



TWU
Carrying Australia

Submission to the “Consultation - Personal injury insurance arrangements for food delivery riders”

29 May 2021

The Transport Workers' Union of NSW
The Transport Workers' Union of Australia

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About the TWU

1. The Transport Workers' Union of Australia (**TWU**) represents tens of thousands of men and women in Australia's aviation, oil, waste management, gas, road transport, passenger vehicles and freight logistics industries. The Transport Workers' Union of NSW (**TWU NSW**) is the largest branch of the TWU and represents workers within the State of NSW.
2. The TWU represents 70,000 transport workers in Australia today, including 20,000 owner drivers. With over one hundred years' experience in conducting Australia's passenger and freight task, the TWU has been proactive in establishing industry standards that improve the lives and safety of transport workers, their families and the community. This work has included a long history of establishing innovative regulatory systems which have, among many things, helped to ensure that owner drivers, classified as contractors, and other transport workers have access to fair rights, entitlements and safe work.
3. The TWU is the union which also represents workers in the transport sector of the emerging 'gig-economy' which includes rideshare, food delivery and more recently, parcel delivery workers. Since 2018, the TWU has been leading a campaign to ensure that transport workers in the gig-economy are provided access to safe, fair and ethical work standards.

1. Introduction

4. The TWU welcomes the opportunity to provide feedback to the consultation for 'Injury insurance arrangements for food delivery riders in the gig economy' (**the Consultation**).
5. The TWU recognises the important work of SIRA in undertaking this consultation and providing a pathway to ensure that workers in the food delivery sector are provided injury insurance coverage and safety at work.
6. The food delivery sector is in a safety crisis. A third of food delivery workers report being seriously hurt or injured. Over 70% fear being killed every time they start work.¹ None of these workers are provided workers compensation today or any other rights.² Over 80% of those hurt or injured, report receiving no support from the food delivery company they work for.³
7. The safety crisis in the food delivery sector is being driven by the diminution of standards. Food delivery companies classify delivery workers as independent contractors, allowing them to circumvent minimum rights, entitlements and protections otherwise afforded to workers classified as employees. This has placed workers under unsustainable financial and economic pressures, leading to unsafe work practices. In addition, this circumvention of rights is the reason why food delivery workers can be seriously hurt, permanently injured or killed without access to workers compensation insurance.
8. The provision of workers compensation, while important, needed and welcomed, is a reactive measure that will not address the underlying causes of this safety crisis. So long as workers in the food delivery sector and broad on-demand transport or 'gig' economy, are pressured to push themselves beyond safe standards by systems of work and payment terms which by the nature necessitate risk-taking behaviour, workers will continue to be needlessly injured and killed. Nevertheless, the provision of workers compensation insurance will provide some of the most at-risk workers in Australia today, much needed support. If structured correctly, workers compensation can help to assist in incentivising safe worker practices in the food delivery sector as well.
9. The following submission will argue in support of the extension of the existing workers compensation scheme to the entire on-demand transport sector by clarifying the obligations of gig economy companies under the deemed worker provisions of the *Workplace Injury Management and Workers Compensation Act 1988* (NSW) (**WC Act**). In addition, the submission will

¹ TWU 2020, Food delivery Rider Survey, Accessed 29th May 2021 <https://www.twu.com.au/wp-content/uploads/2020/09/Delivery-rider-survey-infographic.pdf>

² Ibid

³ Ibid

call on the NSW State Government to address the underlying cause of unsafe and dangerous work practices by expanding the scope of Chapter 6 of the *Industrial Relations Act 1996 No 17* (NSW).('Chapter 6') to cover on-demand transport work in all forms.

2. Feedback to the SIRA Discussion Paper

10. From the outset the TWU would like to provide some brief feedback to a number of points raised in SIRA's discussion paper at the centre of this consultation.⁴ Some of the assumptions and omissions in the discussion paper are worthy of additional examination.
11. The first pertains to the question of whether food delivery riders are currently provided workers compensation under the existing WC Act. The WC Act prescribes workers compensation coverage to workers classed as both 'employees' and those as 'independent contractors' who, having met certain conditions, are considered to be deemed workers for the purposes of the WC Act. 'Section 3.2 Workers Compensation' of the discussion paper outlines the deemed worker provisions and asserts that "it is a *general view* that people providing food delivery gig economy services are, in most cases, not likely to be covered by the scheme".⁵ The discussion paper does not provide any information to support this conjecture or on what basis this view can be indeed considered 'general'.
12. In response to this point, the TWU would like to note:
 - The TWU continues to support a number of test cases to ascertain whether the deemed worker provisions of the WC Act would cover food delivery workers classified as contractors. The first of these, which involves the death of a food delivery worker Bijoy Paul while working for Uber Eats, will reach the Workers Compensation Commission of NSW in the coming months.
 - To the TWU's knowledge, there is no 'general view' or other consensus which would suggest that food delivery workers would not be considered as deemed workers under the existing WC Act.
 - The TWU has received legal advice which suggests, to the contrary, that food delivery workers would likely be captured by the existing deemed worker provisions of the WC Act.

