

# Submission in Response to Fair Work Commission Statement [2021] FWCFB 4053

Regarding Menulog Pty Ltd's Application to Make a Modern Award  
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## INTRODUCTION

1 This submission 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**). We write this submission in response to the Fair Work Commission's (**The Commission**) Statement regarding Menulog's application to make a new modern award.

2 The research team have engaged in qualitative study of the on-demand food delivery industry since 2016, publishing 3 academic papers which considered [job quality](#) in this industry, forms of [managerial control over the labour process](#) in this industry, and [worker responses](#) to platform-based on-demand food delivery. We have also undertaken work with Dr Brett Smith and published a paper considering Australian [consumers' understanding and preferences](#) for minimum working conditions in the food-delivery segment of the digitally enabled 'gig' economy.

3 The research team have authored several op-ed pieces on topics relevant to the putative industry including

- The interface between how [this type of work and temporary migrants' visa restrictions](#)
- The [consequences of The Commission's decision](#) in the Klooger case [2018] FWC 6836
- The importance of the [Australian Taxation Office's determination that Foodora](#), before it went bankrupt, should have been collecting PAYG income tax and paying superannuation
- The role of [algorithmic management](#) in the food-delivery sector
- The consequences for Australia's gig economy of the [United Kingdom Supreme Court decision](#) in the case of Uber BV and Others v Aslam and Others [2021] UKSC 5
- The significance of the decision of the Fair Work Commission [in the case of Diego Franco v Deliveroo Australia Pty Ltd \[2021\] FWC 2818](#)
- The potential consequences, and some of the missing details, [of Menulog's then proposed employment trial](#)

4 It is from this context that we seek to assist The Commission by providing this submission.

## INDUSTRY & OVERALL CONTEXT

5 We believe there are four contextual issues that are of general relevance to the provisional views and observations expressed by the commission. First, we outline and attempt to define the industry which is applicable. Second, we consider the scope and scale of the industry, with relation to employment, as it currently stands. Third, we explain the labour process by which this work is done by independent contractors. Finally, we consider the potential fissuring of other types of work should a new award be created.

6 The industry, in relation to Menulog's application for a Modern Award, is described as the "on demand delivery services" industry. That is, the delivery of goods arranged via on demand platforms. What has distinguished the 'gig' economy to date, as is referenced in Menulog's definition, is that workers have been engaged as independent contractors, meaning that there has been little possibility of testing whether the *Fast Food Industry Award 2010* or the *Road Transport and Distribution Award 2020* are relevant.

7 This question of industry definition is not necessarily straightforward. Indeed, for context, it is important to place on-demand delivery within the wider 'on-demand' economy which captures a cornucopia of industries, occupations and business models – from low skilled food delivery to high skilled professional photography. [A 2019 labour market survey](#) found that 7.1% of respondents were working, or had sought to participate in 'on-demand' work, in the prior 12 months. Reflecting this, the researchers respectfully suggest that a more extensive discussion needs to focus upon the precise nature of the work that current and prospective employees undertake in this industry. We outline at [10] below, that the work is primarily the delivery of food from different hospitality businesses, as well as other ancillary services, which doesn't precisely reflect Menulog's definitional focus.

8 It follows therefore that Menulog's definition at paragraph 14 of their application defines the industry in a very narrow way. Consequently, the proposed 'On Demand Delivery Award' potentially would only cover a few businesses, or even a single firm. To characterise this as an industry is potentially problematic in the broader context of the award system and its modernisation. The researchers, therefore, respectfully suggest The Commission consider the appropriateness of, and potential precedent set by, creating a new modern award for an industry of this size and specificity

9 The scope and scale of the on-demand delivery industry, as it is defined by Menulog, currently covers very few employees. [IbisWorld](#) estimate is that the size of the on-demand food-delivery industry in Australia in 2021 is approximately \$850m by revenue. However, the value of the work which is performed by employees that would fall under a modern award reflects a very small proportion of this revenue. The preferred business model of the largest and third largest platforms, Uber Eats and Deliveroo (Menulog is the second largest), is to engage independent contractors rather than employees, and they have defended this position in The Commission, for example in the case of [Gupta v Portier Pacific \[2020\] FWCFB 1698](#). Menulog has also engaged workers as independent contractors as well as employing workers under the Miscellaneous Award. This means that much of the on-demand delivery industry remains outside the remit of Modern Awards, and indeed the creation of a new Modern Award as per Menulog's application would, in all likelihood, capture a limited range of the workers who perform this type of work.

