



# STATEMENT AND DIRECTION

*Fair Work Act 2009*

s.158—Application to make a modern award

s.40F(5)—President may give the Road Transport Advisory Group directions as to the way in which the body is to carry out its functions

## **Application by Menulog Pty Ltd**

(AM2021/72)

JUSTICE HATCHER, PRESIDENT

SYDNEY, 11 NOVEMBER 2024

*Application to make a modern award to cover the on demand delivery services industry – President may direct the Road Transport Advisory Group as to the way it carries out its functions – Road Transport and Distribution Award 2020.*

### **Background**

[1] On 25 June 2021, the Commission received an application<sup>1</sup> from Menulog Pty Ltd (Menulog). The application was made pursuant to s 158 of the *Fair Work Act 2009* (Cth) (FW Act) and seeks that the Commission make a new modern award covering the ‘on demand delivery services industry’ (the application).

[2] On 23 August 2021, Menulog filed an exposure draft of the award sought, entitled the ‘On Demand Delivery Services Industry Award 2022’. The coverage clause in the draft provided that the award would cover ‘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’.

[3] On 24 August 2021, a Full Bench of the Commission directed parties to file submissions on the ‘threshold issue’ concerning whether either the *Fast Food Industry Award 2010* or the *Road Transport and Distribution Award 2020* (RTD Award) already covered employers and their courier employees in the on demand delivery services industry as defined by Menulog.<sup>2</sup> Submissions and evidence addressing the threshold issue were subsequently filed by interested parties and a hearing was held on 6 December 2021 before a differently-constituted Full Bench.

[4] On 28 January 2022, the Full Bench issued a decision<sup>3</sup> in which it concluded that the ‘on demand delivery services industry’, as defined in Menulog’s proposed award, fell within the definition of the ‘road transport and distribution industry’ found in clause 4.2(a) of RTD Award.<sup>4</sup> Consequently, the Full Bench concluded that the field of employment which would be covered by Menulog’s proposed award was currently covered by the RTD Award. The Full Bench prefaced its decision by acknowledging that, while it could not make a binding determination in respect of the threshold question of award coverage, it was nonetheless entitled to express and act on its opinion as to that question for the purpose of subsequently exercising modern awards powers under the FW Act in respect of Menulog’s application.<sup>5</sup>

[5] Since this decision, the parties have undertaken a series of conciliations before Commissioner McKinnon in relation to the application.

### **Referral to the Road Transport Advisory Group**

[6] Amendments to the FW Act concerning the road transport industry commenced on 26 August 2024, following the passage of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth). As part of these amendments, the Road Transport Advisory Group (RTAG) was established.<sup>6</sup>

[7] The function of the RTAG is to advise the FWC in relation to matters that relate to the road transport industry including ‘the making and varying of modern awards that relate to the road transport industry’.<sup>7</sup>

[8] The road transport industry is defined in s 15S of the FW Act,<sup>8</sup> and relevantly includes:

- (a) the *road transport and distribution industry* within the meaning of the *Road Transport and Distribution Award 2020* as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph ...

[9] Section 40E(3) requires the RTAG to consult any relevant subcommittee before advising the Commission in relation to a matter and that these subcommittees must be chaired by a member of the RTAG (s 40G(2)).

[10] Section 40E(4) further provides that the President of the Commission ‘must consult, and have regard to the views, of the RTAG in determining priorities for the work of the Commission in relation to matters affecting the road transport industry’.

[11] On 25 October 2024, a report back was held before me in relation to the application<sup>9</sup> and the parties were heard regarding the further progress of the matter in light of the amendments, and in particular their views on whether it should be referred to the RTAG. The parties generally expressed support for a referral of the application to the RTAG.

[12] Accordingly, pursuant to s 40F(5) of the FW Act, I direct the RTAG to provide advice as to the following matters:

#### *Prioritisation and process for providing advice*

1. Advice concerning how I should determine the priorities for the work of the Commission in relation to matter AM2021/72, having regard to matters MS2024/1, MS2024/2, MS2024/3 and MS2024/4.
2. A proposed process for the RTAG to provide advice in relation to the matter or matters it identifies as priorities, including:
  - a. a timeframe for when consultation will occur;
  - b. whether any additional entities should be served the application;
  - c. whether subcommittees will be formed; and

- d. if so, how those subcommittees will be composed and operated. The RTAG is directed to take an inclusive and broadly-representative approach in determining the membership of any subcommittee.

*Conduct of RTAG*

3. Advice on how the RTAG proposes to conduct itself more generally, including any proposed terms of reference or similar document that could form the basis for a written direction I may make pursuant to s 40F(5), taking into account the need for RTAG to be open and transparent in the way it conducts itself.

[13] The RTAG is to provide its response to this direction by email to [awards@fwc.gov.au](mailto:awards@fwc.gov.au) no later than **12:00 pm (AEDT) on Friday, 6 December 2024**, subject to any extension granted by me by further direction.

[14] Advice provided by the RTAG pursuant to this direction will be published on the Commission's website.



PRESIDENT

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<PR781097>

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<sup>1</sup> Menulog Pty Ltd, [Application](#), 24 June 2021.

<sup>2</sup> [\[2021\] FWCFB 5227](#) [12].

<sup>3</sup> [\[2022\] FWCFB 5](#).

<sup>4</sup> Ibid [55].

<sup>5</sup> Ibid [8].

<sup>6</sup> *Fair Work Act 2009* (Cth) s 40E(1).

<sup>7</sup> Ibid s 40E(2)(a).

<sup>8</sup> Ibid s 15S(a). Regulation 1.08B of the *Fair Work Regulations 2009* modifies the definition in relation to exclusion of the livestock industry.

<sup>9</sup> [Transcript](#), 25 October 2024.