



BACKGROUND PAPER

Fair Work Act 2009

s.158—Application to vary or revoke a modern award

Menulog Pty Ltd

(AM2021/72)

MELBOURNE, 23 AUGUST 2021

Note: This document has been prepared to facilitate the proceedings on 23 August 2021. It does not represent the concluded view of the Full Bench on any matter or issue.

[1] In a Statement¹ published on 12 July 2021 the Full Bench expressed 4 *provisional* views:

1. At [11] the Full Bench expressed the *provisional* view that the Act requires that the Commission consider the following initial matters before deciding whether or not to make a new modern award covering the on-demand delivery services industry:
 - Whether employers and employees in that industry are currently covered by a modern award.
 - If there is current award coverage, whether the current award coverage of employers and employees in the industry meets the modern awards objective.
 - If the current award coverage does not meet the modern award objective, whether, instead of making a new award, the Commission should vary an existing award to cover the relevant employers and employees (including considering whether any such existing award is appropriate for employers and employees in the industry).
2. At [23] the Full Bench expressed the *provisional* view that the Fast Food Award does *not* currently cover employers and their courier employees in the on-demand delivery services industry

¹ [2021] FWCFB 4053

3. At [35] the Full Bench expressed the *provisional* view that if no other modern award covers employers and their courier employees in the on-demand delivery services industry, then the Miscellaneous Award covers them.
4. At [43] the Full Bench expressed the *provisional* view that if the Miscellaneous Award does cover employers and their courier employees in the on-demand delivery services industry, then it does not provide a fair and relevant safety net for that industry.

[2] Interested parties were invited to lodge written submissions responding to some or all of the *provisional* views at [11], [23], [35] and [43] of the Statement and observations at [29], [39] and [47] of the Statement, by 4pm on Monday 9 August 2021. Reply submissions were to be filed by 4pm on Thursday 19 August 2021.

[3] The following submissions have been received:

- [Menulog 9 August 2021](#); in reply [19 August 2021](#)
- [Australian Chamber of Commerce and Industry and Australian Business Industrial – 9 August 2021](#)
- [National Road Transport Association](#)
- [Australian Road Transport Industrial Organisation](#) – 9 August 2021
- Australian Industry Group – [9 August 2021](#); in reply [19 August 2021](#)
- Transport Workers’ Union – [9 August 2021](#); in reply [23 August 2021](#)
- [Victorian Government](#) – 10 August 2021
- [Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen](#) 9 August 2021
- [Davis Clayton](#) 9 August 2021

[4] It appears from a review of the submissions that *provisional* view 1, as to the matters the Commission must take into account before deciding whether or not to make a new modern award, is uncontested.

[5] We note that ACCI advances an ‘additional threshold matter’ that should be considered namely whether the Commission should exercise any discretion to make or vary a modern award at large under Chapter 2, Part 2-3 of the Act in the context of an application by a single employer.²

[6] Further, the TWU emphasises the ‘prohibitive effect’ of s.163(2) which, it submits, ‘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’.³

[7] It is also common ground that if no other modern award covers employers and their courier employees in the on-demand delivery services industry, then the Miscellaneous Award 2020 covers them.

² ACCI submission 9 August 2021 at [14]

³ TWU submission 9 August 2021 at [19]

[8] Finally, it is also common ground that further submissions and evidence is required to inform the Commission’s consideration of whether an existing modern award should be varied to cover employers and their courier employees in the on-demand delivery services industry.

[9] The following matters are contested:

1. Whether or not the Fast Food Award currently covers employers and their courier employees in the on-demand delivery services industry.
2. Whether or not the Road Transport Award covers employers and their courier employees in the on-demand delivery services industry.
3. If the Miscellaneous Award does cover employers and their courier employees in the on-demand delivery services industry, whether it provides a fair and relevant safety net for those employers and their courier employees.

[10] The TWU proposes that the question of whether the Road Transport and/or the Fast Food Award cover employees to whom the application relates should be determined as a threshold issue. The TWU submits that the answer to this question will ‘frame the issues for determination by the Full Bench.

[11] At the mention at 1pm today other interested parties will be invited to comment on the TWU’s proposal and what directions should be issued in respect of the threshold issue.
