

31 August 2023

# Discussion Paper

AM2021/72 – Application by Menulog for a new modern award to cover on demand delivery services

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# Summary

Much in the landscape of the operation of the on demand delivery services industry, and its proposed regulation, has changed since Menulog made its application for a new On Demand Delivery Services Industry Award on 24 June 2021.

Since the commencement of this Application, with the assistance of the Commission, there have been valuable discussions between the many parties interested in the Application to understand the characteristics of the on demand delivery industry, how the on demand delivery industry interacts with existing industries, including the traditional road transport and distribution industry, and to consider what appropriate safety net employment entitlements in the on demand delivery industry should look like.

Menulog remains committed to the pursuit of its Application, while recognising that there are a number of activities outside of the modern award application which influence the shaping of conditions under the proposed modern award.

The purpose of this Discussion Paper is to outline these processes and the status of them, and to invite comment from interested parties as to the appropriate next steps in the handling of the Application.

Subject to any alternate views expressed and the views of the Commission, Menulog proposes that the appropriate next steps may be:

- » To invite comment from interested parties on the matters outlined in this discussion paper; and
- » To list a conciliation conference to be conducted by Commissioner McKinnon to pick up from the last conciliation conference conducted on 20 September 2022.

Please contact Katie Sweatman, Kingston Reid (Lawyers for Menulog) at [katie.sweatman@kingstonreid.com](mailto:katie.sweatman@kingstonreid.com) with any questions arising out of this Discussion Paper.

31 August 2023

# Charter of Principles and Ongoing Commitments to Ensure Safety and Fairness for On-Demand Delivery Couriers

While it may appear that there has been reduced activity recently in respect of discussions towards the making of the proposed On Demand Delivery Services Industry Award, Menulog and the Transport Workers Union have been engaged in positive and productive discussions about their shared ambition for appropriate regulation of work performed in the on demand delivery services industry.

These discussions have culminated in the joint execution of a Charter of Principles and Ongoing Commitments to Ensure Safety and Fairness for On-Demand Delivery Couriers. The Charter recognises that discussions about the setting of sustainable safety net employment entitlements must occur hand in hand with discussions about the appropriate regulation of independent courier conditions. Under the Charter, the TWU and Menulog affirm their support for the Federal Government legislating to give the Fair Work Commission the capacity to:

1. Set minimum and transparent enforceable rights and standards for all on-demand delivery couriers who are not engaged as employees, while maintaining the level of flexibility and choice sought by these workers.
2. Facilitate a cost-effective and efficient mechanism to resolve all disputes (including terminations of contracts).
3. Ensure the rights of on-demand delivery couriers to join and be represented by the relevant trade union are respected and that on-demand delivery couriers have an effective collective voice.
4. Ensure that appropriate enforcement exists to meet these standards and objectives by ensuring compliance throughout the industry and supply chains.

