

BEFORE THE FAIR WORK COMMISSION

s.158 – Application to make a modern award

Applicant: **MENULOG PTY LTD**

Matter Number: **AM2021/72**

**Submission of the Transport Workers’ Union of Australia on
Provisional views and observations expressed in [2021] FWCFB 4053**

Introduction

1. This submission has been prepared in response to the provisional views and observations contained in the statement of the Full Bench of the Fair Work Commission in [2021] FWCFB 4053 (**Statement**). The Transport Workers’ Union of Australia (**TWU**) welcomes the opportunity to makes these submissions in relation to those matters identified by the Full Bench.
2. These submissions will address the following:
 - (a) The TWU’s constitutional coverage and representation of workers including in the road transport and distribution industry, which encompasses workers in the so-called ‘on-demand’ and ‘gig-economy’;
 - (b) The nature of ‘on-demand’ and ‘gig-economy’ work;
 - (c) The general nature of Menulog’s application;
 - (d) The questions posed by the Full Bench in its Statement.

Who is the TWU?

3. The TWU represents over 70 000 men and women employed or engaged in Australia's aviation, oil, waste management, gas, road transport, passenger vehicles and freight logistics industries. With over one hundred years’ experience in conducting Australia's passenger and freight task, the TWU has been proactive in establishing

industry standards that improve the lives and safety of transport workers, their families, and the community.

4. The TWU currently represents workers in the emerging “On Demand” or “Gig-Economy” which (for reasons further elaborated below) clearly operates within the long-established road transport industry. This sector of the industry primarily refers to workers who perform either meal, food and/or beverage delivery services to private or business customers or private passenger transport services commonly referred to as ‘rideshare’ services.
5. Since 2018, the TWU has been leading a campaign to ensure that transport workers working in the on-demand and gig-economy industries are provided access to safe, fair and ethical standards in their work. These standards should include clear and unfettered application of the relevant workplace health and safety legislation to their work and clear minimum terms and conditions of employment established by the FW Act and the applicable modern award.

What is “On Demand” work?

6. The On Demand industry is generally understood by the TWU as the performance of tasks readily acknowledged and accepted as delivery or transport work. In the case of Menulog and its related competitors, the delivery work performed can be described as the delivery of food, beverages and other consumable goods from restaurants, cafes and related outlets to consumers who have ordered these goods by way of a website or mobile phone application.
7. Such online applications connect consumers with products available through the use of the application which is generally referred to as a digital platform. These products are made available when restaurants and related outlets sign-up or form a contractual relationship with Menulog and related businesses and agree to advertise or sell their products by way of the online application that allows consumers to order their products through the application with the expectation that the operator of the application will also ensure the delivery of the relevant products.

8. Despite the introduction of the online application, the work performed by the transport workers in question is the collection of the ordered consumable goods from the relevant outlet and delivery to the end customer. The primary task of the transport worker engaged to perform the services the subject of the Menulog's application is the collection, transportation and delivery of the named product. There is no special circumstance arising from the online ordering or notification process that changes the true nature of the delivery task to be performed.
9. The task performed by the rideshare driver is the collection and transportation of passengers from one location to another using existing road networks. Once again, the ordering of the service to be provided by the customer is facilitated through an online application or digital platform provided by a business engaged in that sector of the on-demand industry, but that facet has no bearing on the work to be performed by the driver themselves. Rideshare is effectively a taxi service that allows individuals to utilise their own vehicles for the purposes of performing passenger transportation work which has traditionally been covered by the Passenger Vehicle Transportation Award.
10. The primary differential put forward by operators in the so-called on demand delivery service industry is the use of an online application or digital platform itself. This effectively suggests that the work performed by the transport worker, and the nature of the business of the operator, is in some way altered because of the manner in which those transport workers receive their instructions for the performance of work. This is, however, a *non sequitur*. In fact, this has no bearing on the fact that the fundamental nature of the industry, and the essential feature of the work performed, involves a traditional delivery or transportation task.
11. The TWU's experience is that workers operating in this industry are peremptorily and incorrectly classified as independent contractors by their putative employers. In order to perform work on digital platforms, workers must sign 'take it or leave it' contracts of adhesion declaring that they are not employees. The upshot of those contracts is that workers fall outside the protective operation of the *Fair Work Act 2009* (Cth). This practice has been exposed in the recent decision of the Commission in *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818 and, prior to this, *Klooger v Foodora Australia*

