

Form F1 – Application (no specific form provided)

Fair Work Commission Rules 2013, subrule 8(3) and Schedule 1

This is an application to the Fair Work Commission.

The Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address	Level 35, Tower 3/300 Barangaroo Ave		
Suburb	Barangaroo		
State or territory	NSW	Postcode	2000
Phone number		Fax number	
Email address	paul.mcelroy@justeatakeaway.com		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Menulog Pty Ltd
Trading name of business	Menulog
ABN/ACN	120 943 615
Contact person	Paul McElroy

How would you prefer us to communicate with you?

Email (you will need to make sure you check your email account regularly)

Post

Does the Applicant have a representative?



A representative is a person or organisation who is representing the Applicant. This might be a lawyer or paid agent, a union or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

Applicant's representative



These are the details of the person or business who is representing the Applicant.

Name of person	Katie Sweatman		
Firm, union or company	Kingston Reid		
Postal address	Level 17, 459 Collins Street		
Suburb	Melbourne		
State or territory	Victoria	Postcode	3000
Phone number	03 9958 9605	Fax number	
Email address	Katie.sweatman@kingstonreid.com		

Is the Applicant's representative a lawyer or paid agent?

Yes

No

The Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

If the respondent is a company or organisation please also provide the following details

Legal name of business	
Trading name of business	
ABN/ACN	
Contact person	

1. The Application

1.1 Please set out the provision(s) of the Fair Work Act 2009 (or any other relevant legislation) under which you are making this application.

Section 157(1)(b) of the *Fair Work Act 2009* (Cth).

Section 158(1) of the *Fair Work Act 2009* (Cth)

2. Order or relief sought

2.1 Please set out the order or relief sought.



Using numbered paragraphs, set out what you are asking the Commission to do.

1. That the Commission make a Statement that the making of a modern award to cover the On Demand Delivery Industry is not *prima facie* contrary to the modern awards objective.
2. That the Commission make Directions for the further consideration of this Application for the making of an On Demand Delivery Industry Award (**Proposed Award**).

2.2 Please set out grounds for the order or relief sought.



Using numbered paragraphs, set out the grounds, including particulars, on which you are seeking the relief set out in question 2.1.

1. The Applicant, Menulog Pty Ltd (**Menulog**) outlines the key grounds for its application below.
2. Given the novel nature of the application in the Australian industrial landscape, Menulog reserves the right to make more comprehensive submissions upon directions being set down.

Background

3. Menulog makes an application pursuant to sections 157(1)(b) and 158(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) for the Fair Work Commission to make a new modern award (**Proposed Award**) in circumstances where no operative modern award covers Menulog in respect of its on demand delivery business (**On Demand Business**).
4. Menulog commenced operations in Sydney in 2006, working with restaurant partners with their own delivery drivers to provide online ordering solutions. In 2015, Menulog was acquired by a UK-based delivery marketplace called Just Eat. The Menulog delivery service was launched in 2018. Being later to market with this service and relatively new to the gig economy, we Menulog was able to leverage existing market insight to launch a service that was based on best practice at the time. Menulog's online app-based food delivery platform has continued to grow alongside the proliferation of technology (in particular, e-commerce) to facilitate On Demand delivery of food, drinks, and other goods to meet consumer demands and in line with changing consumer behaviour.
5. At the time of making this Application, Menulog's On Demand Business offers on demand food collection and delivery across all Australian states and territories, ranging from grocery delivery to delivery of restaurant food and alcohol.

6. Menulog's model, like its competitors operating an On Demand Business in the market, relies on app technology which connects its network of on demand delivery couriers (**Courier Network**) with restaurants to the end consumer. Its competitors also provide on demand delivery of goods from other retailers, as well as from restaurants, supermarkets and convenience stores.
7. Menulog's On Demand Business is best described as operating in the On Demand Delivery Services Industry (**On Demand Industry**).
8. The On Demand Industry is part of the gig economy, an economy which, at the time of the award modernisation undertaken by the Australian Industrial Relations Commission in 2009 either did not exist or was in its infancy in Australia and globally. The gig economy has been defined as "*economic activity characterised by all of the following features: the worker provides on-demand services, the worker is classified as an independent contractor¹ and a digital platform mediates the transaction.*"²
9. Since 2015, the gig economy has grown 9-fold, with its workforce growing substantially in tandem to an estimated 250,000 workers.³
10. Menulog is proud to be the first On Demand Business in Australia to take steps towards employing couriers to perform on demand delivery.
11. Menulog is committed to engaging with interested stakeholders with a view to achieving a fair set of minimum employment standards that are sustainable and fit for purpose in the On Demand Industry. With this in mind, Menulog has been engaging in preliminary discussions with the Transport Workers Union, which it recognises as the employee organisation representing the interests of couriers working in the On Demand Industry.