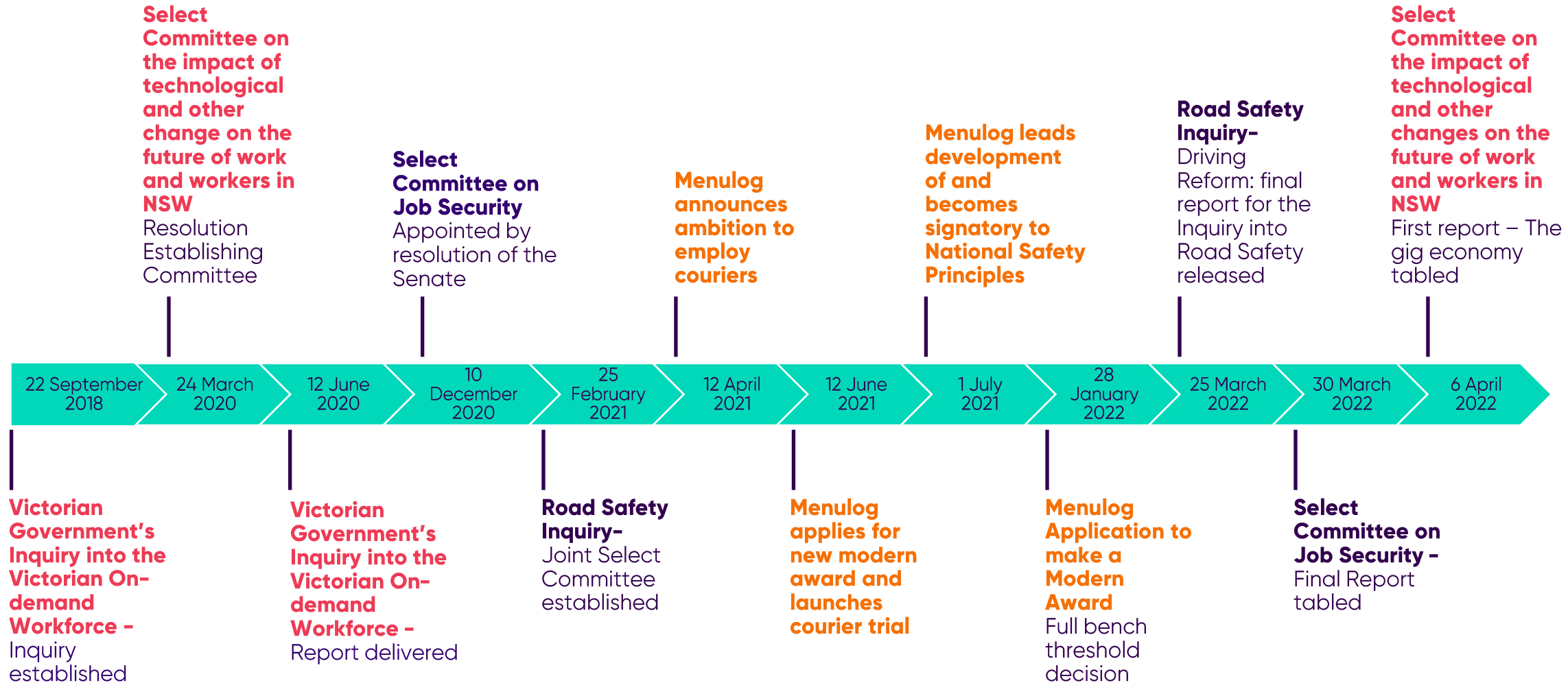
The TWU and Menulog further commit to:

1. Having good faith discussions aimed at reaching a set of sustainable and national industry standards in the various sectors of the on-demand delivery industry, and
2. Lobby the Federal Government or any future body, to establish agreed standards.
3. Having good faith ongoing discussions aimed at reaching a consent position on sustainable conditions to offer employment in the on-demand delivery industry.

Further information about the Charter may be viewed here: <https://tinyurl.com/52y8tx8a> / <https://tinyurl.com/kwyx84hc>

