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Sent: Thursday, 12 May 2022 12:32 PM
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Subject: AM2021/72: Application by Menulog Pty Ltd

Dear Associate

We refer to the abovenamed matter.

Please accept as filed the **attached** submissions of the Transport Workers' Union of Australia of today's date in response to the table prepared by Menulog Pty Ltd.

Other interested parties have also been copied into this correspondence.

Kind regards

Lorraine Biviano

Legal Officer

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Before the Fair Work Commission

Matter: AM2021/72

s. 158 Application by Menulog Pty Ltd, Proposed On Demand Delivery Services Award

Response from the Transport Workers' Union of Australia

1. The Transport Workers' Union of Australia (TWU) refers to the above named matter, the Statement of Commissioner McKinnon on 16 March 2022 and to the table distributed by Menulog Pty Ltd (**Menulog**) on 13 April 2022. The TWU further notes that this matter is listed for mediation before Commissioner McKinnon in Sydney on 18 May 2022.
2. The TWU has considered the matters set out by Menulog in its table. Menulog appears to assert that the many of the terms of the *Road Transport and Distribution Award 2020 (RTD Award)* are not suitable for the so-called 'on demand industry' because those terms either:
 - a. address matters that are 'not relevant' to the on demand industry in Menulog's submission; or
 - b. fail to consider the app based nature of the industry; or
 - c. are otherwise not appropriate to *Menulog's business*.
3. The TWU does not accept that any of the criticisms levelled have substance. Moreover, the criticisms are not such as to justify the creation of a new 'on demand industry' award or a carve out from the provisions of the RTD Award for so-called 'on demand' work. Rather, the criticisms are, in effect, an attempt by Menulog to extricate itself from the obligations imposed by the RTD Award to pay its courier employees penalty rates and overtime for performing delivery work at un-social hours and on weekends. The TWU views the application as an endeavour by Menulog to create a second tier of employees who are not properly remunerated

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for the work they perform on the spurious basis that there is something idiosyncratic or esoteric about the on-demand industry. There is not. Transport companies have for decades engaged employees to work un-social hours and complied with the penalty rate and overtime obligations established by the RTD Award and its predecessors. The TWU thus does not accept the premises of Menulog's application.

4. Further, the road transport industry is an inherently dangerous one. Numerous inquiries and proceedings in industrial Tribunals and Courts have found there to be a relationship between remuneration paid to road transport workers and their capacity and propensity to perform their work safely. A reduction in minimum rates payable to food delivery employees is apt to place further pressure on those employees to perform work unsafely and work unsafe hours. The TWU cannot and will not accept Menulog's application for this reason alone. The TWU notes that a number of food delivery workers have been killed or seriously injured in the course of performing work.
5. By way of further elaboration, the TWU notes that:
 - (i) the RTD Award covers a broad range of duties with the primary relevant factor in this case being that the performance of those duties is "...the transport by road..." of the relevant goods (including prepared meals). This is completely consistent with the work performed by couriers in the on demand industry;
 - (ii) the timeliness required for the delivery of prepared meals is not unique to the work performed by Menulog's couriers. Indeed, the actual worked to be performed does not differ from conventional road transport work simply because the goods to be transported are freshly prepared meals;
 - (iii) Menulog's operations are not, in any event, limited to the collection of freshly prepared meals. Menulog's business involves the pick-up and delivery other goods to its

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customers from locations that are not fast food establishments or restaurants. Such work is already performed by other transport companies under the RTD Award. It is nonsensical to suggest such work should otherwise fall outside the scope of the RTD Award just because prepared meals are ordered through an app.

6. Menulog's submissions further focuses on the terms of the RTD Award which do not apply to them such as those terms that cover workers engaged in transport work in the construction or oil, fuel and gas industries. Such a distinction is completely irrelevant. The road transport industry covers transport work that might in in connection with many other relevant industries including, the on demand industry. The fact that the RTD Award considers those industries is not a relevant factor which Menulog can rely upon to distinguish its position.
7. A further factor identified is that the classifications in Clause 12 and Schedule B of the RTD Award extend to many different vehicle types and configurations not utilised by Menulog. Again, this is not a relevant factor. What is relevant is that the current classification structure sufficiently provides the vehicle types used by Menulog. The TWU notes that the classifications for Transport Worker Grades 1 and 2 well capture the modes of transport currently used by Menulog and on that basis, the question of whether the industrial instrument considers the use of any additional vehicle types takes Menulog nowhere.
8. For the purpose of completeness, the TWU understands that Menulog takes issue with certain terms of the RTD Award and has considered their appropriateness, some relevant terms include:
 - a. Clause 4 – coverage;
 - b. Clause 10 – part-time provisions including minimum engagement and overtime payment;

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- c. Clause 11 – casual employment provisions including minimum engagement, notification requirements and casual shift loadings for overtime;
 - d. Clause 12/Schedule B – classifications;
 - e. Clause 13.4 – spread of ordinary hours;
 - f. Clause 15 – start time provisions and notice;
 - g. Clause 17 – minimum rates;
 - h. Clause 21 – call back;
 - i. Clause 23 – penalty rates.
9. The matters identified are matters the TWU understands will be the subject of discussions in respect of the RTD Award. The TWU does not accept the proposition that these terms and conditions necessitate or point towards a need for the introduction of a new industrial instrument specific to the so-called ‘On Demand Industry’.
10. For completeness, the TWU again refers to the Decision of the Full Bench which dismissed Menulog’s contention that the RTD Award did not apply:

“We conclude that the Road Transport Award currently covers employers and their courier employees in the “on demand delivery services industry” as defined in Menulog’s proposed award, and that the Fast Food Award does not cover such courier employees. It also necessarily follows from this conclusion that the Miscellaneous Award does not cover them by reason of clause 4.1 of that award.”¹

11. The Full Bench further observed the following potential next steps in this matter:

¹ [2022] FWCFB 5 at [55].

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“The next step in this matter is for consideration to be given as to whether the coverage of employers and employees in the “on demand delivery services industry” as defined by the Road Transport Award meets the modern awards objective in s 134(1) of the FW Act.”²

12. The position of the TWU remains consistent with that advanced by it during the course of these proceedings to date. That is, that there is already an instrument, the Road Transport and Distribution Award 2021 (MA00038) (**RTD Award**), that clearly covers couriers engaged in the so-called “on demand” delivery services industry. The Decision of the Full Bench as referred to above is consistent with that position.

Transport Workers' Union of Australia

12 May 2022

² Ibid at [56].