RTAG's proposal.

Timing of the establishment of subcommittees

[22] DoorDash submitted that the six months the RTAG proposed to allow for consultation at the subcommittee level was inadequate, and also submitted that the relevant subcommittees should meet no more than every four to six weeks. The ACCI submitted that the RTAG should postpone its consultation with subcommittees until after the Commission conducts a consultation process addressing coverage and common issues for the applications.

Working groups

[23] DoorDash supported the establishment of working groups, while Uber did not oppose it subject to noting the need to avoid duplication. The Ai Group submitted that while the FW Act empowers the RTAG to establish subcommittees, the FW Act does not contemplate subcommittees having the power to establish working groups.

Terms of Reference and Guiding Principles

[24] In relation to the amended Terms of Reference and the Guiding Principles, the ACCI, Ai Group, Amazon and Uber raised concerns about conflicts of interest and impartiality of both the RTAG members and Commission Members acting as facilitators. The ACCI, the Ai Group, Amazon, DoorDash and Uber also expressed views that interested parties should be afforded an opportunity to comment on advice provided by the RTAG.

[25] Regarding procedural and operational concerns of the Terms of Reference, Amazon and Uber submitted that there was an overall lack of information on procedural fairness of subcommittee meetings, including how subcommittee members will handle commercially-sensitive matters. Uber expressed views that the Terms of Reference lack transparency and do not set out how matters will be referred to the RTAG by the Commission.

Other matters

[26] The ACCI, the Ai Group, DoorDash and Amazon submitted that coverage and common issues should be considered as preliminary matters. Amazon and Menulog expressed concerns about the lack of clear definition and direction for the RTAG's role, suggesting that the Commission should provide further directions on how the RTAG is to carry out its functions.

Consideration

[27] There is no consensus amongst those parties that made submissions regarding which matters should be dealt with first which would cause me to displace the proposed prioritisation advised by the RTAG. I note that the RTAG's view is at this stage only *provisional* in nature and that it proposes to consult with interested parties further before providing any final advice as to prioritisation. This is, in my view, sensible since the emergence of any measure of consensus about any matter may justify a change in prioritisation. Parties will therefore have a further opportunity to provide input as to prioritisation. Six months is an appropriate initial period for the conduct of the consultation process, noting that this may be changed as events develop.

[28] The proposed subcommittee process, with the establishment of working groups if necessary, will ensure that all parties with an interest in each application will have a proper opportunity to participate in the consultation process. The proposed process of establishment will allow the subcommittees to be constituted in a way broadly representative of the diversity of interests amongst both interested businesses and workers. The process will also ensure access to specialist expertise. The purpose of the RTAG consultation process is to provide advice to the Commission about the relevant issues pertaining to each application based, if possible, on consensus. The process will also aid in the identification of disputed issues which will require Commission determination. In that context, I do not consider it appropriate for the Commission to pre-empt the consultation process by determining at the outset the type of matters referred to by the ACCI, the Ai Group, DoorDash and Amazon, but if the RTAG considers that its processes might be aided by the early determination of preliminary or discrete issues, it may provide advice to that effect.

[29] The concerns expressed about procedural fairness and conflicts of interest in the consultation process are somewhat misplaced since the RTAG is not a decision-making body under the FW Act. In any event, for the reasons stated, I am satisfied that the proposed process is fair and transparent. Any issues arising from the participation of particular Commission members in the subcommittee process can be dealt with at the time that the Commission undertakes any decision-making function under the FW Act. If a party considers that a Commission member is disqualified from being involved in the determination of a matter as a result of their participation in a prior consultation process, they can make a recusal application at the appropriate time. In relation to confidential information and privilege, I am confident that, if a party chooses to provide confidential information to an RTAG subcommittee to aid the consultation process, appropriate procedures (such as the provision of undertakings) will be able to be developed to protect confidentiality. The RTAG does not have the power to compel the production of documents or other information, so no participating party can be forced to disclose confidential information.

[30] I am satisfied that the Terms of Reference and Guiding Principles are appropriate. They may be modified in response to any particular difficulties that may arise during the process.

The Hines application (AM2024/35)

[31] On 19 August 2024, Mr Lawrence Hines applied under s 158 of the FW Act to vary the *Road Transport (Long Distance Operations) Award 2020 (Award)*. His application¹⁴ sets out 22 proposed variations to the Award,¹⁵ including to clauses addressing minimum payment and engagement, hours of work and rostering, minimum weekly rates of pay, loading and unloading duties, overtime, annual leave loading, public holidays, dispute resolution and award coverage. Mr Hines' proposed variations have been the subject of conciliation conferences before Commissioner Sloan but the parties have not reached a consent position on any of them. The applicant and other interested parties have agreed that the application should be referred to the RTAG for advice pursuant to s 40E(4) of the FW Act. Accordingly, I intend to refer this application to the RTAG for advice also.

Next steps

[32] I direct the RTAG to commence the consultation process in relation to matters MS2024/1, MS2024/2, MS2024/3, MS2024/4 and AM2021/72 in accordance with its advice of 11 December 2024. I also direct the RTAG to conduct a consultation process in respect of matter AM2024/35 in a manner consistent with that advice.

[33] I further direct that the RTAG provide me with further written advice as to the prioritisation of the matters once it has formed a final view about this. I will then consider whether to issue a formal prioritisation direction in accordance with this advice.



PRESIDENT

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¹ [\[2024\] FWC 3470](#).

² [\[2024\] FWC 2438](#).

³ Ibid [21].

⁴ [\[2024\] FWC 2895](#).

⁵ See ibid [23]–[28].

⁶ [PR781029](#).

⁷ [RTAG Response to Directions, 11 December 2024](#) [19].

⁸ [Menulog submission, 8 January 2025](#).

⁹ [DoorDash submission, 8 January 2025](#).

¹⁰ [Amazon submission, 8 January 2025](#).

¹¹ [Uber submission, 8 January 2025](#).

¹² [Ai Group submission, 8 January 2025](#).

¹³ [ACCI submission, 8 January 2025](#).

¹⁴ [Application \(Form F46\) and submission, 19 August 2024](#).

¹⁵ Two of these are in the alternative.