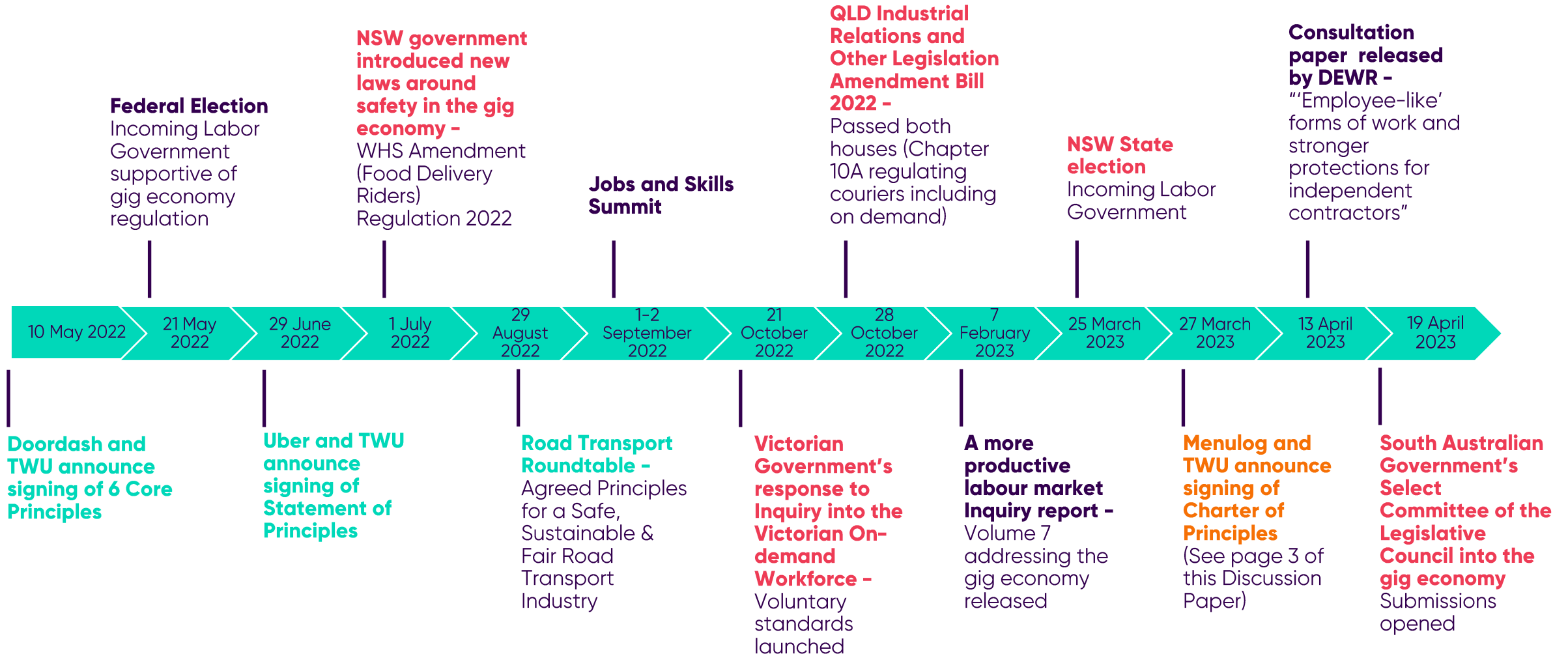
# What's been happening?

In understanding the factors that influence the setting of appropriate employment conditions for on demand delivery couriers, it is useful to have regard to the breadth and timing of different activities occurring at both a Commonwealth and multiple State level in respect to the work of on demand delivery couriers, both employed and independently contracted.



# What's been happening?

(Continued from previous)



# Known Unknowns - Federal

A number of the activities described previously are the subject of ongoing processes, including Government consideration of the extent to which recommendations should be implemented into legislation, giving rise to a number of “known unknowns” which relevantly impact upon the determination of minimum conditions for employed on demand delivery couriers under the proposed On Demand Delivery Services Award.

Outcomes of the Department of Employment and Workplace Relations Consultation Paper – ‘Employee-like’ forms of work and stronger protection for independent contractors

**Why does it matter?**



The consultation paper released by the Department seeks feedback on the structure of a new jurisdiction of the Fair Work Commission which will, among other things, set **minimum entitlements and conditions** for independent couriers who are performing ‘employee-like’ forms of work.

See page 7 of this Discussion Paper for further detail on the DEWR Consultation Paper and the relevant considerations for this Application.

Recommendations arising out of the final report - Select Committee on Job Security



Feeding into the proposed regulation of employee-like forms of work, the recommendations of the Select Committee on Job Security seek to respond to concerns about the capacity of the current regulatory framework to appropriately balance needs for flexibility with the need to provide security of **income** and **minimum working protections**.

