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Justice Hatcher, President  
Fair Work Commission  
Level 4, 11 Exhibition Street  
Melbourne, VIC, 3000  
By email: rws@fwc.gov.au

**8 January 2025**

Dear Justice Hatcher,

**RE: Submission on Justice Hatcher's request for submissions regarding the RTAG's advice on applications by Transport Workers Union of Australia MS2024/1, MS2024/2, MS2024/3 and MS204/4 and an application by Menulog AM2021/71 in response to the 13 December 2024 Statement 2024 FWC 3470**

Thank you for the opportunity for Menulog to make a submission on the RTAG's advice on prioritisation of the Commission's work. Menulog makes this submission to the Commission in its capacity as a business that engages independent contractors in the on-demand delivery industry that may be impacted by the TWU's application for a minimum standards order to cover employee-like workers engaged in the delivery of food, beverages, or other like items (MS2024/3).

Critically, Menulog also makes this submission in its capacity as the Applicant in its own application for a new modern award to cover employees in the on-demand delivery industry (AM2021/72).

As an Australian-born business that was the first in the industry to advocate for better benefits and protections for on-demand couriers, Menulog makes this submission with the goal of supporting the Commission in developing minimum conditions and entitlements for workers in the on-demand delivery industry that are fit-for-purpose, practical and effective, drawing on its unique and significant expertise in navigating the complexities of this industry.

### **Executive Summary**

Menulog acknowledges the Commission's provisional view concerning the prioritisation of the five applications. Menulog remains of the view that MS2024/3 and AM2021/72 should not be dealt with jointly with MS2024/1 or MS2024/2, taking into account the unique complexities of the on-demand delivery industry.

Menulog continues to be concerned about the RTAG's ability to provide impartial advice to the Commission in relation to MS2024/3 particularly when it is proposed that Mr Olsen, a senior official of the Applicant in respect of MS2024/3, would act as Chair in subcommittee meetings dealing with this application, notwithstanding that it is proposed that a Member of the Commission would facilitate meetings of this subcommittee. Members of the Commission are subject to an oath or affirmation that they will faithfully and impartially perform the duties of their office. Independently appointed members of the RTAG are not subject to such duties.

Menulog cannot stress enough the need for interested affected parties to be able to put evidence before the Commission for its consideration in the making of the Minimum Standards Order sought in the event that there are conflicting views taken to those expressed in the advice provided by the RTAG.

Menulog accordingly submits that it is imperative that the Commission make appropriate directions to address the well-founded concerns raised by interested affected parties to mitigate the impact of the foreseeable lack of impartiality in the RTAG's advice.

### **RTAG's advice on the prioritisation of the Commission's work**

Menulog supports the provisional view of the RTAG that MS2024/3 (on-demand delivery) should be considered separately from last-mile delivery. These industries operate fundamentally differently. Last mile forms part of a broader distribution network that carries efficiencies of scale and coordination of items being delivered over days or hours, not by the minute. The on-demand delivery industry is a rapidly evolving industry with distinct operational challenges from last mile. It operates predominantly outside of traditional business hours, demands high levels of courier flexibility, and relies heavily on technology to facilitate sales, orders and deliveries. These factors differentiate it significantly from the more structured and planned operations of traditional freight and logistics companies requiring different considerations for minimum standards orders, including in respect of the last mile of a delivery.

Aside from the RTAG's advice on prioritisation, the scope of its advice to the Commission remains unclear. In the absence of a draft minimum standards order, advice from the RTAG must necessarily be limited to prioritisation rather than advice on substantive matters. When it is proposed that the Commission would like to seek advice from the RTAG on more discrete questions then these questions should be put before interested parties first before advice is sought from the RTAG.

MS2024/3 outlines broad principles rather than putting forward a proposed minimum standards order. Menulog requires a clearer understanding of TWU's specific proposals first to conduct a proper analysis and assess the potential impacts. These substantive matters are best addressed by the Expert Panel, where a Commission member can rigorously examine evidence from all interested parties rather than seeking advice from an RTAG member who is also a senior member of the Applicant.

Menulog encourages AM2021/72 being considered after the RTAG's consideration of MS2024/3 in order to harness efficiencies in considering substantive matters that are relevant to both applications.

Otherwise, it is supportive of AM2021/72 being considered after the MSO applications given the preponderance of workers in the impacted industries being employee-like workers. This should not, however, be taken to preclude consideration being given to how the safety net entitlements of employees in a like position who would be covered by the proposed new modern award ought properly be set.

Menulog supports the RTAG's proposal to engage with the parties to AM2021/72 to seek their views in relation to consultation, and further submits that the RTAG should have regard to the valuable work already undertaken by Commissioner McKinnon in her conciliation of matters pertaining to this application to date.

## **RTAG members chairing subcommittee meetings**

Menulog expresses serious concerns about Mr Olsen, the National Vice President of the Transport Workers' Union, chairing the subcommittee for MS2024/3. His role within the TWU inevitably presents a conflict of interest, undermining the impartiality of the consultation.

While the RTAG proposes a *facilitator* from the Consultation Expert Panel, this role is limited to procedural matters and may not adequately address these concerns.

Menulog's experience in AM2021/72 has shown that some in the traditional road transport industry perceive the on-demand delivery industry as a disruptor. This misunderstanding stems from a lack of understanding of how these industries can complement each other.

Menulog is supportive of the proposal for the RTAG to establish Guiding Principles for subcommittees, and submits that it should be an express requirement under these Guiding Principles that Chairs will undertake their duties in an impartial manner.

## **Directions to be made by the Commission**

Menulog submits that the Commission should give the RTAG further directions as to how it is to carry out its functions. Directions should be issued to the effect that:

- subcommittee membership must include experts with direct experience in the on-demand delivery industry, such as current or former employees of digital labour platforms which are representative and not limited to interested members of the TWU;
- any meetings between RTAG members and any subcommittees are recorded and made publicly available on the RTAG page of the Commission's website. *In camera* sessions should only occur in limited circumstances where an interested party proposes to provide information to the RTAG that is of a sensitive and confidential nature;
- all advice that the members of the RTAG provide to the Commission is made publicly available on the RTAG page of the Commission's website;
- all advice and supporting material provided by subcommittees members to the RTAG is made publicly available on the RTAG page of the Commission's website;
- interested parties are provided the opportunity to comment on more discrete questions about substantive matters before the President seeks advice from the RTAG outside of prioritisation; and
- interested parties are provided the opportunity to respond to the RTAG's advice before it is accepted by the Commission. This should include allowing all interested parties to submit evidence and arguments directly to the Expert Panel. This ensures that the Commission has access to a diverse range of perspectives and evidence, even if they may conflict with the RTAG's advice.

Please do not hesitate to contact Paul McElroy at [paul.mcelroy@justeattakeaway.com](mailto:paul.mcelroy@justeattakeaway.com) should Menulog be able to provide any further submissions or supporting materials to the Commission to assist it in its consideration of these matters.

Yours faithfully,

**Paul McElroy**  
Legal Counsel  
Menulog