

IN THE FAIR WORK COMMISSION

REPLY SUBMISSIONS

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

**FILED ON BEHALF OF:
AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY
AUSTRALIAN BUSINESS INDUSTRIAL**

29 NOVEMBER 2021

1. INTRODUCTION

1.1 This submission is made on behalf of:

- (a) the Australian Chamber of Commerce and Industry (**ACCI**); and
- (b) Australian Business Industrial (**ABI**).

1.2 On 24 August 2021, the Fair Work Commission (the **Commission**) issued a Statement and Directions in *Menulog Pty Ltd* [2021] FWCFB 5227 (AM2021/72) (the **Statement**).

1.3 At [12], the Commission gave the following directions:

“[12] The following directions are made in relation to the threshold issue:

- *Interested parties are to file a note setting out any particular clarification they seek from Menulog regarding the coverage of the proposed award, by 4pm on Monday, 30 August 2021.*
- *Menulog is to file any evidence and submissions in respect of the threshold issue by 4pm on Monday, 18 October 2021.*
- *Interested parties are to file any evidence and submissions in reply by 4pm on Monday, 29 November 2021.”*

1.4 On 18 October 2021, Menulog Pty Ltd (**Menulog**) filed written submissions regarding current award coverage (**Menulog Submissions**) and filed a witness statement of Mr Morten Birk Belling, Managing Director - Australia & New Zealand, Menulog.

1.5 These submissions are in reply to the Menulog Submissions.

2. BACKGROUND

2.1 By its Application, Menulog seeks the creation of a new industry award covering employers and employees in what is described as the “*on demand delivery services industry*” (**ODDSI**) (the **proposed award**). We do not concede the ODDSI constitutes a new industry.

2.2 Menulog advances two propositions in support of that Application:

- (a) No “*operative modern award*” covers the ODDSI and the “*on demand delivery business*” of Menulog (the **primary position**).
- (b) In the alternative, if it is covered, “*the peculiarities of the On Demand Business and the On Demand Industry warrant discrete industrial regulation and coverage*” (the **alternative position**).

- 2.3 Following the receipt of the Exposure Draft¹, and Menulog’s reply to clarifications by interested parties, it is plain that the proposed award does not seek to cover *all* employees of Menulog. The Application is limited to a consideration of “*courier employees*” within the purported ODDSI.²
- 2.4 Hence, the threshold issue to be considered by the Commission is “*whether the employers and their courier employees in the on-demand delivery services industry are currently covered by a modern award*” (**threshold issue**) and more particularly whether the courier employees of Menulog are currently covered by a modern award.
- 2.5 In particular, the Commission directed attention to “*the question of whether or not the Fast Food Award and/or the Road Transport Award cover employers and their courier employees in the on-demand delivery services industry*”.

3. SUMMARY OF POSITION

- 3.1 At the outset of these submissions, we will address three preliminary matters:
- (a) the work being performed by the couriers of Menulog;
 - (b) the definition of “*courier work*”; and
 - (c) the principles of award interpretation.
- 3.2 Each of which represent a logical starting point when considering coverage issues with respect to Menulog’s “*courier employees*”.
- 3.3 In response to the threshold issue, we advance the following contentions:
- (a) The *Road Transport and Distribution Award 2020* (**Road Transport Award**) applies and covers Menulog and their courier employees.
 - (b) The *Fast Food Industry Award 2020* (**Fast Food Award**) applies and covers Menulog and their courier employees.
 - (c) The competing coverage between the Road Transport Award and Fast Food Award needs to be reconciled. Such reconciliation favours the Road Transport Award.
 - (d) There is nothing peculiar, unique or novel about the work of the courier employees of Menulog.

¹ An Exposure Draft of the proposed award was provided on 23 August 2021 (**Exposure Draft**).

² Menulog Submissions dated 18 October 2021, Annexure A, Question 17 (**Menulog Submissions**); Exposure Draft, clauses 4.1 and 12.

- (e) The Commission should not be distracted by Menulog’s attempt to focus upon the Menulog digital platform, especially given the fact Menulog do not seek to cover their entire business operations and workforce - only their courier employees.
- (f) The proposed award is inconsistent with the modern awards objective.

3.4 By these submissions, we submit the Commission should make the following findings:

- (a) There is no basis to recognise the ODDSI as a new industry, as the employers and courier employees involved in “*on demand delivery*” work fall squarely within the road transport and distribution industry.
- (b) Menulog and its courier employees are covered by the Road Transport Award.
- (c) The Application for a new industry award should be dismissed.

4. THE WORK PERFORMED BY THE MENULOG COURIERS

4.1 Whether an *employee* is covered by an award is assessed by comparing their “*particular employment*” to the classification definitions in the relevant award.³ As such, the logical first step is to set out the nature of the work performed by the Menulog couriers. By an analysis of the business documents of Menulog, we will demonstrate the principal function of a Menulog courier is to collect and deliver goods.

4.2 *First*, the Menulog Courier Agreement⁴ states in no uncertain terms that the “*services*” provided by the courier is “***the collection of food and goods from restaurants or other businesses and the delivery of such food and goods to Customers***” (emphasis added).⁵ A person expresses interest to undertake such services by “*applying and logging in through [Menulog’s] mobile application (the Courier Application) or the web portal (the Menulog Portal)*”⁶. Once the “*delivery opportunity*” is accepted - “***a separate contract for services will arise***” (emphasis added).⁷

4.3 *Second*, the Employment Contract for courier employees of Menulog provides the following description of their “*function and duties*”:

“1.1. You are employed in the position of **Employed Courier**.

1.2. During employment with Menulog, You must perform Your duties and responsibilities in

³ *Fair Work Act 2009* (Cth) (**FW Act**), sections 47(3) and 48(5).

⁴ Witness Statement of Morten Birk Belling dated 18 October 2021, Annexure MMB-4, Menulog Courier Agreement.

⁵ Witness Statement of Morten Birk Belling dated 18 October 2021, Annexure MMB-4, Menulog Courier Agreement, clause 21.

⁶ Witness Statement of Morten Birk Belling dated 18 October 2021, Annexure MBB-4, Menulog Courier Agreement, clause 1.4.

⁷ Witness Statement of Morten Birk Belling dated 18 October 2021, Annexure MBB-4, Menulog Courier Agreement, clause 1.5.

accordance with Your job description and:

- a) **Deliver orders to customers in a timely and safe manner** and in accordance with Menulog's policies.
- b) Use Your best endeavours to promote and protect the interests of Menulog and its related corporations.
- c) Faithfully and diligently perform all duties assigned to You by Menulog from time to time in good faith.
- d) Comply with all rules, regulations and guidelines laid down by any relevant authority and/or regulatory body.
- e) Ensure You do not, directly or indirectly, place Yourself in a position where Your personal interests might conflict with Your duties and obligations to Menulog.
- f) Not be directly or indirectly engaged, interested or involved in any other employment, trade, business, office or work or accept any fee, which could affect Your work with Menulog except with the written consent of Menulog.”

