

ROAD TRANSPORT ADVISORY GROUP RESPONSE TO DIRECTIONS

SUBMISSIONS
8 JANUARY 2025

Introduction

1. On 13 December 2024, the response of the Road Transport Advisory Group (**RTAG**) to various directions issued by the Fair Work Commission (**FWC**) were made available on the FWC website. The response addressed the following matters:
 - The priorities of the work of the FWC in relation to matters MS2024/1, MS2024/2, MS2024/3, MS2024/4, and AM2021/72.
 - A proposed process for the RTAG to provide advice in relation to the matter of 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.
 - 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 directions pursuant to s 40F(5), taking into account the need for RTAG to be open and transparent in the way it conducts itself.
2. ACCI welcomes the opportunity to provide submissions responding to the advice provided by the RTAG. ACCI has previously provided correspondence to the FWC indicating its initial views on how the applications should be dealt with and continues to rely on those views.

3. These submissions will address the three matters contained within the RTAG's response in greater detail. ACCI's overarching position, however, remains unchanged with respect to the RTAG's ongoing involvement in these matters, being that the RTAG is legislatively required to be consulted with respect to MS2024/2 and MS2024/4, and its involvement should be limited to those matters.
4. ACCI's primary position on the prioritisation of the matters is that a proposal for an order at this stage is premature and would be most appropriately determined after a consultation process. The consultation process should focus on specifying the coverage of the applications as well as canvassing the areas of overlap in the applications that might be dealt with simultaneously. ACCI submits that this process will appropriately inform it to make a determination as to priority.
5. Further, ACCI recommends that the FWC should conduct its consultations with the interested parties directly, rather than via the RTAG and the subcommittees it proposes to create. Any consultation with the RTAG, required or otherwise, should be intended provide the FWC with expertise that will assist it in its decision-making, rather than for the purpose of the RTAG conducting general consultation to obtain expertise that could be provided directly to the FWC by interested parties themselves.

Prioritisation of applications

6. In its advice, the RTAG states its provisional view on the order in which the applications should be prioritised, proposing the following:
 - a. MS2024/3 - application for an employee-like minimum standards order in relation to delivery of food and beverages.
 - b. MS2024/4 - application for road transport industry contractual chain order (**RTCCO**).
 - c. MS2024/1 and MS2024/2 - applications for an employee-like minimum standards order (**MSO**) and a road transport minimum standards order (**RTMSO**) respectively (last mile package delivery).
 - d. AM2021/72 - application by Menulog Pty Ltd for an award to cover the on-demand delivery service industry.
7. The RTAG stipulated that its position on the prioritisation of the matters was contingent on the commencement of its proposed consultation process, which would involve consultation on the order provided above. The RTAG clearly articulated that the order above is its provisional view, which it intends to confirm after it has

conducted its proposed consultations. ACCI will address the proposed consultation process and the RTAG's involvement further in this document.

8. The RTAG, in providing its response to the directions, did not provide its rationale for the order in which it proposed the FWC prioritise the applications. In response, ACCI submits that it is premature for the FWC to make a determination relating to prioritisation and agrees that the prioritisation of matters should be subject to a consultative process, however, one that differs from the RTAG proposal. A consultative process will enable the FWC to determine any points of similarity between the application which will assist it to prioritise matters accordingly. ACCI recommends that no decision on prioritisation should be made prior to the conclusion of that consultative process. In acknowledgement of this recommendation, ACCI does not seek to progress a proposed order of prioritisation.
9. ACCI maintains its position that the applications ought to, eventually, be dealt with separately. ACCI's position remains cognisant of the similarities that will exist between the applications and has recommended that a consultation process joining all interested parties in the collective matters should be undertaken to highlight those similarities and areas of agreement before the eventual separation of those matters.
10. ACCI reiterates that its primary recommendation is that the prioritisation of matters will be more appropriately determined after a comprehensive consultative process where any similarities or commonalities in the applications can be tested and realised.

Proposed processes for the RTAG

11. ACCI acknowledges that the RTAG may establish subcommittees to advise it in relation to matters relevant to the performance of its functions,¹ including the prioritisation of FWC matters relating to the road transport industry. The RTAG has indicated that it intends to undertake consultation primarily by way of forming subcommittees. The RTAG's intention is to establish a subcommittee for each application, with the exception of MS2024/1 and MS2024/2, which it intends to combine in the initial instance, however, has indicated that it may be separated on advice from its members.
12. The RTAG intends to allow members of those subcommittees to nominate other persons and organisations which may have an interest in a particular application to participate on the relevant subcommittee(s). The RTAG stipulated that this approach is to ensure broad representation. The RTAG advised that it had completed its

¹ *Fair Work Act 2009* (Cth), s40G(1).

proposed steps 1 and 2, involving identifying a list of interested parties and sending correspondence to confirm their interest.

