



Menulog Pty Ltd  
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Education and Employment Legislation Committee  
Via Committee Secretary  
Email: [eec.sen@aph.gov.au](mailto:eec.sen@aph.gov.au)

**13 October 2023**

Dear Committee Secretary,

**Submission in response to the [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#)**

**Executive Summary**

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Thank you for the opportunity for Menulog to make a submission to the Education and Employment Legislation Committee Inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (the “**Bill**”).

As an Australian-born business that was the first in the industry to advocate for better benefits and protections for on demand couriers, Menulog makes this submission with the goal of supporting policy-makers in delivering a Bill that is fit-for-purpose for the gig economy, drawing on it's unique and extensive experience in on demand delivery.

Menulog has appreciated the Government's engagement with platform businesses and has been very encouraged by Minister Burke's various public commitments asserting the intention of this reform, summarised as creating minimum standards for workers without disrupting the way they like to work or having a detrimental impact for any industry participants.

Menulog is very supportive of the intention of this Bill, as it aligns with our corporate values as a reputable and long-standing local business and seeks to provide certainty for platforms and workers alike. However, as the Bill is currently written, there are currently four key issues that undermine the stated policy objective and would result in significant unintended consequences for all industry participants:

1. The deep-rooted alignment to employment is not appropriate or workable for 'employee-like' and creates a new level of uncertainty, including the potential reclassification of workers as employees
2. The Employee-Like provisions do not properly recognise and account for the inherent value exchange within the gig economy i.e. additional benefits for contractors such as the freedom to work when, where are how they like, including for multiple platforms simultaneously (i.e. 'multi-apping')
3. The Bill provides broad powers to the Fair Work Commission (“**FWC**”) without the necessary 'guardrails' (referenced by the Government) to protect the industry
4. If amendments are not made, the reform will come with a potential price tag far beyond the Government's cost and economic impact estimates, posing significant threats to all industry participants



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To address these issues, Menulog proposes the below overarching changes, which will ensure this Bill is fit-for-purpose.

**1. Draw a bright line between employee-like and employment, including:**

- a. Remove the inherent and significant risks that come with direct comparison to employment so that FWC is guided to set minimum standards relevant for employee-like workers from the outset
- b. Remove the stark risk of the reclassification of workers to employees by removing the definition who is an 'employee' from the Bill; recognise the intention underscoring the decisions of the High Court of Australia that have provided certainty to the industry
- c. Bolster the protection offered by the inclusion of 'Form of the Engagement' to ensure the Bill reflects the Government's intention of providing benefits that are "halfway down the ramp" between employment and traditional contracting

**2. Enshrine consultation with platforms and industry in legislation, including:**

- a. Ensure appropriate consultation with all parties when setting minimum standards for employee-like workers by enshrining this as a requirement for FWC in the Bill
- b. Distinguish consultation on employee-like from road transport as two very different industries and ensure that any Minimum Standards Orders ("**MSOs**") or Guidelines ("**MSGs**") for employee-like are only guided by specific industry expertises (not expertise of the traditional road transport industry)

**3. Narrow the scope of FWC powers and add 'guardrails' that will genuinely protect against unintended consequences**

- a. Provide further detail in the Minimum Standards Objective, including:
  - Further guidance on 'pay and conditions' to include a 'Minimum Pay Safety Net' that deeply considers the non-financial value of gig work, applies only to time where services are provided and ensures earnings are 'averaged'
  - Further guidance on managing the different nature of engagement, including the capacity to 'multi-app', and how this should be incorporated into the determination of Minimum Pay Safety Net
  - Provide specific detail on how to avoid 'unreasonable adverse impacts' to ensure this eventuates in practice
  - Remove overlap between employee-like and road transport
- b. Provide an exhaustive list of what can be included in an MSO or MSG and include further detail for these items in order to guide FWC (and steer away from employment concepts that are proven as not appropriate for employee-like and could result in unworkable cost implications), including:
  - Further clarity on payment terms, including a definition and ensuring payment is for estimated time only at an increment suitable to the engagement
  - Remove confusion caused by the inclusion of 'working time'
  - Make personal accident insurance mandatory for the best possible outcome for workers



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- Clarify items including 'deductions', 'record keeping', 'consultation', 'delegates rights' and 'cost recovery'
- c. Add crucial items to the list of terms that must not be included in MSOs or MSGs for the same reasons, including:
  - Minimum or maximum periods of engagement
  - Penalty rates for provision of services at particular times, loadings and/or shift allowances
  - Education and training (outside of safety, which is regulated by States and Territories)
  - Payments based on time 'logged on' to a Digital Labour Platform without the provision of services
  - Recovery of fixed costs
  - Additional leave entitlements outside of what has been accounted for in the Minimum Pay Safety Net
- d. Further clarify the scope of the 'Unfair Deactivation' jurisdiction to reduce the potential public safety risk in cases of serious misconduct (which must be legislated) and unwarranted resource, cost and burden for FWC and the 'Unfair Contracts' jurisdiction to limit inappropriate powers over matters of a commercial nature (which is in conflict with other sections of the Bill)

Menulog has suggested nine overarching amendments (with detailed changes under each) summarised in **Section 1** and detailed in **Section 6**, that it strongly believes will ensure this legislation delivers the best outcome for all industry participants and a continued and strong contribution to the Australian economy by the platform industry.

Menulog believes this is a once in a generation opportunity to get this right for all stakeholders and thus would greatly appreciate the opportunity and time for further consultation to help achieve the shared objective of fit-for-purpose minimum standards for the on demand delivery industry.

Please don't hesitate to get in contact with Menulog Head of Government Relations ANZ, Lisa Brown, should you require any additional information.

Kind regards,

Morten Belling  
Menulog Managing Director ANZ



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## 1. Summary of proposed amendments

Menulog's ultimate goal in providing this submission is to provide constructive feedback that will see the Bill amended to address issues raised in the **Executive Summary**. Menulog would like to support the passage of this Bill, however the following **nine overarching amendments to the Bill**, with some including detailed amendments under the overarching banner where required (**noted below**) are required to avoid significant unintended consequences. Further detail on each of these, including specific wording and changes that sit below each, has been provided in **Section 6**.

### Draw a bright line between employee-like and employment

No.	Inclusion in Bill	Proposal	Priority	See Page
1	Definition of employment	Remove this inclusion from the Bill	Crucial	15
2	Form of the Engagement references	Clearly define 'Form of the engagement' within the Bill	Recommended	16

### Enshrine consultation with industry

No.	Inclusion in Bill	Proposal	Priority	See Page
3	Minimum Standards Orders and Minimum Standards Guidelines	Replicate consultation requirements from road transport jurisdiction  Remove the ability to set MSGs as they do not provide value vs. the risk of unintended consequences	Crucial  Recommended	17
4	Expert Panel	Remove employee-like MSOs and MSGs from Expert Panel jurisdiction or include Digital Labour Platform expertise on Expert Panel	Recommended	17



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**Narrow the scope of FWC powers and provide guardrails to genuinely protect the industry**

No.	Inclusion in Bill	Proposal	Priority	See Page
5	Minimum Standards Objective	Provide additional guardrails within the Objective to bolster this 'guardrail'  <b>(Note: multiple proposed changes)</b>	Crucial	19
6	Terms that may be included in MSOs and MSGs	Make this list exhaustive  Add further clarification on terms included  Delete terms that are in conflict with 'Form of the Engagement'  <b>(Note: multiple proposed changes)</b>	Crucial  Crucial  Crucial	23
7	Terms that must not be included in MSOs and MSGs	Expand list to provide appropriate 'guardrails' and include further detail to protect the industry  <b>(Note: multiple proposed changes)</b>	Crucial	26
8	Unfair deactivation or unfair termination of regulated workers	Better define deactivation  Align the threshold with road transport and detail when FWC must dismiss a claim  Enshrine what constitutes 'serious misconduct' in legislation  Enshrine consultation with industry on 'the Code'  <b>(Note: multiple proposed changes)</b>	Recommended  Recommended  Crucial  Crucial	28
9	Unfair contracts jurisdiction	Include guardrails to fetter the current proposed powers of FWC	Recommended	31



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## 2. Why Menulog is in a unique position to make recommendations

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***Menulog is in a very unique position to offer constructive feedback on this Bill due to A) its local heritage and tenure and B) experience in both contracting and employing on demand delivery couriers in Australia and thus engagement with FWC.***

### **Local tenure**

Menulog was founded in Australia in 2006, where it remains headquartered and employs hundreds of local staff. Historically, Menulog supported local businesses to drive additional revenue through online ordering and delivery.

### **Experience in contracting and employment**

In 2018, leveraging local and international best practice, Menulog engaged contracted delivery couriers to service local businesses seeking to offer delivery.

In order to demonstrate the demand for delivery services in Australia, prior to the commencement of Menulog's delivery service, Menulog had 10,000 partners doing their own delivery. This figure has more than tripled with the addition of a delivery service for restaurants, grocery stores, convenience retailers and more, with millions of customers accessing food and products from these businesses every year.

