

IN THE FAIR WORK COMMISSION

SUBMISSIONS

**PROPOSED ON DEMAND DELIVERY SERVICES AWARD
(AM2021/72)**

FILED ON BEHALF OF:

**AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY
AUSTRALIAN BUSINESS INDUSTRIAL**

9 AUGUST 2021

INTRODUCTION

1. This submission is made on behalf of:
 - (a) the Australian Chamber of Commerce and Industry (**ACCI**); and
 - (b) Australian Business Industrial (**ABI**).
2. On 12 July 2021, the Fair Work Commission (the **Commission**) issued a Statement in *Menulog Pty Ltd* [2021] FWCFB 4053 (AM2021/72) (the **Statement**).
3. At [48] of the Statement the Commission invited parties to comment on various provisional views and observations:

***[48]** Interested parties are invited to lodge written submissions responding to some or all of our provisional views at [11], [23], [35] and [43] and observations at [29], [39] and [47] by **4pm on Monday 9 August 2021**. Reply submissions are to be filed by **4pm on Thursday 19 August 2021**.*

BACKGROUND

4. Based on the limited materials filed so far, Menulog appears to operate a business in which it acts as an 'agent' for a vendor (of goods):
 - (a) marketing the vendor's goods to potential customers; and
 - (b) taking sales orders for the vendor's from customers for the vendor's goods; and then
 - (i) the customers pick-up their goods from the vendor; or
 - (ii) the vendor organises the transportation of the goods to the customer using an employed driver¹ or by using a third party contractor driver; or
 - (iii) Menulog provides a courier service to transport the goods from the vendor to the customer using a driver employed by Menulog.
5. Some of these activities are facilitated in whole or part by use of software applications and a website (digital) rather than human activity.
6. The Application appears to be concerned only with one element of Menulog's business and employed workforce; that being the provision of a courier service to transport the goods from the vendor to the customer (paragraph 4(b)(iii) above).

¹ Such activity would likely be covered by the Restaurant Industry Award 2020 or the Fast Food Award 2010.

7. While not immediately relevant, the other parts of Menulog's business may be regulated by other modern awards².
8. We would urge caution in too easily considering the business activities of Menulog as being new or forming a discrete "industry" in themselves.
9. This is particularly the case for the provision of courier services by Menulog.
10. The fact that Menulog likely use a software application accessed on a portable device (such as a smart phone or tablet) to allocate courier work to 'drivers' is entirely commonplace in the logistics and transport industry and especially so in regard to the allocation of courier work.

THE STATEMENT

11. [11] of the Statement is in the following terms:

[11] Based on the observations of the Full Bench in the Proposed Helicopter Crew Award decision it is our provisional view that the Act requires us to consider the following initial matters before deciding whether or not to make a new modern award covering the on demand delivery services industry:

- 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 whether any such existing award is appropriate for employers and employees in the industry).*

² It is possible that other modern awards may apply to other parts of Menulog's business such as the Fast Food Award 2010, General Retail Industry Award 2020, Professional Employees Award 2020 or the Clerks - Private Sector Award 2020.

12. With one addition, we would agree that the Commission should consider as threshold questions whether:
 - (a) Employees undertaking courier work for Menulog are currently covered by a modern award.
 - (b) If there is current award coverage, whether the current award coverage for employees undertaking courier work for Menulog meets the modern awards objective.
 - (c) 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.
13. This clearly arises from the operation of section 163 of the *Fair Work Act* 2009 (the **Act**).
14. The additional threshold matter that should be considered is whether the Commission should exercise any discretion to make or vary a modern award at large under Chapter 2, Part 2-3 of the Act in the context of an application by a single employer.
15. Menulog makes its application in its interest (as an employer) to regulate terms and conditions of employment of its employees.
16. In the context of the scheme of regulation set out in the Act, consideration should be given as to whether the more appropriate course of action for Menulog (whose interest concerns Menulog and their employees) is to seek to make an enterprise agreement under Chapter 2, Part 2-4 of the Act.
17. [23] of the Statement is in the following terms:

[23] Our provisional view is that Menulog is correct and that the Fast Food Award does not currently cover employers and their courier employees in the on demand delivery services industry.
18. It may be necessary to have the benefit of further particulars concerning the operations of Menulog before confirming this provisional view.
19. As stated, at paragraph 4 above, Menulog “take orders for” meals etc and also “take orders for” the “delivery” of meals etc to be consumed by customers “away from the point of sale”.
20. On an ordinary reading of these words, it can be argued that the activity of Menulog is covered by the Fast Food Award 2010.

