

Australian Industry Group

Applications by Transport Workers'  
Union of Australia

**Submission**  
(MS2024/1, MS2024/2 and  
MS2024/3)

**3 October 2024**

**Ai**  
GROUP

## 1. ABOUT AI GROUP AND OUR INTEREST IN THE PROCEEDINGS

1. The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission in response to Justice Hatcher's Statement of 6 September 2024<sup>1</sup> (**Statement**).
2. The Statement concerned three applications filed by the Transport Workers' Union of Australia (**TWU**) for minimum standards orders (**MSOs**) under the *Fair Work Act 2009* (Cth) (**FW Act**) (**Applications**).<sup>2</sup> The Statement traverses the steps that Justice Hatcher has implemented, and his provisional views, relating to:
  - (a) prioritising the work of the Fair Work Commission (**Commission**) under Part 3-2A of the FW Act in relation to the Applications, including prioritising types of orders and specified cohorts of workers, pursuant to s.582(4D) of the FW Act;<sup>3</sup>
  - (b) constitution of an Expert Panel or Expert Panels to hear and determine the Applications;
  - (c) consultation with the Road Transport Advisory Group (**RTAG**) regarding priorities for the work of the Commission in relation to the Applications;<sup>4</sup>
  - (d) seeking advice from the RTAG regarding unspecified matters relating to the Applications;<sup>5</sup> and
  - (e) constitution of an Expert Panel for the road transport industry for the purposes of facilitating consultation with, and seeking advice from, the RTAG in relation to the Applications (**Consultation Expert Panel**).<sup>6</sup>

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<sup>1</sup> *Applications by Transport Workers' Union of Australia* [2024] FWC 2439 (**Statement**).

<sup>2</sup> The Applications have been allocated matter numbers MS2024/1, MS2024/2 and MS2024/3.

<sup>3</sup> Statement at [11].

<sup>4</sup> Statement at [18] and [21], item 4.

<sup>5</sup> Statement at [17] and [21], item 3.

<sup>6</sup> Statement at [14], [17]-[18].

3. Ai Group has a significant interest in the Applications before the Commission and intends to play a major role in the conduct of associated proceedings.
4. Ai Group's membership includes many road transport businesses and digital labour platform operators that would be covered by the MSOs. This includes major traditional road transport businesses that will be covered by MS2024/2 as well as well-known platform businesses that will be covered by MS2024/1 and MS2024/3. It also includes many smaller businesses that would be covered by each of the MSOs but are not likely to seek to play a significant direct role in the proceedings, as well as a vast number of businesses that would be indirectly impacted by the making of any such MSO. Relevantly for the purpose of these proceedings, Ai Group also has several affiliated associations that represent elements of the road transport industry or supply chain participants. These affiliated associations also have a significant interest in these proceedings.
5. We also have a significant interest in the application for a road transport contractual chain order (**RTCCO**) that has now been filed by the TWU and published by the Commission late on 26 September 2024, after the Statement was issued.<sup>7</sup> We address the impact of this application on the Commission's prioritisation of the Applications and the other matters raised in the Statement later in this submission.
6. Ai Group has a long history of playing a major role in the development of industrial regulation applicable to the road transport industry and advising industry in relation to its application. This includes involvement in major proceedings related to the modern awards applicable to the sector, as well as major proceedings and developments related to contract determinations in NSW and the Road Safety Remuneration Tribunal. We have commonly been the major, and sometimes only, party representing industry in such proceedings. We are also represented on the Victorian Government's Transport Industry Council

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<sup>7</sup> This application has been allocated Commission matter number MS2024/4.

and previously worked with the major platforms to help facilitate the development of the Food Delivery Platform Safety Principles.<sup>8</sup>

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<sup>8</sup> [National Food Delivery Platform Safety Principles](#) (accessed 2 October 2024).

