



STATEMENT

Fair Work Act 2009

s.158—Application to make a modern award

Menulog Pty Ltd

(AM2021/72)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
COMMISSIONER O'NEILL

MELBOURNE, 12 JULY 2021

Application to make a modern award to cover the on demand delivery services industry

1. Background

[1] On 25 June 2021, the Commission received an [application](#) from Menulog Pty Ltd (Menulog). The application is made pursuant to ss.157 and 158 of the *Fair Work Act 2009* (Cth) (the Act) and seeks that the Commission make a new modern award covering the ‘on demand delivery services industry’ (the Application).

[2] The Application includes a definition of the ‘on demand delivery services industry’—also referred to in the Application as the ‘On Demand Delivery Industry’ and the ‘On Demand Industry’—as follows:

‘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.’

[3] Other than this definition, the Application does not set out any terms of the proposed new modern award.

[4] Menulog submits that:

‘Historically and currently, operators in the On Demand Industry have engaged independent contractors or self-employed couriers for delivery of food, beverages and other goods through

their platforms. The Proposed New Award would provide an industry appropriate foundation for minimum employment entitlements to adopt an employment model.’¹

[5] As an initial step in dealing with the Application, Menulog seeks:

- ‘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).’

[6] We do not propose to make a statement in the terms sought in the Application. The Act sets out the preconditions to the Commission making a new modern award and it seems to us that making such a statement, on the limited material before us, is somewhat premature.

[7] In this statement we outline the legislative framework for making a new modern award and consider the Application in that context. We also express *provisional* views about some initial issues raised by the Application and note the need for further submissions and evidence in relation to other issues. Interested parties are then invited to make submissions.

2. Legislative framework

[8] Menulog seeks that the Commission make a new modern award pursuant to s.157(1)(b) of the Act. Section 157(1) relevantly provides that the Commission may vary an existing modern award or make a new modern award, if satisfied that doing so is ‘necessary to achieve the modern awards objective’ in s.134(1):

157 FWC may vary etc. modern awards if necessary to achieve modern awards objective

(1) The FWC may:

- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
- (b) make a modern award; or
- (c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

¹ Menulog Application, 24 June 2021, footnote 1, p 4.

Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

[9] Section 163 of the Act is also relevant to an application to make a new modern award:

163 Special criteria relating to changing coverage of modern awards

Special rule about reducing coverage

(1) The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.

Special rule about making a modern award

(2) 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.

Special rule about covering organisations

(3) The FWC must not make a modern award, or make a determination varying a modern award, so that an organisation becomes covered by the award, unless the organisation is entitled to represent the industrial interests of one or more employers or employees who are or will be covered by the award.

The miscellaneous modern award

(4) The *miscellaneous modern award* is the modern award that is expressed to cover employees who are not covered by any other modern award.

[10] The relevance of ss.163(1) and (2) to an application to make a modern award was considered by a Full Bench in *4 yearly review of modern awards–Proposed Helicopter Crew Award*²:

‘These provisions apply to the AMWU’s application in the following way. First, we must be satisfied that the current coverage of helicopter aircrew under the Miscellaneous Award does not meet the modern awards objective such that an alteration to this position is necessary to meet the modern awards objective.

Second, if we are satisfied that the current modern award coverage must be changed to meet the modern awards objective, s 163(2) prevents us from making the new award proposed by the AMWU until we have given consideration to whether an existing modern award should be varied to cover helicopter aircrew. This is problematic in terms of the way in which the AMWU advanced its case, in that the AMWU’s primary case was that its proposed new award should be made and only submitted in the alternative that an existing award should be varied to cover helicopter aircrew. The approach taken by the AMWU implies an order of consideration in reverse of that required by s 163(2).

² [\[2019\] FWCFB 4748.](#)

Third, in giving primary consideration as to whether an existing award should be varied to cover helicopter aircrew as required by s 163(2), it is necessary to consider for the purpose of s 163(1) whether any relevant award is appropriate for them. Again, because of the way in which the AMWU advanced its case, limited attention was given to this issue and it was initially addressed only in relation to the Aircraft Cabin Crew Award.³

[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).

[12] We consider each of these questions below.

