

Australian Industry Group

Proposed On Demand Delivery Services Award

Submission
(AM2021/72)

29 November 2021

Ai
GROUP

AM2021/72 – PROPOSED ON DEMAND DELIVERY SERVICES AWARD

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in accordance with the Statement¹ issued by the Fair Work Commission (**Commission**) on 24 August 2021 relating to an Application by Menulog Pty Ltd (**Applicant**) for the making of a modern award to cover the on-demand delivery services industry (**Proposed Award**).

2. In the Statement, the Full Bench said:

[11] We agree that the question of whether the employers and their courier employees in the on-demand delivery services industry are currently covered by a modern award is a threshold issue. In particular, the question of whether or not the Fast Food Award and/or the Road Transport Award cover employers and their courier employees in the on-demand delivery services industry, is a threshold issue.

3. This submission only addresses the above threshold issue.

4. Given the Commission's directions for this stage of the proceedings, we make no submissions on the merits of whether or not the Proposed Award should be made or whether the Fast Food Award or the Road Transport Award should be varied to address the on demand delivery services industry. These are issues for consideration later in the proceedings.

2. Does the Fast Food Award cover employees in the 'on demand delivery services industry'?

5. The coverage clause in the Proposed Award filed by the Applicant defines the 'on demand delivery services industry' as follows:

4.2 The **on demand delivery services industry** means the collection and delivery of food, beverages, goods or any other item, that are ordered by a consumer from third party businesses that offer food, goods and other items for immediate collection and delivery on an online or application-based platform, provided that: (a) the collection and delivery is not of the employer's

¹ [2021] FWCFB 5227.

own food, beverages, goods or other items offered by it for sale; and (b) the employer is not in the primary business of providing general transport or delivery services at large of food, beverages, goods or any other item that has not been purchased on its online platform.

6. The Proposed Award would not disturb the award coverage of businesses which prepare fast food and use their own employees to deliver that food. These employers and employees would continue to be covered by the *Fast Food Industry Award 2010* (**Fast Food Award**). We note that the Proposed Award contains the following exclusion:
 - (a) the collection and delivery is not of the employer's own food, beverages, goods or other items offered by it for sale;
7. With regard to other businesses that deliver 'fast food' (as defined in the Fast Food Award, including meals "which are sold to the public primarily to be consumed away from the point of sale"), arguably their employees are covered by the Fast Food Award for the reasons set out at paragraph 5 of Ai Group's submission of 9 August 2021.

3. Does the Road Transport Award cover employees in the 'on demand delivery services industry'?

8. The issue of whether or not the *Road Transport and Distribution Award 2020* (**Road Transport Award**) covers the employers and their courier employees in the on-demand delivery services industry must be determined through the usual approach to determining coverage under modern industry awards.
9. In *Bis Industries v CFMMEU*,² White J of the Federal Court of Australia relevantly stated:
 28. The determination of whether particular employment is covered by a modern Award requires the Court first to construe the coverage clause in the award. This requires the ascertainment of the objective meaning of the words used in the clause taking into account the context in which they appear and the purpose which they are intended to serve: *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148; (2014)

² [2021] FCA 1374, 8 November 2021.

245 IR 449 at [22]. Account must also be taken of the industrial context and background of which the FWC objectively may be taken to have been aware: *Truck Moves Australia Pty Ltd v Simmonds* [2015] FCA 1071 at [48]...

10. Key issues for consideration in determining whether the Road Transport Award cover employees in the 'on demand delivery services industry' include:
- a. Do the relevant employers fall within the industry covered by the Road Transport Award?
 - b. Are the relevant employees covered by a classification in the Road Transport Award?
 - c. If the Road Transport Award and the Proposed Award would both cover the relevant work does one award exclude the coverage of the other award?
 - d. If the Road Transport Award and the Proposed Award would both cover the relevant work, which award classification "*is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work*"?
- a. Do the relevant employers fall within the industry covered by the Road Transport Award?**

11. The definition of the 'road transport and distribution industry' in clause 4.2 of the Road Transport Award includes: (Emphasis added)

(a) the transport by road of goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock, including where the work performed is ancillary to the principal business, undertaking or industry of the employer;

12. Given the breadth of the above definition, the industry covered by the Proposed Award appears to be covered by the definition. However, it appears that there was no consideration during the award modernisation process in 2008/09 of whether the wage rates and conditions in the Road Transport Award are appropriate for the relevant employees in the 'on demand delivery services

industry'. This is an issue of obvious relevance at the next stage of the proceedings when the merits of the Proposed Award are considered.

b. Are the relevant employees covered by a classification in the Road Transport Award?

13. The classifications in Schedule B of the Road Transport Award include:

- At Grade 1: "Courier – foot or bicycle".
- At Grade 2: "Driver of a rigid vehicle (including a motorcycle) not exceeding 4.5 tonnes GVM".

14. 'Courier' is defined in clause 2 of the Award as:

courier means an employee who is engaged as a courier and who uses a passenger car or station wagon, light commercial van, motorcycle or bicycle or who delivers on foot, in the course of such employment.