## 2. INTRODUCTION AND OVERVIEW OF AI GROUP'S CONTENTIONS

7. The FW Act now contains a new jurisdiction that permits the Commission to make MSOs and Minimum Standards Guidelines (**MSG**) pertaining to terms and conditions for regulated workers. It is trite to observe that the establishment of the new jurisdiction is controversial and follows the relatively recent operation and abolition of the Road Safety Remuneration System. It is also relevant to observe that the system bears similarities to the operation of Chapter 6 of the *Industrial Relations Act 1996* (NSW) (**NSW IRA**), a scheme that has resulted in the making of '*contract determinations*' that have been viewed by many principal contractors as deeply problematic in practice.
8. Ai Group urges the Commission to adopt a cautious approach to this exercise which maximises meaningful engagement with industry, and its representatives, in relation to the development of any MSO or MSG. This approach will avoid repeating the mistakes of the past reflected in other regulatory regimes setting mandatory terms and conditions for contractors in the road transport industry.
9. By making the Applications, the TWU seeks that the Commission make MSOs under Part 3A-2 of the FW Act. These are the first applications to be dealt with by the Commission under the new Part 3A-2 – Minimum standards for regulated workers. They therefore represent a significant precedent in relation to the appropriate conduct of consultation and other aspects of proceedings dealing with proposed employee-like worker minimum standards orders (**EWMSOs**) and road transport minimum standards orders (**RTMSOs**).
10. The Applications seek the introduction of a raft of significant new obligations<sup>9</sup> in relation to the engagement of road transport contractors engaged in what is described as '*last mile parcel delivery*' (MS2024/2). The TWU's proposed conditions for employee-like workers engaged in last mile parcel delivery

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<sup>9</sup> We observe that some of the terms sought by the TWU in relation to MS2024/2 in respect of regulated road transport contractors appear to derive from terms applying to certain contracts of carriage under contract determinations made by the NSW Industrial Relations Commission under Chapter 6 of the IRA NSW.

(MS2024/1), and food and beverage delivery (MS2024/3) respectively, are entirely novel.

11. MSOs may be made on the Commission's own motion or on application by certain parties. The Commission has before it three TWU applications for MSOs. As outlined earlier in this submission, a further application for a RTCCO has now been filed, and it is of course possible that other applications may be filed.
12. The fact that these proceedings are dealing with applications advanced by the TWU and not proposed MSOs or MSGs developed on the Commission's own motion is relevant to the manner in which they should be dealt with, and the point at which they should be referred to the RTAG (which we observe, includes a senior representative of a branch of the TWU). The TWU can, and indeed should, be relied upon to advance a case before the Commission to justify its specific claims. The fact that the Applications are pursued by the TWU also has a bearing on what role the RTAG can appropriately play, the manner in which its advice should be provided to the Commission and the weight that can be given to its advice, given the connection between an RTAG member and the Applicant. We will return to this point, but here simply observe, without criticising Mr Olsen, that there is an obvious potential unfairness that may arise from having a senior TWU official, who was presumably nominated by the TWU for appointment to the RTAG, advising the Commission on the merits of TWU applications and that this unfairness, or at the very least perceived unfairness, should be minimised. This is a matter that we discuss further.

### 3. RESPONSE TO MATTERS RAISED IN THE STATEMENT

13. The Statement invites interested parties to make submissions regarding the President's provisional views set out at [21] of the Statement. Specifically, this includes submissions related to views or questions concerning whether:
- (a) an Expert Panel for the road transport industry is required to be constituted for the determination of matter MS2024/2;
  - (b) matters MS2024/1 and MS2024/3 relate to the road transport industry as defined, and the proposition that a direction be given that those applications be heard and determined by an Expert Panel for the road transport industry;
  - (c) given that matters MS2024/1 and MS2024/2 both relate to '*last mile package delivery*' (in relation to employee-like workers and regulated road transport contractors respectively), a single Expert Panel for the road transport industry should jointly determine MS2024/1 and MS2024/2;
  - (d) advice should potentially be sought from the RTAG in relation to the Applications;
  - (e) advice should potentially be sought from the RTAG to determine priorities for the Applications; and
  - (f) the directions the President should give the RTAG in relation to its functions.
14. In this part of the submission, we address these six matters.
15. We also seek to provide an overarching response to the provisional views, and the course of action outlined by the Statement, in the form of a proposed course of action for dealing with the matters. We seek to do so respectfully and constructively, having regard to the fact that the President has not previously invited submissions as to the operation of the new jurisdiction, or in relation to preliminary matters, such as how to prioritise the work of the Commission under the new jurisdiction.