3. The making of a New Modern Award – Preliminary Matters

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

[13] As submitted by Menulog, a threshold consideration is whether employers and employees in the on demand delivery services industry are currently covered by a modern award.

[14] Menulog's primary position is that no 'operative modern award' covers the on demand delivery services industry and its own 'demand delivery business' (defined in the Application as the 'On Demand Business').⁴ In the alternative Menulog submits that if it is covered, 'the peculiarities of the On Demand Business and the On Demand Industry warrant discrete industrial regulation and coverage.'⁵

[15] As related below, it appears from the Application as a whole that Menulog's primary position is that only the *Miscellaneous Award 2020* (the Miscellaneous Award) currently covers employers and their courier employees in the on demand delivery services industry.

[16] Menulog describes its business as follows:

³ Ibid [57]-[59].

⁴ Menulog Application, 24 June 2021 at [3] and [15].

⁵ Menulog Application, 24 June 2021 at Application [16].

‘... 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.

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.

Menulog’s On Demand Business is best described as operating in the On Demand Delivery Services Industry (On Demand Industry).⁶

[17] The Commission’s research area has also prepared an [Information Note](#) about the on demand industry more broadly. The information note has been published on the Commission’s website.

[18] Menulog submits that there are two modern awards ‘that could, on their face, appear to cover’ its on demand delivery couriers (defined in the Application as the ‘Courier Network’) and Menulog in respect of those employees.⁷ Those two awards are the:

- *Fast Food Industry Award 2010* (the Fast Food Award), and
- *Road Transport and Distribution Award 2020* (the Road Transport Award).

[19] Menulog contends that these awards ‘were not contemplated to cover the Courier Network and cannot accommodate the unique needs of the Courier Network or the On Demand Business’.⁸

[20] Menulog contends that ‘its On Demand Business (in respect of its Courier Network) is not covered by the Fast Food Award’.⁹ Subject to certain exclusions, that award ‘covers employers throughout Australia in the fast food industry and their employees in the classifications listed in clause 17—Minimum weekly wages to the exclusion of any other modern award.’ The ‘fast food industry’ is defined in cl.3 of the award as follows:

‘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

⁶ Menulog Application, 24 June 2021 at [5]–[7].

⁷ Menulog Application, 24 June 2021 at [17].

⁸ Menulog Application, 24 June 2021 at [17].

⁹ Menulog Application, 24 June 2021 at [20].

- 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.’

[21] Menulog submits that its business (along with other businesses in the on demand delivery services industry) can be distinguished from the fast food industry because it:

‘... 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.

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.’¹⁰

[22] Menulog also submits that couriers in the on demand delivery services industry cannot be utilised to undertake tasks in addition to delivery of food as is provided for in the classifications in the Fast Food Award.¹¹

[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.

[24] Menulog also contends that ‘its On Demand Business (in respect of its Courier Network) is not covered by’ the Road Transport Award. Subject to certain exclusions, that 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.’. The ‘road transport and distribution industry’ is defined in cl.4.2 of the award as follows:

‘4.2 The **road transport and distribution industry** means:

(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;

¹⁰ Menulog Application, 24 June 2021 at [23]–[24].

¹¹ Menulog Application, 24 June 2021 at [27]–[29].

(d) the wholesale transport and delivery by road of meat from abattoirs, slaughterhouses, and wholesale meat depots;

(e) mobile food vending;

(f) the cartage and/or distribution, in tankers, of petrol or bulk petroleum products (in the raw or manufactured state) from refineries, terminals or depots of oil companies and/or distributors; the cartage and/or distribution on road vehicles of packaged petroleum products (in the raw or manufactured state) from refineries, terminals or depots of oil companies and/or distributors and the transport and/or distribution of petrol and petroleum products (in the raw or manufactured state) for distributors of oil companies or for contractors or sub-contractors to such distributors;

(g) the road transport of crude oil or gas condensate;

(h) the transport on public roads of milk and cream in bulk, and the transport, vending and distribution of milk, cream, butter, cheese and their derivatives (including fruit juices, yoghurt and custard);

(i) the cartage by road of quarried materials; and/or

(j) the distribution and/or relocation by road of new or used vehicles as described in the classifications within this award where the vehicle itself is required to be driven from one location to another for the purposes of delivery and/or relocation of the vehicle.’

