

Consultation on personal injury insurance arrangements for food delivery riders in the gig economy

Discussion paper

April 2021

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1. Introduction

The State Insurance Regulatory Authority (SIRA) is the NSW Government agency responsible for regulating statutory insurance schemes in NSW including workers compensation insurance, motor accidents compulsory third party (CTP) insurance, and home building compensation in NSW.

SIRA has developed this discussion paper on *Personal injury insurance arrangements for food delivery riders in the gig economy* to seek feedback on potential options for mandatory injury insurance for food delivery riders in the gig economy.

Gig economy or platform services are an increasingly common way for people to derive primary or supplementary income. However, recent experience has indicated that application of workers compensation to gig economy participants can be unclear, and that participants may also not be covered by CTP and other insurance products.

In response to a request from the NSW Government, SIRA has prepared this paper to support consultation about injury insurance for food delivery riders injured or killed while providing gig economy food delivery services.

SIRA seeks broad community and industry input to inform its advice to the NSW Government.

This paper outlines potential options for scheme design including requiring gig platforms to provide personal injury and income protection insurance cover; establishing a new personal injury safety net; and extending the existing workers compensation scheme. Other options are to establish a new scheme for gig economy food delivery riders that is modelled on the workers compensation or CTP schemes.

Each option needs to be considered in light of other factors such as the underwriting and service delivery model, the regulatory and financial impact on the food delivery platforms, food outlets, food delivery riders and consumers, and the level of support afforded to food delivery riders providing gig economy food delivery services.

There are many options and at this stage SIRA recognises that stakeholder input is critical to developing advice for the government about the merits and considerations associated with the options.

All food delivery riders who participate in the food delivery gig economy have an important stake in the design of any injury insurance arrangements and are encouraged to make their views known by lodging a submission.

Following consultation, SIRA will report back to the NSW Government.

2. What is the gig economy?

Recent research¹ defined the gig economy as economic activity characterised by on-demand services, provided by an independent contractor where the transaction is mediated through and compensated via a digital platform.

Gig or platform services are an increasingly common means for people to derive primary or supplementary income. The benefits include low barriers for entry, ease of obtaining services and flexibility in relation to hours. The gig economy enables more flexible and tailored services to be provided to consumers, and it provides a range of

¹ Actuaries Institute. *The Rise of the Gig Economy and its Impact on the Australian Workforce*. Green Paper. December 2020.

benefits to industry, including the ability to quickly scale up or scale down its business activity and service offering.

Using the transactional data of approximately 1,000,000 gig economy consumers and 8,008 gig service providers (across five digital platforms), it is estimated that since 2015 the gig economy has grown nine-fold to capture \$6.3 billion in consumer spend in 2019. A large proportion of the gig economy is concentrated in the private transport sector and the food delivery sector.

Consumer spend in the meal delivery market has increased six-fold between 2015 and 2019. This rapid growth was largely driven by gig economy providers who contributed 78% of meal delivery sector growth over this period.

The people most likely to participate in the food delivery gig economy are younger people, males, students, recent migrants and temporary residents and those who speak a language other than English. Many people providing gig economy food delivery services use more than one platform to obtain work.

The COVID-19 pandemic has significantly impacted the economy and workforce resulting in more people seeking alternative and additional income through the food delivery gig economy. This has increased competition within the industry.

3. Why is intervention required?

3.1. Increased risk of injury to food delivery riders

In the latter part of 2020, five food delivery riders tragically died in Australia while engaged in gig economy delivery services.

Unlike other services commonly provided through gig economy platforms, food delivery involves in-person services, delivered via roads. The food delivery riders are often more vulnerable road users with less protection in a crash (many are on a bicycle, motorcycle or scooter) and with time pressure for the prompt delivery of meals. This risk profile is different to other gig economy participants, such as those who work from home online or drive vans, cars or trucks or who have less time pressure to deliver products.

On 24 March 2020, a Select Committee of the NSW Legislative Council was established to inquire into the impact of technological and other change on the future of work and workers in NSW (the 'Future of Work Inquiry'). Submissions to the Future of Work inquiry highlight concerns from stakeholders in relation to work health and safety risks and uncertain and/or inconsistent access to support for workers who have suffered injuries, and the families of workers who have tragically died, while providing food delivery service via gig economy platforms.

On 24 November 2020, the NSW Government established an investigative Taskforce led by SafeWork NSW and Transport NSW to investigate the fatalities of food delivery riders and to determine whether there are improvements that need be made to improve safety in the industry.

3.2. Workers compensation

The general proposition in NSW is that a worker who has received an injury arising out of or in the course of employment shall receive compensation from the worker's employer in accordance with the workers compensation Acts. However, it is likely that many people providing gig economy food delivery services are not covered by the workers compensation scheme.