**Matter 1: That an Expert Panel for the road transport industry is required to be constituted for the determination of matter MS2024/2**

16. Ai Group agrees that an Expert Panel for the road transport industry is required to be constituted for the purpose of hearing and determining matter MS2024/2.
17. Section 617(10B) of the FW Act requires that a RTMSO be made by an Expert Panel for the road transport industry. Section 620(1E) contains requirements for the constitution of an Expert Panel for the road transport industry.

**Matter 2: That matters MS2024/1 and MS2024/3 relate to the Road Transport Industry as defined and that a direction be given that those applications be heard and determined by an Expert Panel for the road transport industry**

18. Ai Group acknowledges that matters MS2024/1 and MS2024/3 might relate to the road transport industry as defined. However, these applications should not be heard and determined by an Expert Panel for the road transport industry.
19. Both MS2024/1 and MS2024/3 are applications for an EWMSO, which, if made, will set minimum standards for employee-like workers who perform digital platform work as defined in the FW Act. These applications are separate and distinct from MS2024/2, which is an application for a RTMSO to set minimum standards for regulated road transport contractors as defined in the FW Act.
20. There is no statutory imperative for the EWMSO applications to be heard by an Expert Panel for the road transport industry, unlike MS2024/2. Under the FW Act, an application for an EWMSO must be dealt with by a Full Bench of the Commission (s.616(4B)(a)).
21. Ai Group accepts that the Commission has discretion to direct that an Expert Panel for the road transport industry deal with an EWMSO (s.617(10D)). However, Ai Group submits that it is appropriate for MS2024/1 and MS2024/3 to instead be referred to a single Full Bench of the Commission. At the very least, this course should be undertaken for the purpose of potentially facilitating an initial conferencing process to ascertain the level of common ground between the parties, and whether any differences can be narrowed through Commission-



conducted conciliation. It should be for this Full Bench to determine whether and how such conferencing in relation to each of MS2024/1 and MS2024/3 is undertaken, including whether such matters are dealt with jointly in that context.

22. After such a process, it would be open for the President to then consider whether the matters should be dealt with to finality jointly by a Full Bench, or whether to constitute an Expert Panel to determine either of the EWMSO applications either individually or jointly (or, indeed, whether all three applications should be jointly determined). The reasons for our position include that:

- (a) It is probable that there will be overlap in the coverage of digital labour platform operators under MS2024/1 and MS2024/3 respectively. There may also be substantial overlap in the class of employee-like workers covered by the EWMSO applications. Nonetheless, the interested parties (or parties covered) in relation to each instrument will not be identical and differing considerations will arise in relation to the consideration of each matter, given the different nature of work undertaken by those that would be covered by each application.
- (b) The EWMSO applications do not deal with mechanisms for resolving potential overlap in coverage. This would be an important threshold issue to be dealt with by the Commission, in consultation with interested parties, and may ultimately lead to a determination that the EWMSO applications should be dealt with jointly. This cannot however be fairly determined at this stage.
- (c) It would be preferable for the Commission to deal with the EWMSO applications separately from the RTMSO application in order that the Commission, in performing its functions under Part 3A-2 of the FW Act, has appropriate regard to the specific business models, working arrangements, work types, and characteristics, experiences and preferences of regulated workers, consistent with the minimum standards objective.<sup>10</sup>

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<sup>10</sup> Section 536JX of the FW Act.