⁴ SIRA 2021, "Personal injury insurance arrangements for food delivery riders in the gig economy". Accessed 29th May, https://www.sira.nsw.gov.au/_data/assets/pdf_file/0007/980314/Personal-injury-insurance-arrangements-for-food-delivery-riders-in-the-gig-economy.pdf

⁵ Ibid. p.5

- Recent case law would suggest that food delivery workers may not even have to rely on the deemed worker provisions of the WC Act, with a recent decision finding that a Deliveroo food delivery rider was an employee.⁶
 - One of the major food delivery companies, Menulog, has recently announced it will be providing workers compensation coverage to its workers by employing food delivery workers.
13. The second point pertains to a suggestion that granting workers compensation coverage may in some way impose employment rights on food delivery companies. ‘Section 4 – Preliminary Options’ continues on to assert that deeming food delivery riders as workers for the purposes of workers compensation legislation “would include the imposition of *statutory employer obligations* on gig economy platforms”.⁷ The discussion paper then continues to list obligations which are provided under the WC Act.
14. The TWU would like to note that deeming a worker for the purposes of the WC Act would not result in a worker being classified as an employee or a food delivery company as an employer, as the discussion paper seems to suggest. The deemed provisions of the WC Act were designed to extend workers compensation to dependent workers in contracting arrangements. The obligations it would impose would be limited to those contained within the WC Act and there are no ‘statutory employer obligations’ which would otherwise apply should food delivery riders be considered deemed workers for the purposes of the WC Act.
15. Finally, an omission in the discussion paper is made under Section 4, as the discussion paper moves on to outline the “Key considerations for identifying the preferred approach” to providing injury insurance coverage to food delivery workers.⁸ The key considerations highlight various economic, financial, structural considerations. One important consideration which seems to be neglected in this list is whether any such injury insurance arrangement will provide the necessary level of support and assistance to workers and families who are affected by a workplace injury.
16. The TWU suspects that this was an unintended omission. It should be beyond refute that the overarching aim of a workers compensation scheme is to ensure that workers and families are adequately supported following a workplace injury.

⁶ *Diego Franco v Deliveroo Australia Pty Ltd [2021] FWC 2818*

⁷ SIRA 2021, “Personal injury insurance arrangements for food delivery riders in the gig economy”. Accessed 29th May, https://www.sira.nsw.gov.au/data/assets/pdf_file/0007/980314/Personal-injury-insurance-arrangements-for-food-delivery-riders-in-the-gig-economy.pdf . p.7

⁸ *Ibid.* p.7

3. Current issues in the food delivery sector

17. The provision of workers compensation insurance is one of the most fundamental protections which can be afforded to workers – particularly those engaged in high-risk industries like the food delivery sector. For years now, tens of thousands of workers have been hurt, injured and killed without being provided access to workers compensation coverage. Meanwhile, food delivery companies have failed to proactively manage safety and ensure safe systems of work, which has further compounded poor safety outcomes and the need for workers compensation insurance.

3.1 Circumvention of industrial laws to date

18. Food delivery companies in the gig economy were first established in Australia in 2015, with the entrance of the food delivery company Deliveroo. Since this time, food delivery companies which today have come to include Uber Eats, Doordash, Menulog, Hungry Panda and Easi, have structured their businesses in order to circumvent their obligations to provide work rights and entitlements otherwise owed to food delivery workers in the road transport industry, leading to exploitative, unsustainable and dangerous trends.

19. The circumvention of rights and entitlements has been primarily achieved by classifying workers as independent contractors in order to evade obligations and standards otherwise enshrined under industrial law. The main industrial instrument is the *Fair Work Act 2009* (Cth) ('**FWA**') which affords the majority of work rights, protections and entitlements under Australia's industrial relations system.

20. The FWA operates on the basis of an outdated binary distinction of a worker as an 'employee' with work rights and protections, and a worker as an 'independent contractor' with none. As a result, food delivery workers today are paid well below half the minimum wage, denied super, leave entitlements, casual loadings, protections from unfair dismissal and are engaged under some of the most dangerous working conditions across the country.

21. The following table provides a summary of working conditions for rideshare and food delivery workers in the on-demand transport sector.

22.

