

## FAIR WORK COMMISSION

### Applications by the Transport Workers' Union

FWC Matters: MS2024/1, MS2024/2, MS2024/3, MS2024/4, AM2021/72

### UBER SUBMISSIONS IN RELATION TO ROAD TRANSPORT ADVISORY GROUP ADVICE PUBLISHED ON 13 DECEMBER 2024

Dear President Hatcher

#### RTAG advice, Statement and Direction

We refer to the Statement and Direction issued on 13 December 2024 and the associated RTAG advice published on the Fair Work Commission (**FWC**) website. Uber provides these submissions in response to the RTAG advice and the invitation to make submissions about further steps that should be taken in the conduct of the applications.

#### Prioritisation of applications

Paragraph [5] of the RTAG advice provides that the RTAG has formed a provisional view in relation to the prioritisation of the five applications. Uber's view is that the prioritisation set out is appropriate except that MS2024/4 (Application for road transport industry contractual chain order (**RTCCO**)) ought to be dealt with either as the final application to be considered and determined by the Tribunal, or be given equal prioritisation with AM2021/72 (Application by Menulog Pty Ltd).

Uber makes this submission on the basis that:

- (a) The legislative scheme for the making of minimum standards orders (**MSOs**) contemplates that an application for an RTCCO should be heard and determined *after* an MSO. Section 536PN of the *Fair Work Act 2009* (Cth) (**FW Act**) provides that an RTCCO must include a term that specifies the extent to which it prevails over or is subject to an MSO to the extent of any inconsistency. Such a term **must** be included, but it is counterintuitive that such a term could be included without an MSO being in existence first. If an MSO (or, as appropriate, each of the applications which may interact with the RTCCO) has not first been made, an Expert Panel cannot make the RTCCO and determine the extent to which it prevails over, or is subject to an MSO having regard to its subject matter. The proposal to make the RTCCO in advance of any MSOs which may interact with it will create uncertainty and significant inefficiencies for the Commission and interested parties, as this sequencing will necessitate subsequent variations to the RTCCO so as to update any terms specifying the extent to which it prevails over or is subject to any MSO.
- (b) MS2024/4 does not specify the population sought to be covered by the RTCCO as required by section 536PE. The application specifies only that the persons to be covered by the proposed order *include* parties to the first and subsequent contracts in the RTCCO, "regulated road transport contractors" who perform work in the RTCCO, and "regulated road transport businesses" (see 1.1 of the application). Based on this description, the FWC and interested parties cannot identify who is covered, and in turn, how other applicable instruments interact with the RTCCO. We understand that the application is not *intended* to apply to digital labour platform operators (**DLPOs**), on the basis that:
  - the Transport Workers' Union (**TWU**) indicated in its submission filed on 27 September 2024 that the application for an RTCCO should be heard at an early stage because it has been part of extensive consultation with industry participants (to date, Uber has not had any discussion or consultation with the TWU in relation to an RTCCO); and

- the TWU indicated at the Expert Panel conference on 29 November 2024 that the TWU had not previously considered that the RTCCO application could be interpreted as potentially extending to DLPOs.

With the caveat that it is unclear at present which entities would be covered by this instrument, to the extent that the RTCCO application *may* apply to DLPOs, later prioritisation of this application will allow for such direct discussion and consultation with the TWU and impacted parties to occur.

While Uber agrees that the applications should be dealt with sequentially, there will likely be threshold issues which are common to the applications. For example, the content of terms that must be included in an MSO (sections 536KH, 536KJ and 536KK). These issues are not unique to the road transport industry, and it is appropriate that they be dealt with early by a Full Bench of the FWC (as distinct from the RTAG or an Expert Panel) because they will inform the content of the instruments. In particular, the content of the mandatory terms relating to coverage should be dealt with as a priority matter. Uber submits that the scope of each MSO must be known before terms and conditions are developed.

### **Full Bench of the FWC rather than Expert Panel to determine MS2024/3**

We refer to paragraph [22] of the Statement of President Hatcher dated 18 October 2024 in which the President confirmed the first and second provisional views contained in the Statement dated 6 September 2024.

Provisional view two on 6 September 2024 provided that MS2024/3 relates to the “road transport industry” as defined, and directed that this application be heard and determined by an Expert Panel for the road transport industry rather than by a Full Bench of the FWC. The default position in the FW Act is that an application for an ELW MSO must be dealt with by a Full Bench of the FWC (section 616(4B)(a)).

Respectfully, Uber requests that the President re-consider the confirmation of the provisional view that MS2024/3 be heard by an Expert Panel rather than a Full Bench. The *Closing Loopholes* amendments to the FW Act created two classes of “regulated workers” – “employee-like workers” and “regulated road transport contractors”. The name “employee-like workers” readily suggests the concern of these provisions, as set out more fulsomely in the section 15P definition. By contrast, a “regulated road transport contractor” is captured by virtue of the industry in which they work, not their lack of bargaining power, similarity to employees or otherwise. By definition, “regulated road transport contractors” are not “employee-like workers” (section 15Q(1)(e)). This distinction gives rise to the procedural and substantive differences set out in Uber’s submission dated 27 September 2024, which inform the type of evidence to be led and submissions to be made by interested parties.

