

**SUBMISSIONS OF THE APPLICANT IN RESPONSE TO
THE 12 JULY 2021 STATEMENT OF THE COMMISSION**

Glossary of Defined Terms

1. In these submissions:
 - (a) **ACCI / ABI** means the Australian Chamber of Commerce and Industry and Australian Business Industrial in the context of the joint interested party submissions made by them in these proceedings on 9 August 2021;
 - (b) **Application** means this application for a new modern award (AM2021/72);
 - (c) **Commission** means either the Fair Work Commission or the Australian Industrial Relations Commission as it was known at the relevant time in the context in which the term is used;
 - (d) **FFI Award** means the *Fast Food Industry Award 2021*;
 - (e) **FW Act** means the *Fair Work Act 2009*;
 - (f) **Interested Parties** means, generally, the parties who filed submissions with the Commission in these proceedings on 9 and 10 August 2021;
 - (g) **Interested Party Submissions** means, generally, the submissions filed by the Interested Parties;
 - (h) **Menulog** means Menulog Pty Ltd;
 - (i) **Miscellaneous Award** means the *Miscellaneous Award 2020*;
 - (j) **NatRoad** means the National Road Transport Association in the context of the interested party submissions field by them in these proceedings on 9 August 2021;
 - (k) **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:
 - (i) the collection and delivery is not of the employer's own food, beverages, goods or other items offered by it for sale; and

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- (ii) 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

(being a definition conceived and proposed by Menulog in the Application);

- (l) **Preliminary Submissions** means the preliminary submissions filed by Menulog in these proceedings on 9 August 2021;
- (m) **RTD Award** means the *Road Transport and Distribution Award 2020*;
- (n) **Statement** means the Statement made by the Full Bench of the Commission in these proceedings on 12 July 2021;
- (o) **TWU** means the Transport Workers Union of Australia.

The Statement of the Commission

2. On 9 August 2021, the Interested Parties filed submissions outlining their submissions around the Commission's provisional views as outlined in its Statement.
3. On this day, Menulog filed Preliminary Submissions and takes this opportunity to provide further submissions about the Commission's provisional views as outlined in the Statement, taking into account the Interested Party Submissions.
4. Noting the Commission's question at [51], Menulog is not aware of any other organisations who may have an interest in this Application beyond the Interested Parties.
5. As to the provisional views set out in the Statement, in summary, Menulog submits that the Commission should take the final view that:
 - (a) The FFI Award does not cover employers and their courier employees in the on demand delivery services industry;
 - (b) The RTD Award does not cover employers and their courier employees in the on demand delivery services industry;
 - (c) Neither the FFI Award nor the RTD Award, nor any other existing modern award should be varied to cover employers and their courier employees in the on demand delivery services industry,

and accordingly, subject of course to appropriate scrutiny of the terms of the proposed modern award, the Commission should determine to take steps towards the making of a new modern award covering employers and their courier employees in the on demand delivery services industry.

6. In the alternative, if upon considering the Interested Party Submissions, the Commission adopts a view that either the FFI Award or the RTD Award does cover employers and courier employees in the on demand delivery services industry, Menulog submits that the Commission ought to adopt the view that that current award coverage of employers and employees in the on demand delivery services industry does not meet the modern awards objective, and that a new modern award is necessary.