	Rideshare Drivers	Food delivery Riders/Drivers
Safety	<p>34.29% involved in a car accident while at work</p> <p>66.31% of drivers have been subject to some form of harassment.</p> <p>17.14% have been physically assaulted</p> <p>Almost half (44.4%) of female drivers reported experiencing sexual harassment</p> <p>40.29% of drivers experienced racial abuse while driving</p>	<p>33.65% have been hurt or injured at work</p> <p>30.77% know someone who has been hurt or injured</p> <p>82.99% of those injured received no support from the food delivery company they worked for</p> <p>70.1% of workers said they “worry about being seriously hurt or killed while at work”</p>
Earnings & Financial Insecurity	<p>Gross Earnings = \$23.00 per hour</p> <p>Effective Hourly Rate (after costs) = \$12.85 per hour</p> <p>54% of food delivery workers are struggling to ‘keep up with bills and buy groceries’</p>	<p>Gross Earnings = \$17.11 per hour</p> <p>Effective Hourly Rate (after costs) = \$10.42 per hour</p> <p>74% of food delivery workers are struggling to ‘keep up with bills and buy groceries’</p>
Lack of COVID Protections	<p>53.81% of rideshare drivers were not provided any safety training</p> <p>48.57% of rideshare drivers were not provided sufficient & free protective equipment (masks, sanitisers, gloves)</p> <p>74.76% of rideshare drivers were not provided any paid leave or financial assistance when needing to isolate after being affected by the COVID.</p> <p>1/5 of rideshare drivers said the rideshare company they worked for took no measures to respond to COVID</p>	<p>5.38% of delivery workers were not provided any safety training</p> <p>49.04% of delivery workers were not provided sufficient & free protective equipment (masks, sanitisers, gloves)</p> <p>78.37% of delivery workers were not provided any paid leave or financial assistance when needing to isolate after being affected by the COVID.</p> <p>59.62% of delivery workers said that the company they worked for promoted full contact-free delivery</p> <p>1/5 of delivery workers said the food delivery company they worked for took no measures to respond to COVID</p>
	<p>87.38% have been left negative feedback for something beyond their control (i.e. road conditions, pick-up restrictions)</p>	<p>61.27% of workers said they have “been unfairly treated by a company without being able to defend myself”</p>

Harsh/Unfair Treatment of Workers	18.45 % have been suspended without pay and 9.22% have been terminated as a result of a false allegation 56.25% said they've "been unfairly treated by a company without being able to defend" themselves	
Dependency on Work	77.62% of drivers are dependent on rideshare as a main source of income	86.12% of respondents are dependent on food delivery work as a main source of income
	N=210	N=209

23. The ability of food delivery companies to circumvent their obligations to workers has been relatively more difficult under other parts of the industrial relations system, which do not otherwise solely confer rights on the basis of employment status. The *Work Health and Safety Act 2011 (NSW) (WHS Act)* for example, moves beyond the binary distinction of a worker as an 'employee' and 'independent contractor' to afford equal rights to all workers, regardless of employment status, and equal obligations to businesses for the safety of these workers.
24. To a lesser extent, a similar approach is also adopted in the WC Act through the deemed worker provisions under Section 5 and Schedule 1 of the Act. This section extends workers compensation coverage to 'independent contractors' in certain dependent arrangements. For example, Clause 2 provides contractors with workers compensation where the work performed is worth more than \$10, is not performed as part of any trade of business regularly carried out by the contractor in their own name and does not subcontract work or hire other employees.
25. Despite these obligations, food delivery companies have either refuted or ignored their obligations to workers under these other industrial instruments entirely by failing to discharge their primary duty of care to ensure a safe workplace for food delivery workers as per the WHS Act and, with the exception of Deliveroo for a brief period, failing to provide workers compensation coverage to food delivery workers. While the TWU is encouraged by the consultation taking place in NSW, the Government has to date failed to either enforce or clarify these obligations.
26. The TWU is currently supporting a number of test cases for some of the families of the workers who were tragically killed last year. These test cases will argue that food delivery workers, and other on-demand transport

workers, are entitled to workers compensation through the current deemed worker provisions of the WC Act. Alternatively, if necessary, the cases will seek to argue that food delivery workers should be classified as employees and thereby entitled to workers compensation coverage.

3.2 Injury insurance arrangements in the food delivery sector

27. Food delivery companies in Australia today do not provide workers compensation for any of their food delivery workers. Some companies have, following pressure in recent years, have elected to provide third-party injury insurance arrangements instead. As will be discussed below, these third-party insurance arrangements provide workers with inadequate coverage for injuries, do not provide any return to work and rehabilitation support and do not apply in many circumstances.
28. A recent survey commissioned by the Victorian Department of Premier and Cabinet reported the following worrying statistics of insurance coverage in the gig economy:⁹
- I. 45.5% of workers report their main platform does not cover them for any type of work-related insurance,
 - II. 39.7% of workers reported their main platform requires them to take out their own insurance,
 - III. More than 20% of workers reported they did not know if their platform provides them with insurance or requires them to take out their own.
29. A TWU survey conducted in 2020 found that:
- 33.65% of food delivery workers had been hurt or injured while working
 - 30.77% knew of a food delivery worker who'd been hurt or injured while working
 - 82.99% of those injured receive no support from the food delivery company that they worked for at the time
 - 70.1% "worry about being seriously hurt or killed while at work"
30. As these statistics demonstrate, a large portion of workers are not covered by any insurance arrangement.
31. The following table provides a comparison between workers compensation arrangements and some of the private injury insurance arrangements which have been taken out by some companies in recent years.