(Emphasis added)

- 4.4 Clauses 1.2(a) provides the principal function, “*to deliver orders to customers in a timely and safe manner*”, with the balance of the clause concerning standard duties incorporated into employment contracts.
- 4.5 *Third*, in the agreement entered between Menulog and the Restaurant the courier is identified as a “*Delivery Partner*” that provides a “*Delivery Service*”.⁸ “*Delivery services*” means “*a service provided by a Delivery Partner **to collect and deliver** the Orders from your restaurant to a customer*” (emphasis added).
- 4.6 *Further*, turning to the Application, the ODDSI is defined as “*the **collection and delivery of [goods] ... that are ordered by a consumer ... on an online or application-based platform***” (emphasis added). By that definition, the principal function of the courier employee is “*the collection and delivery*” of goods. The balance of the definition simply sets out the means by which that service is requested, namely, “*an online or application-based platform*” (**the digital platform**).
- 4.7 Thus, the principal function of the Menulog courier is “*the collection of food and goods from restaurants or other businesses and the delivery of such food and goods to Customers*”.

⁸ Witness Statement of Morten Birk Belling dated 18 October 2021, Annexure MMB-2, Menulog Restaurant Agreement, section 2.

5. ORDINARY MEANING OF “COURIER”

5.1 We now turn to the ordinary meaning of “*courier*” and “*courier work*”. This exercise will enable the key elements of “*courier work*” to be identified and compared against the work undertaken by Menulog couriers and ultimately demonstrate there is no practical difference between the service provided by an ordinary “*courier*” and a “*Menulog courier*”, respectively.

5.2 The Macquarie Dictionary defines “*courier*” as:

“1. a messenger sent in haste.

...

3. a person employed to take charge of the arrangements of a journey.

4. a person who works for a courier service.

5. to deliver (a letter, parcel, etc) as a courier does.”

5.3 A “*courier service*” is defined as:

“a private company which provides a letter or parcel delivery service, especially one which guarantees speed or safety.”

5.4 For completeness, the dictionary definition of “*parcel*” includes:

“1. a quantity of something wrapped or packaged together, a package or bundle.

2. a quantity of something as a commodity for sale; a lot.

3. any group or assemblage of persons or things.”

5.5 Further useful industrial guidance on what is “*courier work*” can be taken from the *Courier and Taxi Truck Contract Determination* (2 June 2011) (**Contract Determination**), which is relevant as an industrial instrument created by an industrial tribunal.⁹ The Contract Determination provides the following definitions:

“Courier or Taxi Truck Vehicle” means any mechanically propelled vehicle not exceeding 4.5 tonnes carry capacity used by a contract carrier in the course of performing courier or taxi truck work under a contract of carriage pursuant to this Determination.

*“Courier Work” means the **transportation by means of a courier** or taxi truck vehicle of **goods of up to a maximum of 250 kilograms of weight from one place to another** by a **contract carrier for reward** at the behest of a principal contractor pursuant to a contract of carriage and where it is intended by the parties that the time to be taken is either:*

⁹ *Transport Industry - Courier and Taxi Truck Contract Determination*, 2 June 2011 (**Contract Determination**), section 1.

(a) **within a standard time requested of the contract carrier by the principal contractor and advertised** as such (to be known for the purposes of this determination "standard service"), or

(b) **within a time required of the contract carrier by the principal contractor which is the shortest possible time or within a time which is less than the standard time** as in (a) above and advertised as such (to be known for the purposes of this determination as "Express/Priority/V.I.P. Service) and where it is intended that in any event completion is to be effected on the same day as commencement or by the earliest reasonable time on the following normal working day."¹⁰

(Emphasis added)

5.6 By that definition, the tribunal affirms the ordinary meaning of *courier*. The following elements of courier work are defined:

- (a) transportation of goods from one place to another;
- (b) made at the request of another;
- (c) goods are of a limited weight; and
- (d) time sensitivity.

5.7 Each of those elements are present in the services provided by Menulog couriers. As such, the Commission should have little difficulty finding there is no practical difference between the service provided by an ordinary "*courier*" and a "*Menulog courier*", respectively both:

- (a) transport goods from one place to another;
- (b) transport goods that are of a limited weight; and
- (c) have an implied and/or express time sensitivity.

5.8 There is no specification or limitation placed on the manner or form in which someone must request this service. As such, any arguments as to Menulog's role in facilitating the request via the digital platform as disrupting the conventional nature of courier work should be rejected.

5.9 Further, as demonstrated above, by its nature courier work attaches a reasonable time expectation. The time expectation may be set at the time of the request and it may be "*the shortest possible time*".¹¹ The implications of "*urgency*" and "*immediacy*" are not foreign concepts. An express reference within the ODDSI definition to "*sale for immediate collection*

¹⁰ Contract Determination, section 1.

¹¹ Contract Determination, section 1.

and delivery” does not distinguish the work being performed; rather, it is an unnecessary stipulation of the understood nature of courier work.¹²

5.10 There is no practical difference between the service provided by an ordinary “*courier*” and a “*Menulog courier*”.

6. PRINCIPLES OF AWARD INTERPRETATION

6.1 When considering coverage under modern awards, two related questions immediately arise by operation of the *Fair Work Act 2009* (Cth) (**FW Act**):

(a) Does the modern award apply to the employer/employee?¹³

(b) Does the modern award cover the employer/employee?¹⁴

6.2 Section 47(1) of the FW Act provides that a modern award “*applies*” to an employer or employee if:

(a) *the modern award covers the employee, employer, organisation or outworker entity; and*

(b) *the modern award is in operation; and*

(c) *no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.*

(Emphasis added)

6.3 For present purposes, as mentioned, there are two modern awards in operation which we contend apply to the Menulog courier employees: the Road Transport Award and Fast Food Award.¹⁵ With no other provision of the FW Act having the effect that the award does not apply,¹⁶ the issue to be dealt with is coverage.¹⁷

6.4 The test for whether an award “*covers*” is set out in s 48(1). That provision provides that a modern award covers an employee or employer “*if the award is expressed to cover*” the employee or employer. Whether an award is “*expressed to cover*” is a matter of interpreting the following provisions within an award:

(a) the coverage clause;

(b) the definition of the relevant industry; and

(c) the classification of employees listed as covered by the award.

¹² Contract Determination, section 1.

¹³ FW Act, section 47(1).

¹⁴ FW Act, section 48(1).

¹⁵ FW Act, section 47(1)(b).

¹⁶ FW Act, section 47(1)(c).