- (d) The default minimum 12-month time frame between publishing a notice of intent to make an RTMSO and commencement of the RTMSO<sup>11</sup>; the requirement that the Expert Panel for the road transport industry take into account the road transport objective in performing any of its functions<sup>12</sup> (which would apply to joint determination of the EWMSO in a manner inconsistent with the apparent intention of the legislature); and the requirement that the Expert Panel have regard to particular road transport issues specified by s.536KA(2)(d)-(e) of the FW Act, are all factors militating against joint proceedings to hear and determine the EWMSO applications with the RTMSO application. At the very least, such matters would complicate, and no doubt extend, the conduct of proceedings associated with consideration of the applications for the proposed EWMSOs.
- (e) Any overlap of issues that may fall for consideration by the Commission in relation to MS2024/1 and MS2024/2 can be dealt with through the manner in which the Commission prioritises its work. It may be appropriate not to deal further with MS2024/2 until MS2024/1 has been dealt with. This is a matter we discuss further below and about which the views of industry and the RTAG should be sought. It is nonetheless a reason why there is not an imperative for these matters to be dealt with jointly by an Expert Panel for the road transport industry.

23. The above considerations support the view that the EWMSO applications (MS2024/1 and MS2024/3) should be dealt with separately from the RTMSO (MS2024/2). While the proposed EWMSOs *may* relate to the road transport industry, the defining characteristic of the relevant workforce is their status as '*employee-like workers*', not their work in the road transport industry. The fact that the TWU seeks similar terms in orders with respect to all three Applications does not automatically mean it is appropriate for the EWMSO applications to be dealt with by the Expert Panel for the road transport industry.

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<sup>11</sup> Section 536JF(3) of the FW Act.

<sup>12</sup> Section 40D of the FW Act.

24. Ultimately, Ai Group submits that it would be premature at this stage for the President to determine the constitution of the Commission for the purposes of hearing and determining the EWMSO applications, and which (if any) of the Applications should be dealt with jointly. Nonetheless, subject to further consultation with interested parties, at this stage it appears more appropriate that if any of the Applications are to be dealt with jointly, it should be the EWMSO applications (MS2024/1 and MS2024/3). Any decision to join the two EWMSO applications should not however be made before the conclusion of a Commission-facilitated conciliation process.

**Matter 3: Given that matters MS2024/1 and MS2024/2 both relate to ‘last mile package delivery’ (in relation to employee-like workers and regulated road transport contractors respectively), whether a single Expert Panel for the road transport industry should jointly determine MS2024/1 and MS2024/2**

25. Any decision regarding the constitution of the Commission for the purpose of hearing and determining the Applications, and whether any of the Applications should be dealt with jointly, should be deferred pending advice from the RTAG regarding priorities for the work of the Commission in relation to the Applications, and subsequent consultation with interested parties regarding directions by the President for the purposes of s.582(4D) of the FW Act. It may ultimately be determined that the Commission should prioritise consideration of some of the four applications presently before it such that not all of them are substantively dealt with at this time.
26. We acknowledge that there is degree of overlap and commonality between each of the Applications with regard to the terms sought by the TWU. There may be an overlap that arises in relation to matters of merit that need to be considered by the Commission. It is not apparent, however, that the last mile parcel delivery EWMSO application (MS2024/1) would appropriately travel with the RTMSO application (MS2024/2). The reasons for this are dealt with at length earlier in this submission (see our response to Matter 2). We emphasise however that parties interested in, or covered by, the respective applications would differ, as will the characteristics of such parties, the work they undertake and the manner

in which they undertake it. There will be a much wider cohort of parties covered by MS2024/2. Further, there will be significant additional complexity that arises from MS2024/2 given the foreseeably much greater need to consider the impact on, and interaction with, the operation of existing regulatory regimes (such as contract determinations) with the proposed order. The joining of the matters will undoubtedly complicate the proceedings and slow the resolution of application MS2024/1.