⁹ McDonald, P. Williams, P. Stewart, A. Oliver, D & Mayes, R. 2019. "Digital Platform Work in Australia: Preliminary Findings From A National Survey", Report Commissioned by Victorian Department of Premier and Cabinet. Accessed 29th May, at <https://apo.org.au/sites/default/files/resource-files/2019-06/apo-nid242706.pdf>

	The Workers Compensation Scheme ¹⁰	Deliveroo – Personal Accident and Income Protection Policy ¹¹	Uber – Partner Support Insurance Policy ¹²	Amazon Flex
Weekly payments	Up to 95% of preinjury average weekly earnings for first 13 weeks, up to 80% thereafter. Maximum of \$2224 per week.	Up to 90% of salary for 104 weeks. Maximum of \$1625 per week.	\$150 per day for a maximum of 30 days.	No coverage
Permanent impairment	Up to \$631000 lump sum	Up to \$500000 lump sum	Up to \$400000 lump sum	No coverage
Medical, hospital and rehabilitation expenses	Maximum of \$50,000 for medical treatment, \$50,000 for hospital treatment and \$10,000 for ambulance treatment.	Up to \$2000 for out of pocket expenses.	Up to \$5000 for reasonable out of pocket costs (excluding medical costs).	No coverage

Table 1 – Third-party injury insurance arrangement Deliveroo, Uber Eats and Amazon 2020

32. Taken together, these statistics demonstrate both the inadequacies of current injury insurance arrangements and the pressing need to ensure workers compensation coverage is extended in a way which compel companies to lift safety standards. In terms of the level of coverage, injury insurance arrangements provide limited income protection. In the case of Uber, this is capped at 30 days and \$150 per day, leaving those affected by serious injuries without any support after this period. Both Uber and Deliveroo’s policies provide little-to-no coverage of medical expenses or support for those returning to work.

33. In some but not all cases, delivery workers are able to access some support under Compulsory Third Party (CTP) insurance schemes. These schemes do

¹⁰ https://www.sira.nsw.gov.au/__data/assets/pdf_file/0006/530862/Workers-compensation-benefits-guide.pdf

¹¹ Insurance Cover Summary for Deliveroo Australia Riders: Personal Accident & Income Protection – Marsh Advantage Insurance

¹² https://image.et.uber.com/lib/fe96127371650c7e75/m/10/Australia+-+Chubb++Personal+Accident+Group+Policy+-+Coverage+Summary+-+2019-20.pdf?_ga=2.52731560.1016689695.1597797064-420517628.1592957189&uclid=id=c0e2e550-d1a2-49228abc-f2a056d16b2d

not apply in a large number of instances (where a food delivery worker was involved at an at fault accident or injured while not driving) and also provide a level of coverage which is inadequate and far below that otherwise provided for under workers compensation.

3.3 Food delivery worker case studies

34. The limitations of existing injury assurance arrangements (or lack thereof) are best considered through the lived experience of food delivery workers who have been injured or tragically, lost their lives at work. The following paragraphs will provide four such experiences among the many thousands in recent years. These experiences demonstrate the inadequacies of existing piecemeal insurance arrangements where they may exist and underline the need for full workers compensation coverage in the food delivery sector.

35. Case Study 1 Esteban Salazar – Uber Eats

36. In 2020, Esteban Salazar was working as a food delivery worker for Uber Eats in the Sydney CBD area when his bicycle collided with the side of a moving tram. Following the incident, Esteban began to experience back pain and was no longer able to work. Esteban was dependent on food delivery worker as his sole source of income and had to use limited savings to support himself while he recovered.

37. Esteban was able to access some limited relief through Uber injury insurance arrangement with Chubb, which after 2 weeks began to provide him with some income payments. While these payments were limited to 30 days, they provided Esteban a lifeline in these first few weeks that allowed to remain at home and begin to recover. During this period, Uber did not offer to support Esteban with his out of pocket medical expenses – and Esteban was informed that these were not covered in Uber’s Chubb policy

38. After the 30 days, Esteban was no longer entitled to income support payments from Uber and cut off entirely. Esteban’s back had recovered somewhat but he still felt pain at times and his GP had advised him to not return to work for another 3-4 weeks. He emailed Uber to trying to seek extra support but was refused and subsequently received no additional payments. With no income to support himself, Esteban recommenced working for Uber Eats on his delivery bike and tried to push through his back pain. Slowly, Esteban began to reaggravate his injury.

39. Having been forced to return to work prematurely, Esteban was informed of an entitlement he might have under CTP insurance and contacted the insurer to submit a claim. The application process took long, there was no capacity

to receive immediate payments without preapproval and it seemed uncertain as to whether he would actually ever receive any income from the CTP insurer in any event. In the end, Esteban was informed by the insurer that he was deemed to be at fault in the accident and would not be entitled to compensation for income lost or his medical costs.

40. Today, 8 months after the accident, Esteban's back has worsened considerably, and he is really struggling to continue on working. Esteban currently requires an MRI and the assistance of a specialist which he cannot afford. The fact he earns below minimum wage while riding for Uber Eats makes his ability to earn enough money to cover his immediate costs and medical expenses even more difficult. Esteban continues to work as much as he can to support his living expenses, but with his back worsening, he does not know how much longer he can continue working like this.

41. Case Study Xiaojun Chen – Hungry Panda

42. Xiaojun Chen was a food delivery worker for Hungry Panda. In 2020, late one night in Sydney, Xiaojun was tragically killed after a collision with a bus while working for Hungry Panda. Xiaojun died after being taken to hospital, leaving behind two young children, his wife and grandparents in China, all of which were financially dependent on him.