¹⁷ FW Act, section 47(1)(a).

- 6.5 The relevant principles that guide the interpretation of award provisions emphasise that attention is to be directed first and foremost to the text, through which the intention of the provision may then be properly deduced. Those principles are as follows:
- (a) The legal meaning of a provision of an award is to be ascertained through a process of construction by which the intention of the provision is deduced.¹⁸ The process of construction **must begin with a textual analysis of the words of the provision**, that is, a consideration of the ordinary and grammatical meaning of the words.¹⁹
 - (b) The words are to be read as a whole and in context.²⁰ Thus, the initial step to construction may involve construing the words of an award provision in context, including giving consideration to the instrument as a whole.²¹
 - (c) Narrow or pedantic approaches to the interpretation of an award are misplaced. Framers of documents such as awards “*may well have been more concerned with expressing their intention in a way likely to be understood in the relevant industry rather than with legal niceties or jargon, so a purposive approach to interpretation is appropriate and **a narrow or pedantic approach is misplaced**” (emphasis added).²² Awards should receive a generous construction.²³*
 - (d) One must “*always be careful to **avoid a too literal adherence to the strict technical meaning of words, and must view the matter broadly, and after giving consideration and weight to every part of the award, endeavour to give it a meaning consistent with the general intention of the parties to be gathered from the whole award**” (emphasis added).²⁴*

¹⁸ *King v Melbourne Vicentre Swimming Club Inc* [2021] FCAFC 123 (**King**) at [40]; see also *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* (2014) 87 NSWLR 41; [2014] NSWIRComm 23 (**Secretary of the Treasury**) at [115] (per Walton J).

¹⁹ *City of Wanneroo v Michael Lindsay Holmes* [1989] FCA 369 (**Wanneroo**) at [43]; See also *Secretary of the Treasury* at [115(2)].

²⁰ *Wanneroo* at [43], citing *Australian Timber Workers Union v W Angliss & Co Pty Ltd* (1924) 19 CAR 172.

²¹ *King* at [40]; see also *Secretary of the Treasury* at [115].

²² *King* at [42], citing *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536; [2018] FCAFC 131 at [197] (per Tracey, Bromberg and Rangiah JJ), applying *Kucks v CSR Ltd* (1996) 66 IR 182 (**Kucks**) at 184 (Madgwick J).

²³ *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 (**McKenzie**) at 503-504; *Wanneroo* at [57]; *Kucks* at 184; *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241; [2005] HCA 10 at [94] and [96] (per Kirby J); *Director of Public Employment (by her Agent the Commissioner of New South Wales Fire Brigades) v New South Wales Fire Brigades Employees' Union* (2008) 180 IR 170; [2008] NSWIRComm 158 (**Fire Brigades Employees' Union**) at [45]-[46].

²⁴ *McKenzie* at 503 (per Street J).

- (e) A tribunal interpreting an award “*must attribute to the words used their true meaning even if satisfied that so construed they would not carry out the intention of the award making authority*”.²⁵
- (f) Historical context or recourse to extrinsic materials “*cannot displace the meaning of the text of a clause of an award or become an end in itself*”.²⁶ Courts have observed: “**the texts of modern awards are widely available to members of the public and should be reasonably capable of being understood and implemented by participants in the relevant industry by reference to the language of the award itself, without having to delve into the pedigree of the instrument**” (emphasis added).²⁷
- (g) “*The consideration of the words of the provision of an award in context includes examining the general purposes and the policy of the provision derived from a statement of policy in the award or from the terms of the award. Thus, the legal meaning may be ascertained by reference to general purpose, consistency and fairness, **although, again, the purpose of a provision derives in its text and structure***” (emphasis added).²⁸
- (h) The determination of the purpose or intention of a provision of an award “*neither permits nor requires a search for what those who drafted or made the award had in mind when the award was made*”.²⁹

6.6 Turning specifically to assessing whether employees are covered by classifications within an award, reference must be made to *the “principal purpose test”*.

- (a) The appropriate test for determining award coverage of an employee is to apply the principal purpose test. The test “*requires an assessment of the principal purpose for which the employee was employed*”: *Layton v North Goonyella Coal Mines Pty Ltd* (2007) 166 IR 394; [2007] AIRCFB 713 (**Layton**) at [25]. The test is also referred interchangeably as “*the primary function test*”. (See example, *Carpenter v Corona Manufacturing Pty Ltd* (2002) 122 IR 387 (**Carpenter**)).

²⁵ *Wanneroo* at [43], citing *Re Health Administration Corporation; Re Public Hospital Nurses (State) Award* (1985) 12 IR 122; *Rogers Meat Co Pty Ltd v Howarth* (1960) AR(NSW) 291; *Re Government Railways and Tramways (Engineers etc) Award* (1928) AR 53 at 58 (per Cantor J).

²⁶ *Secretary of the Treasury* at [127].

²⁷ *King* at [43].

²⁸ *Secretary of Treasury* at [115], citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41 at [47].

²⁹ See *Construction, Forestry, Mining and Energy Union (NSW Branch) v Delta Electricity* (2003) 146 IR 360; [2003] NSWIRComm 135 at [44]; *Fire Brigades Employees' Union* at [47].

- (b) The Commission must make more than a “*mere quantitative assessment*” of the time the person spends performing certain types of duties. An examination must be made of “*the nature of the work and the circumstances in which the employee is employed to do the work*” with a view to ascertaining the principal purpose for which the employee is employed: *Carpenter* at [9].

6.7 It is overwhelmingly clear that the starting approach for the construction of provisions in modern awards is the ordinary and natural meaning of the text. To commence with highly technical principles of statutory construction is entirely misguided, *especially* in the context of industrial instruments. Further, to rely upon the historical context of an award as the primary foundation for interpretation, in light of the principles summarised above, is plainly unfounded.

7. ROAD TRANSPORT AWARD

7.1 The Commission should find that the both Menulog and their courier employees are covered by the Road Transport Award. That finding is open and available on the proper construction of the coverage clause, which provides the award covers:

- (a) “*employers throughout Australia in the **road transport and distribution industry***”³⁰; and
- (b) “*their employees in the classifications listed in ... Schedule B—Classification Structure to the exclusion of any other modern award*”,³¹

and the definition of “*road transport and distribution industry*” at cl 4.2.

7.2 By the submissions that follow, we contend:

- (a) *First*, that a consideration of the ordinary meaning of “*transport by road*”, “*goods*” and “*anything whatsoever*” in cl 4.2(a) demonstrates that Menulog is an employer within the road transport and distribution industry (**the industry argument**).
- (b) *Second*, a consideration of the classifications listed under Schedule B against the principal purpose of the courier employees of Menulog demonstrates that Menulog courier employees fall under the classification listed in the award (**the classification argument**).