Pty Ltd [2018] FWC 6836. The TWU welcomes the approach of Menulog in recognising the value of treating workers in this sector as employees given, they are frequently erroneously identified as independent contractors. The establishment and enforcement of appropriate terms and conditions of employment for these often vulnerable workers is of critical importance.

Menulog's Application

12. Menulog's application details a number of key matters relevant to TWU's contentions. Menulog's own definition of their operations, which is described at paragraph [6] to the application is as follows:

"Menulog's model, like its competitors operating an On Demand Business in the market, relies on app technology which connects its network of on demand delivery couriers (Courier Network) with restaurants to the end consumer."

13. This reference to 'couriers' involves the deployment of terminology that presently and historically has been used to describe work performed by transport workers, namely, the delivery of goods from one place to another.

14. Further, Menulog refers to the coverage of the proposed award at paragraph [14] 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."

15. It will be apparent from the foregoing that Menulog has suggested that the key differential for the delivery work it proposes will fall under the proposed new award

is that the employer operates, in effect, as a conduit between consumers and businesses. It suggests that because the food or related goods for collection and delivery are not the employer's own goods or consumable products that this in some way changes the primary characteristics of the work performed.

16. This asserted differentiating factor is, with respect, not one of any merit. Transport companies (such as Toll Holdings Pty Limited and Linfox Australia Pty Ltd) act as conduits between suppliers or manufacturers or distributors of goods and consumers of those goods (or other businesses which sell those goods). It is and has historically been the case that transport operators arrange for the distribution of goods between the business that produces or sells the goods and other business or consumers.
17. It is further noted that at paragraphs [35]-[41] of Menulog's application that it has been submitted that, whilst on its fact the *Road Transport and Distribution Award 2020 (RTD Award)* might apply to its operations, that its business operations warrant the development of a separate and discrete industrial instrument due to the nature of the industry. The examples given to warrant the departure include the *Transport (Cash in Transit) Award 2020* and the *Waste Management Award 2020*.
18. This submission demonstrates a lack of understanding of the long-established industrial history of the two named sectors of the road transport industry and the inherent risks and separate considerations which apply to both which have justified the development and maintenance of distinct modern awards for those sectors of the transport industry. These considerations do not exist in relation to the work performed by transport workers or couriers engaged by the Menulog's business.

Current Modern Award Coverage

19. The TWU agrees that the decision-making agenda in relation to Menulog's application, as required by ss 157 and 163 of the FW Act, is correctly set out at [11] to the Statement. That is, it is necessary to first consider existing modern award coverage, whether existing modern award coverage fails to meet the modern awards objective and, if so, whether the Commission should vary the coverage of an existing modern award rather than make a new modern award. The TWU would, however, emphasise

the prohibitive effect of s 163(2) of the FW Act which prescribes a ‘Special rule about making a modern award’. That subsection precludes the Commission from making a modern award covering particular employers or employees unless it has considered whether it should, instead, vary an existing modern award to cover them.