After three years of growing our delivery offering and taking learnings at a significant scale, in an industry first in 2021, Menulog announced it would seek to offer better benefits and protections for couriers in Australia. As a first step Menulog increased the level of the insurance cover for contractors and launched a trial of employed couriers in the CBD of Sydney and submitted an application for a new Modern Award that would be sustainable and meet the needs of industry participants.

Menulog continues to employ a small number of couriers under the *Road Transport and Distribution Award 2020* ("**RTD Award**"), however, this program has proven that employment is challenging and the RTD Award is not viable for the on demand delivery industry.

### **Engagement with FWC**

Menulog strongly advocated that the RTD Award was not the right Award and continues to pursue an [On Demand Delivery Services Award](#) ("**ODDS Award**") that would suit the needs of the industry, born long after the Modern Awards were developed in 2009. Unfortunately, the FWC (with experience only in regulating traditional industries) ruled that the RTD award *could* apply to the on demand industry, which has subsequently led to very significant barriers for the operation of this program, including for couriers to join and continue working as an employee.

1. Impacts for Menulog:
  - a. Deliveries made under this Award are financially unsustainable
  - b. Inability to expand program outside of Sydney



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2. Barriers for couriers:

- a. Minimum engagement periods - couriers want to be able to work for short periods of time in between other engagements
- b. Inability to split shifts - as above
- c. Penalty rates (in peak operational times and including non-continuous evening shifts) - these significantly reduce delivery opportunities for employed couriers in times they would prefer to work, as it is not economically viable for Menulog

In addition to the barriers of the Award itself, there are broader barriers for couriers in engagement via employment, including (but not limited to):

- Lack of ability to choose when and where to work
- Reduced opportunity for dynamic and higher earnings (including via multi-apping)
- Having to work in a supervised environment or managed structure
- Overarching lack of flexibility, freedom and choice

**Important learnings for this Bill**

Menulog has the longest local history of any on demand delivery platform in supporting Australian businesses, serving consumers and contributing to the economy. Combined with extensive one-to-one engagement with couriers, Menulog strongly believes the views outlined in feedback and suggested amendments in this submission will have the greatest positive impact for all industry participants.

Menulog believes its ambitions are closely aligned with the Government's, particularly in developing a fit-for-purpose legal framework that does not compromise the value exchange between Menulog and its couriers but provides an avenue for some minimum standards.

It is crucial that policy-makers review learnings shared on the employment of couriers and the risk that traditional employment concepts pose to the operation of this industry, which have been detailed throughout this submission.

**3. Ensuring the Bill meets the stated policy intention of Government**

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As the first platform to seek better benefits and protections for workers via a fit-for-purpose framework and as outlined above Menulog is very supportive of Minister Burke's intention of creating minimum standards without disrupting engagement or having a detrimental impact for industry participants. If this was clearly reflected in the text of the Bill, Menulog would be fully supportive of this legislation.

However, as currently worded, the Bill requires the amendments proposed in **Section 6** to address the following key issues and areas where the text of the Bill is at odds with the publicly stated policy intention of the Government and the assurances made to industry participants.

**A. This Bill lacks 'guardrails to ensure reforms will be "modest" and could see workers reclassified as employees**





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Minister Burke has publicly committed to ensuring [modest](#) reforms [would not turn gig workers into employees](#). However currently, the Bill poses a significant risk of reclassification of workers from contractors to employees (see **Section 4**).

This message was amplified during the [University of Sydney](#) speech in August, where Minister Burke said; *"...most people who work on these platforms don't want to be employees. They like the flexibility of knowing that they can hop on the app when they've got a spare minute and see if there's some work available. There's a host of different circumstances here, but neither the platforms nor the workers want to be shown to be turned into employees."*

In September at the [National Press Club](#), Minister Burke also acknowledged the importance of guardrails for the FWC to protect from unintended consequences saying; *"I'm very grateful to the platforms, some of whom are represented in the room today, for the consultation that we've had. Because part of what they've put to us is... "OK, it's one thing to get that gateway right, but once you've got the gateway, you need to make sure that the rules that the Fair Work Commission brings in place don't effectively turn someone into an employee, even though you've said you want to accept the form of engagement."*

In this same address, Minister Burke went into some of the specifics on items that may change the Form of the Engagement, stating; *"You couldn't logically pay somebody for the time that they're just on an app, because that would wreck the form of engagement. You couldn't do that..."*

This is entirely true however this concept noted by Minister Burke actually extends further than the risk of payment for 'time on the app' to the risk of paying for time when services are not solely provided to one platform.

Given the prevalence of 'multi-apping' in this industry (75% of Menulog couriers multi-app<sup>1</sup>) and in some cases, simultaneously, there is the ability for workers to earn multiple amounts for the same time spent. For example: if a courier were to be delivering for two platforms along the same route, they would be earning amounts from two different platforms for the same transit time, which cannot be seen by individual platforms). As such, there also must be consideration for this in setting a Minimum Pay Safety Net, which is outlined further in **Proposed Amendment Five**.

The Minister also described how traditional employment concepts of work time could interfere with the Form of the Engagement in his interview on ABC's [Insiders](#) in September; *"... You couldn't possibly pay someone just for being on an app. Remember, most of these delivery riders will be on two to four apps at the same time. If you're being paid just for being on the app, it would effectively break the technology. Certainly it can't be anything that interferes with the nature of the engagement. That's why overtime wouldn't work, that's why rostering wouldn't work."*

However, as per explanation in **Section 6, Proposed Amendment One**, the text of the Bill makes this entirely possible and is a significant risk.

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<sup>1</sup> Just Eat Takeaway.com, Quarter 1-2 Courier Engagement Survey, July 2023, 1,065 couriers





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## **B. The 'principles-based' approach does not ensure the industry is 'future proofed'**

Menulog appreciates Minister Burke's intention to ensure "*more reputable apps are [not] being undercut by other apps that emerge on the market...*" as stated at the [National Press Club](#). However, Menulog strongly believes the 'principles-based approach' taken in the drafting of the Bill is actually to the detriment of these 'reputable apps', including Menulog, their partners and customers, and the workers which they engage and does not have the desired impact on 'future proofing' the industry.

A principles-based approach was similarly taken in California in 2019, when it passed AB 5, which would have provided workers with employment rights and benefits based on a five stage test. However, this was quickly overturned by Proposition 22, which was passed by workers that wanted to maintain the freedom and independence that was ultimately curtailed by AB 5.

Proposition 22 sees specific detail included on rates of pay (importantly only applying to engaged time) and mandatory occupational accident insurance. Menulog advocates that these learnings be taken into account by the Australian Government to avoid the pitfalls of taking a similar principles-based approach.

Menulog understands part of the rationale for broad-brush legislation is grounded in the belief that platforms can simply "change the algorithm" to "avoid the law", assuming that platforms like Menulog are able to make technical changes at the press of a button. As outlined in **Section 4**, this is simply untrue.

Furthermore, if the detail of what is being proposed by the Government is actually provided in legislation (for example: a Minimum Pay Safety Net, mandatory insurance etc) then it is impossible for any business to 'innovate' its way around this and it leaves little room for interpretation in the future. Menulog is concerned that while at present, it has public assurances and thus some confidence in the alignment of all involved, without specifics being written into legislation, months and years down the track, this 'good faith' understanding will be lost, at huge expense to the industry and everyone it supports.

Further detail or 'guardrails' for FWC, as outlined in **Section 6**, ensures less room for misaligned interpretation of these 'principles', greater certainty for reputable businesses to operate with confidence and importantly, less opportunity for any business trying to evade regulation to hide behind ambiguity.

Most importantly, workers themselves want clarity and certainty built into legislation, with the latest and largest research of on demand delivery workers in Australia amongst more than 8,000 workers<sup>2</sup> demonstrating that 95% of workers say it's very important/critical reforms are clear and do not add confusion for workers about their responsibilities and entitlements. In further support of this, 88% of platform workers say it's very important/critical reforms do not add administrative or operational burden to workers<sup>3</sup>.

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<sup>2</sup> Quantum Market Research, *On-Demand Platform Industry Research*, August 2023, 8,090 platform workers

<sup>3</sup> Quantum Market Research, *On-Demand Platform Industry Research*, August 2023, 8,090 platform workers



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#### **4. The current Bill will see detrimental impact, including much higher cost increase, for all industry participants**

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***Without amendments summarised above and detailed below in Section 6, this Bill poses a significant risk of very detrimental consequences for workers, small businesses, platforms, consumers and the broader economy.***

##### **A. Risk relating to the potential reclassification of workers**

The proposed changes to the meaning of 'who is an employee' create a significant risk of the reclassification of workers, including on demand delivery couriers, which is completely against the stated policy objectives, as well as the actual text of the Bill; specifically the Minimum Standards Objective. This new definition undermines the decisions made by the High Court of Australia, deciding that workers are indeed contractors, which provided clarity and certainty for industry participants, allowing for greater investment (see **Section 6, Proposed Amendment 1** for further detail).