27. Any potential overlap of the consideration of MS2024/1 and MS2024/2 could be dealt with through the manner in which the President deals with the prioritisation of the applications. There is no need for both matters to be dealt with simultaneously at this time. MS2024/2 could be dealt with after MS2024/1.
28. If the Commission were to deal with both MS2024/1 and MS2024/2 at the same time, it would be beneficial and appropriate for the Commission to firstly convene a separate conferencing process for each of the applications. This would enable interested parties to ventilate their views on the substantive terms of the two applications at an early stage. This process may reveal a level of consensus over the applications, or the degree to which any differences could be narrowed. It may be that much greater consensus could be reached in relation to one application compared to the other. We expect that it may also reveal the likely degree of overlap in coverage between the proposed instruments. Any such conferencing process would be much more manageable and productive if the number of parties and competing interests were confined by the proceedings dealing with the respective applications separately.

#### **Matter 4: Whether advice should be sought from the RTAG in relation to the Applications**

29. Ai Group submits that it would not be appropriate or useful, at this stage, for the President or Consultation Expert Panel to seek advice from the RTAG regarding matters other than the priorities for the work of the Commission.<sup>13</sup>

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<sup>13</sup> See Statement at [17] and [21], item 3.

30. Any broader consultation with the RTAG or affected parties regarding substantive matters arising from the Applications should be deferred to be dealt with as part of proceedings before an Expert Panel (in the case of the RTMSO application) or Full Bench (in the case of the EWMSO applications) constituted to hear and determine the relevant matters. Interested parties should have the opportunity to make submissions to the Expert Panel or Full Bench regarding the appropriate time for the Commission to seek advice on substantive matters, and the specific issues or questions in relation to which the RTAG's advice is sought.
31. The Statement does not specify the questions or matters in relation to which the President or the Consultation Expert Panel would ask the RTAG to provide advice. If the President or Consultation Expert Panel is minded to seek advice from the RTAG on substantive matters at this preliminary stage, the Commission should publish the specific questions the Commission proposes to put to the RTAG for advice and seek comment from interested parties on them.
32. The FW Act sets out a mandatory and distinct consultation process to be followed by the Commission prior to making an EWMSO<sup>14</sup> or RTMSO<sup>15</sup> respectively. Consultation with the RTAG must occur before an RTMSO is made.<sup>16</sup> It does not however need to occur early in the context of proceedings arising from an application, and there are sound reasons for not seeking it at such a stage.
33. Consultation with the RTAG is not a prerequisite for the making of an EWMSO and in our view should not occur unless there is a compelling reason for it. Further, it should not occur unless it is fair, (noting the connection between an RTAG member and the Applicant, and that Mr Anderson has been nominated for membership by an organisation that only represents a narrow range of interests which likely do not include many of the road transport businesses, platforms or supply chain participants affected by the TWU's proposed MSOs).

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<sup>14</sup> Sections 536KAA-536KAE of the FW Act.

<sup>15</sup> Sections 536KB-536KE of the FW Act.

<sup>16</sup> Section 536KA(2)(b) of the FW Act.

34. Ai Group submits that Part 3A-2 of the FW Act accords primacy to direct and genuine engagement with interested parties by the Expert Panel (in the case of an RTMSO application) or Full Bench (in the case of an EWMSO application) constituted to hear and determine the relevant MSO application. Seeking advice from the RTAG is not a proxy for the requirement for genuine engagement with the parties to be covered by a proposed EWMSO<sup>17</sup> or RTMSO<sup>18</sup>.
35. The Commission should not conduct proceedings in a manner that utilises the RTAG or any subcommittees as a forum or mechanism through which concerns over the Applications are ventilated, or any level of consensus between interested parties over amendments to the Applications is reached. It far from ideal for a group comprising persons nominated by (or indeed still employed by) registered organisations or industry associations to convene any formal processes involving industry participants engaging with it. It would obviously be inappropriate for '*principal contractors*' or platforms to *have* to engage in what might appear to be a Commission-endorsed consultation process undertaken by the RTAG that is beyond what is necessary under the Act. There is a real risk that this would not be an effective or fair approach. Relevantly, such parties should not feel compelled to consult with a person employed by (or nominated by) the TWU or an industry association that they may not wish to join. At the very least, there may be confidential or commercially sensitive matters relevant to the merits of the proposed orders that such parties would understandably be reluctant to put before such persons. Appointment to the RTAG is not akin to appointment to the Commission. RTAG members (aside of course from a Commission member appointed to the RTAG) are not subject to any statutory obligations as to how they conduct themselves or perform their functions. Any consultation with industry should be undertaken directly by the Commission itself, as far as possible. The seeking of advice from RTAG should operate as a safeguard that supplements direct engagement by industry participants or representatives with the Commission.