7.3 We will address those contentions in turn.

³⁰ *Road Transport Award*, clause 4.1.

³¹ *Road Transport Award*, clause 4.1.

The Industry Argument

7.4 The industry argument is based upon a proper textual analysis of cl 4.2(a). That provision provides:

“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”*

(Emphasis added)

(i) “transport by road”

7.5 The Commission should have little difficulty finding this factor present and satisfied.

7.6 The meaning of the words are uncontroversial. The Macquarie Dictionary definitions provide:

(a) *“transport”* means *“to carry from one place to another”*;

(b) *“by”* means *“through the action of”*; and

(c) *“road”* means *“a way, usually open to the public, for the passage of vehicles, people and animals”*.

7.7 Returning to Menulog’s Contract of Employment, the courier employee transports ordered items via *“bicycle, e-bike, scooter or car”*.³² Each vehicle nominated in the employment contract, in its ordinary usage, would access the road. It follows that such equipment used in the course of the principal function of a courier employee would *transport by road*.

7.8 Further, the types of vehicle identified by Menulog are also each contemplated by the Road Transport Award and fall within the scope of *“courier”* as defined under the award, which provides:³³

*“courier means an employee who is engaged as a courier and **who uses a passenger car or station wagon, light commercial van, motorcycle or bicycle or who delivers on foot, in the course of such employment.**”*

(Emphasis added)

³² Witness Statement of Morten Birk Belling dated 18 October 2021, Annexure MBB-5, Menulog Contract of Employment, clause 8.2.

³³ *Road Transport Award*, clause 2 and Schedule B.

7.9 To the extent Menulog’s business must involve “*transport by road*”, on an ordinary reading of those words - Menulog is an employer in the road and transport industry and covered by the Road Transport Award.

(ii) “goods”

7.10 The ordinary usage of the term “*goods*” is broad enough to encompass “*food*” and “*prepared meals*”. This construction is supported by the dictionary definition and the ordinary usage adopted by Menulog in its business documents, as outlined below:

(a) *First*, the Macquarie Dictionary defines “*goods*” as “*possessions, especially movable ones*” and “*articles of trade, especially those transported by land*”. It is also relevant to note that “*trade*” is defined as “*buying and selling, or exchanging, of goods*”.

(b) *Second*, Menulog’s own definition of the word “*goods*” in its Menulog Restaurant Agreement provides: “**Goods** means the dishes, menu items and products provided by your Restaurant”.

7.11 Given the obvious breadth of meaning, the suggestion by Menulog that “*goods ... may capture food ingredients, but which do not extend to prepared meals*” requires such a pedantic and narrow interpretation of the word it borders on ridiculous.

7.12 The applicable legal principles could not be more clear: the words of the provision should be understood, by reference to their ordinary usage, to have broad application. A narrow and pedantic approach to its interpretation is entirely misplaced.³⁴

7.13 *Further*, even when considered within the context of the provision as whole, it is self-evident that the intention of the definition at cl 4.2 is to establish broad coverage within the road transport and distribution industry. That is supported by the following analysis:

(a) *First*, the primary source of distinction between the subclauses of cl 4.2 is the mode of transport, collection point, distribution point and/or goods related to prominent businesses within the “road transport and distribution industry”.³⁵

(b) *Second*, the fact that a broad interpretation of cl 4.2(a) may result in a business being covered by multiple subclauses is also contemplated by the provision with the use of “*and/or*” to link the final two subclauses listed within the clause.

³⁴ *Kucks* at [68].

³⁵ See *Road Transport Award*, clause 4.2(a)-(j).

(c) *Third*, the concept of “*prepared meals*” is also contemplated by the separate inclusion of “*mobile food vending*”.³⁶ The ordinary meaning includes the sale of food ready and/or “*on-site food preparation*” ready for immediate consumption.³⁷

7.14 To the extent Menulog’s business must involve “*the transport by road of goods*”, on an ordinary reading of those words of the provision - Menulog is an employer in the road and transport industry and covered by the Road Transport Award.

(iii) “anything whatsoever”

7.15 The ordinary usage of the term “*anything*” is broad enough to include reference to “*food*” and “*prepared meals*”. That construction is supported by an ordinary and natural understanding of the words, which is set out below:

(a) *First*, the Macquarie Dictionary defines “*anything*” as “*any thing whatever; no matter what*”. An ordinary understanding of the pronoun plainly indicates a broad scope.

(b) *Second*, the breadth is then emphasised by the usage of the adverb “*whatsoever*”. That adverb is defined in the Macquarie Dictionary as “*a strong form of whatever*”, which means “*no matter what*”.

7.16 The term “*anything*” is also distinguishable from the term “*everything*”. On a plain reading of those words, it is clear that whilst the provision intends broad coverage, it does not purport to establish infinite coverage. However, when read in the context of the provision and with a practical bent borne in mind, the provision is clearly seeking coverage of anything tangible that can be transported via road (with the exception of human passengers).

7.17 Thus, to the extent Menulog’s business must involve “*the transport by road of ... anything whatsoever*”, on an ordinary reading of those words of the provision - Menulog is an employer in the road and transport industry and covered by the Road Transport Award.

Conclusion - The Industry Argument

7.18 It is entirely inconsistent with the intention and construction of the provision to contend the only item not covered is “*prepared meals*”. The source of Menulog’s reliance on that illogical stance is not legal principle, but the fact that 95.95% of the goods it delivers are from restaurants and fast-food businesses³⁸. It is a pedantic and narrow approach to interpretation that does not seek an honest interpretation of the coverage clause; rather it is contrived to put Menulog outside the broad purview of the road transport and distribution

³⁶ *Road Transport Award*, clause 4.2(e).

³⁷ See NSW Food Authority, “*Mobile Food Vendors*”: <https://www.foodauthority.nsw.gov.au/retail/mobile-food-vendors>.

³⁸ Witness Statement of Morten Birk Belling dated 18 October 2021, paragraph 15.

industry as defined in cl 4.2(a). As demonstrated above, the intention of the provision as deduced by its context plainly points against an overly literalist approach that seeks to read down that scope.

7.19 The above construction of cl 4.2(a), which applies an approach consistent with the authorities set out earlier, demonstrates that Menulog is covered as an employer within the road transport and distribution industry.

The Classification Argument

7.20 The courier employees of Menulog are covered by the Road Transport Award because their principal function (as demonstrated at paragraph 4.7) is consistent with the duties of a Grade 1 and/or Grade 2 “*transport worker*” listed in Sch B of the Road Transport Award.³⁹

7.21 *First*, a Grade 1 transport worker is identified as a “*Courier—foot or bicycle*”. It is self-evident that Menulog courier employees that use a “*bicycle*” as their preferred mode of transport, as permitted by the Employment Contract,⁴⁰ would fall under this classification.

7.22 *Second*, a Grade 2 transport worker includes a “*Driver of a rigid vehicle (including a motorcycle) not exceeding 4.5 tonnes GVM*”. That classification, therefore, covers couriers that use light motor vehicles. As previously mentioned, the definition of courier under the award provides for several modes of transport: “*a passenger car or station wagon, light commercial van, motorcycle or bicycle or who delivers on foot, in the course of such employment*”.⁴¹ As such, a Grade 2 transport worker meets the definition of “*courier*” under the award. *Moreover*, the principal function of a Menulog courier that utilises a motor bicycle or passenger vehicle are obviously consistent with that of a Grade 2 transport worker.

7.23 Thus, the Commission should have little difficulty finding that a Menulog courier employee, whose principal function is the collection and delivery of goods, is a “*transport worker*” (Grade 1 or Grade 2, depending on the vehicle used) under Sch B of the Road Transport Award. Therefore, the courier employees of Menulog are covered by the Road Transport Award.

Conclusion - Road Transport Award

7.24 Both the industry and classification arguments support a conclusion that Menulog is an employer within the road transport and distribution industry and their courier employees are “*transport workers*” under the Road Transport Award.

³⁹ *Road Transport Award*, clause 4.1.

⁴⁰ Witness Statement of Morten Birk Belling dated 18 October 2021, Annexure MBB-5, Menulog Contract of Employment, clause 8.2.

⁴¹ *Road Transport Award*, clause 2.

- 7.25 An analysis of the ordinary and natural meaning of the industry definition at cl 4.2(a), confirms that Menulog is plainly an employer within road transport and distribution industry. *Further*, a consideration of the provision in context reveals the intention of the Road Transport Award to provide broad coverage within that industry. Hence, the Commission should not read down cl 4.2(a) in the manner proposed by Menulog. Such an approach is entirely inconsistent with the principles of award interpretation and primarily serves to oust “*prepared meals*”.
- 7.26 The Commission would also have little difficulty finding the courier employees of Menulog comfortably fit within the classification of Grade 1 and Grade 2 transport worker. That conclusion is supported by reference to the principal purpose of the courier employees and the definition of courier in the award.
- 7.27 Thus, Menulog and its courier employees are covered by the Road Transport Award.

8. FAST FOOD AWARD

8.1 The Commission should find that the both Menulog and their courier employees are covered by the Fast Food Award. That finding is open and available on the proper construction of the coverage clause, which provides the award covers:

- (a) “*employers throughout Australia in the **fast food industry***”,⁴² and
- (b) “*their employees in the classifications listed in clause 17*”,⁴³

and the definition of “*fast food industry*” at cl 3.1.

8.2 By the submissions that follow, we contend:

- (a) *First*, a textual analysis of the industry definition at cl 3.1 demonstrates that Menulog is an employer within the fast food industry (**the industry argument**).
- (b) *Second*, a consideration of the classifications listed in cl 17 against the principal function of the courier employees of Menulog demonstrates that Menulog courier employees fall under the classification listed in the award (**the classification argument**).

8.3 We will address those contentions in turn.

The Industry Argument

8.4 The Fast Food Award defines the “*fast food industry*” in the following terms:

⁴² *Fast Food Award*, clause 4.1.

⁴³ *Fast Food Award*, clause 4.1.

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

- ***meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;***
- ***take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or***
- *food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment”⁴⁴*

(Emphasis added)

8.5 By that definition, determination of whether Menulog falls within the fast food industry requires the presence of two factors. *First*, at least one of the following services must be present:

- (a) taking orders for; and/or
- (b) preparation of; and/or
- (c) sale of; and/or
- (d) delivery of,

(the **service**).

8.6 *Second*, the service must relate to at least one of the following:

- (a) *“meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale”*; and/or
- (b) *“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”*,

(the **goods and purpose**).

8.7 We will address each factor in turn, in order to demonstrate that Menulog may properly be described as an employer within the fast food industry.

⁴⁴ *Fast Food Award*, clause 3.1.

(a) The Service

8.8 The Commission should have little difficulty finding that Menulog’s business involves both “*taking orders*” and “*delivery*”. The business documents of Menulog support the following conclusions:⁴⁵

- (a) Menulog “*take orders for*” meals with the assistance of the digital platform; and
- (b) Menulog facilitates the “*delivery of*” orders with its courier service.

8.9 At this first limb, on an ordinary understanding of the text of the provision, Menulog may be accepted as providing two services recognised by the fast food industry.

(b) The Goods and Purpose

8.10 By the second limb of the definition, certain categories of goods are captured by the fast food industry if they are sold with the intent to be “*consumed away*” or “*sold or served in such a manner as to allow their being taken from the point of sale*” (emphasis added). On an ordinary reading of these words it can be reasonably argued that the activity of Menulog is covered by the Fast Food Award.

8.11 That contention is supported by the following analysis:

- (a) As to the words “*sold*” and “*point of sale*”. Menulog is “*the merchant’s agent for the sale of [goods]*”⁴⁶ and as agent accepts, receives and holds payments.⁴⁷ In this arrangement, the merchant is still considered the “*seller*” of the goods.⁴⁸ It follows that, notwithstanding the utilisation of a digital platform, the “*point of sale*” would be the merchant’s business.
- (b) As to requirement that goods are “*consumed away*” or “*consumed elsewhere*”. Being a collection and delivery service, it is implicit that the “*goods*” ordered via Menulog are not intended to be consumed at the merchant’s business but are to be collected and delivered to a location nominated by the consumer.
- (c) As to the words “*served in such a manner as to allow their being taken*”. The Menulog Restaurant Agreement sets out the following obligation upon the merchant with respect to the packaging of goods for delivery: “*use packaging which is suitable for delivery and (where possible) sealed to avoid tampering*”.⁴⁹ Therefore, it is a term

⁴⁵ See Witness Statement of Morten Birk Belling dated 18 October 2021, Annexure MMB-2, Menulog Restaurant Agreement; MMB-3, Menulog Terms of Use; MMB-4, Courier Agreement; MMB-5, Menulog Contract of Employment.

⁴⁶ Menulog Submissions, paragraph 2.4(f).

⁴⁷ Menulog Submissions, paragraph 2.4(g).

⁴⁸ Menulog Submissions, paragraph 5.10.

⁴⁹ Menulog Restaurant Agreement, section 4, clause 2.3 and section 5, clause 3.2.

of the engagement that the “goods” provided by the merchant to the courier are “served in such a manner as to allow their being taken from the point of sale”.

8.12 By the above construction, it is plain, that Menulog is an employer within the fast food industry. This is demonstrated by the its business operations which include taking orders for and facilitating the delivery of:

- (a) meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale; and
- (b) 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.

8.13 Thus, on an ordinary reading of definition at cl 3.1 Menulog is an employer in the fast food industry and covered by the Fast Food Award.

The Classification Argument

8.14 The courier employees of Menulog are covered by the Fast Food Award because their principal function (as demonstrated at 4.7) is consistent with the duties of a Level 1 “Fast Food Employee”.⁵⁰

8.15 The duties of a Level 1 Fast Food Employee include “**serving or delivery of meals... which are sold to the public primarily to take away or in food courts in shopping centres**” (emphasis added).⁵¹ That description of duty incorporates the wording of cl 3.1 (analysed above). Moreover, it is entirely consistent with the primary function of the Menulog courier employee.

8.16 Further, given that no ambiguity arises as to the meaning and effect of those words, the approach to construction adopted by Menulog is entirely unfounded. The only basis upon which Menulog turns to historical and extrinsic materials is to displace the ordinary and natural meaning of the words of the provision. The unsoundness of that approach is reinforced in circumstances where the intention of the award, as deduced by reference to, *inter alia*, the definition of the fast food industry, plainly seeks coverage of the delivery services within the fast food industry.

8.17 Thus, the Commission should have little difficulty finding that a courier employee of Menulog, whose primary purpose is the collection and delivery of food for customers to consumer away from the point of sale, is a “fast food employee” (Level 1) under Sch B of

⁵⁰ *Fast Food Award*, clause 17 and Schedule B, clause B.1.1.

⁵¹ *Fast Food Award*, Schedule B, clause B.1.1.

the Fast Food Award. Therefore, the courier employees of Menulog are covered by the Fast Food Award.

Conclusion - Fast Food Award

- 8.18 Both the industry and classification arguments support a conclusion that Menulog is an employer within the fast food industry and their courier employees are “*fast food employees*” under the Fast Food Award.
- 8.19 As demonstrated, a proper construction of the definition of “*fast food industry*” based upon the ordinary meaning of the text includes the delivery service provided by Menulog. In the absence of ambiguity, wherein the meaning of the words may be reasonably understood, there is no basis to over complicate the process of construction with reference to historical or extrinsic materials.⁵² Such complication is of no assistance and should be disregarded.
- 8.20 The Commission should also have little difficulty finding the courier employees of Menulog comfortably fit within the classification of Level 1 Fast Food Employee. That conclusion is supported by reference to the principal purpose of the courier employees and the description of Level 1 delivery duties within the award.
- 8.21 Thus, Menulog and its courier employees are covered by the Fast Food Award.

9. COMPETING COVERAGE

- 9.1 In circumstances where Menulog is covered by two industry awards, the Commission must reconcile the competing coverage and determine which award should apply. The reconciliation clauses of both awards provide:

*“4.7 Where an employer is covered by more than one award, an employee of that employer is covered **by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.**”⁵³*

(Emphasis added)

- 9.2 We submit that the Commission should determine the Road Transport Award covers the courier employees of Menulog in favour of the Fast Food Award upon the following bases:
- (a) *First*, the classification of Level 1 and Level 2 transport worker are more appropriate to the work performed by the courier employee than Level 1 fast food employee. This is because:

⁵² FW Act, section 134(1)(g).

⁵³ *Road Transport Award*, clause 4.7; *Fast Food Award*, clause 4.7.

- (i) it more closely represents the manner in which work is performed, namely, transport by road via a bicycle, motor bicycle and/or passenger vehicle; and
 - (ii) the nature and type of goods that are the subject of delivery are broader than “*food*”. This is particularly important in circumstances where around 5% of goods delivered would not fall within the scope of the fast food industry.⁵⁴
- (b) *Second*, the classification of Level 1 and Level 2 transport worker are more appropriate to the environment in which the courier employee normally performs work, than Level 1 fast food employee, because the focus of the road transport and distribution industry is upon transport and delivery of goods by road. This is entirely consistent with the description of the duties of the courier employee and the principal function of the role. In contrast, the fast food industry only seeks coverage based upon the nature of the goods. The priority of Menulog’s business is *delivery*.⁵⁵

9.3 In all the circumstances, when consideration is given to the principal purpose of the courier employee and the environment in which it carries out its collection and delivery service, the Road Transport Award is the most appropriate award to cover the courier employees of Menulog.

10. NOTHING PECULIAR, UNIQUE OR NOVEL ABOUT THE WORK PERFORMED BY THE MENULOG COURIERS

10.1 The Commission may confidently conclude that there is nothing peculiar, unique or novel about the work performed by the Menulog couriers based upon the following:

- (a) The primary function of the courier employee is entirely consistent with the ordinary meaning of “*courier*” (see analysis above at paragraphs 4 and 5).
- (b) The fact that the duties of the courier employee comfortably fit within existing classifications under existing industry awards, namely: the Road Transport Award (transport worker, grade 1 and 2) and the Fast Food Award (fast food employee, level 1) (see analysis above at paragraphs 7 and 8).
- (c) The irrelevance of the digital platform (see analysis below at paragraph 11).

10.2 As such, the alternative position advanced by Menulog on the Application should be rejected. Particularly in circumstances where an existing modern award - the Road Transport Award - provides coverage that is most appropriate to the work performed by the courier employees.

⁵⁴ Witness Statement of Morten Birk Belling dated 18 October 2021, paragraph 15.

⁵⁵ See also submissions below at paragraphs 11.7-11.10.

10.3 For reasons set out above the “*peculiarities*” relied upon by Menulog as the foundation for a new industry, a new award and/or discrete industry regulation should be rejected.

11. THE DIGITAL PLATFORM AS A DISTRACTION

11.1 Menulog operates a delivery service aided by a digital platform. To suggest that the “*delivery services*” aspect of the Menulog’s business is merely an “*addition[al]*” aspect of (or ancillary to) a suite of services provided via a digital platform strains credulity. Menulog’s obstinate reliance upon the digital platform may properly be described as an artifice to perpetuate an illusion of peculiarity or uniqueness.

11.2 Menulog’s submissions with respect to the significance of the digital platform should be rejected on the basis of irrelevance for the following reasons:

- (a) the proposed award is limited to courier employees; and
- (b) the provision of delivery services is the primary service provided by Menulog.

(a) The Proposed Award - Limited to Courier Employees

11.3 The irrelevance the digital platform is plain on the face of the Application. As earlier mentioned, the Application for a “*new industry award*” seeks coverage that is strictly limited to “*courier employees*”.⁵⁶

11.4 The Exposure Draft provides two classifications of courier employee:

“12.1 Level 1 Courier

An employee at this level is an employee employed as a courier, driver or rider (howsoever described).

12.2 Level 2 Courier

An employee at this level an employee employed as a courier, driver or rider (howsoever described) who has delegated responsibility for the supervision of at least two employees.”⁵⁷

11.5 Further, absent seeking coverage with respect to its employees performing “*various technological*” and/or “*support functions*” with respect to the digital platform,⁵⁸ the digital platform bears no relevance to the classifications listed in the proposed award under consideration by the Commission.

11.6 Thus, given the proposed award is limited to courier employees, Menulog’s reliance upon the digital platform serves only to distract the Commission from the fact its Application lacks merit.

⁵⁶ Menulog Submissions, Annexure A, Question 17; Exposure Draft, clauses 4.1 and 12.

⁵⁷ Exposure Draft, clause 12.

⁵⁸ Menulog Submissions, Annexure A, Question 17.

(b) Delivery Services is the Primary Service

- 11.7 On a consideration of the business documents of Menulog, it is self-evident that the provision of “*delivery services*” is a substantial component of its business operations.
- 11.8 *First*, turning to the agreement entered between Menulog and the Restaurant. The agreement is broken into five sections: “*commercial terms*”, “*definitions*”, “*general terms*” (which includes marketing), “*self-delivery and pick up*”, and “*delivery*” (emphasis added). Two of the five sections of that agreement are devoted to *delivery*, with the only difference being whether the merchant or Menulog provide the courier.⁵⁹ By that construction, terms such as “*marketing*” via the digital platform would properly be described as an ancillary service.
- 11.9 *Second*, as discussed above at paragraph 4, the agreements between Menulog and its couriers demonstrate that nature and purpose of the work provided by a Menulog courier is focused upon “*collection and delivery*” of goods.
- 11.10 When attention is properly directed to work performed by the courier - by reference to the business documents of Menulog - two conclusions are available:
- (a) the digital platform is merely a tool by which requests for delivery service are facilitated and communicated to the courier (via a notification); and
 - (b) the role of the courier is primarily concerned with the collection and delivery of goods.
- 11.11 *Further*, to provide a point of comparison, we provide an example of an industry and award in which “*delivery service*” may properly be characterised as “*additional*” or “*ancillary*”. The *Restaurant Industry Award 2020 (Restaurant Award)* does not expressly refer to “*delivery*” within in its industry definition. However, that award provides that “*delivery*” work is contemplated by the award as a duty that may be performed within that industry.⁶⁰ As to potential duties of various classifications, the award provides:
- (a) Food and Beverage Attendant Grade 2 and 3: “*delivery duties*” may be engaged;⁶¹ and
 - (b) Restaurant/Café Worker Grade 1 and 2: “*performing delivery duties*”.⁶²

⁵⁹ Witness Statement of Morten Birk Belling dated 18 October 2021, Annexure MMB-2, Menulog Restaurant Agreement, page 1.

⁶⁰ *Restaurant Industry Award 2020 (Restaurant Award)*, Schedules A and AA.

⁶¹ *Restaurant Award*, Schedule A, clauses A2.2(f) and A2.3(f).

⁶² *Restaurant Award*, Schedule A, clauses AA.2.2(f) and AA3.1(f).

As such, within the restaurant industry, “*delivery service*” may properly be described as an “*additional*” service provided that is not the primary purpose of the business or industry.

11.12 Menulog’s obstinate reliance upon the significance of the digital platform results in a conflation of the role of the digital platform and the role of the courier employees. When separated, as we have demonstrated above, in the context of the courier service provided by Menulog, the digital platform is merely a tool by which requests are facilitated and communicated.

Conclusion - The Digital Platform

11.13 Menulog relies upon the digital platform as an artifice to present existing business structures and tools as peculiar or unique. The Commission should reject any suggestion that the usage of a digital platform to notify couriers of work is novel. The manner in which a courier is notified of a job has no impact upon its principal function, namely, to collect and deliver goods.

11.14 Further, in such circumstances where the primary example of uniqueness relied upon is not even related to the “*industry*” regulation sought by the Application, the Commission should exercise caution in entertaining Menulog’s Application; such caution is warranted given the motivation behind seeking the creation of a new industry award is plainly not to establish “*industry coverage*” of what Menulog characterises as a new industry.

12. OTHER AWARDS APPLY

12.1 By its Application, Menulog has adopted a curious position of wanting recognition of a new industry, but coverage of only one type of employee. The absurdity of this position is further highlighted by the application of existing industry and occupational awards to the balance of employees, identified by Menulog, working within the purported “*new industry*”.

12.2 Menulog accepts that the proposed award is not representative of the entire workforce. It identified the following categories of worker in a response for clarification and in its written submissions: “*various technological*” staff,⁶³ “*HR and other support functions*”⁶⁴ and “*marketing*”.⁶⁵

12.3 For the reasons below, the following awards may apply to other Menulog workers:

- (a) *Professional Employees Award 2020 (Professional Award)*;
- (b) *Clerks—Private Sector Award 2020 (Clerks Award)*; and

⁶³ Menulog Submissions, Annexure 1, Question 17.

⁶⁴ Menulog Submissions, Annexure 1, Question 17.

⁶⁵ Menulog Submissions, paragraph 2.4(b).

(c) *Commercial Sales Award 2020 (Commercial Award)*.

Professional Award - Technological Staff

12.4 There is obvious scope for “*technological staff*” associated with the digital platform to be covered by another industry and occupational award, namely, the Professional Award. This is supported by a consideration of the coverage clause and the classifications listed at Schedule A of that award.

12.5 The coverage clause of the Professional Award provides:

“4.1 This industry and occupational award covers employers throughout Australia as follows:

*(a) Employers throughout Australia with respect to their employees performing **professional engineering** and professional scientific duties who are covered by the classifications in Schedule A—Classification Structure and Definitions of the award and those employees.*

*(b) Employers throughout Australia **principally engaged in the information technology industry**, the quality auditing industry or the **telecommunications services industry** and their employees who are covered by the classifications in Schedule A—Classification Structure and Definitions.*

(c) Employers throughout Australia principally engaged as medical research institutes with respect to their employees performing professional medical research duties who are covered by the classifications in Schedule B—Medical Research Employees and those employees.”

(Emphasis added)

12.6 By way of example, the “*professional responsibilities*” of a “*Level 4 - Professional*” employee include:

“A.1.11 Level 4—Professional

(a) An employee at this level performs professional work involving:

(i) considerable independence in approach, demanding a considerable degree of originality, ingenuity and judgment; and

(ii) knowledge of more than one field of, or expertise (for example, acts as their organisation's technical reference authority) in a particular field of professional engineering, professional scientific/information technology field or professional information technology field.

(b) An employee at this level:

*(i) initiates or participates in short or long range planning and makes **independent decisions on professional engineering, professional scientific, or information technology policies and procedures within an overall program;***

*(ii) **gives technical advice to management and operating departments;***

(iii) may take detailed technical responsibility for product development and provision of specialised professional engineering or professional scientific/information technology systems, facilities and functions;

(iv) coordinates work programs; and

(v) directs or advises on the use of equipment and materials.

(c) An employee at this level makes responsible decisions not usually subject to technical review, decides courses of action necessary to expedite the successful accomplishment of assigned projects, and may make recommendations involving large sums or long range objectives.

(d) Duties are assigned only in terms of broad objectives, and are reviewed for policy, soundness of approach, accomplishment and general effectiveness.

*(e) The employee supervises a group or groups including professionals and other staff, or exercises authority and technical control over a group of professional staff. In both instances, **the employee is engaged in complex professional engineering or professional scientific/information technology applications.**"*

(Emphasis added)

12.7 The above extracts provide a compelling basis to assume that employees providing technical support to the digital platform are covered by the Professional Award.

Clerks Award - HR and Support Functions

12.8 Even with the generalised identification of "*HR and other support functions*", there is obvious scope for coverage of such employees under the Clerks Award.

12.9 The Clerks Award applies in relation to employees wholly or principally engaged in clerical work.⁶⁶ "*Clerical work*" includes "*recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard, attending a reception desk and administrative duties of a clerical nature*".⁶⁷

12.10 Given the broad definition of "*clerical work*", the Clerks Award would likely apply to accounting, human resources and administrative support staff employed by Menulog.

Commercial Award - Marketing

12.11 In the event Menulog employs a dedicated marketing and/or advertising representatives, they would likely be covered by the Commercial Award.

⁶⁶ *Clerks—Private Sector Award 2020 (Clerks Award)*, clause 4.1.

⁶⁷ *Clerks Award*, clause 2.

12.12 The Commercial Award applies to, *inter alia*, “Advertising Sales Representatives and those employees”⁶⁸. An “Advertising Sales Representative” is defined as “a person employed, substantially away from the employer’s place of business, in soliciting orders, obtaining sales leads or appointments or otherwise promoting sales for, or **selling advertising space or time of any kind**”⁶⁹ (emphasis added).

12.13 Thus, the Commercial Award may apply to employees directly liaising with merchants/restaurants with respect to marketing arrangements engaged by Menulog.

Conclusion - Other Awards

12.14 The existence of other operational industry and occupational awards that plainly cover the balance of Menulog’s employees highlights the oddness of the Application presently before the Commission. The fact that Menulog only seeks to carve out special coverage for its courier employees - notwithstanding that fact, like every other aspect of its business operations, those employees are covered by existing awards - warrants consideration of the true motivation for its Application.

12.15 One theory might be that Menulog has realised that its “*courier employee*” model is not as economically viable - as it had hoped - within its business operations. However, not wishing to tarnish any good will it has accumulated for trying that model - it seeks a re-invention of the wheel that will better serve their economic interests as a business. So much may be gleaned by Menulog’s own concession that “[a]ny proposed enterprise agreement would very likely fail the BOOT”.⁷⁰

12.16 In any event, putting aside speculation as to Menulog’s motivations, each of the foregoing considerations point further against their being a proper basis to recognise a “*new industry*” and create a new award that only covers courier employees.

13. THE MODERN AWARDS OBJECTIVE

13.1 The Commission should not be satisfied, having regard to the modern awards objective, that a new award covering courier employees provides a fair and relevant minimum safety net of terms and conditions, in particular, when taking into account “*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards*”.⁷¹

⁶⁸ *Commercial Sales Award 2020 (Commercial Award)*, clause 4.

⁶⁹ *Commercial Award*, clause 2.

⁷⁰ Menulog Submissions dated 19 August 2021, paragraph 47.

⁷¹ FW Act, section 134(1)(g).

- 13.2 By its Application, Menulog actively seeks to disrupt the simplicity and stability of the current modern award system.
- 13.3 *First*, it perpetuates complication by its emphasis of digital platform within its unnecessarily technical definition of the ODDSI. By that definition, Menulog have painstakingly sought to emphasise the role of the digital platform in order to present its delivery business as a new industry. The emphasis is unnecessary, especially given the proposed award only seeks to cover courier employees that provide a collection and delivery service indistinguishable from that provided under the Road Transport Award and, to some extent, the Fast Food Award.
- 13.4 *Second*, the industry definition and employee classifications overlap with the Road Transport Award. Both industry definitions, at their core, concern transportation and delivery of goods. Both also include “*courier*” as a type of employee covered by the award. This unnecessary overlap would only serve to create confusion and instability.
- 13.5 *Third*, recognising a new industry in which all aspects of its business operations are covered (or capable of coverage) by existing awards, once again, presents an unnecessary complication within the existing system. *Further*, to recognise a new industry but only regulate one type of employee does not promote simplicity or sustainability, especially when considered in the light of the preceding contentions (and the analysis at paragraph 12).
- 13.6 Upon proper consideration of s 134(1)(g) of the FW Act, the Commission should find that the creation of the new award proposed by Menulog disregards the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

14. CONCLUSION

- 14.1 A consideration of the business operations of Menulog demonstrates there is no basis to recognise the ODDSI as a new industry or create a new award to regulate the employment of courier employees.
- 14.2 The business operations of Menulog already fall within two recognised industries: the road transport and distribution industry and the fast food industry. As such, Menulog is covered by the Road Transport Award and Fast Food Award. Further, the courier employees of Menulog are covered by reference to the respective classifications within each award, namely, transport worker (Grade 1 and 2) and fast food employee (Level 1).
- 14.3 With coverage under two operational awards, the appropriate course to be adopted is a reconciliation of competing coverage - not creation of a new award. As demonstrated by the analysis at paragraph 9 above, when consideration is given to the principal purpose of

the courier employee and the environment in which it carries out its collection and delivery service, the Road Transport Award is the most appropriate award to cover the courier employees of Menulog.

- 14.4 The absence of peculiarities within the courier service provided by Menulog further points against the creation of a new award for the purposes of discrete industry regulation. Any argument of peculiarity rests squarely upon the presence of the digital platform. However, as demonstrated by the analysis above at paragraph 11, the digital platform bears no relevant connection to the work provided by the courier - it is simply the means by which *requests* are communicated to the courier. All couriers receive a request or instruction of some form before undertaking work - it is not novel and does not warrant discrete industrial regulation.
- 14.5 In all the circumstances, the new award proposed by Menulog is unnecessary. As demonstrated by the analysis at paragraph 13, its creation would disrupt the simplicity and stability of the current modern award system.
- 14.6 The Commission should make the following findings:
- (a) There is no basis to recognise the ODDSI as a new industry, as the employers and courier employees involved in “*on demand delivery*” work fall squarely within the road transport and distribution industry.
 - (b) Menulog and its courier employees are covered by the Road Transport Award.
 - (c) The Application for a new industry award should be dismissed.

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