10 In understanding the nature of the on-demand food delivery industry, as it stands for many workers, and what the work entails it is helpful to understand the labour process which on-demand food-delivery couriers currently engage in. We refer The Commission to Figure 1, which reflects the

labour process working for food-delivery platforms in the Australian contract in a scholarly publication which we published in 2019.

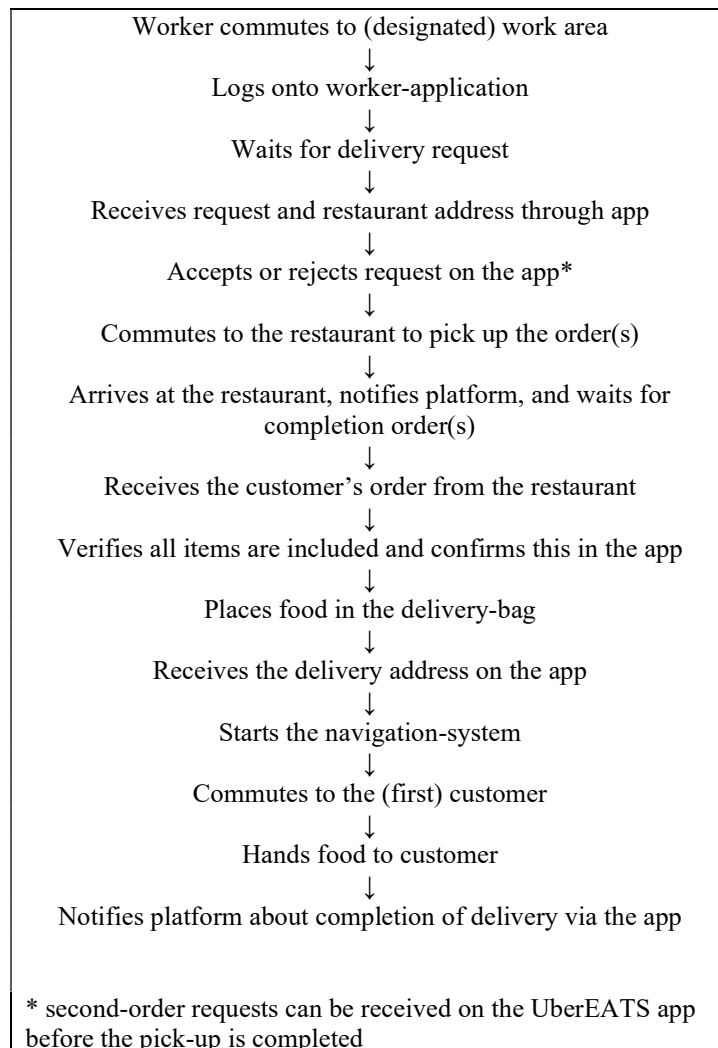


Figure 1 – The Labour Process of Platform-Based Food-Delivery Work

11 Given the ongoing debates and legal challenges surrounding the classifications used by Menulog and other on-demand platforms, the research team respectfully suggests that The Commission considers how the nature of the work (i.e. the labour process) in an employment context would differ from an independent contracting context. Further, we respectfully suggest The Commission conduct and/or commission further research into this. We would suggest that this critical clarification would help to demarcate the putative on-demand services industry better and could inform The Commission's decision as to which award should cover it.

12 The research team further suggests that The Commission consider whether the creation of a separate award would result in a potential fissuring of current fast-food delivery work. There is the distinct possibility that the creation of a new, separate modern award for on-demand delivery platforms like Menulog might potentially provide them with a competitive labour cost advantage against existing forms of work which are nearly identical and covered by existing awards.