Power to make new modern award

12. In exercising its power to make a new modern award pursuant to section 157(1)(b) of the FW Act, the Fair Work Commission must be satisfied that making that modern award is necessary to achieve the modern award objective.
13. Section 134 of the FW Act sets out the modern awards objective. It provides:
 - (1) *The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
 - (a) *relative **living standards** and the needs of the low paid; and*
 - (b) *the need to encourage collective bargaining; and*
 - (c) *the need to promote social inclusion through **increased workforce participation**; and*
 - (d) *the need to promote **flexible modern work practices and the efficient and productive performance of work**; and*
 - (da) *the need to provide additional remuneration for:*

¹ Historically and currently, operators in the On Demand Industry have engaged independent contractors or self-employed couriers for the delivery of food, beverages and other goods ordered through their platforms. The Proposed New Award would provide an industry appropriate foundation for minimum employment entitlements to adopt an employment model.

² Actuaries Institute, 'The Rise of the Gig Economy and Its Impact on the Australian Workforce' (Green Paper, Actuaries Institute, December 2020).

³ Ibid at 1.2.

- (i) *employees working overtime; or*
- (ii) *employees working unsocial, irregular or unpredictable hours; or*
- (iii) *employees working on weekends or public holidays; or*
- (iv) *employees working shifts; and*
- (e) *the principle of equal remuneration for work of equal or comparable value; and*
- (f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
- (g) *the need to ensure a **simple, easy to understand, stable and sustainable modern award system** for Australia that avoids **unnecessary overlap** of modern awards; and*
- (h) *the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy...*

Industry to be covered by the Proposed Award

14. Menulog proposes that the coverage of the Proposed Award will be as an industry award covering employers in the on demand delivery industry and their employees, in respect of which:

*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 sale 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 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.*

Threshold consideration – absence of relevant modern award

15. Menulog contends that the “on demand delivery services industry” as defined is not covered by any operative modern award.
16. In the alternative, Menulog submits that where if it is covered, the peculiarities of the On Demand Business and the On Demand Industry warrant discrete industrial regulation and coverage.
17. Menulog has identified two modern award that could, on their face, appear to cover the Courier Network (and Menulog in respect of those employees), however contends that, for the reasons addressed below, those awards were not contemplated to cover the Courier Network and cannot accommodate the unique needs of the Courier Network or the On Demand Business.

18. The modern awards identified are:
- (a) Fast Food Industry Award 2010 (**Fast Food Award**); and
 - (b) Road Transport and Distribution Award 2020 (**RTD Award**).
19. In the absence of an appropriate industry or occupational award, the Miscellaneous Award 2020 (**Miscellaneous Award**) currently operates to provide a safety net set of minimum employment conditions for individuals who are employed as on demand delivery drivers.

Fast Food Award

20. Menulog contends that its On Demand Business (in respect of its Courier Network) is not covered by the Fast Food Award.
21. The Fast Food Award is an industry award covering employers throughout Australia in the 'fast food industry' and their employees in the classifications listed therein.⁴
22. The 'Fast Food industry' is *exhaustively* defined in the Fast Food Award to mean:
- 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.*
23. Reading the bullet point list ejusdem generis with the preceding words, that is, "fast food industry" it is clear that definition is intended to capture the provision of "fast food" in its ordinary meaning.
24. Menulog, along with other businesses in the On Demand Industry, does not operate a fast food business as it does not prepare or otherwise offer for sale fast food prepared for or on behalf of its own business. On the contrary, Menulog operates an online platform providing for the sale and purchase of foods, beverages and other goods under orders taken from and prepared by third party restaurants, supermarkets, convenience stores, and fast food businesses.
25. Further, Couriers engaged by platforms operating in the On Demand Industry do not solely deliver fast food, creating ambiguity as to modern award coverage in the case of any employee that does not predominantly collect and deliver fast food.
26. Perhaps more saliently, the classification structure contained in the Fast Food Award neither contemplates nor could accommodate the On Demand Industry.
27. Schedule B – Classifications to the Fast Food Award contains three tiers, the latter two connected to, and augmenting the first classification.
28. The first classification, fast food employee Level 1 is engaged in "preparation, the receipt of orders, cooking, sale, serving or delivery of meals, snacks and/or beverages" as well as incidental tasks including "incidental cleaning and cleaning of toilets".
29. The On Demand Industry is distinct in that the Courier Network cannot be utilised to undertake the balance of the tasks, that is, cooking, sale, or serving nor can the Courier

Network be engaged in incidental tasks such as cleaning. Rather, they are exclusively engaged to collect and deliver orders.

