



## IN THE FAIR WORK COMMISSION

AM2021/72

### S.158 – Application to make a modern award – Menulog Pty Ltd

#### Submissions of the National Road Transport Association (NatRoad)

##### Introduction

1. These submissions are filed on behalf of the National Road Transport Association (**NatRoad**) in response to the publication of a Statement dated 12 July 2021 (**Statement**)<sup>1</sup> by the Full Bench of the Fair Work Commission (the **Commission**) in relation to the proposed making of a new modern award covering the 'on demand delivery services industry.'<sup>2</sup> In accordance with the Statement, submissions are required to be lodged by 4pm 9 August 2021.<sup>3</sup>
2. NatRoad members are covered by all of the transport modern awards made by the Commission but principally are covered by the:  
*Road Transport and Distribution Award, 2020 (Distribution Award); and*  
*Road Transport (Long Distance Operations) Award 2020 (Long Distance Award).*
3. The coverage of the Distribution Award is clearly in contention in these proceedings, as is set out below, and therefore NatRoad wishes to be heard in relation to this matter.
4. NatRoad agrees with the Full Bench's provisional view as set out at paragraph 11 of the Statement. Accordingly, in this Submission, we address the three preliminary matters it has determined are required to be considered as follows:
  1. *Whether employers and employees in that industry are currently covered by a modern award.*
  2. *If there is current award coverage, whether the current award coverage of employers and employees in the industry meets the modern awards objective.*
  3. *If the current award coverage does not meet the modern award objective, whether, instead of making a new award, the Commission should vary an existing award to cover the relevant employers and employees (including considering*

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<sup>1</sup> [2021] FWCFB 4053

<sup>2</sup> Id paragraph 1

<sup>3</sup> Id paragraph 48

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*whether any such existing award is appropriate for employers and employees in the industry).*<sup>4</sup>

Prior to addressing these questions, we explore the nature of the services provided by Menulog and similar entities as a means of distinguishing those services from the “traditional” freight and courier tasks encapsulated in the Distribution Award, in particular. As well, that analysis attempts to show that the workers anticipated to be covered are in a different environment than those undertaking usual freight or courier duties.

### **“Platform” Based Work**

5. The Commission has published an Information Note<sup>5</sup> (**Note**) which sets out research into the on-demand services industry. The distinguishing feature of this industry is that it relies on a technology platform to match demand and supply for a particular product or service. As stated in the Note:

*(T)he business model has a reliance on app technology to connect its network of on demand delivery courier network with restaurants to the end consumer as well as on demand delivery of goods from other retailers.*<sup>6</sup>

6. A number of these platforms exist to facilitate the freight task as well as to meet consumer demands for food and other goods. Member feedback is that this subsector is growing and is clearly now a permanent feature of the road freight industry.
7. These platforms have disrupted the normal mechanisms of engaging transport operators and the usual supply chain relationships. In traditional supply chain functioning, a network of relationships where all parties interact successfully is required. But with work secured through platforms those relationships are transitory and often based solely on least cost options. As the ILO has remarked:

*One of the major transformations in the world of work over the past decade has been the emergence of online digital labour platforms. This new form of work has not only disrupted existing business models but also the employment model upon which these business models relied.*<sup>7</sup>

8. Members have informed NatRoad that there are a large number of digital platforms that “match” freight tasks with transport companies. They essentially offer a limited form of freight forwarding, often without assuming any of the liabilities which accompany the traditional manner in which freight forwarding tasks occur that is contractual engagement of the transport operator with the customer, facilitated by an agency relationship. This is different from the model proposed by Menulog in the current context where that company would be the direct employer of employees to be covered by a modern award rather than as facilitators of contractual arrangements between the customer, the supplying restaurant/retailer and the contract delivery driver.

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<sup>4</sup> Id paragraph 11

<sup>5</sup> <https://www.fwc.gov.au/documents/sites/on-demand-delivery-award/additional-material/am202172-information-note-120721.pdf>

<sup>6</sup> Id p1

<sup>7</sup> [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_645337.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_645337.pdf) at the Foreword