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<sup>17</sup> Section 536K(4)(a) of the FW Act.

<sup>18</sup> Section 536KA(2)(a) of the FW Act.

36. Any consultation with the RTAG regarding substantive matters arising from the Applications should be deferred and ultimately undertaken as part of proceedings before an Expert Panel or Full Bench constituted to hear and determine the relevant matters. There is little utility in advice from RTAG about the substance of any application being provided to a Full Bench or Expert Panel not convened for the purpose of determining the relevant application.

**Matter 5: Whether advice should be sought from the RTAG to determine priorities for the Applications**

37. Ai Group notes that the Statement does not set out any provisional views regarding directions the President intends to issue under s.582(4D) of the FW Act relating to prioritising the work of the Commission. Section 582(4D) requires that:

...the President must give a direction as to how the FWC is to prioritise its work under Parts 3A-2 and 3B-2 including, but not limited to prioritising types of orders under those Parts and specified cohorts of workers.
38. Ai Group proposes that there should be consultation with both interested parties and the RTAG (as contemplated by s.40E(4)) regarding the priorities for the work of the Commission.
39. Prior to seeking advice from the RTAG regarding priorities for the work of the Commission, the President should publish and seek comment from interested parties regarding the specific questions the President proposes to put to the RTAG for advice.
40. Ultimately, we propose that the President should identify any course of action the President is contemplating adopting regarding prioritising the work of the Commission, and afford interested parties an opportunity to advance submissions in relation to the issue before determining it.
41. The recent filing of MS2024/4 in this new jurisdiction further complicates the considerations regarding questions of priority. Our view, at this stage, is that MS2024/4 should be dealt with subsequent to MS2024/1 and MS2024/2. We return to this in more detail below.

42. As part of this process, the Commission should seek the advice of the RTAG as to what the priorities of the work of the Commission should be, in accordance with s.40E(4). The RTAG's advice should then be published, and parties should be invited to advance submissions in response to the advice.

**Matter 6: What directions, if any, should the President give the RTAG in relation to its functions?**

43. Ai Group submits that the President's initial directions to the RTAG should be confined to no more than what is necessary to seek its advice regarding the determination of priorities for the work of the Commission in relation to the Applications.
44. Broader consultation with the RTAG will be required by s.40E(4) insofar as the Applications give rise to matters affecting the road transport industry (which at least one of the Applications uncontroversially does). Consultation with the RTAG must occur before an RTMSO is made.<sup>19</sup> Consultation with the RTAG is not however required for making an EWMSO but may be appropriate having regard to the function of the RTAG, where the proposed EWMSO relates to the road transport industry.
45. In the event that the President refers either or both of the EWMSO applications (MS2024/1 and MS2024/3) to the RTAG for advice (in relation to either priorities or substantive matters), the President should issue directions under s.40F(5) of the FW Act to the effect that the RTAG must establish a subcommittee under s.40G(1), which includes representatives of digital labour platform operators and employee-like workers. If a subcommittee is established under s.40G, the RTAG must consult it before advising the Commission (s.40E(3)).
46. For the purposes of the RTMSO application (MS2024/2), the President should issue directions under s.40F(5) to the effect that the RTAG must establish a subcommittee under s.40G(1) including road transport businesses likely to be covered by the RTMSO and/or organisations that represent their interests.

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<sup>19</sup> Section 536KA(2)(b) of the FW Act.