Essentially wiping out this case law could see any on demand delivery courier reclassified as an employee. The cost of such a decision would be untenable for the industry to operate as it currently does, as there is no suitable Modern Award to employ couriers in Australia (**see Section 2**). Significant additional costs would need to be passed on to partners and consumers, leading to lower consumer demand, businesses ceasing to offer delivery and thus less opportunities for couriers. In the absence of a suitable framework for the employment of on demand couriers in Australia, Menulog believes this could also see further departure of platforms from the Australian market due to a severe restriction on the ability to operate at scale with increased financial burden (noting the recent exits of Foodora and Deliveroo). This would then have significant consequence for competition and the economic contribution of the industry.

##### **B. Risk relating to the lack of guidance / broad scope of FWC powers**

Without necessary guardrails in the current Bill, there is a risk that FWC could make any number of MSOs that could unintentionally harm the industry. One of the biggest areas of concern is the potential cost that MSOs not suited to the dynamics of the on demand industry could have.

Minister Burke has stated the impact for customers will be "a few dollars" and that there would be no impact for small business. However in Menulog's experience, an increase of a few dollars would see a noticeable impact on customer demand and thus a flow on effect for both businesses and couriers. Menulog has already seen noticeable impacts on consumer demand when prices are increased by as little as 50c - \$1.00, which continues to be amplified in the current economic climate.

Unfortunately, "a few dollars" and specifically, the Government's estimates outlined in the Explanatory Memorandum ("**EM**") is significantly underestimated. It is not feasible that such a low increase in cost would be the outcome of regulation with the Bill in its current form as **a)** current guidance to FWC directs to offering what is essentially the same pay and entitlements



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as employment which (as per **Section 2**) would already see a significant additional baseline cost and **b**) necessary guardrails have not been included meaning the scope of what *could* be ordered by FWC could result in a significantly higher cost increase. As per Menulog's modelling outlined below, Menulog estimates the increase in cost could be as high as **\$15.13 per delivery** (which would be an increased rate of \$39.47 if calculated per hour as in the EM), which would have a significant cost for businesses and customers and thus, an impact on opportunities for couriers.

Further to this, Menulog estimates an implementation cost that is 400% greater than what has been outlined in the EM, which again would require a significant cost to be distributed across the network.

Menulog has modelled this potential cost leveraging real business and industry experience, with as much accuracy as possible (noting legislation does not currently provide the clarity required for accurate impact modelling) and detailed this below.

**a. Realistic cost impact for 'implementation' of the current Bill**

The EM predicts implementation costs for platform businesses will be \$59,270.23 in the first year. However, our calculations estimate that the initial implementation cost will be in excess of \$300,000.00.

Menulog's estimation includes hours required to do the technical development and also considers requirement interpretation and product design, quality assurance and testing, data engineering and reporting, operational process changes and implementation of new risk controls.

It is again important to reference the Government's assumption regarding the speed and ease of which platforms can make operational and technical changes. Like many other businesses, the technology that powers the Menulog platform is internationally centralised; for Menulog, this is run by the Just Eat Takeaway.com (JET) network.

Absolutely any change to Menulog's product and technology must go through a number of local and international teams, which requires significant lead time and cost to scope, develop, test, approve and implement, taking into account the JET network covers 20 different countries.

**b. Scenario modelling - potential cost of the Bill without the necessary 'guardrails' for FWC**

Menulog has modelled the potential cost implication of the current Bill, specifically what could be ordered by FWC given the current scope, if the required 'guardrails' were not put in place via the proposed amendments outlined in **Section 6**.

Without any amendments and thus a lack of 'guardrails' could see a potential cost increase of **\$15.13 per delivery**.



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This modelling uses the [Victorian National Survey](#) figure as a baseline with inflation applied. For commercial confidentiality reasons, Menulog is unable to share company figures however it believes the survey figures to be broadly representative of the industry.

Towards the estimate of the potential cost implications, the modelling uses the Road Transport and Distribution Award as the reference award. This Award has been used as a reference given that it was the preliminary decision by FWC relating to Menulog's Modern Award application<sup>4</sup> however as per **Section 2**, this is not an appropriate Award for the industry in reality. Once developed, the ODDS Award would be a more appropriate reference.

The modelling applies the following items that could be ordered by FWC, particularly in line with the current guidance written into the Bill regarding the provision to *"compensate regulated workers covered by a minimum standards order or minimum standards guidelines in relation to their pay and conditions compared to employees performing comparable work"* (see **Proposed Amendment Five**):

- a. The use of casual rates as per the RTD Award
- b. Shift loading, to account for when orders are placed relative to loading periods in the award
- c. Payment for un-utilised time, i.e. time logged in but not on a job
- d. Top-up premium, in the case of not being able to periodically average up
- e. Fixed and variable costs, e.g. registration, insurance (fixed) and cost recovery, fuel, depreciation and running costs (variable)
- f. Competition premium, to account for when we expect to be paying over a minimum due to high industry competition

### **c. Flow on costs to business partners and customers**

It is well documented that on demand delivery is a low margin business and that the Australian market is one of the most competitive in the world. A requirement for any on demand delivery platform to survive in this market is to operate with increasing efficiency and at scale. Platforms must also be able to carefully balance the financial expectations of all involved - competitive customer pricing, fair restaurant/business costs and attractive earnings for couriers.

Any potential cost increase would have to be balanced between all industry participants for the industry to continue to function. Menulog not only expects this to result in a reduction in consumer demand due to consumer fee increases, but also expects this will be exacerbated by increased prices for goods, as we anticipate businesses will also pass on further costs to the consumer.

The network effect of this significant drop in consumer demand (i.e. *less orders for businesses, less businesses then offering delivery, less opportunities for couriers, less*

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<sup>4</sup> FWC Full Bench decision, 28 January 2022; the Road Transport and Distribution Award 2020 *could* apply to workers in the on demand delivery industry ([2022 FWCFB 5]).



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*couriers to service delivery etc)* could have an irreparable impact on the on demand delivery industry as a whole and could again result in market shrinkage and a significant impact on market competition. 86% of workers say it's very important/critical that reforms do not constrain the industry by creating fewer customers and work opportunities and more than a third of workers would leave the industry if this was the case<sup>5</sup>.

Thus, it is very important that a legislative framework is developed that will guide FWC in making minimum standards that provide protections for workers without increased costs that will harm the industry overall. Menulog believes that the proposed amendments outlined in **Section 6** of this submission will go some way in achieving this.

## 5. The value exchange in the gig economy must be accounted for

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***It is important to make clear the core reason that employment cannot be used as a benchmark for 'employee-like' workers and that is, the value exchange that exists in this industry that does not exist in employment. It is this value exchange that absolutely must be accounted for in the development of minimum standards to ensure these are fair and reasonable for all.***

The 'gig economy' has evolved so rapidly, in a large part, due to the value exchange that industry participants achieve. On demand delivery platforms, for example, provide value to local businesses through access to a flexible and scalable network of contracted couriers to meet consumer demand for convenience and help drive additional revenue through delivery (versus businesses employing drivers directly at a significant additional cost). In turn, this provides the opportunity for flexible opportunities to earn for on demand couriers, with the freedom to work when and where they choose, the ability to accept or decline delivery opportunities at their own discretion, be enterprising and find ways to work multiple 'gigs' at the same time and to ultimately control how they earn.

Any change, if not deeply considered with regard to the nature of the industry and how it genuinely differs from traditional industries, poses a real risk to the disruption and potential hindrance of existing benefits and value in this industry. The need to preserve freedom, choice, flexibility and independence has been a consistent narrative that has been shared by various stakeholders as part of reform, but most importantly, by the workers themselves (**See Appendix, Point A**). Countless studies demonstrate that flexibility is the top motivator for entering into and continuing to engage in platform work, regardless of whether it is supplement or the primary source of income. Research demonstrates the vast majority of workers state this is critical to maintain as part of the reform process, with 87% saying it's critical to maintain the ability to choose when they work and 85% saying it's critical to start/stop working whenever they choose<sup>6</sup>.

While the Bill makes some reference to conceptual protections to ensure that the current benefits for platform workers, including flexibility, is maintained it, **a)** does not take into account

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<sup>5</sup> Quantum Market Research, *On-Demand Platform Industry Research*, August 2023, 8,090 platform workers

<sup>6</sup> Quantum Market Research, *On-Demand Platform Industry Research Summary*, August 2023, 8,090 platform workers



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the significant value of these benefits to workers and thus does not provide appropriate guidance to FWC in accounting for this in an approach to making minimum standards, particularly relating to pay (see **Section 5**) and **b**) does not go far enough in explicitly ruling out potential MSOs that would (inadvertently) impinge on flexibility and choice or have a significantly detrimental impact to the industry, specifically by way of untenable cost.