9. Similarly, a freight forwarder would rarely be in the business of moving goods itself. Instead, the freight forwarding company acts as an intermediary/paid agent between a shipper and the providers of various transportation services such as shipping on cargo ships, trucking, expedited shipping by air freight, and moving goods by rail.
10. On the other hand platforms eschew the agency relationship and in most instances purport to merely facilitate the connection of transport operators with customers. NatRoad member experience of most freight platforms is that they represent a poor medium given that the chain of responsibility<sup>8</sup> (COR) obligations often fall back on the transport operator and the payment offered is frequently at the bottom end of the market.
11. Having said that, platforms have different levels of involvement in the actual task performed. NatRoad considers that if an entity that might otherwise be classified as a freight forwarder is paid a fixed fee unrelated to the size, weight or destination of the consignment, and does nothing more than provide a platform which introduces senders/receivers to carriers, they exercise little influence or control over the execution of the freight task. As such they would have no influence over the compliance or otherwise of the movement of the relevant freight and might reasonably claim that COR obligations as set out in the Heavy Vehicle National Law (HVNL), would not apply in the context of that type of transaction, that is they are merely facilitating a contract between an operator and a consignor. However, if the digital platform employs workers to perform the services and/or issues invoices associated with the freight task, and therefore has control over the execution of the task, then they would have COR obligations which should be acknowledged and reflected in the contract conditions that apply and, in turn, have a safety net instrument tailored to that function.
12. Clearly, work obtained via a platform is not always of the same kind but is generally reflective of either an agency relationship (the freight forwarding model) or a three-cornered contractual relationship facilitated by a third party “delivery” contractor, as with the Menulog model (at least to the extent that it is currently understood). In this context, amendments to the *Owner Drivers and Forestry Contractors Act, 2005* (Vic) (**Vic Act**) deem digital platforms to be freight forwarders and therefore impose the disciplines of that statute on the platforms when contracting with an owner driver covered by that legislation (fewer than 4 trucks and at least one operated personally).
13. The Vic Act now includes “a person who provides an online platform that facilitates the engagement of contractors by hirers” in its definition of a “freight broker”. One of the obligations of a freight broker under the Vic Act is the provision of an Information Booklet to the engaged contractor (s10(2) and s11A(2)). The prescribed booklet includes a reference to the HVNL, the National Heavy Vehicle Regulator (NHVR) and to COR.<sup>9</sup>
14. The Victorian legislature has determined one element of a solution to the problem of a lack of a safety net for platform workers/contractors. In NatRoad’s understanding, however, the extant form of arrangements remains firmly planted in the contractual side of the employee/independent contractor divide, reinforced by the Vic Act deeming and by decisions of the Commission in, for example, *Gupta v Portier Pacific Pty Ltd*; *Uber*

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<sup>8</sup> For a useful examination of those obligations see <https://www.nhvr.gov.au/safety-accreditation-compliance/chain-of-responsibility/about>

<sup>9</sup> . [https://business.vic.gov.au/\\_data/assets/pdf\\_file/0005/1322339/Victorian-Owner-Driver-Information-Booklet.pdf](https://business.vic.gov.au/_data/assets/pdf_file/0005/1322339/Victorian-Owner-Driver-Information-Booklet.pdf) at p34

*Australia P/L t/a Uber Eats*<sup>10</sup>. In that case a Full Bench of the Commission determined that an Uber Eats worker was not an employee.<sup>11</sup>

15. In Menulog seeking to provide an employment-related safety net to workers engaged by that company, the background and growth of the “platform” industry is clearly part of the environment in which they operate. In the absence of legislative reforms which provide minimum entitlements and fair conduct standards to platform workers who are not capable of being characterised as employees, the Menulog stance appears unique. In turn, as the prior discussion has attempted to outline, its operational model appears to be much different from the traditional procurement of freight or courier services.

### **Modern Award Coverage: Fast Food Award**

16. We refer to question 1 as set out in paragraph 3 above that is: *Whether employers and employees in that industry are currently covered by a modern award.*
17. NatRoad agrees with the conclusion of the Full Bench that the *Fast Food Industry Award 2010 (Fast Food Award)* does not cover employers and their courier employees.<sup>12</sup> However, this view is in part presaged on the fact that “other goods” are ordered and couriered by Menulog workers. We submit that it would assist the Commission and interested parties if evidence were adduced of the full extent to which Menulog delivers “other goods”. For reasons that we set out below, NatRoad believes this to be an important issue as we believe that any new award should be confined to the food and drink e-commerce industry and/or boundaries placed around the extent of coverage of any new modern award in relation to a broader delivery task.