A key consideration in determining a person's entitlement under the workers compensation scheme is whether the person is a 'worker' for the purposes of the Acts. A worker is defined in section 4 of the *Workplace Injury Management and Workers Compensation Act 1998 (1998 Act)* to mean:

a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing)

The legislation also enables categories or classes of persons to be deemed to be workers for the purposes of the legislation. Section 5 and Schedule 1 of the 1998 Act define deemed workers. Clause 2 of Schedule 1 is the most relevant provision for workers in the gig economy. It deems a person a worker if:

- the person has entered into a contract to perform work exceeding \$10 in value
- the work is not part of or incidental to a trade or business regularly carried on in the person's own name or in a business or firm name, and
- the person has not sublet the contract or employed worker to perform the contract.

The meaning of "a contract of service" in section 4 of the 1998 Act and "a contract to perform work" in clause 2 of Schedule 1 of the 1998 Act is guided by common law.

There has been no definitive judicial consideration of whether people providing food delivery gig economy services are workers for the purposes of the workers compensation scheme in NSW. Although specific arrangements in individual circumstances must always be considered, there is a general view that people providing food delivery gig economy services are, in most cases, not likely to be covered by the scheme. None of the top five gig platforms used in Australia has a statutory workers compensation policy covering the people providing food delivery gig economy services in NSW. Some platforms voluntarily make available private insurance products.

3.3. Motor accidents legislation

The motor accidents (CTP) scheme is a compulsory insurance scheme that provides compensation for personal injury or death as a result of a 'motor accident' (as defined in the *Motor Accident Injuries Act 2017*). While some injuries suffered by food delivery riders in the gig economy will involve motor accidents, this is not universally the case. As a result, some food delivery riders will have access to entitlements under the CTP scheme, but others will not.

Currently the workers compensation scheme covers injuries caused by motor accidents occurring while a worker is travelling to or from work if there is a 'real and substantial connection' between the worker's employment and the motor vehicle accident.

Food delivery riders who are injured while driving in the course of their services can make a claim for statutory benefits under the CTP scheme if not covered by the workers compensation scheme. Food delivery bicycle riders injured in a motor accident in NSW can also apply for statutory benefits if not covered by the workers compensation scheme.

Injured food delivery riders who were not at fault in the motor accident and whose injuries are not classified as 'minor' can also make a common law claim for damages under the *Motor Accident Injuries Act 2017 (MAIA)*.

Where a food delivery rider dies as a result of a motor accident and was not the at-fault driver, certain close relatives of the person may be able to claim financial compensation under the *Compensation to Relatives Act 1897*. Funeral benefits may also be recoverable under the MAIA on a no-fault basis.

3.4. Limited and inconsistent alternative protections

Uncertainty around the application of the workers compensation and motor accidents schemes to food delivery riders has resulted in some food delivery platforms voluntarily making available private insurance products.

It is important to note that this insurance cover is not the same as workers compensation and does not provide the same benefits or the same employer responsibilities for injury management or return to work.

Practices between food delivery platforms vary widely. Some platforms provide cover to all food delivery riders by default, some offer an insurance product on a voluntary basis at a cost to the individual rider, and some do not offer any type of insurance. The approach is at the discretion of the food delivery platform, and there is no minimum standard of protection or minimum benefits that must be made available in the event of an injury or death. Complexities can also arise in relation to entitlement under these policies due to the practice of some food delivery riders delegating gigs to others and logging onto multiple food delivery platforms concurrently.

4. Preliminary options

Six preliminary options for personal injury insurance arrangements for food delivery riders are:

Option 1 Maintain the **status quo with increased education and awareness** about existing personal injury and income protections working collaboratively with industry, SafeWork NSW and Transport NSW to explore options to improve safety in the sector.

Option 2 Require **gig platforms to provide personal injury insurance** for their food delivery riders; sourced from the insurance market and complying with prescribed minimum standards for death and disablement, income supplementation and out of pocket expenses.

Option 3 Establish a **scheme to provide a personal injury insurance safety net** for food delivery riders focused on short-term income support and medical benefits for most injuries, lifetime medical care for catastrophic injuries and lump-sum compensation for fatalities.

Option 4 Establish a **scheme to provide personal injury insurance to food delivery riders modelled on motor accidents (CTP) scheme** benefits including short-term benefits for minor injury, extended benefits including access to lump-sum compensation for non-minor injury, lifetime medical care for catastrophic injuries and lump-sum compensation for fatalities.

Option 5 Establish a **scheme to provide personal injury insurance for food delivery riders modelled on workers compensation** protections, including income support payments, medical and treatment expenses, lifetime medical care for catastrophic

injuries, lump-sum payments for permanent impairment and death and modified common law damages.

Option 6 Extend the existing workers compensation scheme to cover food delivery riders by **deeming food delivery riders as 'workers' for the purposes of workers compensation legislation**. This option would include the imposition of statutory employer obligations on gig economy platforms such as requirements to provide suitable duties for injured workers who are able to return to work and protection from termination for six months after the injury.