20. The coverage and application of a modern award is dealt with in Part 2-1 of the FW Act. In short, a modern award will apply to an employee or employer if, by s 47(1) of the FW Act, the award *covers* the employee or employer, is in operation and no other provision of the FW Act provides that the award does not apply. A modern award will ‘cover’ an employer or employee if, pursuant to s 48(1) of the FW Act, the award is *expressed to cover* the employee or employer.
21. Whether an award is *expressed to cover* an employee or employer depends on the proper construction of the award and the circumstances of the employers and employees it is said to cover. The principles of construction are well-known to the Full Bench and can be shortly stated. *First*, awards are to be construed to ascertain the objective meaning of the words actually used.¹ *Second*, in ascertaining the objective intention manifested by the instrument, regard must be had to the text of the provision, considered against the provisions of the award as a whole and in light of its context and purpose.² *Third*, context is considered at the first stage of the interpretative task and not after an ambiguity or uncertainty has been identified and includes materials extrinsic to the award capable of aiding identification of the context and purpose of a provision.³ *Fourth*, whilst matters of context and purpose are important, the construction must begin (and end) with the text of the provision itself.⁴ *Fifth*, consideration and weight must be given to every part of the award, with a view to giving the provision a meaning consistent with the general intent of the award viewed as a whole.⁵ In other

¹ *King v Melbourne Swimming Club Inc* [2020] FCA 1173 at [122].

² *Ancor Ltd v CFMEU* [2005] HCA 10; 222 CLR 241 at [2] (Gleeson CJ and McHugh J).

³ *King v Melbourne* at [123].

⁴ *FCT v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

⁵ *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503 (Street J); *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355 at [69] (McHugh, Gummow, Kirby and Hayne JJ).

words, the construction of a provision of an award must be determined by reference to the language of the award viewed as a whole.⁶

Fast Food Award 2010

22. The TWU respectfully agrees with the provisional view expressed by Full Bench at paragraph [23] of the Statement that the *Fast Food Industry Award 2010* does not cover employees and employers involved in the 'on-demand' sector. The provisional view expressed by the Full Bench is plainly correct.
23. The *Fast Food Industry Award 2010*, read as a whole and construed contextually, contemplates that the employees it captures are employees who are employed by an employer engaged in producing or selling food, rather than merely delivering food. The 'fast food industry' is defined as follows:

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

- *meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;*
- *take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or*
- *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.'*

24. A business such as that operated by Menulog cannot sensibly be regarded as operating a fast food business. It is not involved in the preparation of or offering for sale of meals, snacks and/or beverages, take away foods and beverages or food and/or beverages in food courts and/or shopping centres and/or in retail complexes. Its business is that of transport and delivery.

⁶ *ICAC v Cunneen* (2015) 256 CLR 1 at [31] (French CJ, Hayne, Kiefel and Nettle JJ).

25. There are other indications that the Fast Food Award contemplates that it will apply only to employers engaged in producing or selling food rather than merely delivery. For example, although the classifications contemplate employees engaged in delivery of meals, clause 19.6 provides for a “transport allowance” and clause 19.6(b), in particular, provides:
- (b) Where an employee is engaged primarily to perform delivery duties of the employer’s products to customers using their own motor vehicle, such employee will be paid an allowance of \$0.42 per kilometre.*
26. That is, whilst the award applies to an employee may be engaged in delivery duties, it is contemplated that the employee will be delivering the ‘employer’s products’ rather than food prepared or sold by a third party.
27. Further, the definition of a Fast Food Employee Level 3 refers to employees appointed by the employer to be in charge of, relevantly, a *delivery outlet*. The noun ‘outlet’ refers to a store or shop from which goods a business has produced are sold or distributed to the business’ customers. The collocation ‘delivery outlet’ therefore refers to a store or shop from which delivery goods a business has produced are sold or distributed to customers of the business. This reinforces that the Fast Food Award covers employees who perform delivery work delivering the employer’s own products.