MS2024/3 is an application for an ELW MSO and ought to be determined solely with reference to the minimum standards objective contained in section 536JX which requires, among other things, that the FWC have regard to the need for minimum standards that are “tailored to the relevant industry, occupation or sector and relevant business models” as well as “tailored to the type of work, working arrangements and regulated worker preferences” – being “employee-like work”.

The consequence of the President’s direction that this application be heard and determined by an Expert Panel is that the road transport objective contained in section 40D also applies to the determination of this application and the Panel is *obliged* to have regard to these considerations. In Uber’s submission, the road transport objective is not relevant to this application. Indeed, it is unclear if, and how, the road transport objective and its subsidiary considerations could apply to persons covered by MS2024/3 given that “employee-like workers” are not “regulated road transport contractors” or “regulated road transport workers” or “employees” in the road transport industry (as defined). It is also unclear how an Expert Panel could, in practice, take into account both the road transport objective and the minimum standards objective, and which would take precedence in the event of any inconsistency.

MS2024/3 ought to be heard and determined with reference only to the minimum standards objective rather than being considered through the lens of the road transport objective and considerations

historically relevant to traditional road transport only. In response to the direction that the RTAG provide advice to the FWC in relation to application MS2024/3 (paragraph [23] of the Statement of President Hatcher dated 18 October 2024), Uber makes submissions below regarding the conduct of the process, including the formation and role of sub-committees.

### **Sub-committee representation**

RTAG has decided to establish a sub-committee for each application and sets out the initial process for the formation of each sub-committee in the RTAG advice.<sup>1</sup> The process includes sub-committee participants being asked to identify additional persons and organisations who may be interested in joining the sub-committee to ensure that it is broadly representative.

Further, in paragraph [18] of the RTAG advice, the RTAG may also facilitate the establishment of working groups to examine issues as required. These working groups may include subject matter experts nominated by affected parties and organisations, and it is anticipated that issues examined by working groups may be common to more than one application and involve persons or organisations with interests in a number of applications. That is, a working group may support more than one application.

The preferable course is for:

- (a) sub-committee participants from interested parties to be appointed on a fixed basis and interested parties should retain the capacity to substitute these participants from time to time to ensure appropriate representation on the sub-committee and to provide coverage where participants are unable to attend because of illness, leave, other pressing commitments, etc;
- (b) each interested party that is a member of a sub-committee to have an additional “seat” or “seats” on the sub-committee, to provide an opportunity for either additional representatives of the interested party or third party subject matter experts nominated by the interested party to attend sub-committee meetings from time to time. This approach will be more effective than having these individuals make representations to the sub-committee via working groups only;
- (c) recommendations to be drafted by sub-committees, and escalated to RTAG for endorsement. This will allow the recommendation to be drafted directly by the relevant subject matter experts, and will also assist with reducing the workload on the RTAG, noting its broad range of functions; and
- (d) agendas to be circulated to sub-committee participants a reasonable period in advance of each sub-committee meeting, noting the topic(s) for discussion. This is important to allow sub-committee participants an opportunity to prepare appropriately to ensure meetings are productive and efficient.

Uber does not oppose the establishment of working groups to examine discrete issues but is concerned to avoid duplicative processes in circumstances where the working groups will presumably report to sub-committees, who in turn will report to the RTAG, who in turn will report to the FWC. The referral of matters to working groups should be done on an exceptions basis following consultation with the sub-committee. Dedicated sub-committees have been established for each application and it is appropriate that these sub-committees constitute the principal forum that will undertake the detailed examination of issues relevant to that application. This is contemplated in paragraphs [27] and [28] of the “Road Transport Advisory Group and its subcommittees Terms of Reference” appended to the RTAG advice (**Terms of Reference**)<sup>2</sup>, which contain the process for the preparation and provision of advice to the RTAG by sub-committees. Sub-committees are empowered to consult, conduct research and prepare written advice when assisting the RTAG to perform its functions under the FW Act.

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<sup>1</sup> Paragraphs [11] and [12] of the RTAG advice.

<sup>2</sup> The RTAG advice notes that the Terms of Reference (in their earlier draft form) were published on the FWC website on 30 September 2024 and that no comments were received about the Terms of Reference. The publication of these Terms of Reference does not appear to have been notified to interested parties using the subscriber service as at the date of publication.

### **Owner driver sub-committee**

In accordance with section 40G(3), the RTAG proposes to establish a sub-committee where the majority of members are “owner drivers” which is not defined in the FW Act. Before this sub-committee is constituted, Uber seeks clarification as to which application or applications this sub-committee will support, and how “owner drivers” will be defined, selected and appointed by the RTAG.