13. The RTAG, in its proposal has requested that the President of the FWC make Members of the FWC available to facilitate each subcommittee meeting, which it proposes will alleviate the concerns raised by parties in previous submissions, namely that of the RTAG's impartiality since one of the two RTAG members is the National Vice President of the Transport Workers' Union (**TWU**), the Applicant in all four MSO/RTCCO matters.
14. Additionally, the RTAG recommended that consultation at the subcommittee level ought to take place over a six-month period.
15. As above, ACCI agrees with a consultation period prior to the determination of the prioritisation of the applications. The purpose of this consultation process is to determine whether the application have similarities that might be dealt with simultaneously. Once those similarities have been identified, the FWC will then be in a more informed position to determine the prioritisation of the applications.
16. In addition to consulting on the similarities that exist between the applications, the initial consultation period should focus on confirming the coverage of the applications. ACCI suggests that the ability of interested parties to engage in the consultation process constructively will be hindered if it is unclear to whom the applications will apply. ACCI recommends that coverage of the applications is a priority for the Expert Panel, and considers that when agreement is achieved, it would be appropriate for the Expert Panel to express its view, which will allow for the constructive progression of consultation on the applications.
17. Differing from the RTAG's response, ACCI recommends that a consultation process addressing coverage and common issues between the applications is conducted entirely by the FWC prior to any consultation or determination on the prioritisation of the matters. Once the initial consultation has occurred, all parties will be able to provide a more informed view as to the prioritisation of the matters. The RTAG may commence its consultation relating to prioritisation at that point in order to provide its advice to the FWC. ACCI submits that the RTAG should not be involved in any consultations lead by the FWC for the purpose of addressing coverage and common issues between the applications. ACCI does not consider that there is any additional value having the RTAG lead consultations when the FWC can engage directly directly with interested parties. This is particularly pertinent given concerns have been raised with respect to the RTAG's impartiality.
18. While ACCI acknowledges the RTAG's efforts to mitigate those concerns, it must be accepted that one of two members appointed to the RTAG is employed by the Applicant of MS2024/1, MS2024/2, MS2024/3, and MS2024/4, presenting a clear

conflict of interest. ACCI submits that to avail itself of its consultative obligations, the FWC is only required to consult the RTAG on the prioritisation of work, and then prior to the making (or varying) of any RTMSO or RTCCO. Therefore, ACCI's view is that it would be most appropriate to recommence consultation with the RTAG on prioritisation after the preliminary issues of coverage and commonalities between applications have been addressed. Of course, it is open to the FWC to consult with the RTAG during the preliminary consultation, however, ACCI recommends that any decision to do so should involve clear directions to the RTAG, and an opportunity for interested parties to respond to the RTAG's advice.

19. ACCI notes that the RTAG is not required to make any subcommittees, other than that specified in section 40G(3) of the *Fair Work Act 2009* (Cth) (**FW Act**), but that where it has formed subcommittees, it must consult with them before providing advice. Given the RTAG has already commenced forming subcommittees, and in line with its position expressed thus far, ACCI suggests that those subcommittees will be ill-positioned to consult with the RTAG on matters relating to prioritisation until a general consultation has occurred, dealing with the coverage of the applications, and the components of the applications that may be dealt with simultaneously. The RTAG should postpone its consultation with those subcommittees until after ACCI's proposed consultative process takes place.
20. ACCI submits that its approach is a more appropriate way to manage the concerns raised by parties relating to the impartiality of the RTAG.
21. With respect to the proposed timeframe, ACCI agrees that a broad consultation period for the purpose of identifying any commonalities between the applications would appropriately take place over six months, prior to the determination of prioritisation. ACCI suggests that the timeframe should be subject to review based on the progress of the consultative process. Due to the novelty of these applications, ACCI is not inclined to propose a timeframe beyond this step and considers that the FWC will be better informed to implement timeframes as the matters progress.
22. Finally, with respect to the processes of the RTAG in providing its advice, the RTAG stipulated that it is not necessary that the applications are served in the traditional sense on individual persons and organisations potentially affected and indicated that the FWC's Regulated Worker User Group and subscription service is sufficient to notify interested parties of the ongoing matters.
23. ACCI reiterates its previously conveyed position that the TWU, by virtue of its membership base and its knowledge of the individuals it represents, should have a clear indication of parties that the applications are likely to impact and should be required to make reasonable efforts to notify those parties. The Regulated Worker

User Group and subscription service provided by the FWC are effective only for those aware of it. ACCI suggests that alerting potentially interested parties to those resources would be a helpful component of that notification.

24. ACCI's recommendation ensures that the FWC can be satisfied that a comprehensive consultation has occurred, and that it adheres to its obligations under sections 536KAB, 536KC, and 536PH to ensure that affected entities have a reasonable opportunity to make written submissions to the FWC for its consideration in relation to MSOs and RTCCOs.