47. The Commission should call for submissions as to who should be appointed to any subcommittee.
48. Ultimately, it should be open to any registered organisation or peak council with a relevant interest in any proceedings to select (entirely at their option) a representative to be appointed to such a subcommittee. This should not preclude parties directly covered by any application also nominating representatives. The President should issue such directions as are necessary to achieve this.
49. All proceedings of the RTAG and any of its subcommittees should be conducted on the record, and transcripts should be made available to interested parties. Any advice or information provided by the RTAG to the Commission should be in writing and made available to all interested parties. Interested parties should have an opportunity to comment on any advice or information provided by the RTAG to the Commission, prior to such advice being taken into account by the Commission. The President should give directions to this effect to the RTAG under s.40F(5).
50. Ai Group submits that, following receipt by the Commission of initial prioritisation advice from the RTAG, the Commission should undertake a process of consultation with interested parties convened by a member of the Commission. This initial consultation should ventilate issues including:
  - (a) prioritisation of the Applications (anterior to the President issuing directions for the purposes of s. 582(4D));
  - (b) the constitution of the Commission for the purposes of hearing and determining the EWMSO applications;
  - (c) whether any of the Applications should be dealt with jointly;
  - (d) effective arrangements for genuine consultation for the purposes of Subdivision D of Division 3 of Part 3A-2 (consultation process for a RTMSO);

- (e) effective arrangements for genuine consultation for the purposes of Subdivision BA of Division 3 of Part 3A-2 (consultation process for an EWMSO); and
  - (f) appropriate arrangements for consultation with the RTAG regarding substantive matters arising from the Applications, prior to the making of an MSO. This would include whether the Commission should seek advice from the RTAG in relation to any matters arising from proposed EWMSOs. It would also include consideration of directions the President should give the RTAG regarding its procedures (including for managing conflicts of interest and apprehended bias) and constitution of subcommittees reflecting appropriate representation of regulated businesses and regulated workers.
51. Further, Ai Group submits that the role of the Consultation Expert Panel<sup>20</sup> be confined to dealing with the initial consultation with industry parties regarding prioritisation and management of the Applications following receipt of prioritisation advice from the RTAG.

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<sup>20</sup> Statement at [14], [17]-[18].

#### **4. IMPACT OF APPLICATION MS2024/4**

52. The Statement was issued before the TWU filed its application for a RTCCO, and parties have not been given an opportunity to properly consider the matters identified in the Statement in light of this application. We submit that the Commission should consider the impact this application has on prioritisation of the Applications, and that the President should seek the RTAG's advice on prioritisation of the fourth application.
53. In our view, the Applications should be dealt with before MS2024/4. Matters falling from the determination of the Applications may have a bearing on MS2024/4.
54. It is of course unknown to us whether the Commission will have capacity to deal with all four applications simultaneously, but we do raise a concern that some interested parties will, or may not, have the capacity to participate simultaneously, due to resource constraints.
55. If the Commission proposes to deal with all four applications simultaneously, this may affect the position we and other interested parties take in respect of the matters identified for comment in the Statement. If the Commission does propose to potentially deal with MS2024/4 simultaneously, we request that all parties be given a further opportunity to comment on prioritisation in light of this development.

## **5. OVERARCHING RESPONSE TO THE PROVISIONAL VIEWS AND THE COURSE OF ACTION OUTLINED IN THE STATEMENT**

56. Ai Group respectfully contends that the proposed approach outlined in the Statement does not adequately account for the need for the President to identify how the Commission is intending to prioritise its work under Parts 3A-2 and 3B-2 of the FW Act. It also unjustifiably assumes that the RTAG is to be consulted at an early stage in the process of potentially making one or more MSOs under Part 3A-2.
57. By way of summary, we contend that:
- (a) The President should identify the priorities of the Commission's work under Parts 3A-2 and 3B-2. This is consistent with the requirement of s.582(4D). This should include, but not be limited to, how and the extent to which, the Commission will prioritise dealing with the Applications and the subject of the Statement. It should also involve consideration of how application MS2024/4 will be prioritised, and how any further application or other work that the Commission could undertake under Parts 3A-3 and 3B-2 should factored into such prioritisation.
  - (b) The President should also consult the RTAG in relation to how it should prioritise the work of the Commission in relation to all four applications now before it, as well as any other work under Parts 3A-2 and 3B-2.
  - (c) The President should also seek the views of any interested party as to how the Commission should prioritise its work under Parts 3A-2 and 3B-2. As a matter of fairness and merit, the Commission should also afford interested parties an opportunity to advance submissions commenting on any advice from RTAG as to how the Commission should prioritise its work. In this respect we observe that one of the RTAG members (Mr Olsen) is a senior employee of a branch of the TWU (the Applicant) and there is an obvious issue of fairness that arises from effectively seeking his advice on how the Applicant's applications should be prioritised or otherwise dealt with,

