

IN THE FAIR WORK COMMISSION

NOTE SEEKING CLARIFICATION

**PROPOSED ON DEMAND DELIVERY SERVICES AWARD -
AM2021/72**

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

30 AUGUST 2021

INTRODUCTION

1. This submission is made on behalf of:
 - (a) the Australian Chamber of Commerce and Industry (**ACCI**); and
 - (b) Australian Business Industrial (**ABI**).
2. On 12 July 2021, the Fair Work Commission (the **Commission**) issued a Statement and Directions in *Menulog Pty Ltd* [2021] FWCFB 5227 (**Statement**).
3. At [11]-[12] of the Statement the Commission stated as follows:

[11] We agree that the question of whether the employers and their courier employees in the on-demand delivery services industry are currently covered by a modern award is a threshold issue. In particular, the question of whether or not the Fast Food Award and/or the Road Transport Award cover employers and their courier employees in the on-demand delivery services industry, is a threshold issue.

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

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

4. This note outlines the clarifications sought by ACCI and ABI regarding the coverage of the proposed award.

BACKGROUND

5. For the purposes of context, we outline below relevant clauses included in Menulog's 'Exposure Draft' - On Demand Delivery Services Industry Award 2022 filed with the Commission on 23 August 2021.

Coverage

4.1 This industry award covers employers throughout Australia in the on demand delivery services industry and their employees in the classifications listed in clause 12 to the exclusion of any other modern award.

4.2 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 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.

4.3 This award covers any employer which supplies labour on an on-hire basis in the on demand delivery services industry in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry. Clause 4.2(a) operates subject to the exclusions from coverage in

this award.

...

12. Classifications

A description of the classifications under this award is set out below.

12.1 Level 1 Courier An employee at this level is an employee employed as a courier, driver or rider (howsoever described).

12.2 Level 2 Courier An employee at this level an employee employed as a courier, driver or rider (howsoever described) who has delegated responsibility for the supervision of at least two employees.

QUESTIONS OF CLARIFICATION

1. Which employers other than Menulog are in what the applicant calls the “on demand delivery services industry”?
2. What is the intended distinction between a “courier” and a “driver”?
3. What is the intended distinction between a “courier” and a “rider”?
4. What are the duties of a “Level 1 Courier”?
5. What are the duties of a “Level 2 Courier”?
6. Operationally how does a “Level 2 Courier” actually supervise “at least” two employees?
7. Are the “employees” supervised by a “Level 2 Courier”, “Level 1 Couriers” or other employees?
8. Are there any limitations to the types of “food, beverages, goods or any other item” that a “courier, driver or rider” might deliver?
9. What configuration of motor vehicle do the Level 1 or 2 Couriers operate?
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?
11. Does Menulog provide the motor vehicle, motor bike, motor scooter, powered bicycle or un-powered bicycle to the “courier, driver or rider”?
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?

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?
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?

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?
16. Can a vendor such as a restaurants engage Menulog directly for delivery purposes other than for sales transacted on the Menulog platform?
17. Are there employees engaged in the “*on demand delivery services industry*” other than Level 1 and 2 Couriers?
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?
19. What work activity is undertaken by employees of Menulog other than “couriers, driver or riders” and what Modern Awards apply to their employment?
20. What device do the “couriers, drivers or riders” use to be allocated work?
21. Does Menulog operate an ‘allocations centre’ to allocate the work to “couriers, driver or riders” or is the allocation completely digital?
22. What is the name of the software used to allocate work to “couriers, driver or riders”?

For ACCI and ABI

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