For further information see: <https://tinyurl.com/3fr9fe9f>

Recommendations arising out of the Road Safety Inquiry – Driving Reform: Final Report for the Inquiry into Road Safety



While overlapping with the proposed regulation of employee-like forms of work, the recommendations of the Road Safety Inquiry seek to respond to concerns that the absence of regulation around **hours of work** and **remuneration** in the on demand delivery services industry incentivises unsafe worker behaviour.

For further information see: <https://tinyurl.com/35bwjxm6>

# Proposed regulation of 'employee-like' forms of work

Ahead of the May 2022 Federal Election, the Government committed to empowering Australia's workplace tribunal, the Fair Work Commission, to set minimum standards for workers in 'employee-like' forms of work, including the gig economy.

At the Jobs and Skills Summit in September 2022, the Government committed to progress work to:

- » consider allowing the Fair Work Commission to set fair minimum standards to ensure the Road Transport Industry is safe, sustainable and viable; and
- » amend relevant legislation to give workers the right to challenge unfair contractual terms.

On 13 April 2023, the Department of Employment and Workplace Relations released a Consultation Paper seeking feedback on the direction that the Federal Government should take in implementing these commitments. Relevantly, the Department sought views on how this new jurisdiction should operate, the workers it should cover, the matters the Fair Work Commission should consider in its decision-making, and the potential content of minimum standards, and has been consulting with industry participants around the structure of the legislative framework having regard to submissions received.

The matters that the Department's consultation is addressing includes:

- » Defining what is "employee-like work";
- » The parameters for the Fair Work Commission, that is, the 'guardrails' or scope of the Commission's jurisdiction to exercise functions in respect of non-employee workers that is tailored to the needs of specific sectors (which will include the on demand delivery industry, howsoever that industry is ultimately defined); and
- » The factors to which the Commission would need to have regard in setting conditions, and the standards about which conditions should be set, which may include minimum rates of pay, determining what activities constitute work for which compensation should be provided, and workplace conditions such as leave and rest breaks, among other things.

The matters which will be the subject of regulation will significantly overlap with the matters that are the subject of the proposed On Demand Delivery Services Award. In supporting the Department's guiding principles of ensuring that the setting of minimum rights and protections is balanced with a level playing field for businesses, the determination of minimum employment standards needs to be considered in lockstep with the determination of minimum standards for independent couriers determined to be performing 'employee-like' forms of work.

# Known Unknowns - State

## Queensland

Commencement of Chapter 10A (Independent Couriers) of Industrial Relations Act 2016

## Why does it matter?



A proposed new Chapter 10A of the *Industrial Relations Act* provides for a definition of independent couriers as it captures all drivers of vehicles engaged in transporting goods, including independent on demand couriers. While it has passed through both houses of the Queensland Parliament, it awaits Proclamation. Chapter 10A, if proclaimed, will empower the Queensland Industrial Relations Commission to set minimum standards for independent courier drivers, including by empowering the QIC to make contract determination fixing **minimum remuneration and working conditions** for independent couriers

For further information see: <https://tinyurl.com/yrfjceth>

## Victoria

Phase 2 of Roadmap to introducing Victorian Standards for the Gig Workforce and Gig Worker Support Service



In October 2022, the Victorian Government introduced the Fair Conduct and Accountability Standards, addressing **pay and conditions**, consultation, the right to representation, dispute resolution and safety. The Standards will initially be voluntary, but the Government has indicated that it to introduce laws in 2023 to ensure compliance with the Standards.

For further information see: <https://tinyurl.com/2p8c8w9m>



# Known Unknowns - State

## Why does it matter?

### New South Wales

Implementation of Recommendations arising out of Report No. 1 – Select Committee on the impact of technological and other change on the future of work and workers in New South Wales – The gig economy



The previous NSW Coalition Government gave its response, deferring to Commonwealth Government regulation of gig work. For further information see: <https://tinyurl.com/mr2w523h>

As part of its pre-election commitments, however, the NSW Labor Party made commitments to “better protect” workers in the gig economy and boost their workplace entitlements if elected, as was the result of the NSW State election.

