



Tim Pallas MP

Treasurer
Minister for Economic Development
Minister for Industrial Relations

1 Treasury Place,
Melbourne, VIC 3002

Justice Iain Ross
President
Fair Work Commission

B21/2305

chambers.ross.j@fwc.gov.au

Dear Justice Ross

I refer to the application by Menulog Pty Ltd to make a new modern award to cover the On-Demand Delivery Industry under sections 157–158 of the *Fair Work Act 2009* (AM2021/72) and thank you for the opportunity to provide the Victorian Government's views on this matter.

The application of modern awards to platform workers and whether current settings are meeting the modern awards objective are worthy of consideration by the Fair Work Commission (FWC).

The Menulog application presents an opportunity to consider:

- whether an existing modern award (or multiple awards) adequately applies to on-demand workers;
- if not, whether an existing modern award (or multiple awards) should be varied to provide a fair and relevant minimum safety net for on-demand workers; or
- whether to make a new industry award.

The FWC noted several provisional views in its recent Statement,¹ including that prior to deciding whether to make a new modern award the FWC must decide:

- 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 meets the modern awards objective, primarily to provide a fair and relevant safety net; and
- 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.

Noting that there may be uncertainty about the nature and effectiveness of award coverage for on-demand workers, the Victorian Government considers that these questions should be answered.

The Victorian Government considers that following our recent independent Inquiry into the Victorian On-Demand Workforce (the Inquiry), it is an appropriate time to assess the application of modern awards to on-demand workers. We provide the following information to assist the Full Bench.

¹ [2021] FWCFB 4053, [11].

The Inquiry

As the Commission may be aware, the Victorian Government recently concluded the Inquiry. It recommended that:

“the FWC work with relevant stakeholders, including platforms and representatives of workers and industry, about the application of modern awards to platform workers, with a view to ensuring fit-for-purpose, fair arrangements that are compatible with work enabled by technology (Recommendation 16).”²

The Victorian Government supports implementation of this recommendation in full.³ However, the Victorian Government also acknowledged, in its response to the Inquiry, that award coverage for platform workers is not straightforward. This is partly because the presumed status of most platform workers is that they are independent contractors, and if that assessment withstood legal scrutiny would not be covered by a modern award. It is likely that some (though not all) workers when assessed would not be found to be employees, although it must also be acknowledged that the jurisprudence on this issue is still developing.

The Inquiry found that some platforms engage workers under awards. Other platforms informed the Inquiry that award rates are used as a guide for setting payments. The Inquiry Report noted that there are some aspects of the current regulatory system that may not be easily applied to platform models.

Notably, though, the Inquiry found that many on-demand workers do not benefit from award coverage, or a minimum safety net of protections. It was noted in the Inquiry’s Report that:

Unlike workers engaged under standard employment arrangements, these workers are generally not entitled to paid leave. They are often not able to access remedies for unfair dismissal or entitled to redundancy payments. Their ‘term’ of employment is essentially shift to shift or, at most, rostered period to rostered period, subject to [some exceptions]. Casuals are legally entitled to a higher hourly rate of pay than those employed under ‘standard’ arrangements – a ‘loading’ provided for under modern awards to compensate for lack of other entitlements.⁴

The following matters, which were also considered by the Inquiry, are set out below to assist the FWC in the current proceedings:

- The Inquiry Report identified several industries, including hospitality, personal care and rideshare, where platform-based work is on the rise. As new platforms emerge and enter the market there is more competition, less visibility for regulators and increasing disparity as several models of engagement are being utilised. Some platforms rely solely on the independent contractor model while others use an employment model by, for example, relying on casual employment to maintain flexibility.⁵
- The lived experience of on-demand workers is as varied as the work itself. There is evidence that an increasing number of on-demand workers use platform work as a secondary job to supplement their main income.⁶ However, the Inquiry Report noted

² Report of the Inquiry into the Victorian On-Demand Workforce, page 201, [Inquiry Report](#).

³ The Victorian Government Response to the Report of the Inquiry into the Victorian On-Demand Workforce, page 14, [The Victorian Government Response](#).

⁴ Inquiry Report, page 21, paragraph 117.

⁵ Chapter 5.4 of the Inquiry Report, page 77.

⁶ Para 163 of the Inquiry Report, page 26.

that many on-demand workers derive all their work from platforms and maintain profiles on multiple platforms to maximise their income.⁷

- Many on-demand workers appreciate the benefits associated with platform work, such as flexibility and control over working hours.⁸ However, the inherent risk associated with this unstructured and unpredictable work pattern is the lack of income certainty.

The Victorian Government's position on award coverage

The Victorian Government has consistently supported the maintenance of a fair and relevant minimum safety net for workers, consisting of a national minimum wage, modern awards and the national employment standards. The Government considers that the award system should enable genuine enterprise bargaining and promote workforce participation.

As noted in the Inquiry Report, award coverage for on-demand workers can provide conditions of employment and a clear minimum safety net of entitlements. This could include regulating hours of work and setting minimum rates of pay, as well as providing a basis for enterprise bargaining.

The provision of minimum terms and conditions of employment is also anticipated to have a positive impact on worker safety. Stakeholders have raised concerns about driver safety and the personal risks drivers sometimes feel compelled to assume. The Inquiry noted concerns raised about on-demand transport workers being unsafe at work and at risk of injury or death.⁹

Opportunity presented by the Menulog application

Platform-based work is diverse and has become a feature of many industries. The Menulog application is primarily focussed on food delivery, but on-demand workers are found in many other sectors. Through this application, the FWC is provided an important opportunity to consider existing award coverage and the conditions and entitlements that apply to food-delivery drivers and ensure that working arrangements are fair, fit-for-purpose and compatible with work enabled by technology.

If you require any further detail, please contact Lissa Zass, Executive Director, Industrial Relations Victoria via email (lissa.zass@dpc.vic.gov.au).

Yours sincerely



Tim Pallas MP

Minister for Industrial Relations

10/08/2021

⁷ Chapter 4.1.2 of the Inquiry Report, page 26.

⁸ Chapter 4.5.2 of the Inquiry Report, page 49.

⁹ Inquiry Report, page 123. Several food delivery drivers were killed on the job in 2020 following publication of the Inquiry Report.