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Sent: Wednesday, 11 May 2022 5:58 PM
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Subject: AM2021/72 Application by Menulog Pty Ltd - Australian Business Industrial Response

Dear Associate

I refer to the above proceedings.

Please find **attached** Australian Business Industrial's (**ABI**) response to the table prepared by Menulog Pty Ltd.

ABI looks forward to participating in the conciliation conference of 18 May 2022.

Yours faithfully

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Australian Business Lawyers & Advisors

IN THE FAIR WORK COMMISSION

RESPONSE TO MENULOG PTY LTD'S TABLE OF COMPARABLE TERMS

PROPOSED ON DEMAND DELIVERY SERVICES AWARD

(AM2021/72)

FILED ON BEHALF OF:

AUSTRALIAN BUSINESS INDUSTRIAL

11 MAY 2022

INTRODUCTION

1. The Fair Work Commission's Statement [2022] FWC 585 required Menulog Pty Ltd (**Menulog**) to file and serve a table setting out:

   (a) the terms it seeks in a modern award that are different from the terms of the Road Transport and Distribution Award 2020 (**RTD Award**);

   (b) comparable terms in the RTD Award; and

   (c) the reason for each term that it seeks, by 4.00pm on 13 April 2022.

2. On 13 April 2022 Menulog filed a submission (**Submissions**) inclusive of a 48 page table (**Table**) in response to the Statement.

3. The second column of the table is headed 'Feedback on the RTD Award Term' (**Column 2**). It is apparent that the content of this column is intended to convey, as required by the Statement, '*the reason for each term that it seeks*'.

4. ABI does not seek in this submission to reply comprehensively to each of the clauses sought by Menulog or to the reasons in support of those clauses.

5. ABI looks forward to participating in the conciliation listed for 18 May 2022 and intends to constructively engage with Menulog's position alongside the other parties at that conciliation.

OBSERVATIONS IN RESPONSE

6. Having reviewed the Submissions, ABI raises three preliminary points in response to the Submissions.

The existence of content of Road Transport and Distribution Award 2020 which is irrelevant to the employment of Menulog's couriers

7. Many of the clauses sought by Menulog are supported in Column 2 by an argument that the current clauses of the RTD Award contain irrelevant content to the employment of Menulog's couriers.

8. In response, ABI notes that it is commonplace (in fact, probably universal) that a modern award will include content that is not relevant to a particular employee or employer, notwithstanding that the employee or employer is covered by the modern award. At a basic level, this may take the form of the inclusion of specialised allowances which only apply in very discrete circumstances (rendering them irrelevant to some employers/employees). More broadly, entire awards can be 'split' into 'streams' which outline a set of conditions which apply to certain employees/employers and not to others. Examples include the Timber Industry Award (General Timber, Wood and Timber, Pulp and Paper) and Manufacturing (General and Vehicle Manufacturing).

9. In ABI's submission there is therefore little force in the proposition that merely because the RTD Award contains irrelevant content to the employment of Menulog's couriers, that the RTD Award does not satisfy the modern awards objective for Menulog's couriers.

10. ABI accepts that the modern awards objective at s134(1)(g) of the *Fair Work Act 2009* (Cth) requires the Commission to take into account the need to ensure simple and easy to understand modern awards.

11. ABI submits however that this limb of the modern award objective should be assessed having regard to whether the terms of the RTD Award which are relevant to the employment of Menulog's couriers are simple and easy to understand, not whether there exists in the RTD Award terms that are irrelevant to the employment of Menulog's couriers.

12. By way of instructive example, with respect to 'Clause 4 Coverage' of the RTD Award, a relevant question would be: does the clause 4 of the RTD Award make it clear that couriers employed by Menulog are covered by the RTD Award? In ABI's submission, it is immaterial whether clause 4 in the RTD Award "*goes far beyond what is relevant to the on demand delivery services industry*" (See Column 2 for Clause 4 in the Table).

Requirement to respond to the changes on a 'minute by minute' basis.

13. A number of clauses sought by Menulog are sought on the basis that relevant employers must be able to respond to changes in customer demand on a "minute by minute basis".

14. This requirement is said to justify a removal of any obligation to notify a casual employee if their services are not required on a day-by-day basis, a requirement to provide minimum engagements to casual employees and to identify start times.

15. In response, ABI notes that the work requirements of businesses in many industries are dictated by 'real time' client demands, especially in the road transport industry. Most notable of which, is the courier industry itself.

16. Notwithstanding that customer demand for the relevant employees will vary based on orders made in 'real time', it does appear that the relevant work will have fairly predictable 'busy periods' (mealtimes) and also periods in which very little work would be required. This tends against the proposition that work-flows for the relevant employees working as Menulog's couriers cannot be predicted or are necessarily more variable than other industries with dynamic client needs (including the road transport and distribution industry.

17. In considering these issues, ABI anticipates that the Commission will have regard to the principles considered in *Casual Employment and Part Time Employment* [2017] FWCFB 3541.

Requirements to pay overtime, overtime loading and penalty rates

18. In response to the Submissions that a number of conditions of the RTD Award are 'cost prohibitive' or 'untenable', (e.g., cl 10.8, 11.4, 23), as well as the variations sought to the treatment of junior rates, ABI notes that ordinarily such submissions would need to be supported by probative evidence.

19. In the context of this case, ABI suggests that such evidence would need to distinguish the position of Menulog's couriers in respect of these issues from that of the broader road transport and distribution industry.

20. Again, ABI anticipates that the Commission will take some guidance from its previous decisions, including *Four yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 and *4 yearly review of modern awards - Award stage - General Retail Industry Award 2020* [2020] FWCFB 6301.

21. ABI looks forward to expanding on the above points in the conciliation listed for 18 May 2022.

Courier industry

22. ABI contends that any changes in conditions to Menulog's couriers should also be considered more broadly for all couriers.

Filed on behalf of ABI
11 May 2022