### **Modern Award Coverage: Distribution Award**

18. We note that the Full Bench has determined not to currently express a view as to whether the Distribution Award covers employers and their courier employees in the on demand delivery services industry.<sup>13</sup>
19. NatRoad contends, however, that on its face, the Distribution Award applies and the relevant employers and employees are covered. We next set out our reasoning.
20. The Distribution Award was deliberately structured to include within the definition of the road transport and distribution industry (in current clause 4.2(a)), the notion of “ancillary” work. The Full Bench of the Australian Industrial Relations Commission (**AIRC**) charged with the creation of the transport modern awards<sup>14</sup> noted that:

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<sup>10</sup> [2020] FWCFB 1698

<sup>11</sup> Cf *Klooger v Foodora Australia P/L* [2018] FWC 6836 and, more recently, *Diego Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818 against which an appeal has been lodged by Deliveroo

<sup>12</sup> Above note 1 paras 20-23

<sup>13</sup> Id at paragraph 29

<sup>14</sup> [2009] AIRCFB 345 (3 April 2009)

*We have retained the reference in paragraph (a) of the definition of the road transport and distribution industry to the transport of goods etc where that work is ancillary to the principal business, undertaking or industry of the employer.*<sup>15</sup>

21. The inter-connection between the way in which the classifications are structured in the Distribution Award and the notion of ancillary work is explained by the AIRC Full Bench as follows:

*Even though the RT&D Modern Award is an industry award it is clear that the practical effect of the various existing private transport awards it encompasses is that they operate by reference to a structure of types, models and classes of vehicle and, it follows, to the driver of those vehicles thereby having occupational coverage. We note that there are very few transport classifications in the modern awards made to date and it is likely that any transport functions of any significance are carried out by dedicated transport operators. If the transport of goods etc as defined in the RT&D Modern Award is ancillary to an employer's business but it is carried out by an employee in one of the classifications in the award it should be covered by the award.*<sup>16</sup>

22. The current Full Bench in the Statement notes in relation to the classifications under the Distribution Award as follows:

*We note that the Transport Worker Grade 1 classification in Schedule B—Classification Structure of the Road Transport Award includes 'Courier—foot or bicycle' and 'driver of a rigid vehicle (including a motorcycle) not exceeding 4.5 tonnes GVM'.*<sup>17</sup>

23. Clearly, in terms of the AIRC Full Bench finding where the transport work is carried out by an employee in one of the classifications in the award, albeit the transport of the goods is ancillary to the employer's business, the employer is covered by the award. The main distinguishing feature in the current context, however, appears to be that in the Menulog model, the owner of the bicycle/vehicle is not Menulog but its contractor/employee. Whether or not that structuring will be carried forward under an employer/employee model remains moot.

24. NatRoad does **not** believe that the application of the Distribution Award would be appropriate given the ownership issue just raised and the environment in which work is undertaken, a matter we now elaborate.

### **Coverage Not Appropriate**

25. In elaborating on the latter proposition set out in paragraph 24 of this submission, we in part answer the second question posed by the Full Bench and reproduced at paragraph 3 of this submission thus: *If there is current award coverage, whether the current award coverage of employers and employees in the industry meets the modern awards objective.*

26. We refer to the *Coles* case.<sup>18</sup> In essence the *Coles* case saw the specific award classifications in another award exclude coverage by the Distribution Award. The court found that Coles' employee delivery drivers also known as Customer Service Agents

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<sup>15</sup> Id at para 169

<sup>16</sup> Id at 171

<sup>17</sup> Above note 1 at para 25

<sup>18</sup> *Transport Workers Union of Australia v Coles Supermarkets Australia P/L* (2014) 284 FLR 238

(CSAs) were **covered** by the Distribution Award. But significantly, they were also covered by the *General Retail Industry Award 2010* (the **Retail Award**).

27. The relevant classification under the Retail Award was considered to be the most appropriate to the work performed by the CSAs **and the environment in which they work**. Hence, the Retail Award, and **not** the Distribution Award **applied** to them. This is reflective of the standard clause that appears in modern awards along the lines of the following clause in the Distribution Award:

*4.7 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.*

28. In the *Coles* case the Full Federal Court held that the primary judge was correct in determining that the relevant classification under the Retail Award was a better and more comprehensive match with the work performed by the CSAs than the relevant classification under the Distribution Award. A Retail Employee Level 1 was defined as an employee performing one or more of various functions including the wrapping or packing of goods for despatch, the delivery of goods and work that is incidental to or in connection with that work. A Transport Worker Grade 2 under the Distribution Award is much more narrowly defined. That classification is simple. The classification is expressed to cover a driver of a “rigid vehicle (including a motorcycle) not exceeding 4.5 tonnes gross vehicle mass (GVM).” The court found that determination of coverage was achieved via a process of considering which award classification is most appropriate to the work performed by the CSAs and their work environment. It is this latter consideration that would be, we contend, problematic in the current circumstances where the type of environment created by “platform work” and its manifestations would better fit an award designed to cover that environment.