Key considerations for identifying the preferred approach include the following:

- a) Underwriting and service delivery model including consideration of the risks, benefits and feasibility of private underwriting by licensed insurers and/or public underwriting and service delivery by icare
- b) Design of medical, rehabilitation, income support and death benefits for injured gig economy providers and options for mandatory benefits or lump sum settlements and entitlement periods, potentially including limited retrospective entitlements (for example for fatalities)
- c) Funding arrangements including the ability to give effect to insurance pricing principles such as risk-based pricing, incentivising risk management and good claims performance, risk pooling and price stability
- d) Regulatory and financial impact including affordability of premiums or levies
- e) Portability of insurance cover between platforms for food delivery riders who use multiple platforms
- f) Efficiency, customer service principles and simplicity of scheme design to reduce disputation
- g) Ensuring the solution is fit-for-purpose and accessible for vulnerable food delivery riders, such as those from culturally and linguistically diverse backgrounds, those with lower levels of educational attainment, and for people who reside in Australia temporarily
- h) Clarity of entitlements and coverage to enable underwriters to accurately price risk and set premiums or levies so claim liabilities are fully funded and insurer profits/surpluses are not excessive
- i) Provision for access to pre-dispute resolution services and legal services, and
- j) Consideration of interactions with other insurance schemes and products including workers compensation, CTP, Lifetime Care and Support scheme, the National Disability Insurance Scheme, insurance through superannuation, private accident and income protection products and others.

5. How to make a submission

SIRA invites individuals and organisations to contribute to the policy recommendations by sharing their views, experiences and insights on options for personal injury insurance arrangements for food delivery riders in the gig economy.

In your submission, please provide your views on the options presented at Section 4. You can also provide details of any viable alternative options.

You are encouraged to attach any evidence that will support your views and provide specific examples where possible.

Your submission can be lodged via:

- the SIRA website www.sira.nsw.gov.au
- the NSW Government Have Your Say website www.nsw.gov.au/have-your-say
- email to PolicyDesignWHBCR-SIRA@sira.nsw.gov.au.

5.1. Consultation questions

The below consultation questions are not intended to be exhaustive, but rather are provided to assist with focusing feedback on key considerations.

While SIRA encourages stakeholders to directly address the consultation questions within their submission, this is not a requirement and all feedback will be considered.

1. What benefits and entitlements are the most important to food delivery riders?
2. What insurance pricing principles should be applied to the options and what is their likely impact? How should safe work practices be best incentivised?
3. What is the preferred funding arrangement and key considerations? and why?
4. What are the current private insurance policy protections, costs and administration arrangements? What are current private insurance challenges for food delivery riders?
5. What are the risks/benefits of private underwriting and service delivery by licensed insurers compared with public underwriting and service delivery for any newly developed personal injury scheme?
6. What scheme design features of any new personal injury insurance scheme are critical to minimise administrative costs and disputation levels?
7. Do you have a preferred model and why?

5.2. Key dates

SIRA is conducting public consultation on this paper that closes on 28 May 2021.

Interested stakeholders are encouraged to consider the information in this paper and provide written submissions to SIRA. SIRA will consider all stakeholder feedback in its preparation of advice for the government.

Submissions to this consultation may be published on the SIRA website. If you do not wish to have your submission published, please state this clearly on your submission.

It is noted that additional public consultations may be undertaken later in 2021 to discuss and consider specific design features of any options identified in the current consultation as preferred options.

Please contact SIRA on 13 10 50 if:

- you are an employer, insurer or other stakeholder with an unresolved enquiry or a complaint
- you are a worker with a current complaint about your employer or provider (i.e. treatment provider).

Please contact the Independent Review Office on 13 94 76 if:

- you are a worker (or their representative) with an unresolved enquiry

- you are a worker with a current complaint about an insurer.

6. Glossary of key terms

1998 Act	<i>Workplace Injury Management and Workers Compensation Act 1998</i>
food delivery outlet	restaurants, cafes, kitchens, service stations and other food providers that supply food and drinks via a food delivery platform to members of the public using food delivery riders
food delivery platform	a third-party platform that facilitates food deliveries via an online ordering and delivery platform (usually in the form of a mobile device application) connecting food delivery outlets with food delivery riders
food delivery rider	persons engaged through a third-party platform who transport food to members of the public (consumer) using a bicycle, car, motor scooter or motorbike. Does not include workers working directly for a food outlet
MAIA Act	<i>Motor Accident Injuries Act 2017</i>

Disclaimer

This publication may contain information that relates to the regulation of workers compensation insurance, motor accident compulsory third party (CTP) insurance and home building compensation in NSW. It may include details of some of your obligations under the various schemes that the State Insurance Regulatory Authority (SIRA) administers.

However, to ensure you comply with your legal obligations you must refer to the appropriate legislation as currently in force. Up to date legislation can be found at the NSW Legislation website legislation.nsw.gov.au

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals, or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

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