The vast majority of workers make an informed decision to begin work in the platform industry (only 1 out of 10 disagreeing with this<sup>7</sup>) and 86% want to maintain their independent contractor status, including the same benefits they receive as part of this<sup>8</sup> (**See more in Appendix, Point C**). More than half of workers state they would leave the industry if platforms controlled when and how they could work as part of the reform process<sup>9</sup>.

It is clear workers place a higher value on the non-financial benefits of freedom, choice, and independence, even when weighed up against potential minimum standards, including remuneration (**See Appendix, Point B and C**). This value must be accounted for throughout the legislation, by removing the various references to pay and entitlements for employees as the starting point for employee-like workers. No employees in Australia are afforded these opportunities and entitlements, but they are instead compensated by way of pay and entitlements in Modern Awards.

It is not sensible or practical to try to mirror the entitlements for employment in employee-like (as the Bill currently does throughout), as it is not realistic for platforms to continue to provide the benefits that contractors value, with rates and conditions aligned to employment, where employees do not have the option of working whenever they choose, accepting or declining work at their unfettered discretion or working for multiple companies at the same time. One such example (see further detail in **Proposed Amendment Seven**) is penalty rates; which is a concept specifically designed to compensate employees for being directed to work at a specific time of day or day of week that is generally regarded to be unsociable; this is non-existent in the platform industry, which has evolved to meet the needs and desires of workers providing services whenever and however it suits them.

Furthermore, the ability to 'multi-app' and the opportunity for workers to earn from multiple platforms for the same time invested must be accounted for by FWC and thus must be explicitly written into legislation as a 'guardrail' to ensure that minimum standards provide the desired benefits for couriers, whilst being fair and reasonable for all industry participants. For example: it would not be fair and reasonable to set a Minimum Pay Safety Net for employee-like workers that was based on the pay and entitlements of a comparable Modern Award, whilst couriers are able to multi-app, which could see them earning double or triple the amount through payments from multiple platforms for the same time, in addition to other entitlements. In such a situation, you would have employee-like workers maintaining the choice and flexibility they desire plus pay and benefits above and beyond what any employee would receive, which is completely adverse to the Government's ambition of providing minimum standards that are "halfway down the ramp".

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<sup>7</sup> Quantum Market Research, On-Demand Platform Industry Research, August 2023, 8,090 platform workers

<sup>8</sup> Quantum Market Research, On-Demand Platform Industry Research, August 2023, 8,090 platform workers

<sup>9</sup> Quantum Market Research, On-Demand Platform Industry Research, August 2023, 8,090 platform workers





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Furthermore, while multi-apping provides significant value to workers, this does come at a cost for platforms, businesses and customers. Using the example from **Section 3, Point A**, if a courier is delivering for two platforms simultaneously, they may be able to collect from both businesses and deliver to both customers using less time than provided payment for by the sum of both jobs. However, with additional stops, this inevitably adds additional time that businesses are waiting for couriers and that customers are waiting for their order. For Menulog specifically, there are then processes that compensate businesses and customers if this wait is excessive, without any commercial penalty for couriers (given the flexible nature of the engagement). As long as these delays do not undermine the purpose of the delivery, these costs are accepted as part of the value exchange with couriers.

Given workers want to maintain flexibility above all else, including the ability to 'multi-app', it is thus crucial that FWC is guided to account for the more intangible value that platform work provides to workers when it is considering any MSO or MSG, specifically around remuneration and other entitlements (see **Section 5**) to ensure these are fair and reasonable for all and specifically tailored to the form of the engagement.

## 6. Detail of proposed amendments and rationale

### Proposed Amendment One

Inclusion in Bill	Issue	Risk	Proposal
Definition of employment  <b>Section: 15AA</b>	Renewed and unproductive uncertainty for workers, platform	Could stifle innovation to the significant detriment of workers  Reclassification of workers would significantly damage industry	Remove this inclusion from the Bill

The proposed changes to the meaning of who is an 'employee' for the purposes of the Fair Work Act 2009 (Cth) ("**FW Act**"), which had not been previously referenced, will create uncertainty and disputes, rather than providing much-needed legal clarity to industry participants and could result in the reclassification of workers as employees, which is in direct conflict with the intentions of Government.

As part of reform that intends to move the industry forward, this inclusion is a significant step backward; essentially returning the law to the murky state of 2022, prior to the High Court of Australia ruling in *CFMMEU v Personnel Contracting* and *ZG Operations Australia Pty Ltd v Jamsek*.

Menulog's view is that what has been proposed in the Bill is a statement that the decisions in *Personnel Contracting* and *Jamsek* are not intended to have continuing force, rather than providing a clear and workable definition. The Bill risks shoehorning historical common law





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considerations of how work has traditionally been performed over centuries onto an industry which has existed for less than 15 years.

Thus, Menulog strongly advocates for the definition of employment to be removed from the Bill to avoid the following potential impacts:

**A. Stifling innovation to the significant detriment of workers**

The decisions of the High Court of Australia have provided greater certainty and confidence for platforms, including Menulog, to be able to invest more in this market, specifically new programs and technology that help create a more efficient network and thus more earning opportunities for workers.

This innovation also has significant economic contribution, by providing improved delivery services for existing and new partners to drive further revenue for (mostly small) businesses, as well as a better offering and service for customers and thus greater consumer demand.

With renewed uncertainty and risk of reclassification brought by the new definition of employment, platforms would shy away from such investment as this could **a)** be used as ammunition in a bid to reclassify contractors as employees (as has been demonstrated in the multiple court cases prior to *Jamsek*) and **b)** see significant funds required should such a decision occur, which could otherwise be used in new innovation.

**B. Reclassification of workers with disastrous impacts on the industry**

As outlined in detail in **Section 4**, if any on demand delivery courier were to be reclassified, this would have disastrous impacts for the industry and could ultimately see the departure of platform businesses from the market as there is no suitable framework for the employment of on demand delivery couriers in Australia.

While Menulog will continue to advocate for the development of a suitable new Modern Award, in the absence of this in the foreseeable future, the risk of reclassification is significant and completely unpalatable.

Menulog believes it would be far more productive to provide platforms with the certainty needed to be able to invest in minimum standards rather than creating confusion that may hinder this commitment.

**Proposed Amendment Two**

Inclusion in Bill	Issue	Risk	Proposal
'Form of the Engagement' references	Vague and uncertain term that is subject to multiple interpretations	MSOs / MSGs that would "wreck" (using Minister Burke's wording) the industry and change the way	Clearly define 'Form of the Engagement' within the Bill



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<b>Section(s):</b> 536JX(a)(iv), 536JX(b)(iii), 536KM(1)(d)		workers want and agreed to engage with platforms	
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The 'carve out' relating to FWC not being able to review matters that may change the 'Form of the Engagement' has been continuously referred to as a key guardrail that will ensure unsuitable MSOs and MSGs are not applied to employee-like workers. However it is Menulog's strong view that this lacks the necessary detail required to adequately offer this intended protection.

As it is written, 'Form of the Engagement' is a vague and uncertain term that could be interpreted in a multitude of different ways and thus requires definition in legislation. Menulog suggests the addition of a definition such as the following:

***"Meaning of Form of the Engagement"***

***Form of the Engagement*** means where the digital labour platform:

- (i) pays the worker per completed engagement, not by the hour, in accordance with the estimated time to complete the engagement;*
- (ii) does not unilaterally set hours for the worker;*
- (iii) does not require the worker to accept a specific engagement; and*
- (iv) does not restrict the worker's ability to work for other digital labour platforms or for other businesses or employers whether as an employee, employee-like worker or independent contractor"*

Menulog strongly believes this added detail would significantly help FWC in developing MSOs and MSGs for the benefit of workers, without unintentionally disturbing benefits and inclusions they value and currently enjoy.

**Proposed Amendment Three and Four**

Inclusion in Bill	Issue	Risk	Proposal
Minimum Standards Orders  Minimum standards guidelines  <b>Section(s):</b> 536JY - 536KG	FWC can make MSOs or MSGs at its own initiative <u>without any</u> consultation	MSOs or MSGs created without consideration of needs and interests of workers resulting in significant unintended consequences	Enshrine consultation as per road transport stream  Remove the ability to set MSGs as they do not provide value vs. the risk of unintended consequences
Expert Panel	No Digital Labour Platform expertise	MSOs or MSGs created without	Remove employee-like MSOs



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<b>Section:</b> 617(10D)	included in the Expert Panel, despite vastly different industry operations	consideration of the complexity of the industry compared with traditional employment or traditional road transport operators	and MSGs from Expert Panel jurisdiction or include Digital Labour Platform expertise on Expert Panel
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Menulog has consistently maintained and advocated for the need for deep consultation with relevant parties - including workers and platforms - to ensure that minimum standards are fit-for-purpose and do not have the opposite effect of which they intend. Again Menulog has appreciated consultation with DEWR and the Minister's Office and so it is surprising that a requirement for consultation with industry by FWC has been omitted from the Bill, particularly as this is a novel field of regulation.