13 As we argue at [13-14] below, the delivery of fast food is covered by the *Fast Food Industry Award 2010*. There are currently workers engaged in this form of work as employees providing ‘in-house’ rather than outsourced services, for example pizza delivery drivers by organisations like Dominos. Specifically, current protections and minimum provisions exist for these employees, such as minimum engagement periods, which in the *Fast Food Industry Award 2010* is currently 3 hours for casual employees (cl 13.5) and penalty rates (cl25.5 of the same award). By covering the current and prospective employees of Menulog, and other on-demand platforms whose work primarily centres around the delivery of food and ancillary products by another award (either the *Road Transport and Distribution Industry Award 2020*, *Miscellaneous Award 2020* or a new ‘*On Demand Delivery Services Award*’), applying different minimum wages, minimum engagement periods and different penalty rates, could provide a competitive labour cost advantage relative to in-house’ services. This would likely promote a fissuring of this type of work more broadly and incentivising outsourcing these activities on the basis of labour cost considerations.

14 This fissuring is likely at odds with s134(1)(e) of the *Fair Work Act 2009* (Cth), the principle of equal remuneration for work of equal or comparable value.

## PROVISIONAL VIEW AT [11]

15 The research team are on the view that the commission is correct in this statement and the three questions set out at [11] of The Commission’s statement are the relevant questions to ask.

## PROVISIONAL VIEW AT [23]

13 Based on our appraisal of the relevant industry definition, the research team respectfully differs in their interpretation as to the coverage of the Fast Food Award. The definition from cl.3 of the *Fast Food Industry Award 2010* states

“the fast food industry means the industry of taking orders for and/or preparation and/or sale of and/or delivery of:

- meals, snacks and/or beverages, which are sold to the public primarily to be consumed away from the point of sale;
- take away foods and beverages packaged, sold or served in such a manner as to allow their being taken from the point of sale to be consumed elsewhere should the customer so decide; and/or
- food and/or beverages in food courts and/or in shopping centres and/or in retail complexes, excluding coffee shops, cafes, bars and restaurants providing primarily a sit down service inside the catering establishment.”

A strict reading of the definition would include “the fast food industry means the industry of delivery of: •Meals etc.”

It is therefore possible to find an interpretation that Menulog is indeed “*in the business of delivering [fast food]*” and therefore these couriers are potentially covered by the *Fast Food Industry Award 2010*.

14 The research team also note that the clause in *Fast Food Industry Award 2020* Schedule B – Classifications – B.1 Fast Food Employee Level 1 also includes the word “or”, meaning the award does contemplate the delivery of food, and indeed may cover current industry practice in the fast food delivery as outlined above at [13].

15 The research team also suggests that the Commission considers whether Menulog’s Australian competitors in the on-demand food-delivery – should they be found to be employers – would likely have their operations covered by the same award.

16 Menulog’s application of *ejusdem generis* here is relevant, as the delivery of non-fast-food goods may render the award not applicable. The research team respectfully suggest The Commission inquire as to the frequency and importance of ‘non-fast food delivery’ to consider whether ‘non-fast food’ items are incidental to the fast-food delivery, which is the substantive activity and to what extent these activities are already covered by the *Transport and Distribution Award 2020*.

17 The research team suggests that the majority of Menulog’s earnings, and the earnings of the industry in general, are derived from the fast food industry, moreover, Menulog and its Australian competitors promote their relationship with popular fast food outlets (e.g. McDonalds, Hungry Jacks etc.), however we respectfully suggest that The Commission investigate this issue before reaching a decision.

18 The research team suggest that The Commission request information from Menulog as to the extent of non-fast food delivery in the platform’s operations.

19 The research team notes that the public facing branding and marketing of Menulog deals exclusively with fast food, their [2018 Annual Report](#) commences with “What a time to be in the business of food!” (page 4) and Just Eat Takeaway.com, Menulog’s parent company, [Just Eats’](#) Annual Report 2020 explains their business model involves consumers and restaurants, with consumers engaging in a search, order eat “delicious food enjoyed at home or at the office” and restaurants engage in receive order, cook and deliver (page 12).

20 The research team respectfully suggests that The Commission considers the extent of non-fast food delivery in Menulog’s operation to consider whether the *Fast Food Industry Award 2010* applies to these couriers, as the extent of non-fast food delivery may indicate current award coverage.

## OBSERVATIONS AT [29]

21 The research team refers to the coverage of the *Transport and Distribution Award 2020*, which covers (cl4.2(a)) “the transport by road of goods... or anything whatsoever... where the work performed is ancillary to the principal business, undertaking or industry of the employer”.