30. The situation with respect to the Fair Work Ombudsman's (**FWO**) legal action against Foodora Australia Pty Ltd (**Foodora**), an operator in the On Demand Industry which exited the Australian market in 2018, illustrates the differing views and ambiguity as to modern award coverage for the On Demand Industry.
31. Following the Commission's decision in the matter of *Klooger v Foodora* [2018] FWC 6836 in which it was found by the Commission that the applicant was an employee, and not an independent contractor, proceedings were commenced against Foodora by the Fair Work Ombudsman in the Federal Court of Australia. In these proceedings, it was conceded by Foodora that its couriers determined to be employees were covered by the Fast Food Award. This coverage was not ever found or otherwise considered by the Court or the Commission.
32. To the extent that it may be contended that coverage under the Fast Food Award was previously "conceded" by Foodora, and it is contended that this modern award coverage should be accepted to be so, Menulog submits that this concession was mistaken for the same reasons that it submits that the Fast Food Award cannot sensibly apply to its business or other operators in the On Demand Industry.
33. Menulog contends that, the fact that businesses within the industry have adopted different views supports an argument that current modern award system does not achieve the s 134(1) modern award objective to ensure "**a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards**".

RTD Award

34. Menulog contends that its On Demand Business (in respect of its Courier Network) is not covered by the RTD Award.
35. The RTD Award is an industry award covering employers throughout Australia in the 'road and transport distribution industry' and their employees in the classifications listed therein.⁵
36. The 'road and transport distributions industry' is defined in the RTD Award to include:
- (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;*
 - (b) *the **receiving, handling** or storing 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 in a distribution facility;*
 - (c) *the storage and **distribution of goods**, wares, merchandise, materials 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 where the storage and distribution activities are carried out in connection with air freight forwarding and customs clearance;*
 - (d) *the wholesale transport and delivery by road of meat from abattoirs, slaughterhouses, and wholesale meat depots;*

⁴ Clause 4, Fast Food Award.

⁵ RTD Award, clause 4.

(e) ***mobile food vending***;

....

[emphasis added]

37. While, on the face of that definition, Menulog's On Demand Business (with respect to its Courier Network) could appear to be captured as part of the industry, at the time of award modernisation, unique and distinct industries that also could have ostensibly fallen within the definition, were intentionally and expressly carved out from coverage⁶.
38. At the time of award modernisation, the food e-commerce industry was in its infancy and the sub On Demand Industry giving rise to this Application was virtually nonexistent in Australia. The proliferation of technology since award modernisation could not have been contemplated at the time of award modernisation.
39. Clause 4.3 of the RTD Award provides that the RTD Award does not cover employers and employees covered by:
- Mining Industry Award 2020;*
- Road Transport (Long Distance Operations) Award 2020 whilst undertaking long distance operations;*
- Transport (Cash in Transit) Award 2020 (CIT Award); and*
- Waste Management Award 2020.*
40. Accordingly, it is apposite to consider the genesis of some of the industries carved out from coverage of the RTD Award on the basis of peculiarities warranting discrete industrial coverage.
41. Menulog submits that, had the industry existed in any substantial form at the time the modern awards were made in 2009, the On Demand Industry would have been viewed to warrant similar consideration.
- Transport (Cash in Transit) Award 2020⁷*
42. The CIT Award came about by way of application for a separate award. During that process, Chubb Australasia submitted that the peculiarities of the cash in transit segment of the broader transport industry necessitated special regulation.
43. The submissions made in support of the separate CIT Award focused on the unique and peculiar aspects of the cash in transit industry warranting discrete industrial coverage.
44. For example, Chubb Australasia submitted that the existence of regulatory regimes (such as those provided by the Security Industry Act and Firearms Act) and certain things flowing from such regimes were "*indicative of a situation which is significantly different to that of a lot of other industries.*"⁸
45. By way of further example, Chubb Australasia submitted that the nature of the cash in transit industry resulted in "*higher levels of security and confidentiality*"⁹, warranting consideration of the industry in its own right and not as part of the broader 'road and transport distributions industry'.

