

PRELIMINARY SUBMISSIONS OF THE APPLICANT

Background and introduction

1. On 25 June 2021, Menulog Pty Ltd (**Menulog**) filed an application with the Fair Work Commission for the making of a new modern award (**Application**).
2. On 12 July 2021, the Commission published a statement setting out its provisional views to a number of the propositions that Menulog made in the Application (**Statement**).
3. Menulog is very grateful to the Commission for its detailed consideration of its Application in the Statement in the circumstances that a copy of the proposed modern award itself is not yet before the Commission.
4. As to a number of the questions raised by the Commission in the Statement, Menulog takes this opportunity to provide some preliminary submissions. Detailed submissions will be filed on or before 16 August 2021 to address the preliminary views expressed by interested parties as at 9 August 2021.

The special criteria about making a modern award at section 163(2)

5. Section 163(2) of the *Fair Work Act 2009* (**FW Act**) prescribes that:
the FWC must not make a modern award covering certain employers or employees unless the FWC has considered whether it should, instead, make a determination varying an existing modern award to cover them.
6. In the Application, Menulog set out its position that no modern award currently covers employers or employees in the on demand delivery services industry. As to this position, acknowledging that the *Miscellaneous Award 2020* is itself a modern award, Menulog confirms and clarifies that it is its position that no *industry or occupational* modern award currently covers employers or employees in the on demand delivery industry.
7. Flowing from this position, section 162(4) of the FW Act prescribes that:
the miscellaneous modern award [that is, the Miscellaneous Award 2020] is the modern award that is expressed to cover employees who are not covered by any other modern award.

Is the on demand delivery services industry currently covered by a modern award?

8. Save to the extent that the *Miscellaneous Award 2020* applies as a safety net modern award, Menulog maintains that no industry or occupational modern award covers employers or employees in the on demand delivery services industry.

Lodged by:	Menulog Pty Ltd	Telephone:	03 9958 9605
Address for Service:	Level 17, 459 Collins St Melbourne VIC 3000	Fax:	n/a
		Email:	katie.sweatman@kingstonreid.com

9. Menulog welcomes the Commission's provisional view expressed at [23] of the Statement that the *Fast Food Industry Award 2010* does not currently cover employers and their courier employees in the on demand delivery services industry.
10. At [28] of the Statement, the Commission has noted that the Applicant did not go to whether the *Road Transport and Distribution Award 2020* (**Road Transport Award**) does cover employers and their courier employees in the on demand delivery services industry, but rather whether the Road Transport Award *should* cover them.
11. For the avoidance of any doubt, the contention of Menulog is that:
 - (a) The Road Transport Award does not cover employers and their courier employees in the on demand delivery services industry.
 - (b) If the Commission accepts Menulog's contention that the Road Transport Award does not cover employers and courier employees in the on demand delivery services industry, in satisfying the special criteria prescribed at section 163(2) of the FW Act, the Commission should not instead make a determination to vary the Road Transport Award to cover employers and courier employees in the on demand delivery services industry. Among other things, this would fail to meet the modern objective under the FW Act of the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.
 - (c) In the alternative, if the Commission adopts a view that the Road Transport Award does cover employers and courier employees in the on demand delivery services industry, the Commission ought to adopt the view that that current award coverage of employers and employees in the on demand delivery services industry does not meet the modern awards objective, and that a new modern award is necessary.

Does the current award coverage of the on demand delivery services industry meet the modern awards objective?

12. Menulog accepts and acknowledges that the Commission is unable to express a provisional view about whether the proposed *On Demand Delivery Services Industry Award* would otherwise meet the modern awards objective until its terms are subject to due scrutiny by the Commission and interested parties.
13. Menulog is currently in correspondence with the Transport Workers Union about its exposure draft *On Demand Delivery Services Industry Award* with a view to filing a copy of this proposed modern award prior to the Mention that is listed for 23 August 2021 with an indication of those terms that are able to be agreed with the Transport Workers Union and those that are not.
14. In adopting this approach, Menulog acknowledges that any consensus position reached between it and the Transport Workers Union is of course subject to any different views of other interested parties and the Commission.

**Kingston Reid
9 August 2021**