7. In considering the Interested Party Submissions, Menulog contends that the Commission should come to the conclusion that:
 - (a) The on demand delivery services industry is an emerging industry with its own unique characteristics, as identified by the Commission in the information note and accompanied in its Statement;
 - (b) The Interested Parties have oversimplified the industry. This is apparent insofar as the Interested Parties have sought to shoehorn the on demand delivery services industry to fit within well-established industries when, in reality, such an approach could not satisfy the modern awards objective.¹
 - (c) The Interested Parties do not hold a unified view as to which (if any) modern award covers (or should cover) the on demand delivery services industry². This only further demonstrates that a bespoke award for the on demand delivery services industry is warranted.
8. Critically, Menulog submits that the Interested Party Submissions should be taken to support a view that the modern award coverage of employers in the on demand delivery services industry and their courier employees is “falling between two stools”. Where an emphasis is placed on one characteristic of work in the on demand delivery services industry, the FFI Award may be said to apply, whereas if emphasis is placed upon another characteristic of the on demand delivery services industry, the RTD Award may be said to apply to the on demand delivery services industry.
9. Menulog contends that it is an entirely unsatisfactory outcome that both the FFI Award and the RTD Award could apply. Menulog submits that this predicament of coverage is not resolved by clause 4.7 of each of the RTD Award and the FFI Award which operates where an employer is covered by more than one award. This is because it is not possible to determine in advance whether any given on demand delivery courier will predominantly be work that may be covered by the RTD Award or work that may be covered by the FFI Award.
10. In these circumstances, Menulog submits that the Commission should find overall that **neither** of the FFI Award nor the RTD Award applies.
11. Flowing from this position, Menulog submits that the Commission should adopt its preliminary view that the Miscellaneous Award applies in the interim period as its final view.

The Commission’s Provisional View about the Application of the Fast Food Industry Award 2020

12. At [23] of the Statement, the Commission expressed a provisional view that Menulog is correct and that the FFI Award does not currently cover employers and their courier employees in the on demand delivery services industry.

¹ Fair Work Act 2009 (Cth) s 134.

² See for example AiGroup’s Submissions at [6] and [7] that the Miscellaneous Award applies and the contentions held by other Interested Parties, summarised in these submissions, that the RTD Award or FFI Award applies.

13. In support of Menulog's contentions as set out in its Application and these submissions, Menulog will put evidence before the Commission that:
- (a) Employers in the on demand delivery services industry do not operate fast food businesses;
 - (b) Employers in the on demand delivery services industry do not prepare or otherwise offer for sale fast food prepared for or on behalf of its own business;
 - (c) Employers in the on demand delivery services industry operate online platforms providing for the sale and purchase of foods, beverages and other goods under orders taken from and prepared by third party businesses;
 - (d) These third party businesses include restaurants, supermarkets, convenience stores, as well as fast food businesses, and as the on demand delivery services industry evolves in a manner consistent with the global experience, will increasingly include technology, appliances, clothing and other consumer goods.
14. With respect, Menulog submits that the Interested Party Submissions take too narrow a view of the work of employees in the on demand delivery services industry and the character of the business of their employer.
15. While the Fast Food Employee Level 1 classification within the FFI Award contemplates fast food delivery duties, this approach places "the cart before the horse". The FFI Award is an industry award, and irrespective of whether employees in the on demand delivery services award may perform some of the duties contemplated in the classifications schedule of the FFI Award, the FFI Award cannot cover them if their employer is not in the fast food industry as defined at clause 3 of the FFI Award.
16. The TWU rightly contends that the FFI Award does not apply to the on demand delivery services industry given the FFI Award '*captures employees who are employed by an employer engaged in producing or selling food, rather than merely delivering food*'.³
17. The TWU goes on to submit that a '*business such as Menulog cannot sensibly be regarded as operating as a fast food business*'.⁴ at paragraphs [25] to [27] of the TWUs submissions, they reference other clauses and definitions within the FFI Award, which indicate, in the TWUs view, that the FFI Award is intended to cover '*employees who will be delivering "employer's products" rather than food prepared or sold by a third party*'.⁵
18. NatRoad similarly express a view that the FFI Award does not cover the on demand delivery sector, on the basis that "*other goods" are ordered and couriered by Menulog workers*".⁶
19. Menulog agrees with the submissions of the TWU and NatRoad in this regard, and reiterates that the types of goods that are offered for sale on Menulog's ordering platform, and that of its direct competitors, are by no means limited to fast food.

³ See paragraph [23] TWU's submissions.

⁴ See paragraph [24] of the TWU's submissions.

⁵ See paragraph [26] of the TWU's submissions.

⁶ See paragraph [17] of the NatRoad submissions.

20. In the premises, the Commission should adopt as its final view that employers and their courier employees in the on demand delivery services industry are not covered by the FFI Award.