There are two main areas where this is of great concern that require amendments:

**A. Lack of required consultation by FWC with parties that may be affected by a proposed employee-like MSO or MSG**

This is in stark contrast to the consultation requirements for road transport MSO proposals and without rationale as to why the same consultation requirements should not apply to both streams.

Employee-like workers and digital labour platform operators deserve the same protection from the potentially unforeseen or unintended adverse consequences of novel FWC action as those that operate in the road transport industry.

Parties likely to be affected by an employee-like MSO must be given a reasonable opportunity to not only make written submissions, but to also file evidence in support of their contentions to ensure FWC has a full understanding of the potential impact of its proposals and that workers are protected from potential consequences of these powers.

Further to this, Menulog advocates that MSGs be removed as an option for FWC as they provide no additional value in meeting the intention of this policy. When an MSO could be set, having an MSG simply adds confusion and in fact presents a risk to business that it could provide an avenue to set aside or vary a Contract of Service (see **Proposed Amendment Nine**)

**B. Scope of FWC to direct an employee-like MSO to be dealt with by the road transport expert panel, without any digital labour platform expertise**

As communicated at length in [prior FWC proceedings](#), on demand delivery operates very differently from traditional courier and transportation services. It does not make sense to legislate the ability for an expert panel that has only ever dealt with road transport to advise on an employee-like MSO without any actual expertise in this area.

Menulog believes the best course of action would be to remove employee-like MSOs



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and MSGs from Expert Panel jurisdiction in favour of detailed consultation with industry (as per point A above). This will ensure the most representative and current views and will ultimately result in the best outcome for industry participants.

Another option would be to include a number of Digital Labour Platform experts as part of the Expert Panel, which would help ensure a realistic representation of the interests of workers and industry, provided they cover the major industries that the Government has stated this legislation is intended to capture - including on demand delivery.

### **Proposed Amendment Five**

Inclusion in Bill	Issue	Risk	Proposal
Minimum Standards Objective  <b>Section:</b> 536JX	The Objective lacks the detail required' to protect against dire unintended consequences	Unrealistic and detrimental resource and cost impact for industry participants and FWC	Provide additional detail within the Objective to bolster this 'guardrail'

Along with 'Form of the Engagement', the Minimum Standards Objective has been consistently pointed to by the Government in providing clear guardrails for FWC in setting minimum standards to protect workers and the on demand delivery industry from unintended consequences. Menulog is appreciative that the Government has clearly taken industry feedback on board to develop some items within the Minimum Standards Objective that will provide some protection. However, the Minimum Standards Objective still lacks the detail to provide adequate safeguards to protect industry participants from consequences including (but not limited to):

- A.** Broad and not fit-for-purpose minimum standards which would impose untenable costs on platforms, partner businesses and, as the Government itself has referenced, to consumers
- B.** Minimum standards that would not be fair or appropriate for how the industry operates, including payment and entitlements that could be beyond what is received by employees
- C.** Lengthy and expensive FWC proceedings, draining resources from platforms and the FWC itself. This will lead to huge administrative costs and a focus on proceedings rather than investing and delivering on minimum standards that would actually benefit workers, as per the intention of the Bill

Menulog believes that the addition of the following detail in key points of the Minimum Standards Objective will vastly enhance the protections offered by this 'guardrail'.

### **Proposed change one:**

**Updates to the inclusion: "*the need for standards that deal with minimum rates of pay (Point B in the Bill)*":**



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**A. Clearly define what is considered 'necessary costs' (Point i. in the Bill)**

The inclusion of consideration of all 'necessary costs' could exponentially increase costs for platforms, businesses and consumers and should not be included without further defining that these costs should be those that are necessary for the performance of the service that the employee-like worker is contracted to provide to the Digital Labour Platform. Menulog proposes the following replacement wording for this point:

*"takes into account the costs that will be necessarily incurred by regulated workers in the performance of a service that they have been contracted to provide; and"*

**B. Reword guidance related to pay and conditions so it is actually appropriate for the 'Form of the Engagement' (Point ii. in the Bill)**

As per the explanation in **Section 5**, the proposed wording of *"compensate regulated workers covered by a minimum standards order or minimum standards guidelines in relation to their pay and conditions compared to employees performing comparable work"* is at complete odds with the policy intention of providing pay and minimum standards that are "halfway down the ramp" between employment and traditional contractors.

Menulog strongly advocates for this inclusion to be removed in favour of more appropriate detail (outlined below) that will ensure FWC take into account the following, which is more appropriate to the 'Form of the Engagement':

**a) FWC should be limited to setting a 'Minimum Pay Safety Net'**

FWC should only be able to set a Minimum Pay Safety net or base rate, which must factor in all appropriate inclusions for employee-like workers. This is not only to account for the value exchange in the gig economy (recommended to be specifically included as per the below) but also to continue to maintain vibrant and dynamic market competition. 24% of workers would prefer to earn a fixed/standard rate of pay versus having the ability for dynamic earnings for each ride/delivery, demonstrating the value workers place on the ability to earn flexibly above a minimum rate and the need to preserve platforms capacity to offer this<sup>10</sup>. Additionally, 92% of workers also said it's very important/critical reforms do not impact the opportunity to earn dynamically<sup>11</sup> (**Also see Appendix, Point H**).

This is essential to limit the broad discretion currently provided to FWC to consider remuneration that would be inappropriate in the context of a contracting arrangement, including the ability to set overtime rates and other penalties (see detail in **Proposed Amendment Seven**) or to enable workers to earn more than employees given the ability to 'multi-app'.

**b) State FWC must have regard for the value exchange in the gig economy**

While 'value' is referenced in the previous section of the Bill as something that FWC must have 'regard' for, it is essential that FWC considers the value that contractors receive in contrast to the compensation employees receive for a lack of freedom and choice when considering a Minimum Pay Safety Net. While

<sup>10</sup> Quantum Market Research, On-Demand Platform Industry Research, August 2023, 8,090 platform workers

<sup>11</sup> Quantum Market Research, On-Demand Platform Industry Research, August 2023, 8,090 platform workers



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Menulog acknowledges that reference to a Modern Award (such as the current RTD Award or potential future ODDS Award) is reasonable to reference, due to the additional value provided to employee-like workers, comparison of remuneration must be confined to the base rate of pay for ordinary hours and must not include any entitlements above this (as these traditionally compensate employees for being directed to perform work at a specific time and place without flexibility).

Overall, it is essential that any set remuneration accounts for the total opportunity that platform work provides, including the ability to earn from multiple platforms simultaneously (suggested as an additional change to the Minimum Standards Objective below).

**c) Remuneration must be averaged over a reasonable time period**

For the purpose of determining whether the minimum pay requirement has been met for a particular worker, it is crucial that remuneration be averaged over a reasonable time period (for example, each fortnight or invoice cycle) and that any calculation includes regular payments, as well as any additional payments (such as incentives and bonuses), which are commonplace in the on demand delivery industry.

This approach is necessary to reflect the unique and irregular work patterns of platform workers and ensure they receive fair and adequate compensation for their work, balanced with platforms being able to maintain efficiency, without unnecessary compliance burden or unwarranted costs.

Without a provision for averaging and if the safety net was required to be met on each and every order, there would not only be significant cost associated with operational changes and compliance requirements, but there would be significant overpayments across the industry, which would see unpalatable additional costs passed onto local businesses and consumers. It is crucial to ensure additional costs are measured and appropriate and directed in the right way to ensure the intended benefit for workers is achieved.

**C. Explicitly instruct FWC to consider the different nature of engagement (Point iii. in the Bill)**

It is impossible to conceive how having a minimum rate of pay could have an impact on 'the form of the engagement' so instead of the current wording - "*do not change the form of the engagement of regulated workers*", it would be more appropriate to instruct FWC to recognise the need to adopt a different approach to the setting of minimum rates of pay for a regulated worker to that adopted in the context of traditional employment.

Thus, Menulog proposes the replacement:

*"account for the different nature of engagement of regulated workers as independent contractors rather than employees"*

**D. Capacity to 'multi-app', including simultaneously**

As above, employee-like workers typically undertake work for multiple digital labour platforms (including simultaneously). In setting a minimum rate of pay, FWC must





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consider the prevalence of 'multi-apping' and how this flexibility increases the earning potential of workers during the time services are provided. As per examples above, it is thus crucial to include the below wording in the Minimum Standards Objective:

*"Take into account the possibility that regulated workers may be engaged to undertake work for multiple businesses, including simultaneously, including multiple digital labour platforms and road transport businesses."*

The prevalence of 'multi-apping' is also why it's so crucial for any payment to be made based on estimated time only, as multi-apping enables couriers to extend their 'actual' time on a delivery by providing services to other platforms simultaneously (i.e. additional collections and drop offs). If payment was required for 'actual' time, then it would see platforms having to provide payment for additional time that couriers spend working for competitors (and receiving a double payment from competitors also). Using estimated time is the only way to combat this.