General conduct of the RTAG

25. The RTAG provided its Terms of Reference (**ToR**) in reference to its general conduct and stated that it intended to adhere to its ToR, subject to any further direction(s) from the President of the FWC. The RTAG contended that its ToR adequately addressed concerns relating to its impartiality.

26. While the RTAG has referred to concerns relating to its impartiality, ACCI submits that these concerns would be better alleviated by the Expert Panel leading a preliminary consultative process prior to its consideration of prioritisation, The RTAG may then be again consulted on prioritisation at the conclusion of the preliminary process. The intent for the formation of the RTAG was to ensure that the FWC has the road transport expertise it requires to make decisions.² Its purpose is not to carry out consultative processes that the FWC may more appropriately undertake.

27. Further to that point, the members of the RTAG possess no expertise in digital platform work. There is no requirement that the RTAG is consulted for advice on these matters. The Expert Panel may consider consulting the RTAG if during the consultative process it identifies a lack of expertise where it considers the RTAG may be able to contribute its knowledge. Outside of that specific hypothetical, there is no justifiable reason to consult the RTAG with respect to the substantive and ongoing consultation that will arise in applications relating to employee-like workers. ACCI strongly recommends that interested parties are given the opportunity to respond to any advice provided by the RTAG.

28. The RTAG is, of course, required to be consulted in applications MS2024/2 and MS2024/4, however, the extent of that consultation is not legislatively defined beyond the requirement to consult with respect to prioritisation, and prior to the making or varying of RTMSOs and RTCCOs. ACCI reiterates its acknowledgement that prior to

² Tony Burke, 'Fair and sustainable standards for truck drivers', (Media Release, 5 September 2023), [Fair and sustainable standards for truck drivers | Ministers' Media Centre](#).

providing its advice that the RTAG must consult with any relevant subcommittees it has formed.

29. ACCI's view of the RTAG is that while it must be consulted, it does not play a determinative role. The utility of the RTAG is that it can engage with a cohort of individuals, for example, owner drivers, that the FWC may not be able to efficiently engage with for a number of reasons, including accessibility and quantity. The RTAG, by virtue of its members, can connect with these parties directly where the FWC does not. This cannot be said in the matters relating to employee-like workers.

30. ACCI submits that the RTAG's response to the President's Directions, if accepted, will constitute a substantial overstep of the RTAG into areas in which it has no expertise, and would result in an inefficient handling of the consultative process. Consultation with the RTAG should be limited to those matters in which it is legislatively required to be consulted, or those where it can demonstrate expertise. Additionally, with respect to these applications, ACCI recommends a significant alteration to the RTAG's proposal, including a preliminary consultation process lead by the FWC to determine the coverage and the common issues to be dealt with simultaneously prior to the determination of prioritisation.

Conclusion

31. ACCI recommends that a preliminary consultation with interested parties to determine the coverage and issues that may be dealt with simultaneously should be conducted by the FWC prior to the RTAG's proposed consultation on prioritisation. ACCI contends that its approach will dramatically decrease the length of the RTAG's consultation and will mean that the FWC is able to remain in control of the broader consultation process. ACCI provides the below table to better demonstrate its proposal:

Order	Action
1	FWC commences a preliminary consultation for the purpose of defining the coverage of the proposed MSOs, RTMSO, and RTCCO, as well as identifying the common issues that may be dealt with simultaneously. This will likely occur over a six-month period.
2	Once the above matters have been resolved, the RTAG commences its consultation on the prioritisation of the applications.
3	Interested parties are given an opportunity to respond to the RTAG's advice.
4	FWC makes a prioritisation on the order in which the applications will be dealt with.

32. ACCI also recommends that the FWC's consultation with the RTAG should be limited to those circumstances in which it is legislatively required.
33. The RTAG's function is to provide the FWC with the appropriate expertise. It would be appropriate for the FWC to undertake its own consultation process, and, where required, consult with the RTAG to ensure that all relevant expertise and knowledge are before the FWC. The RTAG may, in those circumstances where either it or the FWC considers additional expertise is required, be directed by the FWC to form a relevant subcommittee and compile that information.
34. There is no added value to the FWC for engaging with the RTAG in the manner it has proposed, particularly with respect to applications MS2024/1 and MS2024/3 broadly. The FWC can obtain the positions of the interested parties directly, and in those matters where it is required, consult with the RTAG on its position prior to the making of an RTMSO or RTCCO. It is also open to the RTAG to determine that it does not have a position or advice to provide additional to that which is before the FWC already. ACCI is of the view that this is the most efficient way for the FWC to conduct these novel matters, and to dispel concerns of the impartiality of the RTAG.

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