43. Following his death, Xiaojun's wife, Ms Lihong Wei, flew to Australia in order lay her husband to rest. Hungry Panda had at the time provided Lihong with some financial assistance to cover her flight and accommodation costs. Lihong used her savings and other small donations from family and community numbers to cover funeral expenses and other immediate costs. Lihong was provided little time to grieve over the death of her husband and remained anxious about how she would continue to support her family.

44. Hungry Panda provided its food delivery workers no injury insurance (workers compensation or any other arrangement) and as such Ms Wei could not access any substantive support from the company following her husband's death. Ms Wei sought legal assistance, which advised her to pursue a claim under the CTP insurance arrangement. Today, it has been almost a year since her husband's death and Lihong has not been provided any support from the CTP insurer due to difficulties presented with ascertaining her husband's income.

45. Ms Wei has survived during this time through charity. The TWU had arranged a union fundraiser appeal which provided Ms Wei \$7,500. Another fundraiser arranged by a City of Sydney resident, raised another \$40,000 for Ms Wei. This money has been used to by Lihong to support the 5 people who were formerly dependent on Xiaojun Chen's income and is now running out.

Lihong does not know how she will continue to support her family and is anxious about the status of her CTP claim.

46. Lihong is pursuing a claim under workers compensation, arguing that her husband should have been provided workers compensation coverage. She believes that only workers compensation coverage will provide her the level of cover required to ensure she can continue to support her family. Yet, Ms Wei knows that the claim will take years to resolve and will be vigorously contested by the food delivery company her husband worked for. Nevertheless, she has committed to press on for as long as she can with the hope that in the end, she will be able to support her family in the absence of her husband.

47. Case Study: Vitor Faria – Deliveroo

48. In 2019, Vitor worked part-time in a kitchen and part-time delivering food for Deliveroo and UberEats. While delivering food for Deliveroo, Vitor was struck by a car and thrown from his bike. The driver of the car did not stop to help him. Vitor was taken to hospital from the scene suffering from a torn ligament in his knee and injuries to his arms. He required surgery and rehabilitation.

49. Vitor notified Deliveroo of his injury the day it occurred, but Deliveroo did not provide any information to him about his entitlements. It took Vitor contacting them a second time to be provided information about how to make a claim. He only knew to do this because he was friends with a worker that had recently been injured and knew that insurance was available.

50. Deliveroo did not contact Vitor again at any point during his dealings with the insurance company, his rehabilitation or his return to work. Deliveroo's insurance at the time provided Vitor 26 weeks of payment, at 90% of his average earnings from Deliveroo. His first payment was received one month after his injury.

51. The insurance did not cover Vitor's income from Uber Eats or his part time kitchen work and as a result he was earning approximately half of what he was earning before his injury. The insurance also did not provide payment for Vitor's medical expenses, and this was covered by available Compulsory Third Party insurance.

52. When the insurance payments from Deliveroo stopped Vitor had his fitness for work assessed by his GP, who recommended a further two weeks off work. With no further income protection payments available to him Vitor returned to work, against the wishes of his GP.

53. Deliveroo did not facilitate Vitor's return to work or provide any light duties during this period. The incident was not investigated further by Deliveroo and no changes to the work health and safety policies were considered.

54. Case Study – Anne (pseudonym) Uber Worker

55. Anne is an Uber Eats delivery worker who uses a car to complete deliveries. In 2019, Anne was delivering food to an apartment block at night when she fell into a ditch along a poorly lit path prior to reaching the front door. Upon falling, Anne broke her ankle and was unable to move. She called her husband to collect and drive her to the closest hospital.

56. Shortly after her injury, Anne underwent surgery for her broken ankle. The surgery involved two metal plates and several screws being inserted to support her ankle.

57. Following her injury, Anne contacted Uber Eats to seek assistance and was provided a lump-sum payments of \$2,500 and 30 days of income support at \$150 per day. Anne was injured outside of her vehicle and informed she would not be entitled to claim through her CTP insurer.

58. While the money was welcomed by Anne, the \$2,500 provided did not cover Anne's medical costs. Anne had to cover the costs of crutches, a wheelchair, specialists consultations and medicines. Anne was advised to get physiotherapy but was unable to afford it. After the 30 days of payment, Anne leg was not yet healed and despite this, her payments were cut off.

59. One month after her injury, Anne was forced to return to work still on crutches. For fear of being reported to Uber and terminated for using her crutches while working, she left her crutches in her car and hobbled into restaurants to collect orders.

60. A few months after, Anne aggravated her injury further and had to undergo surgery to remove pins and plates from her ankle. With no insurance covering, Anne was forced to go through the public system and remained on a waiting list for 4 months prior to being able to get the surgery required to relieve the pain. She would not receive any income support during this time and would continue to bear the costs for specialists and medicines which were not covered by Medicare.

61. It has been almost one year since Anne's accident. She still can't walk very far on her leg and if she stands for too long, her ankle swells. Anne's doctor has advised her that her leg will never be full recovered. Anne continues to work as an Uber Eats delivery worker and tries her best to push on with the pain and swelling.