**Proposed change two:**

**Updates to the inclusion: "*the need to avoid unreasonable adverse impacts*" (Point C in the Bill)**

Menulog strongly suggests the following detail be added:

- A.** *business, including on business costs and viability, as well as innovation, productivity and the regulatory burden;*
- B.** *the opportunity for regulated workers to obtain or undertake paid work;*
- C.** *the parties that utilise or rely upon the work undertaken by a regulated worker or the services offered by a party that engages them;*
- D.** *the day-to-day operation of platform businesses in providing opportunities for revenue / earnings to industry participants*

Regarding **Point D. above**, understanding employee-like provisions are set to come into effect from 1 July 2024, it is absolutely crucial that some further guidance is provided to FWC in legislation that protects against the potential disastrous impact of MSOs that do not have the adequate time frame for consultation and implementation.

In addition to the need for consultation outlined in **Proposed Amendment three**, it is essential that adequate time is mandated for this consultation to ensure the nuances of highly complex industries under the 'gig economy' umbrella are accounted for and that then, adequate time for implementation and compliance is afforded by FWC.

Without this, there is a real risk that platforms, due to the nature of how they operate (see **Section 4**), would be non-compliant for significant periods of time. This would in turn see a huge impact to revenue for small business and earnings opportunities for workers.

**Proposed change three:**

**Update "*the need to consider other orders or instruments...*" (Point D in the Bill)**





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Menulog is concerned with the current likelihood of overlap between the employee-like worker and road transport industry jurisdiction given the broad definitions of the two jurisdictions and the possibility that workers could be captured under MSOs across both streams. To guide the FWC in avoiding any unnecessary overlap, Menulog proposes the following amendment to the final point under the Minimum Standards Objective:

*“the need to consider other orders or instruments (however described) made under this Chapter and to avoid any unnecessary overlap of such orders and instruments.”*

This replicates the language from FWC’s existing obligations to ensure there is no unnecessary overlap between Modern Awards.

### **Proposed Amendment Six**

Inclusion in Bill	Issue	Risk	Proposal
Terms that may be included in MSOs and MSGs  <b>Section: 536KL</b>	The broad scope provided to FWC goes far beyond employment  A non-exhaustive list and lack of required detail creates uncertainty and severe risk of unintended consequences	Unrealistic potential cost impact for industry participants; per delivery increase of up to \$15.13	Make this list exhaustive  Add further clarification on terms included  Delete terms that are in conflict with ‘Form of the Engagement’

In principle, Menulog is supportive of having a list of terms that should be included in MSOs and MSGs (and those that should not as per next section, **Proposed Amendment Seven**) however it is important to caveat that this is only with the required amendments to the Minimum Standards Objective to ensure that what is ‘in’ and ‘out’ is reviewed holistically by FWC and accounts for the value exchange in the gig economy.

The current breadth of matters that FWC can ultimately make orders on, currently tempered only by a high level Minimum Standards Order (**see Proposed Amendment 5**) and a short list of conceptually what is ‘out’ is of major concern. To address this issue, Menulog proposes the following:

#### **A. Make this an exhaustive list**

Menulog strongly advocates for an exhaustive list in order to guide FWC on terms it should be included in MSOs and MSGs. Not only will this ensure that FWC is addressing matters that are going to be of most benefit to the workers that this policy is focussed on, but it will also provide the certainty and clarity that businesses require in order to make the significant operational and financial investment in a commitment to minimum standards. Without this clarity (and with a potential for unlimited orders) there is a huge



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risk that minimum standards will be unsustainable and will have a significantly detrimental impact for the industry and all that rely on it and the economy.

Once again, these terms, in many respects, go far beyond the terms that may be included in a Modern Award (see detail below) and thus again do not meet the stated Government objective of providing benefits “halfway down the ramp”.

## **B. Add further clarification for Terms included**

Menulog also advocates for additional amendments that will ensure direction is more suited to the practicalities and needs of those working in the gig economy. Specifically:

### **a. Payment terms: Provide further clarity and ‘guardrails’ in legislation**

‘Payment terms’ is an incredibly broad concept and ill-defined in the current wording of the Bill. Not only is it far broader than what can be considered in an employment relationship but it could enable any number of MSOs to be made, including matters of a commercial nature (which goes against other sections of the Bill).

While Menulog is supportive of FWC consulting on and setting an appropriate Minimum Pay Safety Net for workers, there must be further statutory guidance on how this should be done as a ‘guardrail’ to ensure this is not unsustainable for industry with flow on effects for workers, businesses and consumers. Menulog suggests the following changes:

#### **i. Define payment terms**

Menulog strongly advocates that ‘payment terms’ should be further defined as “*payment for the performance of work or services provided under a contract for services*” so that it is very clear how FWC should view this inclusion.

#### **ii. Ensure any payment is on ‘estimated time’ only**

It is crucial that payment for the performance of services e.g. delivering food and other goods from a business partner to a customer, is paid on the ‘estimated time’, as per the Contract of Service.

Using on demand delivery as an example, the ‘estimated time’ is calculated from the moment a courier accepts a delivery request until the end of the time that the delivery is estimated to take using a safe and efficient route or method (taking into account variations by vehicle and external factors such as traffic and weather). Platform workers have unfettered discretion in whether they accept a delivery opportunity, the route they take and whether they provide services simultaneously to multiple platforms (i.e. ‘multi-apping’).



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Therefore, payment could not be made for the 'actual' time, time on platform (see **Proposed Amendment 7**) or 'unutilised time' as workers have the discretion to do other tasks, including work for other platforms. Any attempt to apply minimum pay rates to the time when a worker is not actively engaged in performing a task would undermine the flexibility that platform workers value and have a significant commercial impact for platforms, as well as business partners and customers, should additional costs need to be distributed. To ensure the sustainability of the on demand delivery industry, FWC should be constrained to setting minimum remuneration in relation to this estimated time period only.

**iii. Ensure payment increments are suitable to avoid unnecessary cost**

It is essential that any minimum rate of pay is applicable at an increment suitable to the on demand delivery industry, where individual deliveries or jobs are typically short in length (less than 25 minutes on average).

With this in mind, a "per minute" increment (as noted by Minister Burke) would be suitable however longer increments would not be as they would **a)** lead to significant overpayments (and driving costs up further for all) and **b)** require significant operational change (leading to increased cost)

Menulog strongly suggests that this requirement is added to legislation in relation to the on demand delivery industry via the Minister's regulation making powers.

**C. Deductions: Specify this is only for road transport**

Menulog notes this inclusion should be specific to the road transport stream only as there are no appropriate deductions that would apply for employee-like workers.

**D. Working time: Remove from list**

'Working time' is again incredibly broad and creates further complexity and confusion as it enables the FWC to set terms regarding remuneration for theoretically any period of time. Menulog suggests that this be removed in favour of adding further detail to 'payment terms'.

**E. Record keeping: Add clarification**

To ensure clarity for all industry participants in terms of what their responsibilities are, Menulog suggests 'record keeping' be updated to "*keeping records that are relevant to establishing compliance with a minimum standards order*".

**F. Insurance: Make this mandatory**

Menulog provides personal accident insurance for all couriers and is strongly in support of a minimum level of personal accident insurance for couriers that accounts for the industry's associated risks and provides appropriate coverage at a national level. This is



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in line with views of couriers who are aware of the risks of being on the road and believe that a minimum level of protection across the industry has merit (**See Appendix, Point D**). Menulog believes this should be a mandatory matter addressed by FWC to ensure that all workers have access to cover that is designed for specific sub sectors where employee-like workers provide services (provided this is done following appropriate consultation, as per **Proposed Amendment 3**).

In addition to providing this cover, legislating mandatory insurance that is fit-for-purpose for employee-like workers would also meet the ambition of many State and Territory Governments that have announced they would investigate the provision of insurance akin to workers compensation for employees, without the need for complex, resource intensive, time consuming and expensive changes to workers compensation legislation.

It remains Menulog's firm view that workers compensation insurance is not at all appropriate for the on demand delivery industry and, rather than trying to shoehorn this concept into something that works for the gig economy, it is far more favourable approach for all industry participants to develop a new minimum standard at a national level. Thus, Menulog recommends the Government make clear in the Bill that the provision of insurance to all workers cannot be a requirement at a national level and then also be subject to State and Territory reform. A national approach must prevail to avoid undue cost, complexity and significant negative consequences for industry.

#### **G. Consultation: Define further**

Legislation must define what is meant by a 'major change' when it comes to the requirement for consultation, once again to avoid undue compliance requirements that result from FWC's interpretation of this inclusion.