without seeking the views of other interested parties. We also observe that it is not a statutory requirement, and it is not otherwise apparent, that either RTAG member (including also Mr Anderson) has expertise or a fulsome knowledge of potentially relevant matters related to platform work (or at least not from the perspective of the platforms) or understanding of the perspective of supply chain participants that may be affected by the making of any MSO or MSG. We do not here impugn or criticise the RTAG members, but seek to again highlight that engagement with the RTAG should not be viewed as a substitute for engagement with industry.

- (d) The Commission should not take any further step in relation to the Applications currently before it until the President has identified the Commission's priorities. Such a determination will of course have a bearing on how (and indeed if at this time) the Commission further deals with each of the applications advanced by the TWU. The President should issue a Direction to this effect to the Consultation Expert Panel convened pursuant to [14] of the Statement.
- (e) If the President does not accept our submissions at (a)-(d) above, the President should:
  - (i) direct the already constituted Consultation Expert Panel referred to at [14] of the Statement to facilitate a conferencing process to enable engagement with interested parties over MS2024/2. This should commence by calling for submissions from parties indicating their desire to participate in such a process; and
  - (ii) constitute a Full Bench, or otherwise allocate a single member, to undertake a conferencing process with interested parties over MS2024/1 and MS2024/3. We observe that the relevant number of interested parties likely to participate in such proceedings (on behalf of platforms) is expected to be relatively confined.
- (f) MS2024/2 should not be dealt with jointly with MS2024/1 and MS2024/3. Ai Group contends that MS2024/1 and MS2024/3 (which relate to proposed

EWMSOs) should be given priority over MS2024/2 (proposed RTMSO), such that further proceedings relating to MS2024/2 are not undertaken at this stage.

- (g) The Commission should not convene an Expert Panel to deal with applications MS2024/1 and MS2024/3. Such matters should be dealt with by a Full Bench.
- (h) If any of the proceedings are to be dealt with jointly, it should be MS2024/1 and MS2024/3, but whether the two matters should be joined should not be determined until after a preliminary conferencing process facilitated by the Full Bench referred to in the preceding paragraph has taken place.
- (i) If the Commission refers MS2024/1 and MS2024/3 to an Expert Panel, it does not follow that the Expert Panel should jointly deal with proceedings related to the making of these applications and MS2024/2. Indeed, there are compelling reasons why it should not, at least at this stage.
- (j) The President is not required to, and should not at this stage, refer any broader matter to the RTAG for consideration beyond seeking its advice regarding the priorities for the work of the Commission. The Commission should seek advice from the RTAG at a later point if the applications before it are pressed, and once any modifications are made to the terms sought in light of the aforementioned conferencing process or any broader response from interested parties.
- (k) The President should, consistent with our submissions, issue directions to the RTAG in relation to its operations, including the formation of subcommittees, the form in which its advice is provided and any envisaged '*consultation*'. In the framing of such directions, and the conduct of the proceedings more generally, the RTAG should not be viewed as a substitute for engagement by the Commission with industry. It is merely an advisory group.
- (l) The President should afford interested parties an opportunity to comment on any advice provided by RTAG before it is taken into consideration.

## **6. SERVICE OF THE APPLICATIONS**

58. Ai Group does not advance a specific proposal regarding service of the Applications.