4. Consideration of Policy Options

62. It is important to reiterate that workers compensation alone will not deal with the safety crisis in the sector which is driven by a lack of safe and sustainable standards. Food delivery companies, in the absence of regulation, will continue to compete vigorously and this will continue to heighten economic and contractual pressures placed on food delivery workers. For this to be effectively addressed, the NSW State Government must intervene to ensure food delivery workers, like other dependent workers in NSW, are provided access to safe, sustainable and fair working conditions which enable work to be performed safely in the first instance.
63. Notwithstanding this, access to workers compensation is important in its own right. Workers compensation will assist in alleviating the incalculable suffering of those workers hurt and injured every day and those families who have lost a loved one at work. If structured appropriately, a workers compensation system can also act to incentivise safer business practices in a sector which has been embroiled by the failure of companies to manage work health and safety and discharge their primary duty of care.
64. SIRA's discussion paper sets out 6 options for providing injury insurance compensation to food delivery workers. They are as follows:
1. Maintain the status quo with increased education and awareness about existing personal injury and income protections.
 2. Require gig platforms to provide personal injury insurance for their food delivery riders.
 3. Establish a scheme to provide a personal injury insurance safety net for food delivery riders.
 4. Establish a scheme to provide personal injury insurance to food delivery riders modelled on motor accidents (CTP) scheme benefits.
 5. Establish a scheme to provide personal injury insurance for food delivery riders modelled on workers compensation protections.
 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.
65. The various options above can be evaluated by considering two main questions: (1) What level of insurance coverage is appropriate for the food delivery sector?; and (2) How can an insurance system be structured to deliver such entitlements most effectively?

66. With regards to the first question concerning the level of coverage, food delivery workers must be afforded protections no less than that otherwise provided by the existing workers compensation system. To put it simply, the health and lives of food delivery workers are of no less value than that of any other worker in Australia. A broken leg in the food delivery industry is just as incapacitating, a permanent disability just as debilitating and the loss of a loved one just as devastating to family and friends regardless as to whether it occurs in any other industry. There is no justification for some inferior substandard coverage. In actual fact, the high-risk nature of the industry should justify a level of coverage over and above that otherwise enshrined in the existing workers compensation system.
67. Despite the fact that some food delivery companies have elected to provide some injury insurance coverage to their workers, it is clear that these benefits are significantly worse than what is otherwise available in the Workers Compensation Scheme, particularly in regards to the payment for medical, hospital and rehabilitation services and the weekly payment for time off work. In the tragic case of a workplace death, a food delivery workers life is worth less than half that of any other worker who would have access to workers compensation.
68. The Workers Compensation Scheme should be reformed to require businesses to provide workers compensation to all dependent workers regardless of their method of engagement. Piecemeal insurance offerings provide substandard and inadequate relief to an injured worker and are fundamentally unable to promote the successful recovery at work.
69. With regards to the second question, namely, how best to structure an injury insurance arrangement in the sector, it is important that the design of any such scheme can effectively incentivise safe work practices among food delivery companies. The workers compensation system has provided an incentive scheme through insurance premiums which move to reward 'safer' companies with fewer claims and those more 'dangerous' companies which have unsafe working conditions. In an industry where food delivery companies have driven standards to unsustainable and unsafe levels, the operation of a scheme will assist in creating an economic incentive to providing a safe workplace to delivery workers and discharging their primary duty of care.
70. Conversely, a 'pool' or 'levy' funded system would have the opposite effect. It would deliver insurance coverage to an industry while socialising the costs of unsafe business practices among food delivery companies and for consumers. Companies which for example provided no safety training, no protective equipment, poor onboarding processes, set unrealistic delivery time frames and placed workers under unsustainable economic pressure

would likely have a higher-rates of injuries and claims. Yet, the costs of these claims would be shared equally among other food delivery companies who might otherwise *invest* in safety.

71. A recent academic paper by Dr Michael Rawling and Professor Joellen Riley Munton has analysed regulatory responses to the on-demand and observes:

“While establishing a source of funds for providing compensation to injured workers and their dependants would certainly be an improvement on current arrangements, any proposal that falls short of providing full workers’ compensation benefits will fail to address the root of the problem. A workers’ compensation system that requires payment of premiums by the business controller who determines the systems of work is far better suited to providing an incentive to improve safety standards, than a system that merely compensates victims after accidents have occurred. And a system that provides for rehabilitation of workers, income maintenance during time off, and facilitates a return to work after recovery, deals more comprehensively with workers’ need for economic security.”¹³

72. For these reasons, the only option which can satisfy both providing workers an adequate level of coverage and improving safety in the industry is Option 6. The WC Act should be amended to cover food delivery workers by clarifying them as a ‘deemed worker’ for the purpose of the WC Act. This is practically the most tried and tested approach, which currently is in affect for countless other categories of workers classified as contractors in NSW.

5. On-demand transport industry

73. Food delivery riders are no doubt in highly dependent work arrangements and are in desperate need of access to workers compensation along with safe and sustainable working standards. However, the issue of poor safety outcomes and a lack of work entitlements is not limited to food delivery ‘riders’ and most certainly not to the food delivery sector.

