

Submission in Response to Fair Work Commission Statement & Directions [2021] FWCFB 4053 regarding Menulog Pty Ltd's Application to make a Modern Award AM2021/72

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This brief Reply Submission to the Fair Work Commission (**The Commission**) is made by three researchers: Dr Tom Barratt of Edith Cowan University, Dr Caleb Goods of The University of Western Australia and Dr Alex Veen of The University of Sydney (**research team**) in response Menulog Pty Ltd's (**Menulog**) submission on 18 October 2021 (**Menulog's Submission**).

- 1) The research team welcome Menulog's attempts to bring the protections of the national employment system to food delivery couriers, as this has the potential to protect these workers, many of whom have labour market vulnerabilities, from exploitative labour practices.
- 2) We argue that rather than "falling between two stools", as Menulog's Submission states at 7.5, the industry is primarily involved in the delivery of fast food, otherwise products transported on the road network, and believe that the provisions of the *Fast Food Industry Award 2010*, but failing that the *Road Transport and Distribution Industry Award 2020*, should apply. Menulog's Submission spends much time differentiating the 'platform' business model and how this differs from other forms of work. However, the research team requests The Commission consider the material reality of the industry is one in which the customer, worker and restaurant are matched via a platform, this industry provides value to customers (consumer surplus) and therefore generates revenue by the delivery of products, the overwhelming majority of which are fast food, from vendors to customers.
- 3) We draw attention to the Answer at 27 of Menulog's Statement, where customers ordering the same food, in the same app, using at least part of the 'matching' that Menulog claim to distinguish this industry, would be delivered by workers covered by different awards. This would create an arbitrary schism between the entitlements of employees making deliveries ordered via Menulog's platform, depending solely on the basis of which courier the customer chooses to deliver the same food from the same restaurant.
- 4) In our opinion, the *On Demand Delivery Services Award* is at odds with several elements in the Modern Awards Objectives outlined at s134 of the *Fair Work Act 2009* (Cth).
 - a. Equal pay for equal work. If workers who are performing the same job have different terms and conditions of work, and here we take into account minimum engagement periods, which lowers the cost per delivery and risk of 'idle time', would provide Menulog a competitive labour cost advantage through unequal pay for equal work,

between workers who are engaged via orders on Menulog's own platforms but are engaged by the restaurant (or other vendor) not Menulog, as well as employed drivers in the fast food industry.

- b. Flexible modern work practices: We seek to again highlight to the Commission our research findings in relation to the on-demand industry as to what 'flexibility' means in the gig economy. While platforms engage the rhetoric of flexibility, flexibility in an on-demand setting should not be conflated with workers minimum engagement periods or additional remuneration for working unsocial hours being downgraded.
 - c. The unnecessary overlap of modern awards: Rather than "falling between two schools", the research team argue that the nature of employment and work in this industry is subject to competing coverage between the *Fast Food Industry Award 2010*, and if not, then the *Road Transport and Distribution Industry Award 2020*. To create another Modern Award here, given the small scale of employment of this industry, would create an unnecessary overlap and increase the regulatory burden on those who arrange delivery services (especially given the divisions in worker classifications outlined above).
- 5) The needs of the low paid (s134(1)(a)) must also be considered here, and we argue that the shift provisions outlined in the exposure draft of the proposed Award do not meet the needs of the low paid. 1 hour split shifts are unlikely to meet the needs of these workers for improved income security and regularity¹. There is much academic literature (see for example Maury (2020)²) that contingent work with similarly low engagement periods is detrimental for workers who face labour market vulnerabilities which are faced by food delivery couriers. If the Commission does find that it is preferable to establish the On Demand Delivery Services Award, the Research Team strongly suggest that these minimum engagement period be substantially increased (and/or not be split) that the work better meets the needs of these workers.
- 6) The Research Team also wish to point out that this is a historic case, the first that seeks to bring gig work specifically under a Modern Award. As at 1) above, this is an admirable objective, and we request The Commission take this into account. However, the 'upgrading' of the terms and conditions of work which underpin the food-delivery segment of the app-based gig economy in a 'contractor model' should not come at the expense of downgrading the terms and conditions of employees in other segments of the gig economy, or the economy at large.
- 7) The research team wish to bring these issues to the attention of the Commission in making a determination and acknowledge that there are many considerations to be weighed up. We hope the Commission will take into account these considerations when coming to a determination.

* This submission reflects the expert opinions of Drs Barratt, Goods and Veen, and does not necessarily represent the views of their respective institutions.

¹ Goods, C., Veen, A., & Barratt, T. (2019). "Is your gig any good?" Analysing job quality in the Australian platform-based food-delivery sector. *Journal of Industrial Relations*, 61(4), 502–527. <https://doi.org/10.1177/0022185618817069>

² Maury, O. (2020). Between a Promise and a Salary: Student-Migrant-Workers' Experiences of Precarious Labour Markets. *Work, Employment and Society*, 34(5), 809–825. <https://doi.org/10.1177/0950017019887097>