22 The research team is of the view that, if the *Fast Food Industry Award 2010* is not found to apply, then the work, at least as described in Figure 1, falls under the coverage of the *Road Transport and Distribution Award 2020*. We form this view because the platform, to match supply and demand for food (or other goods), transports via the road network the goods (fast food or otherwise) from restaurant (or convenience store or supermarket) to the customer.

23 The research team also note the capacity in cl7 of the *Transport and Distribution Award 2020*, Facilitative Provisions, to allow workers, individually or majority agreement, to create flexibility in relation to hours of work, ordinary hours, days of week and spread of hours (cl7.2 (a) (i-ii) and cl7.3 (a) (i-ii)).

24 The research team also suggest that the express inclusion of Transport Worker Grade 1 includes a foot or bicycle courier, adding to weight of evidence that the work could be covered under this award.

25 Menulog in their application have sought to distinguish and carve out on demand delivery services from the *Road Transport and Distribution Award 2020* on the basis of peculiarities of the on

demand delivery services industry (para 49). Indeed, following Menulog’s definition at para 14, the immediate delivery of the goods is the distinguishing feature that makes the industry ‘on demand’. Menulog’s definition includes the instructive caveat “for immediate collection and delivery”. However connection of couriers and customers for the immediate collection and delivery does occur elsewhere in the transport industry. One prominent example is bicycle messengers, who at the behest of clients collect and deliver documents and small packages for immediate collection and delivery.

26 Bicycle messengers, in the view of the research team, would quite clearly be covered by the definitions set out at [21-22] above of the *Road Transport and Distribution Award 2020*. This, in the view of the research team, indicates that if the *Fast Food Industry Award 2010* does not apply, then the *Road Transport and Distribution Award 2020* does covers on-demand workers who perform food and other delivery work for Menulog.

27 A new modern award, or an amendment to the *Fast Food Industry Award 2010* or the *Road Transport and Distribution Award 2020* again raises issues of fissuring of courier work, and would likely result in deviation from the modern award objective of equal remuneration for work of equal or comparable value under s134(1)(e) of the *Fair Work Act 2009* (Cth)

## PROVISIONAL VIEW AT [35]

28 The research team submits that the provisional view of The Commission is correct in that if no other modern award covers employers and the courier employees then the Miscellaneous Award covers them.

## OBSERVATIONS AT [39]

29 The research team note that the cohort of workers engaged in food delivery work in an independent contractor context retain several labour market vulnerabilities. Of the 58 riders we interviewed on the Uber Eats and Deliveroo platforms, 47 were temporary migrants, for example on student or working holiday visas. These workers are known to face structural disadvantages in the labour market, and their exploitation has occurred disproportionately in some segments of the economy, e.g. in agriculture. The workers we interviewed also were contingently attached to labour market, and 27 of 58 explicitly mentioned they had no long-term commitment to food delivery work and expressed very little desire to engage in collective bargaining.

28 The research team suggests The Commission explores the characteristics of the workforce, whether it would be different in an employment rather than contracting context, and whether this would indeed meet the modern awards objective as per s134 of the *Fair Work Act 2009* (Cth).

29 Beyond these assertions on worker characteristics, the assertion that peak periods differ from other delivery work is envisaged by the *Road Transport and Distribution Award 2020*, as at cl23 weekend work, particular public holiday work and combinations of these are already envisaged and are covered in the award.

## PROVISIONAL VIEW AT [43]

30 The research team agrees with the commission that the Miscellaneous Award does not provide a fair and relevant safety net for food delivery couriers. However, the research team’s view is that the workers should be, and are, covered by either the *Fast Food Industry Award 2010* or the *Road Transport and Distribution Award 2020*.

## OBSERVATIONS AT [47]

31 We seek to 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, which indeed is one of the modern award objectives, flexibility means different things to different parties, and that ideas of flexibility in an on-demand setting should not be conflated with workers minimum engagement periods or remuneration for working unsocial hours being withdrawn.

32 The research team also wish to express reservations about the precedent that the creation of a new Modern Award with relatively small industry and sectoral capture would set, which of itself may run contrary to the modern award objectives outlined s134(1)(e) of the *Fair Work Act 2009* (Cth).

33 We hope that this submission assists The Commission form a view as to the appropriateness of current coverage, potential award modification or granting Menulog's application to make a modern award to cover the on-demand services industry.

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