29. We therefore agree with the contention of Menulog in its application<sup>19</sup> that having regard to the modern awards objective, reliance on another award (but not the Miscellaneous Award as addressed) would not be appropriate.<sup>20</sup> We also agree with the Menulog contention described in paragraph 27 of the Statement that the circumstances of the “platform” based industry are such that it should be carved out of coverage of the Distribution Award. This is akin to the basis on which the specific awards in clause 4.3 of the Distribution Award are currently “carved out.” Further, driving as a task occurs under a large number of modern awards (as in the example of the Retail Award in the *Coles* case) but that on its own is rarely sufficient to invoke the coverage of the Distribution Award, a matter taken up further below.

30. However in the meantime, we refer to the words of Burt CJ in *The Federated Engine Drivers & Firemen’s Union (WA) v Mt Newman Mining Co Pty Ltd*<sup>21</sup> that not every worker who drives an engine in carrying out their employment is an engine driver; the question

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<sup>19</sup> <https://www.fwc.gov.au/documents/sites/on-demand-delivery-award/application/am202172-application-240621.pdf>

<sup>20</sup> Id at paragraph 60

<sup>21</sup> (1977) 57 WAIG 794 cited with approval in *Fair Work Ombudsman v D’Adamo Nominees Pty Ltd (No.4)* [2015] FCCA 1178 at para 256

is whether “the worker is employed to drive an engine so that he earns his wages by doing that, or whether he is employed to do something else.”<sup>22</sup>

### **New or Varied Award?**

31. NatRoad now responds to the third question posed by the Full Bench as follows: *If the current award coverage does not meet the modern award objective, whether, instead of making a new award, the Commission should vary an existing award to cover the relevant employers and employees (including considering whether any such existing award is appropriate for employers and employees in the industry).*
32. First, given our reasoning in respect of the Distribution Award, we do not need to consider in detail the issues raised in the analysis of the *Miscellaneous Award*. Suffice it to say that we agree with the proposition set out in the extract quoted in the Statement which indicates: “the *Miscellaneous Award* was never intended to provide a comprehensive safety net for any particular industry or occupation, but rather was meant to provide basic conditions only for employees not covered by other modern awards until such time as a proper safety net could be established for identifiable groups of such employees in another modern award.”<sup>23</sup>
33. The second point is that, subject to evidence of the kind being adduced as indicated in paragraph 17 of this submission, the subject matter of the new modern award should be to deal with prepared food and drink supply based on the “platform” model. That proposition rests on the need to make a safety net instrument that is shaped by the relevant environment, noting as in the *Coles case* the Distribution Award does not provide appropriate coverage, as the “substantial character” of Menulog’s business is not in the transport of goods/freight but more in matching customer requirements for food and beverage with the availability of that product and its subsequent on-demand delivery facilitated by technology that is constantly changing.
34. Whilst the *Coles case* measures the most appropriate award classification where coverage was present, the notion of making the safety net instrument appropriate to the environment in which the employer and employees work must remain a key consideration in looking at whether the safety net instrument is appropriate. That consideration is carried through in the modern award system where driving is often included within a modern award but the classifications are tailored to the industry’s functioning e.g. driving of various vehicles as set out in the *Building and Construction On Site Award 2020*.
35. These considerations are well addressed in paragraph 44 of the Statement where Menulog’s arguments are set out in detail.
36. We agree with Menulog, particularly as noted in bold, where it is contended that:

*(I)n comparison to varying an existing modern award, the proposed new award would better achieve the objective to ensure a simple, easy to understand, stable and*

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<sup>22</sup> Ibid

<sup>23</sup> Above note 1 at paragraph 42

*sustainable modern award system avoiding unnecessary overlap of modern awards (s.134(1)(g))—and **variation of the Road Transport Award ‘to contemplate’ the on demand delivery services industry would instead complicate the modern award system and create unnecessary regulatory burden, and could result in frequent variations of that award to keep pace with changes to technology and consumer demand.***<sup>24</sup>

## **Conclusion**

37. NatRoad believes that the Distribution Award currently on its face covers employers and their courier employees in the on demand delivery services industry.
38. However, given the substance of the work that is undertaken and the environment in which it is undertaken (but with further evidence required to substantiate that matter) the Distribution Award is not an appropriate safety net instrument to regulate “platform” work. This question will require further evidence and in particular consideration of the boundaries to be placed around the industry of the employer and establishing the duties performed by the employees linked to appropriate classification definitions in the proposed modern award. That will largely depend on the facts accepted as defining the nature of the industry.
39. In summary, for the present NatRoad contends that whilst the Distribution Award prima facie covers the employers and employees in the on demand delivery services industry, we would support the creation of a new award that better reflects the environment in which work is undertaken.

9 August 2021

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<sup>24</sup> Id at para 44