74. A failure to ensure safe and sustainable standards in the road transport sector has catastrophic effects for all road transport workers. We have seen for years in Australia how economic and contracting practices have placed pressures on employee and contractor drivers in trucking, passenger transport, parcel delivery and most recently, in the emerging ‘on-demand’

¹³ Michael Rawling & Joellen Riley Munton, *Proposal for legal protections of on-demand gig workers in the road transport industry: A report prepared for the Transport Education Audit Compliance Health Organisation (TEACHO)*, (Sydney: UTS Faculty of Law, 2021), p.10.

and 'gig-economy'.¹⁴ We have also seen decades of academic research in Australia and abroad come to substantiate the effects which such economic and contracting practices have on worker and public safety.¹⁵

75. The rise of the on-demand economy has taken these pressures to new extremes. Through it, we have seen the obliteration of standards to the point where workers are routinely paid half the minimum wage, can have their livelihoods stripped away from them at the whim of an algorithm and, where the companies responsible for creating these arrangements, have no accountability for the dire and deadly consequences for on-demand transport workers.

76. This has been the case for food delivery riders in the on-demand economy. It has also been the case for drivers in the food delivery sector (as the previous case study for Anne for example represents). It has been the case for drivers in the ridesharing industry where 1/3 report being involved in a serious accident. It has been the case for drivers in the emerging on-demand parcel delivery sector where Amazon Flex drivers for example are having to dangerously overload vehicles while being pushed to extreme working schedules.¹⁶ All these workers in the on-demand transport sector are:

- Low paid and highly unlikely to have workers compensation or injury insurance coverage
- Despite being classified as contractors, highly dependent on the company they work for.
- Work in a high-risk industry and under arrangements which continue to strip away standards and compound such risks.

77. Workers compensation should in turn be extended to workers, which share these basic characteristics. Simply, there is a need to ensure workers in *dependent* contracting arrangements are provided workers compensation. The existing deemed worker provisions of the WC Act work to extend workers compensation to categories of contractors who are likely to be in such dependent arrangements. The Government and regulators can play a constructive role in building on this approach and clarifying existing obligations to the on-demand transport sector.

¹⁴ See for example Mayhew, C. & Quinlan, M. (2002), Fordism in the fast food industry: pervasive management control and occupational health and safety risks for young temporary workers, *Sociology of Health and Illness*, 24(3): 261-84; Quinlan, M., Fitzpatrick, S. J., Matthews, L. R., Ngo, M., & Bohle, P. (2015) Administering the cost of death: Organisational perspectives on workers' compensation and common law claims following traumatic death at work in Australia. *International Journal of Law and Psychiatry*, 38:8-17; Rawling M and Kaine S (2012) 'Regulating supply chains to provide a safe rate for road transport workers', 25(3) *Australian Journal of Labour Law* 237.

¹⁵ Ibid.

¹⁶ See TWU 2020, "Submission to the INQUIRY INTO IMPACT OF TECHNOLOGICAL AND OTHER CHANGE ON THE FUTURE OF WORK AND WORKERS IN NEW SOUTH WALES, no.30, Accessed 29th May, at [https://www.parliament.nsw.gov.au/lcdocs/submissions/69334/0030%20Transport%20Workers%20Union%20\(TWU\).pdf](https://www.parliament.nsw.gov.au/lcdocs/submissions/69334/0030%20Transport%20Workers%20Union%20(TWU).pdf)

78. Most importantly, workers compensation alone will not address the underlying cause of unsafe behaviour for all these workers. Whether in the rideshare, parcel delivery or food delivery sectors, the on-demand transport sector is expanding rapidly with highly competitive pressures continuing to diminish standards in the absence of regulation.
79. NSW, having long recognised this tendency in the transport industry, has moved to create a safe and sustainable standard setting mechanism for the sector in the form of Chapter 6 of the *Industrial Relations Act 1996* (NSW). This standard setting mechanism must be the foundation of any approach which seeks to improve safety in the sector and provide safe and sustainable work.¹⁷

6. Other Considerations

6.1 Return to work for food delivery workers

80. One particular challenge in the food delivery and broader on-demand transport industry pertains to the return to work provisions under the workers compensation scheme and how these may practically be applied to the sector. While it may be hard to envisage how a food delivery worker may be transitioned back into work in the sector, there are a number of possibilities which could practically apply here.
81. The TWU is aware that certain food delivery companies have in some cases, provided injured food delivery workers the ability to be transitioned to work on light duties. For example, last year, one injured rider working for Deliveroo was transitioned back into work on light duties after having broken his arm. These light duties involved the delivery rider, completing surveys with other workers outside restaurants in his local area which sought to gauge important information about Deliveroo's competitors. The surveys were completed over the course of four weeks and provided the rider the ability to transition back to normal duties gradually.
82. There are a number of other possibilities for return to work to be developed throughout the food delivery sector. No doubt, food delivery companies will apply creativity to these as their incentivised to do so. Such activities may include:
- Marketing and flyering – food delivery companies often employ workers to hand out promotional flyers in shopping districts.
 - Customer and Rider Support – food delivery companies provide a range of customer and delivery worker support. This includes assistance through the app and call centre assistance as well.