#### **H. Delegate's Rights: Explicitly prohibit 'Right of Entry' for employee-like**

Minister Burke has clearly stated 'right of entry' is not applicable for the employee-like stream and Menulog is completely aligned with this position, given this may result in an inappropriate situation that would allow entry into someone's car, as an example. Menulog advocates this be explicitly removed for the employee-like stream, via wording added into the Bill.

#### **I. Cost recovery: Define further**

Cost recovery is also too broad a term that results in a great deal of uncertainty as to the scope. One option to address this is within the Minimum Standards Objective (see previous) and removing 'cost recovery'. Alternatively, in addition to the Minimum Standards Objective being amended, cost recovery could be better defined as 'variable costs only', with fixed costs being a specifically prohibited term.

#### **Proposed Amendment Seven**

Inclusion in Bill	Issue	Risk	Proposal
Terms that must not	This list is too short	Unrealistic cost	Expand list to



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be included in MSOs and MSGs  <b>Section:</b> 536KM	and high level to provide meaningful 'guardrails'	impact for industry participants; per delivery increase of up to \$15.13	provide appropriate 'guardrails' and include further detail to protect the industry
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Menulog's concerns regarding terms that must not be included in MSOs and MSGs echo those raised in the previous section, as they do not currently provide the necessary guardrails for FWC. The following items are crucial to include in legislation so that FWC cannot make orders that could result in a \$15+ cost increase per delivery:

**A. 'Minimum or maximum periods of engagement'.**

The ability to choose when and how to provide services is a key benefit and must be explicitly protected in legislation (see **Section 4.1** on learnings from Menulog's trial of employment of on demand delivery couriers and how minimum engagement periods are hugely detrimental to businesses and workers) This inclusion could simply be added to the inclusion of 'rostering arrangements'.

**B. 'Penalty rates for providing services at particular times or on particular days (including but not limited to over-time penalties), any loadings and/or shift allowances'.**

These terms are completely at odds with how the platform industry operates, given these employment entitlements are only provided to compensate for the disutility of being required to work at particular times by an employer, typically outside of a 'regular' time period. For employee-like workers, any hours are 'regular' as workers unequivocally choose when and how they provided services. Thus, all rates should be based on 'standard rates' as there is never a time that a worker would be directed to work at a specific time.

The allowance of a traditional employment concept such as penalty rates to be applied to an employee-like worker is a significant threat to the ongoing viability of platform businesses, given that time where penalty rates may traditionally apply (i.e. evenings and weekends) are the times where business and consumer demand for delivery service is highest (and sees the most opportunities for couriers to earn) and thus there is no possible way for platforms (flowing to businesses and consumers) to sustain an increased rate at these times, on top of what is already a fruitful period for workers. This learning is extremely evident in what Menulog has seen as a significant limitation in the employed courier trial under the RTD Award (see **Section 2**).

**C. 'Education or training'**

Education and training, outside of work health and safety, which is regulated by States and Territories, should be bespoke to and managed by platforms. Couriers state that mandated additional skills training and education may be a deterrent for entering and continuing their participation in the workforce (**See Appendix, Point E**). It would be inappropriate to issue an MSO or MSG regarding education or training given the huge



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breadth of businesses operating in the industry and that training needs to address the specific operations of each platform to ensure the best experience for all industry participants.

**D. 'Payments based on time 'logged on' to a Digital Labour Platform without the provision of services'.**

As previously stated, it is essential that payment is only required for the time that a worker is actually providing services to a platform based on the 'estimated time', as per the Contract of Service. The Minister and Government have confirmed that workers should not be paid simply for the time they are logged onto a platform (see quotes in **Section 3**) and so this should be specifically stated in the Bill to futureproof from adverse decisions that could fundamentally detriment the industry.

Menulog understands from its consultation that this concept is supported across industry, including by trade unions, and therefore, given the strong level of alignment, would be a simple amendment with a huge return.

**E. 'Recovery of fixed costs'.**

As previously stated, it is not appropriate to enable orders relating to the payment of workers for fixed costs as these items are used primarily for personal use, such as a mobile phone.

**F. 'Additional leave entitlements, including the development of a portable leave scheme, outside of what has been considered in the Minimum Pay Safety Net'.**

Menulog advocates for a clear and transparent Minimum Pay Safety Net that would adequately provide for workers to be able to take time away from the provision of services if they are unwell or for mental health reasons, for example. Additional leave entitlements on top of this would create undue complexity and cost, without additional benefit to workers. The concept of a 'Portable Leave' scheme in the on demand delivery industry is extremely complex and problematic, with significant administrative resource and cost required that would ultimately detract from any benefit actually paid to couriers.

**Proposed Amendment Eight**

Inclusion in Bill	Issue	Risk	Proposal
Unfair deactivation or unfair termination of regulated workers  <b>Section(s):</b> 536LB - 536MG	Unclear definition of the term 'deactivated'  Misalignment of threshold for jurisdiction and when FWC must dismiss a claim	High volume of claims resulting in significant cost and administrative burden for FWC and platforms  Potential public safety risk	Better define deactivation  Align the threshold with road transport and detail when FWC must dismiss a claim  Enshrine what constitutes 'serious misconduct' in



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	Lack of detail on what constitutes serious misconduct		legislation  Enshrine consultation with industry on 'the Code'
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Menulog is very much in favour of a clear and transparent process for dispute resolution and proud of its work in this space, including its publicly available [Courier Dispute Resolution Policy](#).

Menulog was pleased to see much of the detail provided in consultation referenced in the Bill however, based on Menulog's significant experience in effectively managing disputes, its strong view is that the wording in the Bill could go further in providing critical detail and definitions in legislation to **a)** reduce the potential risk of unwarranted claims for the FWC and the associated costs and **b)** remove the potential risk to public safety in instances of 'serious misconduct' (see below).

To ensure this inclusion is robust and useful as intended, Menulog proposes the following simple changes:

#### **A. Better define 'deactivation' in line with the practical realities of the industry**

The Bill currently proposes a broad definition of the term 'deactivated' as including 'modifications, suspensions, and terminations'. Menulog is aligned with the broader industry view that there should be a new subsection that carves out temporary (14 days or less) modifications or suspensions that have been implemented for legitimate and necessary purposes relating to:

- (a) the health and safety of a user of the digital labour platform or member of the community, including to enable an investigation to be conducted by the digital labour platform operator, regulator or law enforcement (**see Point C below**);*
- (b) suspected fraud, misrepresentation, or falsification of information provided to the digital labour platform operator, including to enable an investigation to be conducted by the digital labour platform operator, regulator or law enforcement;*
- (c) non-compliance with a digital labour platform operator's terms and conditions of use, including licensing and accreditation requirements;*
- (d) a software update or technical issue which has inadvertently modified, suspended or terminated a person's access to the digital labour platform.*

#### **B. Ensure the threshold for access and use of the jurisdiction is appropriate and clear**

##### **a) Replicate eligibility period for employee-like workers, as per the road transport stream**

Menulog believes the proposed 6 month eligibility period for employee-like workers to be able to bring an unfair dismissal claim should be increased to 12 months, in line with the threshold for road transport contractors and to more accurately reflect the way workers flexibly engage with platforms.





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**b) Define circumstances where FWC must dismiss an unfair deactivation**

Currently the Bill proposes a list of '*initial matters*' that FWC must decide before considering the merits of an unfair deactivation application however, Menulog is again aligned with industry in that this should be reframed as a provision that provides clear grounds upon which FWC must dismiss an unfair deactivation when:

- i)** *the application was made out of time without valid rationale for extension*
- ii)** *no arguable case has been made to establish that:*
  - 1) the person is a person protected from unfair deactivation*
  - 2) the person has actually been deactivated*
  - 3) there was no valid reason for the deactivation*
  - 4) the deactivation or termination was not consistent with the Digital Labour Platform Deactivation Code*

**C. Ensure safety remains the foremost priority**

There are several clearly defined instances in Menulog's own dispute resolution process where, in the event of 'serious misconduct', a courier would immediately lose access to the Menulog network while a detailed investigation of any reported incident is conducted (including cooperating with police investigations). This is absolutely essential to ensure the safety of everyone engaging with the Menulog platform and the general public.

Currently, the Bill only states that FWC must consider instances of 'serious misconduct' in '*considering whether it is satisfied that a person's deactivation was unfair*', however it is crucial further detail is outlined in legislation to ensure the safety of all industry participants. Cases of serious misconduct should be listed in the Bill as:

- i. Theft
- ii. Fraud
- iii. Violence
- iv. Assault
- v. Sexual harassment or similar conduct
- vi. Behaviours that may place the safety of the worker or other people at risk
- vii. A breach of law
- viii. Breach of a term of their contract with the Platform Business if they have been advised in the contract that such a breach may result in their deplatforming / deactivation

It is also essential that platforms are not required to provide any information to a worker that contains personal information about a consumer or any information that could identify them, which should be explicitly included in the Bill.