[25] 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’.

[26] Menulog submits that:

‘While, of the face of the definition [of road transport and distribution industry], 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 coverage.

At the time of award modernisation, the food e-commerce industry was in its infancy and the sub [sic] 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.’¹² [footnote omitted]

[27] As examples of ‘unique and distinct industries’ carved out of coverage by the Road Transport Award, Menulog refers to the *Mining Industry Award 2020*, *Road Transport (Long Distance Operations) Award 2020*, *Transport (Cash in Transit) Award 2020* and *Waste Management Award 2020*. Menulog submits that had the on demand delivery services industry existed in a substantial form when modern awards were made in 2009, it would have been viewed as warranting similar consideration.¹³

¹² Menulog Application, 24 June 2021 at [37]–[38].

¹³ Menulog Application, 24 June 2021 at [41].

[28] It seems to us that Menulog’s submissions in respect of the Road Transport Award do not go to whether or not the award *does* cover employers and their courier employees in the on demand delivery services industry, but rather to whether the award *should* cover them. Accordingly, we consider Menulog’s further submissions to this effect under question 2 below.

[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.

[30] Menulog submits that ‘in the absence of an appropriate industry or occupational award, the [Miscellaneous Award] currently operates to provide a safety net of minimum employment conditions for individuals who are employed as on demand delivery drivers’.¹⁴ While not beyond doubt, it appears this should be understood as a submission that the Miscellaneous Award presently covers employers and their courier employees in the on demand delivery services industry.

[31] Following the decision in *United Voice v Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort*,¹⁵ the coverage of the Miscellaneous Award was considered by a Full Bench as part of the *4 yearly review of modern awards* (the Review). The relevant sections of the coverage clause at that time were:

4. Coverage

4.1 Subject to clauses 4.2, 4.3, 4.4, 4.5 and 4.6 this award covers employers throughout Australia and their employees in the classifications listed in clause 14—Minimum wages who are not covered by any other modern award.

4.2 The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.

4.3 The award does not cover employees:

(a) in an industry covered by a modern award who are not within a classification in that modern award; or

(b) in a class exempted by a modern award from its operation, or employers in relation to those employees.

4.4 The award does not cover employees excluded from award coverage by the Act.

[32] The Full Bench in the Review addressed the interaction between the coverage clause and s.143(7) of the Act as follows:

¹⁴ Menulog Application, 24 June 2021 at [19].

¹⁵ [\[2018\] FWCFB 128](#).

‘... the construction of the words “... those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards ...” in clause 4.2 of the Miscellaneous Award adopted in paragraphs [37]-[38] of the Gold Coast Kennels decision is equally applicable to s 143(7)(a) (noting that clause 4.2 was evidently intended by the AIRC award modernisation Full Bench to reflect the terms of s 143(7)(a)). That is, on the plain meaning of s 143(7)(a), the class of employees the subject of the prohibition consists of those employees who:

(1) have not traditionally been covered by awards (State or federal); and

(2) have not traditionally so been covered because of the nature or seniority of their role.

The class of employees in s 143(7)(a) therefore does not include employees who have not traditionally been covered by awards for a reason other than the nature or seniority of their role. The obvious and perhaps primary example of this would be employees performing new or emerging types of work who have not yet been the subject of any application or considered for award coverage. Another possible example is obscure groups of employees who have historically simply “fallen through the gaps” of award coverage.

Fourth, the prohibited class in s 143(7)(b) consists of employees who perform work that is not a similar nature to work that has traditionally been regulated by awards – regardless of why this is the case, unlike s 143(7)(a). However, to fall within this class, the work must not be “similar in nature” - that is, not of a character, kind or sort that has a likeness or resemblance - to traditionally award-regulated work. Thus, merely because employees perform work that is not the same as traditionally award-regulated work is not sufficient by itself to place them within the prohibited class in s 143(7)(b). It is also to be noted that s 143(7)(b) operates by reference to “work” that has traditionally been “regulated” by awards, unlike s 143(7)(a) which is concerned with employees traditionally not “covered” by awards. Thus employees who perform work which resembles in character or kind any work which has traditionally been the subject of award regulation will not fall within the excluded class.¹⁶