The Application of the Road Transport and Distribution Award 2020

21. At paragraph [29] of the Statement, the Commission indicated that it did not propose to express a view as to whether or not the RTD Award covers employers and their courier employees in the on demand delivery services industry.
22. The positions expressed in the Interested Party Submissions in support of a finding of coverage under the RTD Award are underscored by a reliance on the bare wording of clause 4.2(a) of the RTD Award which provides that the road transport and distribution industry means the transport by road of goods, wares, merchandise, material **or anything whatsoever** whether in its raw state or natural state... (emphasis added, entire definition not replicated).
23. Menulog submits that the Commission should find that the RTD Award does not apply to employers and their courier employers in the on demand delivery services industry.
24. While it may *prima facie* appear to reflect a conflicting position to that taken in respect of the potential application of the FFI Award, Menulog submits that the reason why employers and their courier employees do not fall within the definition of the road transport and distribution industry as defined at clause 3 of the RTD Award is because it also delivers fast food, ergo the industry falling between two stools, as the evidence will demonstrate.
25. Menulog contends that the views expressed in the Interested Party Submissions have oversimplified the on demand delivery services industry and, respectfully, fail to give adequate consideration to the nature of the items being delivered.
26. The Macquarie Dictionary defines “goods” as:
- plural noun 1. possessions, especially movable effects or personal belongings.*
- 2. articles of trade; wares; merchandise, especially that which is transported by land.*
27. Further, the Macquarie Dictionary defines “wares” as:
- noun 1. (usually plural) articles of merchandise or manufacture, or goods: a pedlar selling his wares.*
- 2. pottery, or a particular kind of pottery: Delft ware.*
28. Menulog submits that goods, wares, merchandise and materials are all examples of raw goods and manufactured items, which may capture food ingredients, but which do not extend to fast food. In this sense, fast food is offered for sale as a convenient alternative to the consumption of freshly prepared food at a restaurant, whether picked up by or delivered to its consumer.
29. Neither food sold and consumed at a restaurant nor fast food are items that may properly be regarded as goods or wares that are purchased on a retail or wholesale basis. Menulog contends that the extension of the definition of the road transport and distribution industry to “anything whatsoever” is intended to capture items of a similar nature.

30. In support of its position in this regard, Menulog submits that if it was contemplated by the Commission at the time of making the modern awards that fast food was an example of “goods, wares, merchandise, material or anything whatsoever whether in its raw state or natural state” the delivery of which could be covered under the RTD Award, the FFI Award would have been expressly carved at clause 4.3 of the RTD Award. To the contrary, the FFI Award stands on its own feet for employees in the fast food industry engaged in fast food delivery.
31. While the Interested Parties may point to the inclusion of mobile food vending at clause 4.2(e) of the definition of the road transport:
 - (a) The inclusion of mobile food vendors is directed at covering those employees who operate and drive food trucks, consistent with the broader coverage of truckdrivers under the RTD Award generally; and
 - (b) The specific inclusion of mobile food vending does not displace the general exclusion of fast foods under the RTD Award.
32. In the premises, the Commission should adopt as its final view that employers and their courier employees in the on demand delivery services industry are not covered by the RTD Award.
33. Further, in the absence of coverage under the FFI Award or the RTD Award, Menulog submits that the Commission should adopt as its provisional view expressed at [35] of the Statement that the Miscellaneous Award is the safety net modern award currently covering employers and their courier employees in the on demand delivery services industry, as its final view.

Could the RTD Award or FFI Award be varied to apply to on demand delivery couriers?