15. Given the breadth of the above definitions, the work of the relevant employees in the 'on demand delivery services industry' appear to fall within the classifications in the Road Transport Award. However, it appears that there was no consideration during the award modernisation process in 2008/09 of the relevant employees in the 'on demand delivery services industry' when the classifications were developed. This is an issue of obvious relevance at the next stage of the proceedings when the merits of the Proposed Award are considered.

c. If the Road Transport Award and the Proposed Award would both cover the relevant work does one award exclude the coverage of the other award?

16. Clause 4.1 of the Road Transport Award states:

- 4.1** This industry award covers employers throughout Australia in the road transport and distribution industry and their employees in the classifications listed in Schedule A—Classification Definitions for Distribution Facility Employees and Schedule B—Classification Structure to the exclusion of any other modern award.

17. Clause 4.1 of the Proposed Award states:

4.1 This industry award covers employers throughout Australia in the on demand delivery services industry and their employees in the classifications listed in clause 12 to the exclusion of any other modern award.

18. Where only one of two awards with competing coverage contains the above highlighted wording, that award will generally exclude the operation of the other award. However, where both awards contain the highlighted wording, the wording will not be relevant in determining which award covers the work. These principles were identified by a Full Bench of the Commission in *Allgood and Ors v Kal Tire*³ (**Kal Tire**) as follows, with reference to competing coverage between the Vehicle Award and Black Coal Mining Award which this matter related to: (Emphasis added)

[39] We consider that once the respondent and its employees (the appellants) fall within the coverage provisions of clause 4.1 of the Vehicle Award, that award covers them to the exclusion of any other modern award, at least, as in the instant case, where the other modern award (the Black Coal Award) which might provide coverage does not also contain an exclusive coverage provision. That the respondent might be otherwise said to be an employer of employees who are employed in the black coal mining industry does not mean that the Black Coal Award covers them. This is because it cannot. It is excluded by operation of the exclusionary provision in clause 4.1 of the Vehicle Award.

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[41] Our construction of the meaning and effect of the general exclusionary provision in clause 4.1 of the Vehicle Award is consistent with the conclusion of the exclusionary provision in clause 4.1 of the Cleaning Award which was the subject of the decision in *Spotless*, and which we consider to be plainly correct.

[42] We do not accept that the provisions of clause 4.3(b) of the Vehicle Award or clause 4.8 of the Black Coal Award, on the construction of clause 4.1 of the Vehicle Award we prefer, would never have work to do. As the Deputy President identified there are numerous modern awards which contain general exclusionary provisions stating that the award covers the identified classes of employers and employees “to the exclusion of any other modern award”. Where two such awards cover an employer, the overlapping coverage cannot sensibly be resolved by recourse to the general exclusionary provision. In such a case provisions like clause 4.3(b) of the Vehicle Award or clause 4.8 of the Black Coal Award have work to do in determining that an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

³ [2020] FWCFB 5816.

4. The significance of the ‘most appropriate classification’ provision

19. The Fast Food Award, the Road Transport Award and the Proposed Award all include the following clause that is intended to address problems of overlapping award coverage:

Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

20. The effect of this clause was considered by the Full Court of the Federal Court in *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd*, as discussed in the following extract from the Commission’s *Kal Tire* decision:

[43] Indeed, that was the position in *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* a judgment of the Full Court of the Federal Court of Australia, on which the appellants rely. The judgment in *Coles Supermarkets* concerned an appeal by the Transport Workers’ Union of Australia (TWU) against a judgment of the Federal Circuit Court of Australia in which there had been a contest, *inter alia*, whether the *Road Transport and Distribution Award 2010* (Transport Award) or the *General Retail Industry Award 2010* (Retail Award) covered the employment of certain TWU members and if the latter covered the employment, did it do so to the exclusion of the Transport Award. Each award contained a general exclusion that the award covered the identified classes of employers and employees “to the exclusion of any other modern award”. Each award also contained a “most appropriate classification” provision (clause 4.8 of the Transport Award and clause 4.7 of the Retail Award).

[44] The Full Court observed as awards no longer depend on specific employer residency, the possibility exists for overlap in award coverage. Modern awards (the Transport Award and the Retail Award are no exception) therefore contain a “most appropriate classification” provision. Further, the Full Court observed that if both the Transport Award and the Retail Award cover Coles in relation to the employment, the award classification which is “most appropriate” to the work of the employees and to the “environment” in which the work is normally performed will be the award classification which covers and applies to that work.

[45] Both awards were found to cover Coles. The generalised provision in each award, stating that it covered the identified classes of employers and employees to the exclusion of any other modern award, could not resolve the overlap in

coverage. The issue was resolved in favour of classificational coverage by the Retail Award by recourse to the “most appropriate classification” provisions.

21. The effect of the ‘most appropriate classification’ provision in modern awards was also considered in some detail by White J in *Bis Industries v CFMMEU*⁴ in concluding that the *Manufacturing and Associated Industries and Occupations Award 2020* was the appropriate award to cover three employees of Bis Industries who carried out maintenance work on coal mining sites rather than the Black Coal Mining Award.
22. Ai Group submits that when considering the making of a new award, it is appropriate for the Commission to ensure that overlapping award coverage is avoided wherever possible. That is, it is appropriate for the Commission to minimise the circumstances where award coverage needs to be determined through the “most appropriate classification” clauses.

⁴ [2021] FCA 1374, 8 November 2021.