BEFORE THE FAIR WORK COMMISSION

FAIR WORK ACT 2009

ss. 157,158 Application to make a modern award

Applicant: **Menulog Pty Ltd**

Matter Number: **AM2021/72**

Reply Submission from the Transport Workers' Union of Australia

1. These submissions reply to certain of the submissions filed by interested persons on 9 and 10 August 2021.
2. They also suggest that a hearing be held by the Full Bench to determine the issue of award coverage as a threshold matter. The Transport Workers' Union of Australia (**TWU**) is willing to participate in a conciliation presided over by the Commission either before or after determination of the threshold award coverage issue. The TWU anticipates the issue of coverage and other substantive matters concerning terms and conditions of employment of employees performing food delivery work in the 'gig-economy' can be canvassed at such a conciliation.
3. The TWU apologies to the Commission for the late filing of the submissions.

NatRoad

4. NatRoad's submissions raise at [7]-[8] the existence of companies performing freight tasks using 'digitally based' platforms to allocate and arrange work. The TWU's experience is that such companies have become increasingly prominent. Such companies and their platforms would readily fall under the RTDA and, the TWU understands, are not the subject of this application. There is (and can be) no issue raised that the RTDA does not provide appropriate and fair *minimum* rates and conditions for employees of such companies.
5. The TWU's experience is that exploitation of employees operating in the non-food delivery sphere of the 'gig-economy' who are involved in the transportation of goods

are generally vulnerable workers who are misclassified as independent contractors and fall outside the protective auspices of the *Fair Work Act 2009* (Cth) (**FW Act**).

6. To the extent that [14] to the NatRoad submission asserts extant arrangements between platform providers/controllers and food delivery workers fall on the 'independent contractor' side of the binary divide between employees and independent contractors, it is incorrect. The decision in *Gupta v Portier Pacific Pty Ltd* (2020) 296 IR 246 preceded the decisions and analysis of the Full Court of the Federal Court in ***CFMMEU v Personnel Contracting*** *Pty Ltd* (2020) 279 FCR 631 and *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119. Special leave has been granted in both those decisions and if the appellant succeeds in the *CFMMEU v Personnel Contracting* in convincing the High Court to reformulate the multi-factorial test on the basis that the ultimate question is whether the worker is working in their own business or the business of the putative employer, it is difficult to see how the fiction currently maintained by entities such as Uber Eats and Deliveroo Australia Pty Ltd that their food delivery riders are independent contractors can survive (cf in this connection *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818, noting that an appeal of this decision by Deliveroo Australia Pty Ltd has been held in abeyance pending the outcome of the above cases: *Deliveroo Australia Pty Ltd v Franco* [2021] FWCFB 5015).
7. [18]-[23] of the NatRoad submission are plainly correct. The RTDA covers food delivery workers engaged by entities such as Menulog.
8. It is difficult, with respect, to apprehend the logic in the argument advanced at [25]-[30]. It is unclear whether NatRoad assert that the RTDA does not cover food delivery workers based on a 'most appropriate' analysis (conducted as against a currently non-existence award) or whether NatRoad assert, as appears to the case in the submissions advanced at [31]-[39] that the RTDA does not provide a fair and appropriate safety net. The TWU do not agree with the bald assertion at [39] that the 'environment' in which on-demand food delivery work is undertaken entails that the RTDA does not provide an appropriate and fair safety net for employees.

ACCI and ABI

9. The TWU agrees with the contentions advanced at [8]-[10] of ACCI and ABI's submissions. It is neither unusual nor novel for work to be allocated to employees via a portable device in the transport and logistics industry. The unfortunate upshot of this feature of food delivery work has been that it has been used as a springboard by companies such as Uber Eats and Deliveroo to contend that the work is somehow novel and unique and falls outside the common law concept of an employment relationship and that workers engaged by these entities do not have the benefit of the protective and remedial provisions of the FW Act.
10. [18]-[23] of ACCI and ABI's submissions are erroneous and fail to grapple with the fact that the *Fast Food Industry Award 2020,* properly construed, applies to employers who themselves retail food to customers; not to third party providers who are engaged by such retailers to distribute food and related products. A useful example exposing this distinction is between a person employed by a shop selling pizzas to deliver pizzas to customers and a person employed by Menulog to deliver pizzas to customers of the pizza shop.
11. It also follows that the Miscellaneous Award would not, for this reason, cover employees and employers in the on demand delivery services sector.
12. [39] of ACCI and ABI's submissions is correct as to the coverage of the RTDA. Contrary to [42], the issue of 'most appropriate' coverage does not arise as the *Fast Food Industry Award* does not extend to on demand food delivery services.

AiG

13. For reasons akin to those detailed in [8] above, the *Fast Food Industry Award* does not cover food delivery drivers/riders employed by companies such as Menulog.

ARTIO

14. The TWU agrees with ARTIO's view that the RTDA covers employees to whom the proposed award would cover. The TWU also concurs with ARTIO's view that the RTDA RTDA is not achieving the modern awards objective in relation to such employers and employees.

Moving forward

15. The TWU respectfully submit that it is appropriate that the question of whether the RTDA and/or the *Fast Food Industry Award* cover employees to whom the application relates be determined by the Full Bench as a threshold issue. The answer to this question will, the TWU submits, frame the issues for determination by the Full Bench.
16. The TWU submits that conciliation of the applicant's substantive application would most productively occur after determination of this threshold question. However, the TWU would not oppose conciliation occurring before any hearing on the threshold issue.

Transport Workers' Union of Australia

22 August 2021