34. As outlined above, Menulog contends that the Commission ought to find that *neither* the FFI Award nor the RTD Award may properly be said to apply.
35. The special criteria prescribed at section 163(2) of the FW Act requires the Commission to consider whether it should vary either the RTD Award or the FFI Award to appropriately cover employers and courier employees in the on demand delivery services industry. Menulog submits that the Commission should decide *not* to make such a variation, and that the making of a new modern award is the most appropriate course to achieve the modern awards objective.
36. As set out at paragraph [38] of the Application, the on demand delivery services industry was in its infancy at the time of award modernisation and remains a dynamic and growing industry. The RTD Award and FFI Award cover comparatively well-established industries.
37. To merely ‘tack on’ the on demand delivery services industry to the RTD Award or FFI Award as an afterthought would be to completely ignore the complexities of the on demand delivery services industry. This would only serve to complicate those instruments and lead to unnecessary overlap.
38. Moreover, ‘annexing’ the on demand delivery services industry onto the RTD Award would be an entirely unsatisfactory situation in circumstances where the on demand delivery services industry is evolving at rapid pace. For example, the impact of COVID-19 has widened the scope of the on demand delivery services industry with an increased focus on grocery delivery resulting in a number of new industry players

entering the market. Simply annexing the on demand delivery services industry onto an existing award may well create a situation where the on demand delivery services industry is stifled by conditions that make sense (and have been negotiated *ad nauseum*) in very old, well established industries.

39. Any proposal to vary either the FFI Award or the RTD Award to more appropriately cover the on demand delivery services industry would result in extensive amendments which would in effect create a modern award within a modern award, which is contrary to the Modern Awards Objective to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.
40. In support of Menulog's contentions as set out in its Application and these submissions, Menulog will put evidence before the Commission that on demand delivery services operate at their peak outside of ordinary business hours, and taking into account the high degree of flexibility demanded by on demand delivery couriers in the performance of their work, there will reasonably need to be different minimum standards in respect of:
 - (a) Span of ordinary hours of work;
 - (b) Broken shifts;
 - (c) Minimum engagement;
 - (d) Penalty rates on weekends and public holidays;
 - (e) Allowances;
 - (f) Flexible additional hours of work,
 among many other terms.
41. Menulog's contentions as to the flexibility demanded by on demand delivery couriers in the performance of their work arises from its broad experience in engaging independent couriers, which is entirely consistent with the evidence provided by its direct competitors in public hearings conducted by the Senate Select Committee on Job Security, the Select Committee on the Impact of Technological and other Change on the Future of Work and Workers in New South Wales, and the Inquiry into the Victorian On-Demand Workforce.
42. Through its current employment trial, Menulog is seeking to understand whether these demands for flexibility from on demand delivery couriers translates to employed couriers, such findings contributing to the evidence that will be placed before the Commission in support of the Application.
43. Menulog submits that this evidence will support a finding that a new modern award covering employers and their courier employees in the on demand delivery services industry is required to meet the modern awards objective, taking into account:
 - (a) the need to promote flexible modern work practices and the efficient and productive performance of work, having regard to:
 - (i) a need to provide for flexible hours of work to reflect consumer expectations in the provision of on demand delivery services;

- (ii) a need to provide for flexible hours of work to reflect worker expectations in their engagement with on demand and broader gig economy;
 - (iii) a need to develop minimum conditions from the foundation of the on demand delivery services industry being a new industry within the Australian economy, and not merely an evolution of the existing, historical fast food industry or road transport and distribution industry;
- (b) the need to provide additional remuneration for employees working overtime, employees working unsocial, irregular or unpredictable hours, employees working on weekends or public holidays, or employees working shifts, having appropriate regard to:
- (i) a need for employers in the on demand delivery services industry to operate viable businesses which are competitive with the preponderance of businesses in the on demand delivery services industry that utilise independent couriers to provide delivery services;
 - (ii) the different peak operating periods, as inherently demanded by their customers, of employers in the on demand delivery services industry;
- (c) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden of adapting to an employment model, underscored by the considerations outlined above;
- (d) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards, having regard to the detailed submissions outlined above in respect of the failure of the FFI Award or the RTD Award to cover employers and their courier employees in the on demand delivery services industry; and
- (e) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy, having regard to the rapid growth of the on demand delivery services industry.
44. With all of these considerations in mind, Menulog submits that the Commission should find that:
- (a) Neither the RTD Award nor the FFI Award currently cover employees in the on demand delivery services industry; and
 - (b) Having regard to the special criteria prescribed at s163(2) of the FW Act, the Commission should determine that it should **not** make a determination to vary the RTD Award and / or the FFI Award to cover employers in the on demand delivery services industry and their employee couriers; and
 - (c) Exercising the power to make a new modern award for the on demand delivery industry is the only or, in the alternative, most appropriate means of meeting the Modern Awards Objective.