⁶ By virtue of clause 4.3 of the RTD Award.

⁷ As it is currently named.

⁸ Transcript of Proceedings, AM2008/21 (Australian Industrial Relations Commission, AM2008/51, Harrison SDP, 9 December 2008) [634].

⁹ Ibid [660].

Waste Management Award

46. Similarly, the historical context culminating in the Waste Management Award is relevant. In announcing the release of an exposure draft for that award, the AIRC commented:

“... we have decided to proceed on the basis that waste management should be covered by an industry specific award rather than an award applying to the transport industry more generally.”¹⁰

47. Relevantly, antecedent to that decision, the Transport Workers’ Union submitted that *“in an operational sense the waste industry is distinct from transport... the classifications required for waste are not the same as those that are required for a general transport award”¹¹* and the Waste Contractors and Recyclers Association submitted that *“the services that are provided by the waste and recycling industry are fundamentally very different to the transport industry”¹²*.

Mining Industry Award

48. In its decision to separate the mining industry,¹³ the AIRC set out various reasons including:

“... the peculiarities of working in these locations are likely to give rise to considerations about terms and conditions that may or should be dealt with in a modern award, that may well not in any other priority industries. The industrial issues that have arisen over the years in relation to the terms and conditions of employment of mining industry employees require some particular considerations different to those of employees engaged in more central work locations operating on more conventional ordinary weekly hours”¹⁴
[emphasis added].

Relevance to current Application

49. Turning to the current Application, similarly, the peculiarities of the On Demand Industry warrant discrete industrial regulation.
50. The current circumstances are analogous to the issues canvassed prior to the CIT Award being made. That is, the On Demand Industry is substantially different from the broader transport industry.
51. In particular, Menulog’s On Demand Business does not operate in freight and logistics, rather it is confined to food, drink, and other goods ordering and delivery.
52. The On Demand Business (and, more broadly, the On Demand Industry) operates substantially differently to traditional freight and logistics businesses insofar as the latter is predicated on the traditional handling and distribution of goods in a structured and planned manner. By comparison, the On Demand Industry is inefficient and the way businesses (including the On Demand Business) operate is at the behest of immediate customer demand, precluding the capacity for On Demand Businesses to coordinate and organise the delivery of goods in a manner that achieves economies of scale, or enables the efficient and methodical performance of work during business hours rather than unsociable hours.
53. As canvassed above, the On Demand Business model relies on app technology which connects the Courier Network with both restaurants; supermarkets; and convenience stores, and ultimately the end consumer.
54. The On Demand Business’ reliance on app technology and the immediacy of “On Demand” which underpins the entire model also sets it apart in an operational sense.

55. The On Demand Business and businesses operating in the On Demand Industry provide a fundamentally different service offering to the currently regulated sectors and industries within the broader transport industry.
56. From a practical perspective, the way that classifications, rates of pay, allowances, hours of work, penalty rates, breaks and other staffing considerations might be contemplated by the Proposed Award would need to account for the unique immediacy and challenges of both On Demand and technology including the fallibility of, and constant changes to, technology.
57. For example, peak periods in the On Demand Industry differ significantly other industries affecting the appropriate span of hours and penalty rate structure. By comparison, freight and logistics businesses operate to more traditional business operating hours.
58. To this point, Menulog notes that it was determined by the Australian Industrial Relations Commission in the making of the modern awards that the spread of hours under the RTD Award would be 5.30am to 6.30pm Monday to Friday. This is distinguished from the *Road Transport (Long Distance Operations) Award 2020* which does not limit the spread of hours within which drivers can undertake their driving and delivery work, taking into account the different nature of the transport and delivery of goods which necessarily takes place outside of ordinary business hours to meet the needs of the road transport businesses and their customers.
59. Menulog submits that the different periods of time during which the work of On Demand Businesses operate to meet the needs of their business clients and their consumers warrants a new modern award with a fit for purpose spread of hours of work.

Miscellaneous Award

60. While the Miscellaneous Award may apply as a safety net in the absence of coverage or application of any other modern award reliance on that award is not sufficient to meet the modern award objective. In particular:
- (a) modern awards objective at s 134(1)(d) of the FW Act which requires the Commission to consider the need to promote flexible modern work practices and efficient and productive performance of work; and
 - (b) modern awards objective at s 145(1)(g) of the FW Act which requires the Commission to consider the need to ensure a simple, easy to understand, stable and sustainable modern award system.
61. It is uncontentional that these objectives would be best met by the application of an award contemplating the specific industry and employees as opposed to reliance on a safety net award.
62. This view is supported by observations made by the Full Bench of the Fair Work Commission in 4 yearly review of modern awards – Miscellaneous Award 2010¹⁵ that:
- “...Our approach to conditions of employment is influenced by the nature of the award’s coverage. We agree with those who have suggested that the **coverage of the award is very narrow and likely to be limited in time where emerging industries are concerned** or where the expansion of coverage of a modern award*

¹⁰ *Re Minister for Employment and Workplace Relations – Award Modernisation* (2009) 180 IR 124 [110].