To the extent it is proposed that the sub-committee will consist of employee-like workers, interested parties should have an opportunity to nominate workers who have expressed an interest in participating, or who have an interest in the relevant application.

### **Sub-committee records regarding “without prejudice” discussions**

Paragraph [27] of the RTAG advice states that as members of both the FWC and Consultation Expert Panel, facilitators will understand when there is a need to keep certain deliberations confidential to a sub-committee – for example, because consensus has not been reached by a sub-committee and its discussions are without prejudice and would be adversely impacted by discussion outside the sub-committee.

To that end, the “Guiding Principles for Subcommittees” (**Guiding Principles**) state that all discussions of sub-committees will occur on a “without prejudice” basis and participants have the right to reserve their position on various matters discussed, and where a consensus position is reached, sub-committee participants may agree to publish that position (and where relevant, indicate that it is subject to reaching agreement in relation to additional matters or an overall package).

Uber understands that “without prejudice” discussions by sub-committee participants will not be published without the consent of *all* sub-committee participants. However, it is not apparent from the terms of the Guiding Principles whether such discussions, or parts of them, will be confidential and how such confidentiality and without prejudice privilege will be protected. This is in circumstances where:

- (a) records of matters discussed by sub-committees and the outcome of those discussions, where applicable, will be maintained and posted to the FWC’s website (Guiding Principle 10);
- (b) if consensus cannot be reached, the sub-committee Chair with the assistance of the facilitator will ensure that the views of sub-committee participants are reflected in sub-committee records (Guiding Principle 11). While the Chair will be assisted by the facilitator in the performance of this function, the Chair is responsible for the maintenance of the records;
- (c) sub-committees are obliged to provide advice to the RTAG in writing that clearly sets out the sub-committee’s views and underlying reasoning, and if sub-committee participants are unable to reach consensus, to clearly present the competing views (Guiding Principle 13);
- (d) the Chair (who is also a member of the RTAG) may be excluded from sub-committee discussions at the request of the facilitator. However, the RTAG will receive the advice prepared by the sub-committee which must note any competing views. Further, the RTAG will have access to the records of sub-committee deliberations referred to above.

We would appreciate the President providing further clarity concerning how confidentiality and without prejudice privilege will be observed and how evidence and submissions provided to the RTAG, including by working groups, will be treated. The issue of confidentiality and without prejudice privilege is particularly important having regard to Mr Olsen’s dual role as member of the RTAG and the National Vice President of the Transport Workers’ Union.

As a related matter, we note that the Guiding Principles do not address or provide guidance on the procedures or mitigations in place for managing the competition law considerations which may arise during discussions between interested parties relating to conditions for employee-like workers, within both RTAG sub-committees and working groups having regard to the scope of the authorisation in section 536P.

### **Draft advice to be provided to sub-committee participants before circulation to RTAG or FWC**

Paragraph [36] (point 3) of the RTAG advice provides a list of matters which the RTAG advice to the FWC will incorporate, including that the advice will clearly and accurately present the differing viewpoints where “RTAG sub-committee participants” cannot reach consensus.

Presently, the Terms of Reference do not impose any obligation on the RTAG to reflect the views of sub-committee participants in its advice to the FWC. The Terms of Reference provide only that advice from the RTAG to the FWC will, among other things:

- (a) clearly set out the views of the RTAG and the underlying reasoning, including how advice from subcommittee(s) has been incorporated;
- (b) clearly and accurately present the differing viewpoints where RTAG members (as distinct from sub-committee participants) cannot reach consensus; and
- (c) where relevant, note if it is submitted without the endorsement or agreement of a member of the RTAG (as distinct from sub-committee participants).

In order to ensure that the advice provided to the RTAG and the FWC reflects the views of sub-committee participants, Uber submits that:

1. any draft advice or recommendations should be prepared by sub-committee participants; following which
2. all sub-committee participants should be provided with a copy of the proposed draft advice from the sub-committees before this is provided to the RTAG;
3. sub-committee participants should be permitted to attend and observe meetings of the RTAG; and
4. subsequently, all sub-committee participants should also be provided with the draft advice from the RTAG to the FWC for consideration and comment.

Each of these matters ought to be reflected in the Terms of Reference. These steps will ensure that each sub-committee participant's views and positions are accurately and completely documented before being published on the FWC website.

Similarly, the Terms of Reference do not set out the process by which matters will be referred to the RTAG by the FWC. If it is proposed that the FWC will seek the advice of the RTAG in relation to an MSO, the discrete questions for advice should be notified to interested parties, and they should have an opportunity to comment before the referral occurs. Uber refers to and repeats its submission dated 27 September 2024 that this will enable the questions proposed to be framed taking into consideration the views of interested parties including in relation to any nuances of digital labour platform work that may inform the advice.

**8 January 2025**