

## IN THE FAIR WORK COMMISSION

### MATTER MS2026/1

#### APPLICATION BY THE TRANSPORT WORKERS' UNION OF AUSTRALIA AND THE AUSTRALIAN ROAD TRANSPORT INDUSTRIAL ORGANIZATION

##### Submission of Uber Eats

1. This submission is filed on behalf of Portier Pacific Pty Ltd trading as Uber Eats (**Uber Eats**) in response to the draft "Road Transport Contractual Chain Order – Fuel Cost Recovery" published by the Fair Work Commission (**FWC**) on the afternoon of Friday 10 April 2026 at the conclusion of the second day of the hearing (**Draft Order**).

##### COVERAGE OF DRAFT ORDER

2. The application for a road transport contractual chain order (**RTCCO**) filed by the Transport Workers' Union (**TWU**) and the Australian Road Transport Industrial Organization (**ARTIO**) on 2 April 2026 (**Application**) contained an express and considered exclusion from coverage for "on demand delivery work" (as set out in B(3) and defined in A(1) of the TWU Application) (**On Demand Work**).
3. The express exclusion for On Demand Work – as sought by the Applicants and supported by Uber Eats – is not contained in the Draft Order. Instead, the Draft Order is expressed to cover "all work in the road transport industry" (as defined in section 15S of the *Fair Work Act 2009* (Cth) (**FW Act**)). The reason for this altered scope is not apparent from the terms of the Draft Order, or the comments made at the hearing on 8 April 2026 (**Day 1**) and 10 April 2026 (**Day 2**).
4. Uber Eats submits that any draft RTCCO and supporting notice of intent published by the FWC in this proceeding ought to expressly exclude On Demand Work in the terms proposed by the Applicants and supported by Uber Eats, subject to the amendments foreshadowed by counsel for the TWU.<sup>1</sup>

##### CLAUSE 4.5 OF THE DRAFT ORDER

5. Clause 4.5 of the Draft Order is in the following terms:

In respect of contractual relationships governed by State or Territory industrial instruments, collective agreements or individual contracts, the adjustment of rates pursuant to any "rise and fall" rate adjustment mechanism for which any such instrument, agreement or contract provides

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<sup>1</sup> PN877 of the transcript of the hearing on 10 April 2026.

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will satisfy the obligations in clause 4.1, 4.2 or 4.3 provided that this takes into account the increased cost of fuel and provides for cost recovery of this.

6. Clause 4.5 is linked to “rise and fall” rate adjustment mechanisms under individual contractual relationships and assumes that rates are adjusted in line with such a mechanism. The idea appears to be that any fuel cost recovery pursuant to such provisions is taken into account in determining whether the Draft Order has been observed. Such a provision would be ineffective to exclude Uber Eats and employee-like workers performing On Demand Work from the obligations in clauses 4.1-4.3. This clause:
  - a. does not cover additional efforts made to accommodate increased costs outside the specific and narrow “rise and fall” rate adjustment mechanism;
  - b. does not take into account the nature of the contractual arrangement between Uber Eats and employee-like workers who are engaged to perform On Demand Work. The relevant services agreements between Uber Eats and employee-like workers do not contain “rise and fall” adjustment mechanisms for fuel cost recovery. Rather, employee-like workers receive an all-in fare per trip which covers both their labour and costs;
  - c. does not specify which contracting parties are obliged to make the rate adjustment, and have the benefit of the rate adjustment where there are multiple participants under a marketplace model (i.e. digital labour platform operator, employee-like worker, merchant and customer); and
  - d. does not account for the use of dynamic pricing in a marketplace model, where delivery persons are paid a fare for each successfully completed delivery service provided to Uber Eats which does not specifically designate aspects of the fare to recovery of costs. The delivery fare is based on the estimated time and distance, and considerations such as the availability of delivery persons at the time delivery is required and customer demand.
7. In these circumstances, it is appropriate that any RTCCO expressly exclude On Demand Work.

#### **STATUTORY CRITERIA FOR MAKING AN RTCCO**

8. Before the FWC can make an RTCCO which covers “road transport employee-like workers”, the FWC must consider it is appropriate.<sup>2</sup>
9. The FWC must also take into account particular matters in making its decision, as set out in section 536PF. Relevantly, they include that there must have been genuine engagement with the parties to be covered by the RTCCO (section 536PF(2)(a)) and that the FWC must be

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<sup>2</sup> Section 536PD(4).

satisfied that making the RTCCO will not unduly affect the viability and competitiveness of road transport businesses, owner drivers or other similar persons (section 536PF(2)(e)).

10. On the morning of Day 1 of the hearing, Uber Eats' representative addressed the FWC on the position of Uber Eats as follows:

As we understand the applicants' intention and the terms of the draft order that have been put forward, Uber Eats will not be covered by the draft order, and we have proceeded on that basis...<sup>3</sup>

11. The Applicants have conducted their application accordingly, with counsel for the TWU submitting on Day 2 of the hearing that On Demand Work is to be excluded from coverage of the RTCCO. The rationale for excluding Uber Eats and DoorDash Technologies Australia Pty Ltd (**DoorDash**) was explained by counsel for the TWU in the following terms:

Uber Eats and Door Dash have provided and are continuing to provide or [sic] might be described in broad terms as a fuel levy for the employee-like workers who perform work in their businesses.<sup>4</sup>

12. In light of the express exclusion for On Demand Work, Uber Eats and other participants who may be impacted by the terms of an RTCCO covering this work have not participated in the hearing. They include the two major digital labour platform operators facilitating the performance of On Demand Work, being Uber Eats and DoorDash.
13. There is no evidence before the FWC in this proceeding that addresses the appropriateness of an RTCCO covering employee-like workers and other persons performing On Demand Work, and its impact on this sector. In those circumstances, the FWC ought not be satisfied that the pre-conditions for the making of an RTCCO covering On Demand Work have been met.

**Seyfarth Shaw**

Solicitors for Uber Eats

13 April 2026

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<sup>3</sup> PN148 of the transcript of the hearing on 8 April 2026.

<sup>4</sup> PN851 of the transcript of the hearing on 10 April 2026.