[33] The Full Bench went on to describe the class of employees covered by the Miscellaneous Award as follows:

‘Dealing with s 143(7)(b) first, we consider that the work performed by employees covered by the award as described in the classification structure is work of a kind resembling that traditionally covered by awards – that is, lower-skilled, semi-skilled or trades-qualified work of a non-managerial, non-professional nature. No party before us was able to identify any credible example of employees falling within scope of clause 4.1 who are excluded from award coverage by virtue of s 143(7)(b).’¹⁷

[34] The Full Bench varied the coverage clause of the Miscellaneous Award to reflect these conclusions. The current coverage clause of the Miscellaneous Award is set out below:

4.1 Subject to clauses 4.2, 4.3, 4.4 and 4.5 this award covers employers throughout Australia and their employees in the classifications listed in clause 15—Minimum rates who are not covered by any other modern award.

¹⁶ [2020] FWCFB 754 at [34]-[36].

¹⁷ Ibid at [39].

4.2 The award does not cover managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.

4.3 The award does not cover employees excluded from award coverage by the Act.

[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.

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

[36] At this point we have not expressed a view as to whether or not the Road Transport Award covers employers and their courier employees in the on demand delivery services industry.

[37] In relation to the Road Transport Award, Menulog submits that ‘the peculiarities of the On Demand Industry warrant discrete industrial regulation.’¹⁸ In summary, Menulog further submits:

- the on demand delivery services industry is substantially different from the broader transport industry, and ‘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’
- the on demand delivery services industry operates substantially differently to traditional freight and logistics businesses that handle and distribute goods in a structured and planned manner, in contrast the on demand delivery services industry ‘is inefficient and operates at the behest of immediate customer demand’ (precluding ‘delivery of goods in a manner that achieves economies of scale’ and ‘efficient and methodical performance of work during business hours rather than unsociable hours’)
- 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’
- the on demand delivery services industry is different operationally and provides a ‘fundamentally different service offering’ to the broader transport industry
- classifications, rates of pay, allowances, hours of work, penalty rates, breaks and other staffing considerations for a proposed new award for the on demand delivery services industry ‘would need to account for the unique immediacy and challenges of both On Demand and technology including the fallibility of, an constant changes to, technology’

¹⁸ Menulog Application, 24 June 2021 at [49].

- as an example, peak periods in the on demand delivery services industry differ significantly from other industries, affecting ‘the appropriate span of hours and penalty rate structure’, and
- the different periods of time during which businesses in the on demand delivery services industry operate warrants a new modern award with ‘fit for purpose spread of hours of work.’¹⁹

[38] It seems to us that differentiating the on demand delivery services industry from the transport industry more broadly, of itself, is of limited assistance in making the case that a new modern award should be made for the industry. The more relevant consideration is whether the characteristics of the industry necessitate different award minimum terms and conditions of employment to those provided by existing modern awards that do or could cover employers and their courier employees in the industry. In that respect, the material presently before us does not go far beyond an assertion that as a result of working times in the on demand delivery services industry, the spread of hours in any such existing awards would not be fit for purpose.

[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.

[40] In relation to the Miscellaneous Award, Menulog submits that reliance on that award will not meet the modern award objective, in particular taking into account:

- the need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)), and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system (s.134(1)(g)).

[41] Menulog log submits ‘it is uncontentionous that these objectives would best be met by the application of an award contemplating the specific industry and employees as opposed to reliance on a safety net award’. In its context, we understand Menulog’s reference to ‘a safety net award’ to mean the Miscellaneous Award. In support of that submission the Application refers to the following observations of the Australian Industrial Relations Commission about the then award:

‘... 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 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.’

[42] In the *Proposed Helicopter Crew Award* decision, the Full Bench described the Miscellaneous Award as follows:

¹⁹ Menulog Application, 24 June 2021 [50]–[59].

‘The above passages make it clear that 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. The terms of the *Miscellaneous Award* reflect this underlying intention. We have already referred to the simplified and generic classification structure, which is not constructed with any particular group of employees in mind but is rather designed as a catch-all for any employees not covered by any other modern awards. The Full Bench decision above describes the natures of the hours of work provisions. Other provisions are of a similar nature: clause 15, *Allowances*, for example provides only for some basic expense-related allowances and does not deal with any specific skill increments or disabilities which might be required for a specific industry or occupation, and clause 22, *Overtime and penalty rates*, provides for a fairly rudimentary scheme of overtime rates and nighttime and weekend penalty rates that is not adapted for any particular pattern of work.’²⁰

[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.