**D. Ensure the 'Code' is developed in detailed consultation with industry experts and is applied at a national level**

Menulog is in favour of the development of a national Digital Labour Platform Deactivation Code ("**Code**") and strongly advocates for the need for consultation with platforms to be written into the Bill when the Code is being developed.



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Furthermore, Menulog strongly suggests that the Bill specifies that the Code and FWC jurisdiction override any State and Territory jurisdiction, present or future, to ensure a fair and efficient process for all involved. It would be a detrimental situation where a claim could be brought at both a State / Territory and Federal level, which would see unnecessary time, resource and cost invested by all parties, as well as undue complexity with potentially conflicting inclusions.

### **Proposed Amendment Nine**

Inclusion in Bill	Issue	Risk	Proposal
Unfair contracts jurisdiction  <b>Section(s):</b> 536MY - 536NK	FWC has an unfettered right to set aside or vary a services contract on the basis that they include 'unfair contract terms' that would relate to workplace relations matters in an employment relationship	MSGs provide avenue to set aside or vary a services contract  Comparison to employment relationship	Include guardrails to fetter the current proposed powers of FWC

FWC is an employment tribunal and does not have the expertise to deal with commercial and contractual matters and thus, the current scope of the unfair contracts jurisdiction is too broad, as it currently provides FWC wide discretion to set aside or vary services contracts on the basis that they include 'unfair contract terms'. Again this is inappropriately based on workplace relations matters in an employment relationship.

The Bill also provides FWC with the peculiar power to issue MSGs, which are voluntary and currently, without consultation with industry participants. As per **Proposed Amendment Three**, these seem to provide no additional value until you consider the potential consequences of an MSGs interaction with the unfair contracts jurisdiction, which could potentially see an additional new avenue to control the terms of a services contract.

The proposed jurisdiction also does not require FWC to conduct a hearing or afford a reasonable defence to a Digital Labour Platform. This raises concerns about the process and the potential for unfair outcomes.

To address these concerns, the following guardrails should be included in the Bill:

- A.** FWC should be required to make its decision to set aside or vary a services contract as part of a Full Bench
- B.** FWC must seek the views of anyone impacted by its proposed decision to set aside or vary a service contract
- C.** FWC must consider an 'Undertaking' from a Digital Labour Platform



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## 7. Conclusion

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Menulog is very supportive of the intention of this Bill and the Government's ambition of creating minimum standards for workers that maintain the way they like to work, without detrimental impacts to the industry. In order to achieve this intention and to provide certainty for all industry participants, it is essential that the amendments outlined in the submission above are made to the Bill. This is a once in a lifetime opportunity to work together to ensure the best possible outcome for workers, businesses, consumers and the Australian economy.

## 8. Appendix: The Voice of the Worker - Courier Feedback

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In addition to the quantitative research throughout the submission above, Menulog has consulted with couriers via multiple channels throughout the consultation period and subsequent development of its position on reform, to ensure this represents the best interest of workers.

The below is a snapshot of direct feedback from Menulog's latest face-to-face and online Courier Feedback Forum<sup>12</sup>, where couriers voluntarily joined to share feedback on proposed reform.

### A. Forum takeaway one:

#### **Couriers value flexibility and choice above all else**

**The ability to have a flexible form of work is highly appealing.** While couriers are a highly diverse workforce, what unifies them is the fact that they are looking for a flexible form of working, something not as rigid as other jobs out there today. This is a key motivator for undertaking this form of work and not participating in other forms of work that have set work times, set rates of pay and other entitlements, a management structure etc This is a key differentiator for working in this industry, and something couriers do not want to see changed.

- *"I could have quite easily been a bus driver. It has good pay, you're driving around... But I can't work whenever I want if I do that. I would have shifts, a boss. I do this [courier work] because I can work on my own terms. No other jobs allow you that."*
- *"I'm a single mother who looks after her kids. I need a flexible job for that. A 9-5 [regular job] wouldn't let me do that, but this does."*

### B. Forum takeaway two:

#### **Couriers understand the value exchange in the gig economy and what is at risk if reforms are not fit-for-purpose**

**For couriers, classing their work as just another job is a potential mis-step that doesn't take into account the subtleties of this workforce.** Minimum standards that are not fit-for-purpose could create disengagement and disenfranchisement, breaking

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<sup>12</sup> Menulog H1 Courier Feedback Forum, 2023, 17 participants (small roundtable groups)



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what is appealing about this job. It has the capacity to have knock-on impacts, particularly if any reforms lead to price increases which then might lead to a decreased number of orders.

- *"I don't want them to tell me how much to work or set limits on my earnings - I feel like I'm the loser if they do that because today I can work when I want and earn a lot."*
- *"I wouldn't do this job if it wasn't flexible like it is today."*
- *"If there's added costs, that means restaurants and Menulog will have to charge more. That means people might not use it. If they're not using it, that means less work for me. I'd prefer to have a job than no work at all."*
- *"At the moment people aren't ordering as much as they used to - it's not like it was a few years ago. If they had extra costs to it, will people order? Or course not. And you know what that means for me? Less work."*

**Couriers also note the benefits of an incentives-based model versus a static wage and like the ability to 'multi-app'.** The healthy market competition creates a dynamic, exciting system that gives couriers the opportunity to potentially earn a lot in a short space of time. Couriers will multi-app as a way to ensure consistent work is coming through, as well as seeking out incentives.

- *"On a Friday I'm able to make \$80 an hour. I'll do 6-9 and earn \$240. That's basically from surfing the apps for whatever is best. That's the same as doing an eight hour shift at a bar."*

**C. Forum takeaway three:**

**Couriers make an informed choice to engage in on-demand work**

**The majority of couriers have made an active, informed choice** to participate in the gig economy. They are aware that they are 'trading off' the entitlements of employment for the ability to be your own boss and the freedom to choose your hours, which couriers say ultimately outweighs the alternative

- *"As with any job there are compromises you need to make, it's not like I'm unaware of this [with courier work], I've looked into it, assessed if it's right for me and made my decision."*

**Couriers also discuss the assumption that workers in this industry do not have a choice or have been pressured into turning to this kind of work.** They recognise there are generalisations made about couriers in Australia.

- *"There's a lot of negative press about gig economy workers. They don't understand that I don't want a boss. I want my own hours. That's why I don't work in a traditional job."*

**D. Forum takeaway four:**

**Couriers are aware of the risks of being on the road and believe that a minimum level of protection across the industry has merit**

**Couriers agreed a minimum level of insurance is a positive**, with bicycle and e-bike couriers showing far greater interest than couriers that use a vehicle that stated they already have mandatory insurance.



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- *"I would like to think that if we had an accident we would be covered and our families protected"*

**E. Forum takeaway five:**

**Mandated additional skills training and education has the potential to add a barrier for the workforce**

**There's a sense from couriers that this may be a deterrent for entering and continuing their participation in the workforce.**

- *"To me this is a big maybe. Maybe if you lacked an understanding of the roads or were new to [riding] a bike. But for me in a car - no way, I know the [road] rules."*
- *"I don't think we need this. I know how to avoid accidents. I do my job and I don't know what they could teach me."*
- *"What I love about this job is it's easy to start work. It's not like any job where there's back and forth, interviews. To add training just adds another thing we need to get through. I'm not sure I'd do it if there was intensive training."*

**F. Forum takeaway six:**

**The flexible nature of work allows time off without consequence**

**A dedicated leave entitlement is not relevant to couriers today.** They have made the active decision to have a flexible arrangement and stop providing services for any given time without consequence. However they do note the value of protection if injured and are in favour of a standard for personal accident insurance.

- *"Name me any other job where I can work when I want. Sick today? I don't go. Want to make more [money]? I do more work. Realised I've made enough for the day? I log off early. I'm the boss. I'm free. There's no one over my shoulder, riding me hard or anything - I'm in charge."*
- *"I do this already. I choose a flexible job so I choose the hours, not my boss. If I want time off I just take it."*

**G. Forum takeaway seven:**

**Couriers want to be consulted as part of the reform process**

**Couriers conveyed apprehension that they have heard little detail on the reforms and are yet to be formally consulted to understand their perspective.** Couriers are eager for the Government to understand this unique industry and the specific benefits stemming from flexibility. At worst, they feel deeply apprehensive about the reforms and 'in the dark' as there has been no clear consultation process

- *"This is different to jobs, we work in a different way and a standard agreement [employment model] doesn't work with this. [...] They [the Government] should talk to us to understand this. It's not a normal job."*
- *"This isn't a one size fits all job. What worries me is they [the Government] don't understand that because they haven't asked us."*



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**Couriers are concerned that legislation will lead to a decrease in demand, which will ultimately impact their ability to earn.**

A number of couriers have highlighted that they've already seen a recent drop in demand , which they attribute to current cost of living pressures. Couriers are now concerned that any legislative impacts will result in pricing changes which will then lead to less orders through on demand platforms.

- *"You raise prices, people won't order. If people don't order I won't have work. There's a knock-on effect. That is why I think nothing is particularly broken about the system now".*