Road Transport and Distribution Award 2020

28. At paragraph [29] of the Statement, the Full Bench indicates that it does not propose to express a view as to whether or not the *Road Transport and Distribution Award 2020 (RTD Award)* covers employers and their courier employees in the on demand delivery services industry. The TWU submits that the RTD Award applies to employees performing ‘on-demand’ delivery work and the Commission should so determine.
29. Clause 4.1 of the RTD Award provides that the Award covers employers throughout Australian in the road transport and distribution industry and their employees in the classifications listed, relevantly for present purposes, in Schedule B. Thus, two conditions precedent to coverage are prescribed:

- (a) the employer is *in* the road transport and distribution industry;
 - (b) the employee(s) falls within one or other of the classifications prescribed.
30. Clause 4.2 of the RTD Award provides a comprehensive definition of the road transport and distribution industry, defining it to mean, relevantly for present purposes:

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;

...

31. ‘Goods’ are items or possessions that are able to be sold or moved. In a legal context, ‘goods’ are chattels personal (other than things in action), being all items of tangible personal property.⁷ Food produced by a restaurant for consumption by a consumer is an item of personal property and thus a ‘good’. The distribution of food from a restaurant to a consumer involves the transport by road of goods (or, alternatively, ‘material or anything whatsoever’).
32. Menulog’s business (and those of its competitors) is to arrange for the distribution of food from restaurants and like establishments to customers. It is, therefore, clearly involved in the road transport and distribution industry as its business involves the transport of goods by road. Item 2 in Schedule B to the RTD Award captures drivers of rigid vehicles, including motorcycles, not exceeding 4.5 tonnes GVM. Employees of Menulog (and its competitors) who transport food using motorcycles or vehicles with a gross vehicle mass of less than 4.5 tonnes fall within this classification.
33. Item 1 of Schedule B to the RTD Award captures ‘foot or bicycle’ couriers. A courier is defined by clause 2 to the RTD Award to mean an employee engaged by a company who, relevantly, uses a bicycle in the course of their employment. The ordinary

⁷ *Davenport v Davenport (No 2)* [2020] FCCA 2766 at [34]; *Gaynor v Tseh* [2018] FamCA 164 at [8] (Cronin J).

meaning of the noun 'courier' is a person that takes things from one person or place to another. Plainly, employees who collect food or other goods from restaurants and other establishments and deliver those goods to consumers are engaged as couriers and fall within Item 1 of Schedule B to the RTD Award.

34. In the result, employers and employees engaged in the on-demand sector are engaged in the 'road transport and distribution industry' and are covered by the RTD Award. The Commission should conclude accordingly.
35. Therefore, the Commission must be satisfied that the RTD Award **is not** achieving the modern awards objective including by not establishing appropriate standards and conditions for this sector before it can contemplate creating a new and separate award. The Commission will not be satisfied of this. Further, on the assumption that the Commission determines that the RTD Award is not achieving the modern awards objective, it is appropriate for the Commission to vary the RTD Award rather than create a new award.

Miscellaneous Award

36. As a result of the application of the RTD Award, the Miscellaneous Award does not cover employers and employees in the on demand delivery services sector as suggested at paragraph [35] to the Statement. Accordingly, whilst the TWU agrees with the observation at paragraph [43] of the Statement that the Miscellaneous Award does not provide a fair and relevant safety net for employers and their courier employees in the on demand delivery services industry, the issue does not arise.

Menulog's other contentions

37. For the reasons detailed above, there is no good reason to differentiate on demand delivery work from the road transport industry more generally. Indeed, such work is but an extension of that industry albeit one moderated by the use of online applications or digital platforms.
38. Further, it is not correct to assert, as Menulog does at paragraphs [56]-[59] of its application, that span of hours and penalty rate structures applicable under awards made by this Commission are either inapposite for or should not otherwise be applied

to employers operating in the road transport industry and allocating work through the use of digital platforms.

39. The contention presumes that employees who work on weekends and who perform work at night-time and at other unsocial hours should not be afforded remuneration that properly compensates them for such disabilities. Employees who perform work allocated through the use of digital platforms are entitled, just as other employees who perform delivery work, to appropriate compensation for working unsocial, irregular or unpredictable hour and for working on public holidays.

Transport Workers' Union of Australia

Dated: 9 August 2021