[44] Menulog addresses the modern awards objective in concluding the Application. In outline Menulog submits:²¹

- the proposed new award would promote social inclusion through increased workforce participation (s.134(1)(c))—as enabling engagement of couriers as employees rather than independent contractors
- the proposed new award would promote flexible modern work practices and efficient and productive performance of work (s.134(1)(d))—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’
- the proposed new award would have a positive impact on business, including on productivity, employment costs and regulatory burden (s.134(f))—by tailoring the new award to recognise the unique features of the On Demand Industry, including ‘the need for a custom approach to hours of work, rates of pay, allowances and penalty rates’
- it would ‘not be operationally or financially feasible’ for the on demand delivery services industry to operate under the *Miscellaneous Award*, *Fast Food Award* or *Road Transport Award*
- the proposed new award would have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h), and

²⁰ [2019] FWCFB 4748 at [62].

²¹ Menulog Application, 24 June 2021 [66].

- in 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 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.

[45] These claims as to the benefits of the proposed new award appear credible, on their face, but Menulog will need to provide us with further submissions and evidence in support of the asserted benefits of the proposed new award. We also note that it is difficult to see how a number of these assertions could be established absent details of at least those key terms of the new award proposed by Menulog that would distinguish the new award from existing modern awards.

3.3 Should an existing award be varied to cover the relevant employers and employees?

[46] If we are satisfied that the current modern award coverage of employers and their courier employees in the on demand delivery services industry does not meet the modern awards objective, then s.163(2) requires us to consider whether an existing modern award should be varied to cover those employers and employees. In the *Proposed Helicopter Crew Award decision* the Full Bench noted:

‘The relevant effect of s 163(2) is to require us to finalise our consideration of whether helicopter aircrew might appropriately be covered by the Air Pilots Award - that is, reach a final view about that matter – before we give any consideration to the making of the new award proposed by the AMWU. As already stated, the possibility of helicopter aircrew being covered by that award arose from comments from the bench during the hearing of the application, and it may be that not all interested parties, including those with an interest in the Air Pilots Award such as the AFAP, have yet been given a proper opportunity to be heard in relation to this issue. Accordingly we consider that the appropriate way forward is, in the first instance, for the presiding member of the bench to conduct a conference of the parties to identify what existing provisions of the Air Pilots Award might appropriately apply to helicopter aircrew and what modifications might be necessary in order for that award to cover helicopter aircrew in a way consistent with the modern awards objective. If no consensus can be reached, a further hearing will be listed to receive any further submissions which interested parties may wish to make concerning the possibility of coverage under the Air Pilots Award.’²²

[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.

²² [\[2019\] FWCFB 4748](#) at [71].

4. Next steps

[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**.

[49] A Mention hearing will be held on **Monday 23 August at 1pm**.

[50] We note media reports about a trial by Menulog of employing couriers under the Miscellaneous Award.²³ Menulog is also invited to provide information about this trial in its submission.

[51] The Application notes that Menulog has engaged in preliminary discussions with the Transport Workers' Union. This application is also likely to be of interest to other businesses operating in the on demand industry. Menulog is asked to provide details of other organisations that may have an interest in this application.

[52] The Commission is available to assist in facilitating conferences of interested parties. A request for a conference should be emailed to Chambers.Ross.j@fwc.gov.au.

[53] The Commission has established a dedicated [Major Cases webpage](#) for this matter.

[54] The Commission's award subscription service will be used to notify interested parties of updates during this matter such as deadlines for the filing of submissions and evidence, notices of listing and when any decisions or statements are issued. A dedicated subscription service called 'Menulog application to make a new modern award' has been established. Interested parties are encouraged to subscribe to receive notifications on the subscription services page on our website. Any questions about the subscription service can be sent to amod@fwc.gov.au.

PRESIDENT

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²³ Nick Bonyhady, '[First gig economy delivery workers employed in Australia](#)', *The Age*, 30 June 2021 (accessed on 30 June 2021).