¹¹ Transcript of Proceedings, AM2008/23 (Australian Industrial Relations Commission, AM2008/23, Giudice J, 10 December 2009 at [35]–[36].

¹² *Ibid* [137].

¹³ *Re Award Modernisation* (2008) 175 IR 120 [49].

¹⁴ *Ibid*.

¹⁵ AM2014/237 at [153].

*is involved. Accordingly **we do not think the award should contain a comprehensive safety net designed for any particular occupation or industry.** Rather it should contain basic conditions only, leaving room for the application of an appropriate safety net in another modern award in due course.”*

Discrete Industrial Regulation warranted to achieve Modern Awards Objective

63. Menulog contends that, in light of the above, the Proposed Award is both necessary to, and would, meet the modern award objective.
64. The modern award objective could not be met by a simple variation to an existing award for the reasons set out above. Put simply, the On Demand Business as with other businesses operating in the On Demand Industry is not covered by any other modern award.
65. To the extent that it is contended that the On Demand Industry could be appropriately accommodated by a variation to relevant parts of the RTD Award, Menulog submits that a variation to the RTD Award would not be sufficient and that making the Proposed Award is necessary to achieve the modern award objective.
66. In addressing the modern award objectives, Menulog submits:
- (a) The Proposed Award would promote social inclusion through increased workforce participation within the meaning of s 134(1)(c) of the FW Act insofar as it would provide an employment and industrial framework allowing businesses in the On Demand Industry to employ employees in circumstances where the industry has largely been dominated by principal and contractor models.
 - (b) The Proposed Award would achieve the objective of promoting flexible modern work practices and the efficient and productive performance of work within the meaning of s 134(1)(d) of the FW Act insofar as it would acknowledge and regulate a previously unregulated industry in a manner that accommodates the fundamental flexibility, unpredictability, and agility of the On Demand Industry.
 - (c) The proposed Award would have a positive impact on business, including on productivity, employment costs and the regulatory burden so as to achieve the s 134(1)(f) objective. That would be achieved by tailoring the Proposed Award (within the confines of the current regime) to recognise the unique features of the On Demand Industry, and the resultant need for a custom approach to hours of work, rates of pay, allowances, and penalty rates.
 - (d) It would not be operationally or financially feasible for On Demand Industry Business (including On Demand Business) to operate within the confines of the structures prescribed by the Miscellaneous Award, Fast Food Award, or the RTD Award.
 - (e) By extension, the Proposed Award would have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy within the meaning of the s 134(1)(h) modern award objective.
 - (f) The Proposed Award, as opposed to the variation of an existing award (such as the RTD Award) would better achieve the s 134(1)(g) modern award objective to ensure a simple, easy to understand, stable and sustainable modern award system avoiding unnecessary overlap.
 - (g) In circumstances where the RTD Award was varied to contemplate the On Demand Industry, that objective would not be achieved. On the contrary, that would complicate the modern award system, create unnecessary regulatory burden and could result in subsequent frequent variations to the RTD Award as the On Demand Industry keeps pace with changes to technology and consumer

demand, ultimately rendering the RTD Award a hybrid award entirely undistinguishable from its current form.

67. Furthermore, having regard to s577 of the FW Act pertaining to the performance of the Commission's functions, Menulog submits that the making of the Proposed Award will be consistent with the requirement for the Commission to perform its functions and exercise its powers in a manner that is fair and just, and will promote harmonious and cooperative workplace relations in the On Demand Industry.
68. Having regard to all of the above, Menulog submits the Commission should determine that the making of an On Demand Delivery Industry Award is not contrary to the modern awards objective.

3. The employer

3.1 What is the industry of the employer?

On Demand Delivery Services Industry

4. Industrial instrument(s)

4.1 Please set out any modern award, agreement or other industrial instrument relevant to the application and their ID/Code number(s) if known.

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	Kingston Reid
Name	Lawyers for the Applicant
Date	24 June 2021



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS