

**FAIR WORK COMMISSION**  
*Fair Work Act 2009*  
s.158—Application to make a modern award

**Menulog Pty Ltd**  
(AM2021/72)

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**MENULOG’S SUBMISSIONS REGARDING CURRENT AWARD COVERAGE**

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**1. Background and Summary**

- 1.1 These submissions are made by Menulog Pty Ltd (**Menulog**) in accordance with the directions issued by the Fair Work Commission on 24 August 2021 (**Directions**).
- 1.2 The submissions are directed to the threshold question identified in the Full Bench’s statement dated 24 August 2021, namely whether employers and their courier employees in the on-demand delivery services industry are currently covered by a modern award. Narrowing the question further, the Full Bench has identified that the particular question to be decided is whether the *Road Transport and Distribution Award 2020* (**Road Transport Award**) and/or the *Fast Food Industry Award 2020* (**Fast Food Award**) covers employees to whom Menulog’s application dated 25 June 2021 (**Application**) relates (**Threshold Question**).
- 1.3 The employees to whom the Application relates are national system employees (within the meaning of the *Fair Work Act 2009* (**FW Act**)) who are employed as couriers, drivers or riders (collectively referred to as ‘**couriers**’ in these submissions), in the “*on demand delivery services industry*” as defined in the Application (**Relevant Employees**).
- 1.4 What is proposed by the Application is not an enterprise award. What is proposed is an industry award, which would cover all employers in the on demand delivery services industry, not just Menulog.
- 1.5 Menulog might currently be the only sizeable operator in the Australian on demand delivery services industry which considers the contractual status of some of its couriers to be employees. However, some of the couriers engaged by other operators might already be parties to what are, properly construed, contracts of employment.<sup>1</sup> Even if they are not, it may be that other operators will follow the lead of Menulog in Australia, and the practice in a number of other jurisdictions,<sup>2</sup> by in future engaging their couriers under contracts of employment. Those current or future employees would also be Relevant Employees (if they are working in the “*on demand delivery services industry*”), in relation to whom the Threshold Question should be answered.
- 1.6 For the reasons set out below, the answer to the Threshold Question is that neither the Road Transport Award nor the Fast Food Award covers Relevant Employees. Nor does any other award, save for the *Miscellaneous Award 2020* (**Miscellaneous Award**).

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<sup>1</sup> See, for example, the arguments contained at paragraph 11 of the Transport Workers’ Union submissions dated 9 August 2021 (**TWU Preliminary Submissions**).

<sup>2</sup> Witness Statement of Morten Belling dated 18 October 2021 (**Belling Statement**) at [11].

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- 1.7 These submissions deal with the Threshold Question as follows:
- (a) part 2 deals with the definition of the “*on demand delivery services industry*”, as contained in the Application, and the characteristics of the industry;
  - (b) part 3 deals with the principles to be applied in determining the Threshold Question;
  - (c) part 4 deals with the Road Transport Award, and concludes that it does not cover the Relevant Employees;
  - (d) part 5 deals with the Fast Food Award, and concludes that it does not cover the Relevant Employees; and
  - (e) part 6 deals with other awards, and concludes that only the *Miscellaneous Award 2020 (Miscellaneous Award)* covers the Relevant Employees.
- 1.8 Direction 1 issued by the Full Bench on 24 August 2021 provided that interested parties were to file a note by 30 August 2021 ‘*setting out any particular clarification they seek from Menulog regarding the coverage of the proposed award*’ (emphasis added). A number of interested parties filed and served questions. Some questions were about the coverage of the proposed award. However, a number of the questions were not about the coverage of the proposed award, and are therefore irrelevant to the Threshold Question.
- 1.9 Notwithstanding that some of the questions asked by interested parties are irrelevant to the Threshold Question, Menulog has endeavoured to answer the questions posed. Menulog’s answers are at Annexure A to this submission.

## 2. The on demand delivery services industry

- 2.1 The “**on demand delivery services industry**” is defined in part 2.2, paragraph 14 of the Application 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.*
- 2.2 A number of matters may be noted in relation to the on demand delivery services industry.
- (a) The items which are collected and delivered are “*food, beverages, goods or any other item*”. It is not just food, let alone fast food.<sup>3</sup> As an example of this – and it is only an example, because there are other operators in the industry - the items available via the Menulog app and the Menulog website include not only

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<sup>3</sup> Belling Statement at [52].

fast food, but also restaurant food traditionally associated with “dine in” restaurants rather than take away, and also grocery items such as bread, milk, toilet paper, cleaning products and other essential items.<sup>4</sup>

- (b) The items are not sold by the employer itself.<sup>5</sup> Rather they are items “*that are ordered by a consumer from third-party businesses that offer food, goods and other items for sale*”. See also the exclusion in paragraph (a) of the definition: the items are not “*the employer’s own food, beverages, goods or other items offered by it for sale*”. This is further dealt with at paragraph 5.10 below.
- (c) The items “*are ordered by a consumer... for immediate collection and delivery*”. It is not the seller of the items – such as a restaurant or store – who initiates the order for collection and delivery, rather it is the consumer who initiates the order. The collection/delivery is immediate (hence the “on demand” aspect of the name of the industry).<sup>6</sup>
- (d) The items “*are ordered by a consumer... on an online or application-based platform*”. Note that this is different to an online or application-based platform being used merely as a means of coordinating collection and delivery relating to a pre-existing order for items. The online or application-based platform is the means by which the consumer generates the order.
- (e) Related to the previous point, “*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*”. Once again it can be seen that the employer’s online platform is of critical importance in defining the industry, because the industry concerns items purchased on the employer’s online platform.

2.3 The Belling Statement contains (redacted) standard contracts between Menulog and a restaurant partner (**Menulog Restaurant Partner Agreement**),<sup>7</sup> and the standard terms of service between Menulog and a consumer of Menulog’s online or application-based platform (**Menulog Customer Terms**),<sup>8</sup> as examples of how the arrangements work in practice for an operator in the on demand delivery services industry. These arrangements are broadly similar to the arrangements for other operators in the on demand delivery services industry (which would, if they were the employer of Relevant Employees, be covered by the proposed award) – see for example the:

- (a) Deliveroo Customer Terms and Conditions of Service;<sup>9</sup>
- (b) DoorDash Terms of Service Australia;<sup>10</sup>
- (c) Uber Customer Terms and Conditions;<sup>11</sup>

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<sup>4</sup> Belling Statement at [52], [53] and [54].

<sup>5</sup> Belling Statement at [38] and [39].

<sup>6</sup> Belling Statement at [61].

<sup>7</sup> Annexure MBB-2 to the Belling Statement.

<sup>8</sup> Annexure MBB-3 to the Belling Statement.

<sup>9</sup> Annexure MBB-6 to the Belling Statement.

<sup>10</sup> Annexure MBB-7 to the Belling Statement.

<sup>11</sup> Annexure MBB-8 to the Belling Statement.

- (d) Uber Delivery Terms (note that this document starts at page 15 of the document also containing the Uber Customer Terms and Conditions);<sup>12</sup>
- (e) Uber Eats Merchant Agreement General Terms;<sup>13</sup> and
- (f) Uber Eats Merchant Agreement Service Terms.<sup>14</sup>

2.4 The arrangements, relevantly and in summary form, are as follows.

- (a) There are commercial terms agreed between the operator (eg Menulog, Deliveroo, DoorDash or UberEats) and the merchant (such as a restaurant or a store).<sup>15</sup>
- (b) The operator engages in marketing activities, using the merchant's name, logo and other intellectual property, to promote the merchant's business.<sup>16</sup>
- (c) The operator provides an order processing service, which enables customers to place orders on the operator's online or application-based platform, for items to be supplied by the merchant (not the operator).<sup>17</sup>
- (d) The "Service" which the operator provides to the consumer is that the operator provides a way for the consumer to communicate the consumer's orders for products to merchants (restaurants or other sellers), using the operator's online or application-based platform.<sup>18</sup>
- (e) The operator provides an ordering device and/or software, programs or applications, which enable the merchant to receive orders.<sup>19</sup>
- (f) The operator acts as the merchant's agent, for the sale of food and other products, being sales by the merchant to customers who place an order on the operator's online or application-based platform.<sup>20</sup>
- (g) The operator acts as the merchant's agent to accept, receive and hold credit card or debit card payments.<sup>21</sup>

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<sup>12</sup> Annexure MBB-8 to the Belling Statement.

<sup>13</sup> Annexure MBB-9 to the Belling Statement.

<sup>14</sup> Annexure MBB-10 to the Belling Statement.

<sup>15</sup> For example, the Menulog Restaurant Partner Agreement, Uber Eats Merchant Agreement General Terms and Uber Eats Merchant Agreement Service Terms.

<sup>16</sup> Menulog Restaurant Partner Agreement, Section 3, clause 2.1; Uber Eats Merchant Agreement General Terms clause 3.2(a)(i), 3.4, 6.3 and 6.4.

<sup>17</sup> Menulog Restaurant Partner Agreement, Section 3, clause 1.2(a); Uber Customer Terms and Conditions clause 2 (first paragraph); Uber Delivery Terms clause 2 (third paragraph).

<sup>18</sup> Menulog Terms and Conditions at clause 1.2.

<sup>19</sup> Menulog Restaurant Partner Agreement, Section 3, clause 1.2(c); Uber Eats Merchant Agreement General Terms clause 7.

<sup>20</sup> Menulog Restaurant Partner Agreement, Section 3, clause 1.1.(a); Uber Eats Merchant Agreement General Terms, clause 3.2(a)(ii).

<sup>21</sup> Menulog Restaurant Partner Agreement, Section 3, clause 1.1.(b); Deliveroo Customer Terms and Conditions at clause 10; Uber Customer Terms and Conditions clause 4 (first paragraph); Uber Eats Merchant Agreement General Terms, clause 3.2(b); Uber Eats Merchant Agreement General Terms clause 5.1.

- (h) The commercial terms between the operator and the merchant include various fees, and a commission, payable by the merchant to the operator.<sup>22</sup>
- (i) The operator holds the payments received from customers, less fees charged by the operator to the merchant, on behalf of the merchant,<sup>23</sup> and pays those amounts to the merchant.<sup>24</sup>
- (j) The merchant prepares the items ordered by the customer, and it is the merchant which is responsible for fulfilling the order and for the quality of the relevant items.<sup>25</sup>
- (k) In addition to the services referred to above, the operator and the merchant can also agree for the operator to procure delivery services provided by a “delivery partner” (which might be an independent contractor or an employee).<sup>26</sup> If such an agreement is reached:
  - (i) the merchant prepares the items so that they are ready for collection, uses packaging suitable for delivery, and checks the order;<sup>27</sup>
  - (ii) the operator procures delivery of the order to be provided by a delivery partner;<sup>28</sup>
  - (iii) neither the operator nor the delivery partner takes legal ownership of the items to be delivered;<sup>29</sup>
  - (iv) the operator may charge a fee/commission to the merchant, that may be different to (logically, higher than) the fee/commission charged if the operator had not procured the delivery services;<sup>30</sup> and
  - (v) the operator may charge each customer a delivery fee/service fee.<sup>31</sup>

2.5 Each of the three steps (the consumer obtaining information about available merchants and items, and then ordering an item, and paying for it; the merchant receiving the order so that the merchant may prepare the item; and the courier receiving details of the collection/delivery and confirming completion of the delivery) take place on a separate

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<sup>22</sup> Menulog Restaurant Partner Agreement, Section 1; Uber Eats Merchant Agreement General Terms clauses 5.2, 5.3 and 5.5.

<sup>23</sup> Menulog Restaurant Partner Agreement, Section 3, clause 5.1.

<sup>24</sup> Menulog Restaurant Partner Agreement, Section 3, clause 5.4; Uber Eats Merchant Agreement General Terms clause 5.4.

<sup>25</sup> Menulog Restaurant Partner Agreement, Section 3, clause 4.11; DoorDash Terms of Service Australia – last paragraph before clause 1 (the paragraph beginning “The Company makes available...”); Uber Delivery Terms clause 2; Uber Eats Merchant Agreement General Terms clause 4.5.

<sup>26</sup> Menulog Restaurant Partner Agreement, Section 3, clause 1.2(b); Uber Eats Merchant Agreement Service Terms clause 2.1.

<sup>27</sup> Menulog Restaurant Partner Agreement, Section 5, clause 3; Uber Eats Merchant Agreement General Terms, clause 4.5(a).

<sup>28</sup> Menulog Restaurant Partner Agreement, Section 5, clauses 1 and 2.1; Uber Eats Merchant Agreement General Terms. clause 4.1(a).

<sup>29</sup> Menulog Restaurant Partner Agreement schedule of fees; Uber Eats Merchant Agreement Service Terms (Uber Delivery Option), clause 2.2.

<sup>30</sup> Uber Eats Merchant Agreement Service Terms (Uber Delivery Option), clause 3.1.

<sup>31</sup> Menulog Restaurant Partner Agreement, Section 5, clause 2.2; Deliveroo Customer Terms and Conditions at clause 10; Uber Delivery Terms clause 3.1 (paragraph after the heading “If you choose Uber Eats Delivery Services) and clause 4 (first paragraph); Uber Eats Merchant Agreement Service Terms (Uber Delivery Option), clause 2.1.

proprietary app developed for use by each of consumer, merchant and courier, with each app “speaking” to the other at the relevant stage of the ordering and delivery process. That is, the three apps, while each different and performing different functions, “speak” to each other across the same platform.<sup>32</sup>

- 2.6 It can be seen from the above that each operator’s online or application-based platform is central to the way that the on demand delivery services industry operates. The online or application-based platform is not simply the means by which collections and deliveries are coordinated. It is the means by which sales are generated, consumers make their orders, and merchants fulfill the customer’s order.
- 2.7 It is to be noted that the Uber Delivery Terms, at clause 3.2, refer to a service called “Uber Connect”, which allows the customer to request delivery by an affiliate of Uber (Porter Pacific), using Uber’s mobile or web-based application. Those services are not within the scope of the on demand delivery services industry, as defined (see paragraph 2.1 above), because the items to be delivered are not items which “*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*”. This requirement is one of the defining features of the industry, as defined, which distinguishes it from the “road transport industry” referred to in part 4 below.

### 3. Principles to determine award coverage

- 3.1 A modern award covers an employee or employer if the award is expressed to cover the employee or employer.<sup>33</sup> The Threshold Question is therefore to be determined by reference to whether the Road Transport Award and/or the Fast Food Award is expressed to cover the Relevant Employees.
- 3.2 In a modern award, the key words to be construed are the words of the scope clause of the award, and any definitions of defined terms used in that scope clause.
- 3.3 The test to be applied, in deciding whether an award covers particular work, is to discern the objective meaning of the words used, bearing in mind the context in which they appear and the purpose they are intended to serve.<sup>34</sup> Because of their nature as industrial instruments, “*the literal words of a provision might more readily be understood to have a meaning other than their ordinary meaning if the context so suggests.*”<sup>35</sup>
- 3.4 The principles relating to the construction of awards were summarised by the Full Court of the Federal Court in *King v Melbourne Vicentre Swimming Club Inc* [2021] FCAFC 123:

#### **“Principles of construction of awards**

[40] *The principles governing the construction of awards are well-established and the primary judge’s exposition of them was not challenged on appeal. The construction of an industrial instrument depends on its language, understood in light of its industrial context and purpose: see Amcor Ltd v Construction, Forestry, Mining and Energy Union [2005] HCA 10; (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J). In City of Wanneroo v Holmes (1989) 30 IR 362 at 378-379, French J said (most citations removed);*

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<sup>32</sup> Belling Statement at [25].

<sup>33</sup> FW Act, s48(1).

<sup>34</sup> *Transport Workers’ Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148 at [22] (Siopis, Buchanan and Flick JJ).

<sup>35</sup> *Ridd v James Cook University* [2021] HCA 32 at [17].

*The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words. The words are to be read as a whole and in context. Ambiguity if any, may be resolved by a consideration, inter alia, of the history and subject matter of the award. Resort to such matters as prefatory statements and negotiations is of dubious assistance if admissible at all. The logs of claim and arbitrator's reasons for decision may be referred to to determine the ambit of the dispute which led to the making of the award so that where there are two possible interpretations, one within the ambit and one without, the former may be preferred. ... That is not to say the words must be interpreted in a vacuum divorced from industry realities. As Street J said in *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR(NSW) 498 at 503:*

*it must be remembered that awards are made for the various industries in the light of the customs and working conditions of each industry, and they frequently result ... from an agreement between the parties, couched in terms intelligible to themselves but often framed without that careful attention to form and draughtsmanship which one expects to find in an Act of Parliament. I think, therefore in construing an award, 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.*

[41] We agree with the primary judge's observation (at PJ [127]) that:

*Practices in the relevant industry may provide material context. An illustration is *Transport Workers Union v Linfox Australia Pty Ltd* [2014] FCA 829; 318 ALR 54, where Tracey J held that evidence about the morning commencement time of work in the transport industry, together with an examination of the history of relevant award provisions, informed the construction of the term 'day shift' with the consequence that ordinary day workers were not to be regarded as shift workers for the purposes of the award, and were therefore not entitled to 'crib time'.*

[42] Hence the 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: see *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 536 at [197] (Tracey, Bromberg and Rangiah JJ) applying **Kucks v CSR Ltd** (1996) 66 IR 182 at 184 (Madgwick J). An award may be read that way despite mere inconsistencies or infelicities of expression which might tend to some other reading, and "meanings which avoid inconvenience or injustice may reasonably be strained for": *Kucks* at 184.

[43] The circumstances may lead the court to conclude that a clause in an award is a product of history; in such circumstances it may be possible to discern the purpose of the award only by reference to its history: see *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518 (Burchett J). But there are limits to that; as the primary judge said in the present case (at PJ [128]-[129]), 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. That is

especially so where, as here, non-compliance with an award can expose a person to pecuniary penalties: see *Wanneroo* at 380.<sup>36</sup>

3.5 See also the exposition of principles by Wheelahan J (of which the Full Court approved) in *King v Melbourne Vicentre Swimming Club Inc* [2020] FCA 1173 at [122]-[130].

#### 4. Road Transport Award

4.1 The Road Transport Award, properly construed, does not cover operators, and their Relevant Employees, in the on demand delivery services industry.

4.2 The key clause in the Road Transport Award is clause 4, in particular clauses 4.1 and 4.2 which are as follows:

**“4.1** *This industry 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.*

**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;*
- (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;*

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<sup>36</sup> *King v Melbourne Vicentre Swimming Club Inc* [2021] FCAFC 123 at [40]-[43] (Collier, Katzmann and Jackson JJ).



- (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 on demand delivery services industry 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.”*

4.3 Each of subclauses 4.2(d), (f), (g), (h) and (j) can be readily discounted, as not applicable to the on demand delivery services industry. They do not relate to items which “*are ordered by a consumer... for immediate collection and delivery*”, and are therefore outside the scope of the on demand delivery services industry.

4.4 Greater attention is to be paid to each of subclauses 4.2(a), (b), (c) and (e) of the Road Transport Award.

#### **Subclause 4.2(a) of the Road Transport Award**

4.5 Subclause 4.2(a) of the Road Transport Award is to be read consistently with the principles referred to at paragraphs 3.3 to 3.5 above.

4.6 An important part of the context, in which the words of clause 4.2(a) is to be read is that, when those words were initially drafted (as part of award modernisation under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (FW Transitional Act)*), the food e-commerce industry was in its infancy and the on demand delivery services industry (the subject of the Application) was non-existent in Australia.<sup>37</sup> The proliferation of technology used in the “gig economy”, since award modernisation occurred in 2008-2009, could not have been contemplated at the time of award modernisation. The first on demand delivery industry platform to commence operation in Australia was UberEats, which commenced operation only in 2015, some six years after the award modernisation process was undertaken by the Australian Industrial Relations Commission.

4.7 Putting aside the kinds of items which are collected and delivered (which is dealt with further at paragraphs 4.19 to 4.29 below), and the classifications, clause 4.1 read with clause 4.2(a) of the Road Transport Award is in the following terms:

*This industry award covers employers throughout Australia in ... [the industry of] ... the transport by road of [items], including where the work performed is ancillary to the principal business, undertaking or industry of the employer; and their employees in the classifications listed...*

4.8 The Road Transport Award (like the Fast Food Award, and many other modern awards) is an industry award, not an occupational award. Contrary to paragraphs 8 to 10 of the TWU Preliminary Submissions,<sup>38</sup> the focus of the Commission, in determining whether operators in the on demand delivery services industry (and Relevant Employees) are covered by the definition of the “road transport and distribution industry” should not be on the work activities of the individual employees, but rather the business of the employer.

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<sup>37</sup> Belling Statement at [17] to [19]

<sup>38</sup> See also the paragraphs 9-12 of the Submission dated 9 August 2011 of the Australian Road Transport Industrial Organisation (**ARTIO Submission**).

- 4.9 Properly understood, the industry engaged in by employers in the on demand delivery services industry (as defined – see paragraph 2.1 above, and see also paragraphs 2.2 to 2.7 above) is not an industry of “*transport by road*” of items. The on demand delivery services industry is an industry of marketing a (third party) merchant’s items to consumers; accepting orders from consumers as an agent of the merchant (with the sale being made, from the merchant to the consumer, for immediate delivery) using an on-line or application based platform; accepting payment from the consumer on behalf of the merchant, and collecting/delivering the item immediately from the merchant to the consumer. It is a very different industry to the traditional “road transport industry” described in subparagraph 4.2(a) of the Road Transport Award: delivery is one aspect of the process, but the on demand delivery services industry is so much more than that.
- 4.10 As to the central importance of the operator’s online or application-based platform, see paragraph 2.6 above. Menulog also refers to and repeats paragraphs 51 to 55 of the grounds set out at part 2.2 of the Application. The online or application-based platform places the consumer at the centre of the process, in a way that is foreign to traditional forms of transport and logistics. It is the consumer who chooses not only the items they wish to purchase, and the merchant, and when they wish the items to be delivered, but also which platform to use – whether it be Menulog, Uber, DoorDash, or some other competitor, and therefore by whom delivery is effected. The immediacy of delivery is also driven by the consumer’s purchase on the platform which is based on a consumer’s demand for immediate consumption of the items ordered. These matters are all very unlike the forms of road transport which existed at the time that the Road Transport Award, originally known as the *Road Transport and Distribution Award 2010*, was made.
- 4.11 The TWU Preliminary Submissions at paragraph 16 seek to equate the role of an operator in the on demand delivery services industry with transport companies such as Toll Holdings Pty Ltd and Linfox Australia Pty Ltd. The businesses are very different, because they are in different industries.
- 4.12 Transport companies such as Toll and Linfox:
- (a) do not market the businesses of their clients, in the way that operators in the on demand delivery services industry do;
  - (b) do not operate platforms (whether online, application based, or otherwise) which customers can use in order to purchase items from third party businesses, in the way that operators in the on demand delivery services industry do;
  - (c) do not act as agents for the third party merchants in relation to the sale of, and holding monies in relation to the sale of, the merchants’ items, in the way that operators in the on demand delivery services industry do.
- 4.13 Each of the business activities referred to in paragraph 4.12 above – which are core activities for an operator in the on demand delivery services industry – are not business activities of Toll, Linfox, etc, at all. They are key distinguishing features, between two different industries.
- 4.14 The online and application based platforms used by on demand delivery service industry operators, as described above, are different to the applications described in paragraphs 8 to 11 of the Submission dated 9 August 2021 of the National Road Transport Association (**Nat Road Submission**). What the Nat Road Submission describes is a platform which is “*digital platforms that “match” freight tasks with transport companies. They essentially offer a limited form of freight forwarding...*”. That is not the task of the digital platforms used by operators in the on demand delivery services industry. The task is not one of freight forwarding. The platform is one for the consumer

to order items from a third party merchant and for the merchant to supply the items for immediate collection and delivery (as well as facilitating payment by the consumer to the operator as agent for the merchant).<sup>39</sup>

- 4.15 The same observations may be made in relation to bicycle messengers, collecting and delivering documents and small packages, of a kind referred to at paragraphs 25 and 26 in the Submission of Dr Tom Barratt, Dr Caleb Goods and Dr Alex Ven dated 9 August 2021 (**Academics' Submission**).
- 4.16 That there are employers in some industries, who perform work which might be described as "delivery", not covered by the Road Transport Award, is apparent from clause 4.3 of the Road Transport Award. Menulog refers to and repeats paragraphs 39 to 48 of the grounds set out at part 2.2 of the Application.
- 4.17 It is also apparent from the references to "delivery" in the Fast Food Award (see paragraphs 5.3 and 5.12 below), the *General Retail Industry Award 2020* (**General Retail Award**) at clause 4.2(h) (in relation to the delivery of newspapers) and the General Retail Award at Schedule A.1.1(h) (in relation to the duties of a Retail Employee Level 1), that industries other than the road transport industry can involve "delivery" without being covered by the Road Transport Award. See too the *Meat Industry Award 2020* (at clause 4.2(d)(ii)) and the *Timber Industry Award 2020* (at clause 4.2(b)(ii)), which each include in the industry the transport of items, without being covered by the Road Transport Award. Just because part of an employer's functions might involve delivery or transport does not necessarily mean that it (and its employees) are covered by the Road Transport Award.
- 4.18 In the context of the broader system of modern awards, described above, there can be collection and delivery of items, without the employer/employee being within the definition of "road transport industry" defined in subclause 4.2(a) of the Road Transport Industry. The very unique nature of the on demand delivery services industry – and the significant differences between it and the traditional road transport industry – should lead to a conclusion that the on demand delivery services industry is not covered by subclause 4.2(a) of the Road Transport Award.

***“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”***

- 4.19 Further and in the alternative to paragraphs 4.5 to 4.18 above, having regard to the types of items which are within the scope of subclause 4.2(a) of the Road Transport Industry, and the extent of meal delivery as part of the on demand delivery services industry, the Commission should conclude that that the subclause does not cover a substantial enough part of the work of the Relevant Employees so as to fall within subclause 4.2(a).
- 4.20 The kinds of items, transport of which is covered by subclause 4.2(a) of the Road Transport Award, is not every possible kind of item which might conceivably be capable of delivery. Rather, the items referred to in subclause 4.2(a) are *“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”*.

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<sup>39</sup> See also paragraphs 4 and 9 of the TWU Submission dated 22 August 2021.

4.21 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.*

4.22 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.*

4.23 The Macquarie Dictionary defines “merchandise” as:

- noun 1. goods; commodities; especially manufactured goods.*
- 2. the stock of a store*

4.24 The Macquarie Dictionary defines “material” as:

- noun 1. the substance or substances of which a thing is made or composed.*
- 2. any constituent element of a thing.*
- 3. anything serving as crude or raw matter for working upon or developing.*
- 4. a person demonstrating potential in a particular skill or occupation: he's good foreman material.*
- 5. information, ideas, or the like on which a report, thesis, etc., is based.*
- 6. a textile fabric.*
- 7. (plural) articles of any kind requisite for making or doing something: writing materials.*

4.25 The phrase “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” should be read *ejusdem generis* with “goods, wares, merchandise or materials”.

4.26 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 prepared meals, which are delivered in such a state that they are ready for immediate consumption. Such food – delivered immediately upon the order by the consumer – is a substantial part of the business of operators in the on demand delivery services industry. The offering for sale (by restaurants) of such meals, delivered to the consumer’s door, is a convenient alternative to the consumption of the same (freshly prepared food) at a restaurant.<sup>40</sup>

4.27 Neither food sold and consumed at a restaurant, nor delivered to the consumer’s home, are items that may properly be regarded as “goods, wares, merchandise or materials”. Nor are they the same type of thing as “goods, wares, merchandise or materials”. The Commission should conclude that they are not within the meaning of the words “anything whatsoever”, properly construed.

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<sup>40</sup> Belling Statement at [60] – [61].

- 4.28 That a freshly prepared meal, delivered on the basis that it is ready to eat immediately, is not an example 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*” is supported by the reference to “delivery” in the Fast Food Award. Menulog refers to paragraphs 4.17 above and 5.3 and 5.12 below. The terms of other modern awards, made by the Commission or its predecessor, operating alongside the Road Transport Award, is an important part of the context of construing the meaning of the Road Transport Award. This context supports a conclusion that, properly construed, subclause 4.2(a) of the Road Transport Award does not cover the on demand delivery services industry.
- 4.29 For the above reasons, the Commission should conclude that operators in the on demand delivery services industry, and the Relevant Employees, are not covered by subclause 4.2(a) of the Road Transport Industry when that subclause is properly construed. Attention should then fall to the more specific subclauses, 4.2(b), (c) and (e).

#### **Subclause 4.2(b) of the Road Transport Award**

- 4.30 The opening and closing phrases of subclause 4.2(b) of the Road Transport Award are important words of limitation. What subclause 4.2(b) relates to is “*receiving, handling or storing... in a distribution facility.*”
- 4.31 Operators in the on demand delivery services industry do not have distribution facilities.<sup>41</sup> Rather, items are collected from a merchant and delivered directly to the consumer.<sup>42</sup> They are not received, handled, or stored, at a distribution facility, because there is no distribution facility at all. On that basis, subclause 4.2(b) of the Road Transport Award does not cover operators in the on demand delivery services industry.

#### **Subclause 4.2(c) of the Road Transport Award**

- 4.32 Similarly, the opening and closing phrases of subclause 4.2(c) of the Road Transport Award are important words of limitation. What subclause 4.2(c) relates to is “*storage and distribution... where the storage and distribution activities are carried out in connection with air freight forwarding and customs clearance.*”
- 4.33 Firstly, and for the same reasons as explained in paragraph 4.31 above, operators in the on demand delivery services industry do not engage in “storage” activities. They do not have facilities at which good may be stored.
- 4.34 Second, the use of the word “distribution”, as part of the phrase “storage and distribution”, implies that goods are to be distributed to many locations from one central storage point. Such multi-destination “*distribution*” is inconsistent with the activities of operators in the on demand delivery services industry, because the items which are collected and delivered are “*ordered by a consumer from third-party businesses ... for immediate collection and delivery*”.<sup>43</sup> The courier engages in what might be called point to point collection and distribution, directly from the merchant to the consumer who has ordered the items for immediate delivery, as reflected by Menulog’s average restaurant

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<sup>41</sup> Belling Statement at [46].

<sup>42</sup> Belling Statement at [28]

<sup>43</sup> Definition of the “on demand delivery services industry” – paragraph 2.1 (see also paragraph 2.2) above.

to customer delivery time of 9.2 minutes<sup>44</sup>. If they go to several delivery points then the delivery will not be “immediate” (and, if the item is hot food, it will go cold).<sup>45</sup>

- 4.35 Third – and most importantly in relation to subclause 4.2(c) of the Road Transport Award – even if operators are engaged in “*storage and distribution activities*” (which they are not, for the reasons explained above), operators in the on demand delivery services industry do not engage in their activities “*in connection with air freight forwarding and customs clearance*”. The collection and delivery of items “*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 on an online or application-based platform*” is not air freight forwarding, nor is it customs clearance (nor is it in connection with those activities). It is a different thing entirely.

#### **Subclause 4.2(e) of the Road Transport Award**

- 4.36 As to subclause 4.2(e) of the Road Transport Award, the ordinary meaning of the phrase “*mobile food vending*” is that it is the selling of food from a vehicle such as a mobile canteen. This is supported by the context in which the Road Transport Award, originally known as the *Road Transport and Distribution Award 2010*, was made.
- 4.37 Prior to award modernisation under the FW Transitional Act, there existed a notional agreement preserving State awards (**NAPSA**) named the *Transport Workers’ (Mobile Food Vendors) Award 1987* (AN160321) (**Mobile Food Vendors NAPSA**). Clause 3 of the Mobile Food Vendors NAPSA provided that the award applied to employees within the classifications in clause 7, namely mobile canteen operators (grade 1 and grade 2) and leading hands placed in charge of mobile canteen operators. Couriers in the on demand delivery services industry are not mobile canteen operators.
- 4.38 Operators in the on demand delivery services industry are not engaged in mobile food vending. As stated at paragraphs 2.4 to 2.7 above, operators in the on demand delivery services industry do not sell food or other items, rather the items are sold by the merchant (ie, in relation to food, the restaurant) to the customer. The operator (and the courier) never hold legal title to the items delivered.<sup>46</sup>

#### **Conclusion in relation to the Road Transport Award**

- 4.39 It follows from the above that the Road Transport Award does not cover employers in the on demand delivery services industry, or the Relevant Employees.

### **5. Fast Food Award**

- 5.1 Consistent with the Full Bench’s preliminary view, contained in the *Full Bench Statement dated 12 July 2021* [2021] FWCFB 4053 at [23], Menulog submits that the Fast Food Award does not cover operators, and their Relevant Employees, in the on demand delivery services industry.

- 5.2 The key clause in the Fast Food Award is clause 4, in particular clause 4.1:

“4.1 This industry award covers employers throughout Australia in the fast food industry and their employees in the classifications listed in clause 17—

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<sup>44</sup> Belling Statement at [27].

<sup>45</sup> Belling Statement at [27].

<sup>46</sup> Belling Statement at [38].

Minimum weekly wages to the exclusion of any other modern award. The award does not cover employers in the following industries:

- the hospitality industry; or
- the general retail industry.”

5.3 The definition of “*fast food industry*” from clause 3.1 of the Fast Food Award, is also relevant:

“**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”.

5.4 Regard should be also had to the definitions of “*general retail industry*” in the *General Retail Industry Award 2020 (General Retail Award)*, “*restaurant industry*” in the *Restaurant Industry Award 2020 (Restaurant Award)* and “*hospitality industry*” in the *Hospitality Industry (General) Award 2020 (Hospitality Award)* which are referred to in paragraph 6.2 below.

### **The Fast Food Award applies to fast food outlets, which are part of the fast food sector carved out from (but otherwise part of) the retail industry**

5.5 An important part of the context of the Fast Food Award is the process which led to the making of the award, originally named the *Fast Food Industry Award 2010*, and also the relationship between that award and the *General Retail Industry Award 2010*.

5.6 When the Full Bench was engaged in award modernisation, under the FW Transitional Act, the Fast Food Award arose out of consideration of the awards applying to the retail industry. The relevant union, the Shop, Distributive and Allied Employees’ Association (**SDA**), proposed that the modern retail industry award “*should cover all classifications of employees within the four walls of a shop, but not community pharmacies, **fast food outlets**, hair and beauty salons, wholesale and warehouse activities except storage functions within a shop, clerical and administrative work not performed within a shop and the retail component of the vehicle industry repair, services and retail industry.*”<sup>47</sup> The Full Bench’s preliminary view was to agree in principle with the SDA’s approach, but not to agree to the exclusions of community pharmacies, fast food outlets and hair dressing services.<sup>48</sup>

5.7 Consistent with the award modernisation Full Bench’s preliminary view described in paragraph 5.1 above, when the Full Bench first published its exposure drafts on 12 September 2008 (providing the parties an opportunity for submissions), the Full Bench included fast food and pharmacies in the draft scope of the Retail Industry Award.<sup>49</sup> That is consistent with the scope of the fast food industry being confined to

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<sup>47</sup> *Full Bench Award Modernisation Statement 20 June 2008* [2008] AIRCFB 550 at [80] (emphasis added).

<sup>48</sup> *Full Bench Award Modernisation Statement 20 June 2008* [2008] AIRCFB 550 at [83].

<sup>49</sup> *Full Bench Award Modernisation Statement 12 September 2008* [2008] AIRCFB 717 at [4].

fast food shops, ie outlets selling fast food which they produce or otherwise own, not an operation which acts as an agent for merchants and delivers fast food sold by those (third party) merchants.

- 5.8 The Full Bench's decision dated 19 December 2008 referred to the view it had previously stated, in relation to a single retail industry award which would include fast food outlets and pharmacies, and stated that as a result of consultation with the relevant parties the Full Bench had decided that it would be impractical to implement award rationalisation on the scale provided for in the exposure drafts, and that "*The industry principally affected is the retail industry. In that industry there will be a number of modern awards covering separate sectors.*"<sup>50</sup>
- 5.9 In the 19 December 2008 award modernisation decision, the Full Bench decided to make separate awards for general retailing, fast food outlets, hair and beauty, and community pharmacies.<sup>51</sup> This is consistent with the fast food industry, covered by the Fast Food Award, being a sector within the broader retail industry, alongside other awards such as the General Retail Award and the *Pharmacy Industry Award 2020*. Each of those awards covers employers which operate as "*bricks and mortar*" shops, from which they sell items.
- 5.10 Employers in the on demand delivery services industry are not restaurants, nor are they fast food outlets. They do not make the food which they deliver, nor do they sell the food. Rather they act as agents, for the merchants (ie, restaurants and fast food outlets) which make and sell the food.<sup>52</sup> They also act as agents for other third party business, which offer for sale other types of items for immediate delivery, using the operator's online or application-based platform.
- 5.11 The critical point is that employers in the on demand delivery services industry are not, themselves, the party who sell (or make, or at any time hold title over) the items which are delivered to customers. They are not fast food outlets. Accordingly, they are not part of the broader "retail" industry, nor are they part of the fast food sector of the retail industry (which is covered by the Fast Food Award). It follows that they are not covered by the Fast Food Award.

### Reference to "or delivery" in the Fast Food Award

- 5.12 The reference, in the chapeau to the definition of "*fast food industry*" from clause 3.1 of the Fast Food Award, to "*and/or delivery*" is to be read in the context described above, and also in the context of the Fast Food Award as a whole. So too the reference to "delivery" in the classification of Fast Food Employee Level 1.<sup>53</sup> Properly understood, the "delivery" referred to there is delivery of the employer's products – ie fast food produced by an employer which is itself a fast food outlet. That is consistent with the transport allowance at clause 19.6(b) of the Fast Food Award, and with the use of the compound phrase "delivery outlet" in and Fast Food Employee Level 3.<sup>54</sup> Menulog endorses paragraphs [25]-[27] of the submissions of the Transport Workers' Union dated 9 August 2021.

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<sup>50</sup> *Full Bench Award Modernisation Statement 19 December 2008* [2008] AIRCFB 1000 at [26]-[27].

<sup>51</sup> *Full Bench Award Modernisation Statement 19 December 2008* [2008] AIRCFB 1000 at [279]-[284].

<sup>52</sup> Paragraphs 2.2 and 2.4 above

<sup>53</sup> Fast Food Award, Schedule B.1.1.

<sup>54</sup> Fast Food Award, Schedule B.3.



## Not all of the food delivered by on demand delivery services industry operators is “fast food”

5.13 Further and in the alternative to the above, the fact that “fast food” is not the only item delivered by employers in the on demand delivery services industry<sup>55</sup> supports a conclusion that those employers are not covered by the Fast Food Award.

5.14 Part of the context, in which the Fast Food Award is to be construed, is the terms of the pre-reform awards which existed at the time of award modernisation under the FW Transitional Provisions. As Burchett J put it in *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518:

“Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground.”

5.15 The award modernisation Full Bench, in making the Fast Food Industry Award 2010 and the *General Retail Industry Award 2010*, followed the main federal industry awards where possible, and had regard to all other applicable instruments, although noting significant differences in awards and NAPSAs applying to the fast food and pharmacy parts of the retail industry.<sup>56</sup>

5.16 The predecessor of the definition of the fast food industry in the Fast Food Award is drawn from clause 4.3 of the pre-reform award named the *National Fast Food Retail Award 2000* (AP806313). The history of the definition is that clause 4.3 was inserted with effect from 26 April 2005, by an order dated 11 May 2005,<sup>57</sup> in an application under s113 of the *Workplace Relations Act 1996*.

5.17 The transcript of the hearing on 26 April 2005 reveals that the purpose of the application to vary the *National Fast Food Retail Award 2000* by inserting clause 4.3 was to insert an agreed industry description, which would correspond with the definition of “*the industry*” to be included in a common rule declaration to be made on the same date.<sup>58</sup> The definition which was inserted, and which remained in the *National Fast Food Retail Award 2000* at the time that it was replaced by the *Fast Food Industry Award 2010* as part of a modernisation, was similar to the definition of fast food industry in the Fast Food Industry Award.

5.18 Clause 4.3 of the *National Fast Food Retail Award 2000* provided:

- “4.3 This award shall apply to all work in or in connection with the receipt of orders for and/or preparation and/or sale and/or delivery of:
- meals, snacks and/or beverages, including but not limited to, pizzas, hamburgers, chicken, fish and chips, souvlakis, kebabs, muffins, noodles, rice, sandwiches, rolls, ice cream, coffee, juices, which are sold to the public primarily for take away; and/or

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<sup>55</sup> Belling Statement at [47] – [48].

<sup>56</sup> *Full Bench Award Modernisation Statement 19 December 2008* [2008] AIRCFB 1000 at [286].

<sup>57</sup> PR957882.

<sup>58</sup> Transcript of proceedings before Senior Deputy President Kaufman, application by Shop, Distributive and Allied Employees Association (C2004/2862) and other matters, 26 April 2005 at pn11-13.

- take away foods and beverages packaged sold or served in such a manner as to allow their being taken from the point of distribution 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 in other than food courts of shopping centres and retail complexes.”<sup>59</sup>

5.19 Notably, the meals, snacks and/or beverages were defined to include pizzas, hamburgers and the like. It is apparent that these are the kinds of food provided by fast food outlets, and the phrase “*meals, snacks and/or beverages*” is to be read as *ejusdem generis*. What the Fast Food Award covers is exactly what the name suggests – fast food. It does not cover what might be regarded as more traditional, or higher end, restaurants and other hospitality establishments. The latter are covered by the Hospitality Award instead.

5.20 The broad cross-section of types of businesses served by employers in the on demand delivery services industry – merchants which are not just fast food outlets, but also (non-fast food) restaurants and other (non-food) merchants – supports a finding that the Relevant Employees are not covered by the definition of “fast food industry” in the Fast Food Award.

5.21 If the fact that some fast food was delivered by a Relevant Employee on a shift – notwithstanding that the Relevant Employee is not employed by a fast food outlet, and notwithstanding that fast food delivery may not be all/ a substantial part of his duties on that particular shift – could mean that the Relevant Employee was covered by the Fast Food Award, inconsistent and perverse outcomes might occur. An employee might be covered by the Fast Food Award on one shift, but not the next, and the question of award coverage could only be determined after his or her shift is completed. Having regard to the modern award objective of ensuring a “*simple, easy to understand, stable and sustainable modern award system*”,<sup>60</sup> the Commission should strain against a construction which would allow this to occur.

## **Conclusion in relation to the Fast Food Award**

5.22 Given the Fast Food Award’s status as an industry award, the proper approach is to have regard to the industry in which the Relevant Employees are employed, and to consider whether that industry is within the meaning (properly construed) of the “fast food industry” covered by the Award. For the reasons set out above, the Fast Food Award does not cover employers in the on demand delivery services industry, or the Relevant Employees.

## **6. Other awards**

6.1 No other modern awards, other than the Miscellaneous Award, cover operators and their Relevant Employees in the on demand delivery services industry.

6.2 Three other awards, which may be considered, but then discounted, are the General Retail Award, the Restaurant Award and the Hospitality Award.

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<sup>59</sup> Order of Senior Deputy President Kaufman dated 11 May 2005 (PR957882) varying the *National Fast Food Retail Award 2000* (AW806313). See also the Common Rule Declaration dated 12 May 2005 (PR957912), containing a definition of “*the industry*” in the same terms.

<sup>60</sup> Section 134(1)(g) of the FW Act.

- (a) Clause 4.1(a) of the General Retail Award provides that the General Retail Award applies to employers in the “*general retail industry*”. The general retail industry is defined by clause 4.2 of the General Retail Award to mean “*The retail sale or hire of goods or services for personal, household or business consumption ...*” including the items in paragraphs 4.2(a)-(h) but excluding the matters contained in paragraphs 4.2(i)-(o). The key phrase in that industry description is “*retail sale or hire*”. As discussed at paragraphs 2.4 to 2.7 above, employers in the on demand delivery services industry (ie the employers who would be covered by the proposed award under the Application) do not themselves engage in retail sale or hire. It is the merchant – ie the restaurant or other seller – who sells the food or other items to the customer.
- (b) Clause 4.1(a) of the Restaurant Award provides that the Restaurant Award covers employers in the “*restaurant industry*”. The “*restaurant industry*” is defined by clause 4.2 of the Restaurant Award relevantly to mean “*restaurants, reception centres, night clubs, cafés or roadhouses and includes catering by a restaurant business and a tea room operated in, or in connection with, a restaurant business ...*”. The operators in the on-demand delivery service do not themselves conduct a restaurant business or any of those other businesses. This is not an award which covers operators in the on demand delivery services industry, or the Relevant Employees.
- (c) Clause 4.1(a) provides that the Hospitality Award applies to employers in the “*hospitality industry*”. Clause 4.2 of the Hospitality Award contains an inclusive definition of the “*hospitality industry*”, being several kinds of businesses, none of which are like the business conducted by an operator in the on demand delivery services industry.
- 6.3 Save for the Miscellaneous Award, there are no other awards which might be considered to cover couriers employed by operators in the on demand delivery services industry.
- 6.4 In the absence of some other modern award covering them, couriers employed by operators in the on demand delivery services industry are covered by the Miscellaneous Award. They are within the scope of clause 4.1 of the Miscellaneous Award, and not excluded by clauses 4.2, 4.3 or any other subclause of clause 4 of the Miscellaneous Award.
- 6.5 As set out at paragraphs [40] to [43] of the 12 July 2021 Statement of the Full Bench<sup>61</sup> however, the Miscellaneous Award is not intended to provide a comprehensive safety net for any particular industry or occupation. Accordingly, in the circumstances that the Commission finds that the Miscellaneous Award does cover the on demand delivery services industry, Menulog submits that the Commission ought to adopt its provisional view that the Miscellaneous Award does not provide a fair and relevant safety net for the on demand delivery services industry, and a new modern award is required to satisfy the modern awards objective.

## 7. Conclusion

- 7.1 A number of interested parties have filed preliminary submissions with the Commission, and the Commission has ordered that interested parties file submissions dealing with

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<sup>61</sup> [2021] FWCFB 4053

the Threshold Question by 29 November 2021. Menulog reserves its right to reply to those submissions at the hearing scheduled for 6 December 2021.

- 7.2 One of the themes emerging from some of the interested parties' submissions is an implicit suggestion that the Threshold Question need not be answered, because Menulog may currently be the only operator in the on demand services industry which considers some of its couriers to be employees. Menulog refers to and repeats paragraph 1.5 above. Even if most of the individuals currently engaged as couriers in the on demand delivery services industry are properly characterised as independent contractors, this does not mean that the question of award coverage of such individuals (if they were employees) is irrelevant. For example, the existence of an award covering employees working in a particular industry, and the remuneration and other terms and conditions under that award which would apply to an employee, may be a relevant consideration in a proceeding by an independent contractor under the *Independent Contractors Act 2006*.<sup>62</sup> Persons can be working in an industry, even if they are not covered by an award because they are independent contractors. Just because most of the workers in an industry are described as independent contractors does not lead to a conclusion that the industry does not exist.
- 7.3 Further, just because an industry is relatively new does not mean that it does not exist. The existence of the on demand delivery services industry and its significant differences from older industries which existed when modern awards (and their pre-reform predecessors were made) is a reality that cannot be ignored. It is not appropriate to try to shoe-horn a new industry, based on a few common activities, into an old industry in which it really does not fit. The appropriate course is to assess the on demand services industry in its entirety, not in a piecemeal fashion, and to recognise it as a distinct industry, separate from other (older) industries with which it has limited commonality.
- 7.4 Returning to the interested parties' preliminary submissions, in general terms, many of the submissions filed to date by the interested parties take too narrow a view of the character of the business of employers in the on demand delivery services industry, and of the work performed in that industry by the Relevant Employees and the character of the business of their employer. Some interested parties focus on, and emphasise, some aspects of the on demand delivery services industry, in order to support a conclusion that the Road Transport Award applies, while others focus on other aspects, to support a conclusion that the Fast Food Award applies. Both of those conclusions are wrong, because they ignore those aspects of the on demand delivery services industry which do not fit those interested parties' proposed conclusion.
- 7.5 One thing which is apparent from the submissions filed to date by the interested parties is that the award coverage of employers in the on demand delivery services industry, and of the Relevant Employees, is "falling between two stools". Where an emphasis is placed on one characteristic of work in the on demand delivery services industry, the Fast Food Award may be said to have coverage, whereas if emphasis is placed upon another characteristic of the on demand delivery services industry, the Road Transport Award may be said to apply to have coverage.
- 7.6 It is an unsatisfactory outcome that both the Fast Food Award and the Road Transport Award could be argued to have coverage, depending on which parts of the on demand delivery services industry is focussed on. Menulog submits that this predicament of coverage

is not resolved by clause 4.7 of each of the Road Transport Award and the Fast Food Award, which operates where an employer is covered by more than one award.

7.7 The appropriate course for the Commission is to have regard to all aspects of the on demand delivery services industry – as defined in paragraph 2.1 above and further explained in paragraphs 2.2 to 2.7 above. Once regard is had to the relevant facts, and to the awards as properly construed, the Commission should conclude that:

- (a) the Road Transport Award does not cover the Relevant Employees or their employers in the on demand delivery services industry;
- (b) the Fast Food Award does not cover the Relevant Employees or their employers in the on demand delivery services industry; and
- (c) the Miscellaneous Award is the only award which covers the Relevant Employees, or their employers in the on demand delivery services industry in respect of the Relevant Employees.

**Brendan Avallone**  
Aickin Chambers

**Kingston Reid**  
**18 October 2021**

## ANNEXURE A

### MENULOG'S RESPONSES TO INTERESTED PARTY QUESTIONS ABOUT SCOPE OF THE PROPOSED ON DEMAND DELIVERY SERVICES AWARD

- (A) On 12 August 2021, the Commission issued a Statement and Directions which, among other things, invited interested parties to file a note setting out any particular clarification they seek from Menulog regarding the coverage of a proposed new modern award to cover the on demand deliver services industry.
- (B) With respect to the questions posed by interested parties, Menulog responds as follows.

#### AUSTRALIAN BUSINESS LAWYERS & ADVISORS

**1. Which employers other than Menulog are in what the applicant calls the “on demand delivery services industry”?**

If they were to employ couriers, based upon their current operating models, businesses anticipated to be captured by the on demand delivery services industry include:<sup>63</sup>

- (a) Deliveroo
- (b) Door Dash
- (c) Uber Eats
- (d) Hungry Panda
- (e) Easi

**2. What is the intended distinction between a “courier” and a “driver”?**

There is no intended distinction – courier and driver are simply two titles which describe the same function. Courier is viewed as a more inclusive term taking into account that many couriers in the on demand delivery services industry perform their duties with the use of a bicycle rather than by driving a car.

**3. What is the intended distinction between a “courier” and a “rider”?**

Please see answer to question 2 above.

**4. What are the duties of a “Level 1 Courier”?**

The core duties of a Level 1 Courier are proposed to be to:<sup>64</sup>

- (a) Pick up orders from restaurants and merchants that have been assigned to them;
- (b) Deliver orders to customers as assigned to the courier via the app as per the information and instructions provided;

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<sup>63</sup> Belling Statement at [20].

<sup>64</sup> Annexure MBB-5, Belling Statement; Belling Statement at [32]

- (c) Communicate with live operations for all issues that occur during the scheduled working times.

**5. What are the duties of a “Level 2 Courier”?**

As per a Level 1 Courier, with the additional duties of supervising at least two employees.

**6. Operationally how does a “Level 2 Courier” actually supervise “at least” two employees?**

In other markets in which Just Eat (Menulog’s parent company) operates an employed courier model, it has set up hubs which form a base from which couriers work. In these circumstances, there will often be a courier who is appointed to also undertake supervisory duties in respect of the management and support of couriers. In the absence of hubs, there will be situations where an area supervisor or team lead will support couriers out on the road in addition to performing courier duties themselves, including but not limited to work shadowing.<sup>65</sup>

**7. Are the “employees” supervised by a “Level 2 Courier”, “Level 1 Couriers” or other employees?**

The employees supervised by a Level 2 Courier will be Level 1 Couriers.

**8. Are there any limitations to the types of “food, beverages, goods or any other item” that a “courier, driver or rider” might deliver?**

*Prima facie*, it is not envisaged that there would be any limitations to the types of food, beverages, goods or other items that a courier may deliver, subject to any legal requirements such as in respect of the delivery of alcohol or high food safety risk items such as fresh meat and fish.<sup>66</sup> At a practical level, the nature of on demand delivery services is such that it is not practical for merchants to offer items for sale that cannot be immediately packaged and handed over for delivery. The majority of items offered for sale on Menulog’s platform and the platforms of its competitors is predominantly limited to food and convenience items.<sup>67</sup>

**9. What configuration of motor vehicle do the Level 1 or 2 Couriers operate?**

Without limitation, Level 1 or 2 Couriers would typically utilise a car, motorbike, scooter, ebike or bicycle.<sup>68</sup>

**10. Where a Level 1 or 2 Courier is a “rider” are they riding a motor bike, motor scooter, powered bicycle or un-powered bicycle?**

A courier may utilise any of these vehicles.

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<sup>65</sup> Belling Statement at [33].

<sup>66</sup> Belling Statement at [47].

<sup>67</sup> Belling Statement at [15].

<sup>68</sup> Belling Statement at [35].

**11. Does Menulog provide the motor vehicle, motor bike, motor scooter, powered bicycle or un-powered bicycle to the “courier, driver or rider”?**

Currently, Menulog does not provide bicycles or other vehicles for the use of its couriers in the performance of their duties, however it may do so in the future (and equally it may not).

The proposed modern award proposes that employed couriers who use their own bike or other vehicle in the performance of their duties will receive compensation for this by way of an allowance.

**12. We note that from Menulog Website:**

*Menulog offers choice for local restaurants, with two services to choose from.*

*The first is ‘self-delivery’, where restaurants can provide their own drivers, leveraging Menulog’s world-class ordering technology and national network. The second is the Menulog Delivery Service, where Menulog also provides delivery logistics via its network of couriers.*

**Is it the case that the proposed award is intended to cover only couriers employed by Menulog under the Menulog Delivery Service Model and not those employees of restaurants who are engaging in self-delivery notwithstanding that they are using Menulog’s platform?**

Yes, that is correct. Any couriers employed or engaged directly by a restaurant would not be covered by the proposed award. Employees of restaurants would be covered by whichever award covers the relevant restaurant<sup>69</sup> - they would not be covered by the proposed award, because of the exclusion in the industry description at paragraph (a) “the collection and delivery is not of the employer’s own food, beverages, goods or other items offered by it for sale”.

**13. When a customer places an order using the Menulog platform is the sale made with Menulog who then order from the vendor on behalf of the customer or do Menulog simply pass on the order to the vendor and the sale is made with the vendor and the customer?**

Menulog processes the order which is then conveyed to the vendor for completion of the sale which occurs between the vendor and the customer.<sup>70</sup>

**14. If the answer to the question in 18 is the former, is it correct to describe Menulog as a sales agent for the vendor?**

This question seeks that Menulog answer a question of law, not of fact.

**15. If the answer to the question in 18 is the latter, is it correct to describe Menulog as a marketing agent for the vendor who also provides an electronic payment platform for the vendor?**

This question seeks that Menulog answer a question of law, not of fact.

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<sup>69</sup> See for example Restaurant Award, Schedule A.2.2(f), A.2.3(f), AA.2.2(f) and AA.2.3(f); Fast Food Award, Schedule B.1.1.

<sup>70</sup> Belling Statement at [24].



**16. Can a vendor such as a restaurant engage Menulog directly for delivery purposes other than for sales transacted on the Menulog platform?**

No, Menulog does not provide general delivery services. Only orders made through the platform are delivered by it.<sup>71</sup>

**17. Are there employees engaged in the “on demand delivery services industry” other than Level 1 and 2 Couriers?**

There are various technological, HR and other support functions that support the performance of work in the on demand delivery services industry.<sup>72</sup> Pursuant to clause 4.1 of the exposure draft award, it is proposed that only couriers will be covered by the proposed award.

**18. What is the intended scope of the word “own” in the phrase “own food, beverages, goods or other items offered by it for sale” - Does the food, beverages, goods or other items need to be produced/manufactured/assembled by the employer or is it sufficient that the employer has legal ownership of the items prior to sale?**

The intended scope of the word “own” in this context is intended simply to capture those items that the restaurant or merchant has legal ownership of in order to offer them for sale. This exclusion would accordingly capture groceries offered for sale by supermarkets and convenience stores, notwithstanding that these items have not been produced / manufactured / assembled by these businesses.<sup>73</sup>

**19. What work activity is undertaken by employees of Menulog other than “couriers, driver or riders” and what Modern Awards apply to their employment?**

Please see above at question 17.

In relation to the award coverage of employees performing work of a kind other than couriers (ie work beyond the scope of the proposed award), this question seeks that Menulog answer a question of law, not of fact, which is not relevant to the seeking of clarification regarding the coverage of the proposed award. Under cover of that objection, to the extent that Menulog corporate and support employees are covered by modern awards, Menulog understands them to be covered by the *Clerks – Private Sector Award 2020*.

**20. What device do the “couriers, drivers or riders” use to be allocated work?**

Couriers use their smartphone which has a courier app installed to it to be allocated work.<sup>74</sup>

**21. Does Menulog operate an ‘allocations centre’ to allocate the work to “couriers, driver or riders” or is the allocation completely digital?**

The allocation is entirely digital. There is no allocations centre or other human involvement in the allocation of deliveries.<sup>75</sup>

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<sup>71</sup> Belling Statement at [45].

<sup>72</sup> Belling Statement at [8].

<sup>73</sup> Belling Statement at [52].

<sup>74</sup> Belling Statement at [25].

<sup>75</sup> Belling Statement at [25].

- 22. What is the name of the software used to allocate work to “couriers, driver or riders”?**

Menulog has developed a proprietary app for use in its business.<sup>76</sup> Competitor platforms have their own similar proprietary apps that they have developed for use in their on demand delivery business.

## THE ACADEMICS

- 23. The research team note that Menulog refer to “employers” throughout their reply submission dated 12 July. Employees (rather than contractors) of which employers would be covered by the putative Modern Award?**

Please see question 1 above.

- 24. Related to [1] above how large an industry would be covered by the putative Modern Award, in terms of turnover and/or employees?**

This question seeks that Menulog answer a question which is not relevant the seeking of clarification regarding the coverage of the proposed award, and which is not within the direct knowledge of Menulog. Under cover of that objection, Menulog notes that in December 2020, the Actuaries Institute estimated that consumers spent \$3.8billion on meal delivery in 2019, of which a substantial proportion of the growth of this industry was made up by gig platform food delivery businesses.<sup>77</sup>

- 25. In our submission dated 6 August we referred to the labour process working for food-delivery platforms in the Australian context using an independent contractor model (See Figure 1 below). Can Menulog please explain how their labour process for food-delivery (or delivery of other items, with vendor in place of restaurant) differs under an employment model?**

Please see figures 2 and 3 in the Belling Statement.

- 26. Given Menulog’s reliance on the application of *ejusdem generis* in their submission, can Menulog inform The Commission of the relative proportion and importance of ‘non-fast food delivery’ to their business when compared with food delivery?**

Menulog does not maintain data about the nature of the individual items that are purchased through its platform, and could not comment upon the proportion of food v non-food items delivered by its competitors.

Menulog estimates that approximately 5% of items purchased through its platform are non-food items,<sup>78</sup> and the proportion of non-food items has continued to grow throughout the COVID-19 pandemic while customers have been subject to stay-at-home orders or otherwise encouraged to limit their movements.<sup>79</sup>

- 27. Menulog’s mobile application allows customers of certain restaurants to choose between delivery of certain items by Menulog’s courier network or a restaurant’s own in-house delivery networks, where available (See Figure 2 above for illustrative example). Can Menulog explain how the nature of the work between**

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<sup>76</sup> Belling Statement at [25].

<sup>77</sup> Annexure MBB-1, Belling Statement.

<sup>78</sup> Belling Statement at [15].

<sup>79</sup> Belling Statement at [21].

**‘in house food delivery’ and that what would be carried out under the putative Modern Award is substantially different from one another?**

This question seeks that Menulog answer a mixed question of fact and law (what is “substantially different”), and which is not relevant to the seeking of clarification regarding the coverage of the proposed award. In any event, couriers employed or engaged directly by a restaurant would not be covered by the proposed award. Employees of restaurants would be covered by whichever award covers the relevant restaurant - they would not be covered by the proposed award, because of the exclusion in the industry description at paragraph (a) “*the collection and delivery is not of the employer’s own food, beverages, goods or other items offered by it for sale*”

**NATIONAL ROAD TRANSPORT ASSOCIATION**

**28. What is the nature and extent of the ‘other goods’ that Menulog will supply to customers?”**

Please see questions 8 and 26 above.

**AUSTRALIAN ROAD TRANSPORT INDUSTRIAL ORGANISATION**

**29. Does Menulog operate a restaurant, a kitchen or fast-food outlet?**

No, Menulog does not operate a restaurant, kitchen or fast-food outlet. Menulog does not understand that any of its competitor platforms operate a restaurant, kitchen or fast-food outlet.<sup>80</sup>

**30. Does Menulog prepare any food for distribution/delivery?**

No, Menulog does not prepare any food for distribution/delivery. Menulog does not understand that any of its competitor platforms prepare any food for distribution/delivery.<sup>81</sup>

**31. Please explain in some detail the process that Menulog uses to collect and then deliver take away food parcels, including initial ordering, allocation of work to couriers, collection of ‘food, beverages, goods or other items’ by the couriers and delivery of same to the customer?**

Please see question 25 above.

**32. Is this process only applicable via a mobile phone application? In other words, can a customer ring a restaurant or fast-food outlet to order a meal and request the restaurant to arrange delivery through Menulog?**

Customers can also make orders through a website page accessible from a computer.

No, further to question 16 above, Menulog does not provide general delivery services and accordingly it would not be possible for a customer to make a phone order from a restaurant and request delivery from Menulog. Equally, it would not be possible for a restaurant to engage Menulog to deliver food that has not been ordered through the Menulog platform.<sup>82</sup>

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<sup>80</sup> Belling Statement at [55].

<sup>81</sup> Belling Statement at [55].

<sup>82</sup> Belling Statement at [45].

- 33. What methods of transport does Menulog use to make the deliveries of ‘food, beverages, goods or other items’ to customers? Are there any alternative methods used to walkers, cyclists, couriers – whether in a vehicle or on a motor cycle?**

Please see question 9 above.

- 34. Why does Menulog need to be able to deliver ‘goods or any other item’, and what would a reasonable person expect to be included in such phrase?**

Because its customers want to be able to purchase these items on demand.<sup>83</sup> Menulog and its competitor platforms provide its customers with the opportunity to conveniently purchase goods and other items and have them delivered on demand. These types of items include groceries and other consumer goods, ranging from toilet paper to phone chargers.<sup>84</sup>

- 35. Does a restaurant/fast food outlet pay for the transport service provided by Menulog when it delivers ‘food, beverages, goods or other items’ to a customer?**

Yes, the restaurant or merchant pays a percentage of each sale made which goes to the payment of wages or fees to the courier and other operational costs of Menulog or the relevant competitor platform. This percentage varies across different platforms.

- 36. How does Menulog charge for the transport service it provides in the delivery of ‘food, beverages, goods or other items’? Is it time based, flat rate, distance based or some other method?**

Menulog and its competitor platforms charge a delivery fee to the customer which is supplemented by the fee charged to restaurants. Platforms may offer discounted delivery fees to incentivise purchases from particular restaurants to optimally utilise couriers, or they may increase delivery fees during periods of peak demand. These fees are typically between \$2 - \$6.

- 37. Does Menulog collect and deliver ‘food, beverages, goods or any other item’ from a supermarket, corner store, liquor shop, petrol station, bakery, cigarette shop or similar retail outlet?**

Yes, Menulog and its competitor platforms collect and deliver from each of these types of businesses.<sup>85</sup>

- 38. Does Menulog operate on a 24/7/365 basis? Or does it only transport ‘food, beverages, goods or other items’ between specified times and if so, what are those times?**

This question seeks that Menulog answer which is not relevant to the seeking of clarification regarding the coverage of the proposed award. Under coverage of that objection Menulog notes that, as an online platform, Menulog is theoretically open to orders on a 24/7/365 basis and does not have its own universal opening or closing times that limit the capacity for restaurants and merchants to offer items for sale, or for customers to make purchases.<sup>86</sup>

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<sup>83</sup> Belling Statement at [53] and [54].

<sup>84</sup> Belling Statement at [52].

<sup>85</sup> Belling Statement at [15] & [52].

<sup>86</sup> Belling Statement at [36].

At a practical level, Menulog only takes orders for businesses during the hours that those businesses are open to take and fulfil orders made through the Menulog platform. Accordingly, when businesses close off the capacity to receive orders through the Menulog platform, consumers are no longer able to place orders. This is at the discretion of restaurants and merchants and is not controlled by Menulog.<sup>87</sup>

Menulog understands its competitors to operate their online platforms in the same way.

**39. How many couriers does Menulog engage to collect and deliver ‘food, beverages, goods or any other item’? How many of those couriers are employees?**

This question seeks that Menulog answer which is not relevant to the seeking of clarification regarding the coverage of the proposed award.

Menulog currently employs twenty directly employed couriers.<sup>88</sup>

**40. What employment terms and conditions currently apply to those courier employees?**

This question seeks that Menulog answer which is not relevant to the seeking of clarification regarding the coverage of the proposed award. Under coverage of that objection, the standard form contract for Menulog’s employed couriers is annexed to the Belling Statement.<sup>89</sup>

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<sup>87</sup> Belling Statement at [37].

<sup>88</sup> Belling Statement at [127].

<sup>89</sup> Annexure MBB-5, Belling Statement.