21. This arises from a consideration of clause 3, 4.1 and Schedule B of the Fast Food Award 2010.

22. The Fast Food Award 2010 defines the “fast food industry” (used in clause 4.1) in the following terms:

***fast food industry** means the industry of **taking orders for** and/or preparation and/or sale and/or **delivery of**:*

- *meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;*
- *take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or*
- *food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment*

***[emphasis added]**.*

23. Schedule B of the Fast Food Award 2010 contains a classification in the following terms:

A.1 Fast Food Employee Level 1

*An employee engaged in the preparation, the receipt of orders, cooking, sale, serving **or delivery of** meals, snacks and/or beverages which are sold to the public primarily to take away or in food courts in shopping centres.*

[emphasis added]

24. [35] of the Statement is in the following terms:

***[35]** On the basis of the coverage clause of the Miscellaneous Award as varied by the Full Bench in the Review, our provisional view is that if no other modern award covers employers and their courier employees in the in the on demand delivery services industry, then the Miscellaneous Award covers them.*

25. This provisional view is correct.

26. The Miscellaneous Award 2020 is unique within the modern award system (and plays a role in meeting section 134 (g); “stable and sustainable modern award system for Australia” in that it is not an industry award or an occupation award but rather operates (subject to its coverage and exclusions) as a ‘not elsewhere included’ award.

27. That is to say it applies to employees who ordinarily or historically would be covered by an award but where no specific industry or occupation based modern award applies.

28. The history of the Miscellaneous Award 2020 is set out in *4 yearly review of modern awards – Miscellaneous Award 2010 (AM2014/237) [2020] FWCFB 754*.
29. The work performed by drivers undertaking courier work for Menulog if not covered by a current industry or occupation based modern award would fall within the coverage clause (clause 4) of the Miscellaneous Award 2020.
30. [43] of the Statement is in the following terms:

[43] We agree with those observations as to the character of the Miscellaneous Award. It is our provisional view that if the Miscellaneous Award does cover employers and their courier employees in the on demand delivery services industry, then it does not provide a fair and relevant safety net for that industry.
31. Some caution needs to be exercised in this provisional view.
32. The Miscellaneous Award 2020 must be taken to meet the modern awards objective in section 134. It has been subject to extensive review in 2012 Transitional Review and the 2014 Review; hence it is now designated as a 2020 rather than 2010 modern award.
33. Therefore, it cannot be said that if Menulog's courier drivers are covered by the Miscellaneous Award 2020 it does not provide a fair and relevant safety net for them as contemplated by s 134.
34. This said, the modern awards objective can be met by a great diversity of formulations of terms and conditions of employment within a modern award.
35. At the very least, if such a finding was to be made, it would need to be the subject of substantive submissions from interested parties and be supported by probative evidence demonstrating the apparent inadequacy of the Miscellaneous Award 2020 as a fair and relevant safety net and that what is proposed meets the requirements of s 134 and s 138 in the alternative.
36. If we accept for the purposes of argument that no industry or occupation based modern award covers the courier drivers employed by Menulog, but the Miscellaneous Award 2020 does it may be the case that a new modern award could be formulated and made for these employees (and Menulog) that meets the modern awards objective (s 134) despite them previously being covered by the Miscellaneous Award 2020 that otherwise meets the modern awards objective and provides a fair and relevant safety net.

37. While we do not express a concluded view, it might also be considered whether there is a presumption (or 'legislative preference') in the architecture of Chapter 2, Part 2-3 of the Act that employees be covered by an industry or occupation based award in light of the unique character and purpose of the Miscellaneous Award 2020 in distinction to all other modern awards.

38. [29] of the Statement is in the following terms:

[29] Absent further submissions from Menulog and other interested parties, we do not propose to express a view as to whether or not the Road Transport Award covers employers and their courier employees in the on demand delivery services industry.

39. Irrespective of any other modern award applying, on an ordinary reading of the Road Transport and Distribution Award 2020, it would apply to the courier drivers employed by Menulog.

40. It seems uncontroversial that clause 4.1 and 4.2 covers the work undertaken by Menulog and the courier drivers employed by Menulog:

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
[emphasis added]

41. Schedule B of the Road Transport and Distribution Award 2020 includes a classification for a Grade 2 Transport Worker that includes:

Driver of a rigid vehicle (including a motorcycle) not exceeding 4.5 tonnes GVM

42. Further particulars may be required to form a conclusive view on this and to consider any issues of competing modern award coverage and the operation of the standard clause contained in each modern award³:

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.

³ Refer to *The AWU v Coffey Information Pty Limited* [2013] FWCFB 2894 (C2012/6708)

43. [39] of the Statement is in the following terms:

[39] Menulog will need to expand upon these considerations in order to satisfy us that it is necessary to make a new modern award for the on demand delivery services industry to achieve the modern awards objective.

44. We agree.

45. [47] of the Statement is in the following terms:

[47] As with the issue of what awards presently cover employers and their courier employees in the on demand delivery services industry, and whether that current coverage meets the modern awards objective, further submissions and evidence will be required to inform our consideration of whether an existing modern award should be varied to cover those employers and employees.

46. We agree.

47. In addition, this may also require a consideration of work value and also section 284 of the Act.

For ACCI and ABI

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