### South Australia

A Select Committee of the Legislative Council has been established to inquire into and report on the gig economy



On 19 April 2023, a Select Committee of the Legislative Council into the gig economy invited submission. The submissions are currently under consideration by the Select Committee, together with further evidence obtained under transcript in June 2023. The terms of reference for the Select Committee overlap with the matters currently under consideration federally, and including consideration of the current legislative and regulatory regime and the extent of compliance within that regime in the gig economy, the impacts of the gig economy on workers inside and outside of the gig economy and the impact of gig economy work on families, communities and businesses, and current supports available to workers and employers.

For further information see: <https://tinyurl.com/mrxabnhk>

# Industry developments

In addition to regulatory processes that are in train for the on demand delivery services industry, since the interested parties last convened, there have been some developments in how platforms in the on demand delivery services industry provide their services to businesses and consumers, which may foreseeably impact upon how the industry may be defined, and how the minimum rights and entitlements of on demand delivery couriers ought to be framed.

## Abandonment of DashMart by DoorDash

On 7 April 2023, it was announced that DoorDash would not continue its operation of DashMart. DashMart involved the establishment of “dark stores”, not open to the public at large, at which grocery items were stocked and could be ordered by DoorDash customers, which were collected and delivered by independent couriers engaged through the DoorDash platform. On demand delivery couriers were not involved in the picking or packing of items for delivery.

**Further information:** <https://tinyurl.com/4tp7ra6u>

## Pick, pack and delivery deal between Uber Eats and Coles Supermarkets

On 12 April 2023, it was announced that Uber Eats had entered into an arrangement with Coles Supermarkets to enable Uber Eats customers to order “thousands” of products through the Uber Eats platform, which would be picked, packed and delivered by on demand delivery couriers.

The model raises questions about the scope of duties for on demand delivery couriers, and the modern award that would apply if these couriers were employed.

**Further information:** <https://tinyurl.com/jtjmne5j> / <https://tinyurl.com/dzc2ywc3>

## Road Transport Roundtable, Agreed Principles for a Safe, Sustainable and Fair Road Transport Industry

In August 2022, the Minister for Employment and Workplace Relations convened a roundtable of participants in the broader road transport industry, which resulted in a set of agreed principles for a safe, sustainable and fair road transport industry, which included calls for the Australian Government to establish and maintain appropriate and enforceable standards in relation to both traditional transport operations and on-demand delivery work. The Department of Employment and Workplace Relations’ consultation paper on the proposed regulation of conditions for employee-like workers seeks feedback on how these Agreed Principles should influence the scope of the proposed new jurisdiction of the Fair Work Commission.

**Further information:** <https://tinyurl.com/wsks8u8h>

# Matters that may still be able to be progressed under the proposed modern award

Having regard to the activities outlined above in this Discussion Paper, Menulog acknowledges that there may be limited scope for the interested parties to discuss and move towards a consensus position on substantive minimum rights and entitlements under the proposed On Demand Delivery Services Industry Award in the immediate future.

Menulog remains committed to the proposed Award, and considers that it will form a very important piece within the broader regulation of this part of the economy in providing fit-for-purpose and sustainable safety net employment conditions for employed couriers in the on demand delivery services industry.

Menulog identifies that there is scope for meaningful discussions to continue between the interested parties to the proposed Award about matters that have dual relevance to the proposed modern award, and any future regulation of non-employees performing similar work, however conditions may be set for workers in this industry:

- » How may the on demand delivery industry be defined?
- » What are duties of on demand delivery couriers, and how should these translate into award classifications?
- » Without setting the limits of how work is arranged, what are the factors relevant to any parameters placed upon minimum work engagements, split shifts and the span of hours of work relevant to work performed in the on demand delivery services industry?

These matters need not be viewed as exhaustive, and Menulog welcomes discussion about any other matters that may productively support the determination of appropriate employment conditions for work performed in this industry.

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**KINGSTON  
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