

**IN THE FAIR WORK COMMISSION
AM2021/72**

PROPOSED ON DEMAND DELIVERY SERVICES AWARD

RESPONSE TO MENULOG PTY LTD'S DISCUSSION PAPER

**FILED ON BEHALF OF
AUSTRALIAN BUSINESS INDUSTRIAL**

21 SEPTEMBER 2023

1. INTRODUCTION

- 1.1 On 31 August 2023, Menulog Pty Ltd (**Menulog**) filed with the Fair Work Commission (**FWC**) a Discussion Paper which outlines the status of developments outside of its modern award application which may influence the outcome of these proceedings.
- 1.2 In the Discussion Paper, Menulog outlines that there is still scope available for the interested parties to the proceedings to determine the appropriate employment conditions for work performed in what is referred to as the “on demand delivery services industry”.
- 1.3 As acknowledged in Menulog’s Discussion Paper, Australian Business Industrial (**ABI**) recognises that there have been significant developments in the relevant regulatory landscape since Menulog’s application was made.
- 1.4 ABI considers the two fundamental developments impacting on Menulog’s application are:
 - (a) the Full Bench of the Fair Work Commission determining that Menulog’s operations were covered by the *Road Transport and Distribution Award 2020 (RTD Award)* on 28 January 2022;¹ and
 - (b) the introduction of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (**the Bill**) which proposes the introduction of the employee-like jurisdiction in the FWC as well as a similar jurisdiction covering regulated road transport workers.

For the purposes of this note, we assume that the Bill will be passed in its current form.

- 1.5 ABI does not oppose interested parties in the proceedings engaging in further discussions, however, ABI considers that any future discussions with the interested parties would need to be informed by the interrelationship between Menulog’s application and the likely extension of the Fair Work Commission’s jurisdiction.

2. OVERVIEW OF EMPLOYEE-LIKE JURISDICTION

- 2.1 If the Bill passes in its current form, employee-like workers performing services contracts for digital platform operators will be regulated by the *Fair Work Act 2009* (Cth) (**Act**).
- 2.2 A ‘digital labour platform’ has been defined in the Bill to mean an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services.² This means that Menulog’s operations will be captured by the new provisions.
- 2.3 The Bill will empower the FWC to:
 - (a) set minimum standards concerning a range of matters for employee-like workers;
 - (b) register consent collective agreements; and
 - (c) resolve disputes about unfair deactivations.³

¹ *Application by Menulog Pty Ltd* [2022] FWCFB 5, [55].

² Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) s 15M.

³ *Ibid* ss 536JY, 536LP and 536MR.

- 2.4 Most analogous to the proposed Award will be the FWC’s ability to set Minimum Standard Orders and ability to register consent collective agreements.

Minimum Standard Orders

- 2.5 On its own initiative or on application, the FWC will be able to make Minimum Standards Orders for employee-like workers.⁴
- 2.6 In exercising its jurisdiction, the FWC will be guided by the Minimum Standards Objective,⁵ a provision similar to the Modern Awards Objective.
- 2.7 Minimum Standard Orders must include terms identifying the coverage of the order and terms about settling disputes,⁶ and may include terms about:
- (a) Payment and deductions;
 - (b) working time;
 - (c) record keeping;
 - (d) insurance;
 - (e) consultation;
 - (f) representation;
 - (g) delegates rights; and
 - (h) cost recovery.⁷
- 2.8 Minimum Standard Orders cannot include terms about overtime rates, rostering and commercial matters that are not about engagement of workers.⁸
- 2.9 It appears uncontroversial that a Minimum Standard Order for employee-like workers is capable of determining appropriate minimum conditions for work performed by Menulog couriers, albeit in a contracting context, not an employment one.

Consent collective agreements

- 2.10 Consent collective agreements may be made between a digital labour platform and an organisation that is entitled to represent the industrial interests of one or more regulated workers.⁹

3. CONSEQUENCES OF THE CHANGE IN CONTEXT

- 3.1 While ABI recognises that it is Menulog’s prerogative to continue to press its application, ABI observes that all parties should consider quite carefully the utility of the current application, given the above developments.
- 3.2 This observation is informed by a range of factors including:
- (a) that any ‘legislative gap’ in relation to minimum standards applying in the so-called “on demand delivery services industry” will presumably be filled by the introduction of the ‘employee-like’ jurisdiction;

⁴ Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) s 536JY (4).

⁵ Ibid s 536JX.

⁶ Ibid s 536KH (1).

⁷ Ibid s 536KL (1).

⁸ Ibid s 536KM (1).

⁹ Ibid 536MK (2).

- (b) the likelihood that the minimum standards developed in the employee-like jurisdiction, for commercial, practical and merit reasons may have to *closely* resemble the terms of any the “on demand delivery services industry” modern award in any event;
 - (c) the ability of entities like Menulog to pursue collective agreements *within* the employee-like system could allow Menulog to tailor its engagement with its workers in an appropriate way for them;
 - (d) the prospect that, for commercial reasons, the so-called “on demand delivery services industry” may turn out to be predominately populated by *either* operators utilising employment or operators utilising employee-like workers (which, given the status quo, is likely to be employee-like workers);
 - (e) the prospect that, if a “on demand delivery services industry” modern award is created, it will have significant (potentially total) overlap with the employee-like jurisdiction, and will not facilitate a modern awards system which is ‘simple and easy to understand; and
 - (f) the fact that the workers are covered by the RTD Award in any event.
- 3.3 In short, given recent developments, it is not apparent what role an “on demand delivery services industry” modern award would play within the new ‘Fair Work’ system.
- 3.4 ABI is interested to discuss these matters with interested parties, should the FWC determine that to be the appropriate course.

Response prepared by Australian Business Lawyers & Advisors on behalf of Australian Business Industrial.

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