Proposal that Menulog engage in enterprise bargaining rather than pursue the making of a new modern award

45. The ACCI / ABI have submitted at paragraph [16] of its submissions that '*...consideration should be given as to whether the more appropriate course of action for Menulog is to seek to make an enterprise agreement...*'.
46. With respect, Menulog submits that this position is misconceived and represents a failure to appreciate the purpose of the Application and the wider context of the on demand delivery services industry. Specifically, the Commission must be satisfied that any enterprise agreement passes the better off overall test (**BOOT**). To that end, s 193 of the FW Act provides:

*an enterprise agreement **passes the better off overall test** under this section if the Commission is satisfied that, as at the test time, that each **award covered employee**, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee **than if the relevant modern award applied to the employee.***

(Emphasis added)

47. In circumstances where Menulog contends that no modern award currently exists that caters adequately to specific needs of the on demand delivery services industry *and* the interested parties hold vastly differing views with respect to award coverage:
- (a) it would be unnecessarily complex for the Commission to conduct a BOOT; and/or
 - (b) Any proposed enterprise agreement would very likely fail the BOOT.

Menulog's Trial of Employed Couriers

48. In the Statement, the Commission invited Menulog to provide information about its trial of employed couriers that has recently been reported in the media.
49. On 12 April 2021, Menulog announced to the Senate Select Committee on Job Security it would investigate avenues for the employment of on-demand delivery couriers in Australia. This project involves a multidisciplinary international team across Australia, New Zealand, Canada, UK and Netherlands.
50. Menulog announced a three-pronged approach toward employment in Australia, comprising of:
- (a) The commencement of a trial of employed e bike couriers in the Sydney CBD;
 - (b) This application for a new modern award; and
 - (c) The improvement of conditions for independent couriers nationally, including enhanced accident compensation insurance and exploring options for other enhanced benefits.
51. Menulog has recruited, trained and on-boarded the first group of employed couriers, who are now actively working in the Sydney CBD. Menulog has kept this initial group small to ensure a smooth initial launch and will continue to recruit as it gains learning

and insight from its first employed couriers. At the time of filing these submissions, it has employed 15 couriers.

52. Menulog intends to employ at least 100 couriers as part of the first phase of trial, bearing in mind the impact that COVID-19 is having on the industry, both from a courier supply and demand perspective.
53. Employed couriers are employed on a part time basis, generally working four-hour shifts. They are paid hourly rates of pay that are underpinned by the Miscellaneous Award.
54. Rostering and other hours of work are similarly managed in accordance with the Miscellaneous Award. The employed couriers are accruing leave in accordance with the National Employment Standards, are covered by Menulog's workers' compensation insurance and have superannuation contributions made on their behalf.

Conclusion

55. In conclusion, having regard to the questions posed at [11] of the Statement arising from the observations of the Full Bench in the *Proposed Helicopter Crew Award* decision, Menulog submits that the Commission should answer in the following way:
 - (a) Are employers and employees in the on demand delivery industry currently covered by a modern award? – *No, save to the extent that the Miscellaneous Award covers employers and couriers in the on demand delivery services industry*
 - (b) If there is current award coverage, does the current award coverage of employers in the on demand delivery services industry meet the modern awards objective? – *Ongoing coverage under the Miscellaneous Award does not meet the modern awards objective*
 - (c) If the current award coverage does not meet the modern awards objective, instead of making a new award, should the Commission 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)? – *No*
56. As previously foreshadowed, having continued discussions with the TWU, Menulog will file with the Commission the terms of its proposed new modern award covering employers in the on demand delivery services industry, including itself. Menulog acknowledges the TWU's position that the appropriate instrument to cover employers and employees is the RTD Award. The Commission ought not take the different positions of Menulog and the TWU in this regard as indicative of any absence of constructive and positive discussions between Menulog and the TWU.

Kingston Reid
19 August 2021