¹⁷ It is worth noting that Chapter 6 also provides access to workers compensation, by providing cost models which include funding that allows workers to take out their own workers compensation, and auditing mechanisms to ensure they have done so before carrying out work.

- Worker consultation – food delivery companies are beginning to invest more time in consulting with workers, particularly around WHS issues. To this end, workers will be required to lead consultations with workers.

6.2 Portability of insurance cover between platforms for food delivery riders who use multiple platforms

83. One complication which requires some consideration is how workers compensation premiums will be priced for food delivery companies where single workers are engaged for multiple food delivery companies at once (referred to as ‘multi-apping’). If this issue is not addressed, then food delivery companies would otherwise pay inflated workers compensation insurance premiums for the workers they engage. For example, a single worker across multiple apps might have two or three companies pay workers compensation premiums for them at the same time.

84. This issue can be addressed through a number of ways. For one, workers compensation pricing could factor an industry wide average ratio which reflects the prevalence of multi-apping, and discounts insurance premiums by this factor. This principle is currently used in New York where a system of setting minimum pay standards for rideshare drivers is based on a similar formulation of average industry utilisation rates across multiple on-demand rideshare companies.¹⁸

85. Another option would be for insurance premiums to be costed on the basis of the work performed (hours worked for a company or the number of jobs a company assigned) rather than on a per worker basis. Doing so would apportion costs for a workers compensation scheme proportionately across the industry.

6.3 Economic Considerations – Impact on consumers and food delivery companies.

86. It is important that extending workers compensation is done in the most economically efficient, so as to minimise unnecessary costs to consumers and the food delivery sector. Of course, this is not to say that an inferior standard of insurance should be pursued with the intent of reducing costs. Rather it is about recognising and accepting that there will be a cost to providing workers compensation entitlements and creating a system which delivers such entitlements in the most effective and efficient manner.

87. Already noted has been the challenges around extending workers compensation to workers who are engaged across multiple companies.

¹⁸ CWED, 2018, “ An Earnings Standard for New York City’s App-based Drivers: July 2018 Economic Analysis and Policy Assessment”, Accessed 16th May.
<https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf>

There is a risk here that food delivery companies are unnecessarily paying full premiums for coverage which may have been already provided by another company. The State insurer can most effectively resolve this by discounting premiums by a rate which reflects the tendency to multi-app within such companies.

88. Also discussed previously has been the way in which the workers compensation system would provide food delivery companies with a financial incentive to improve safety in the industry. This would conversely – reward companies who invest in safety and penalise those which don't. Safer companies would gain a competitive advantage with lower premiums, and in the long-run workers compensation costs across the industry would decline as safety improved. While consumers will likely bear some of the costs of the scheme, the costs to consumers will be circumscribed by the ability of consumers to move towards safer companies with lower workers compensation premiums. It is important to note in this respect that in the long-run, an industry wide 'pool' scheme would be economically more inefficient as it would do nothing to incentivise safe work among companies and provide consumers with no ability to reduce costs by moving toward safe operators.

7. Recommendations

89. The food delivery sector has brought to light problems in the emerging forms of work which are not isolated to food delivery riders or the food delivery sector. While the deaths of five food delivery riders in a few short weeks stopped the nation last year, these deaths speak to a more endemic problem surrounding the practices of emerging 'gig' or 'on-demand' economy companies in the transport industry. These emerging on-demand companies are intensifying work practices and diminishing standards with deadly consequences for workers – and there is an abysmal failing of industrial instruments to address these issues or support the workers, families and communities who are suffering as a result.

90. Any workers compensation scheme introduced just for food delivery riders, will not address the broader challenges of unsustainable conditions leading to high-rates of deaths and injuries in the sector. It will also neglect other dependent on-demand transport workers who are also at risk, in need of workers compensation coverage and are currently being denied access for the same reasons.

91. Provided such, the following recommendations provide a pathway to extending workers compensation coverage to the workers who need it the

most, while addressing the underlying issues presented by the on-demand economy to workers.

Recommendation 1. Establish industry wide standards which provide safe and sustainable work practices

92. Food delivery workers, and all on-demand transport workers, must have access to basic rights and conditions which provide the foundation for safety at work. NSW has led the way in providing transport contractors in similar dependent arrangements such protections for decades through Chapter 6 of the *Industrial Relations Act 1996 (NSW)*, which provides:

- A system of mandatory model contract provisions across categories and classes of workers,
- Ability to conciliate and arbitrate disputes including those related to the unfair termination of contracts,
- Appropriate minimum industry rates which ensure cost recovery on top of minimum labour rates,
- The ability to set enforceable rates and conditions on an enterprise basis to deal with issues specific to each company,
- The ability to create mechanisms which fund and ensure the provision of workers compensation arrangements to workers as owner drivers.

93. The NSW Government and regulatory authorities must act to ensure food delivery workers have safe terms of engagement with regards to pay level and incentive structures, channels to collective representation and access to dispute resolution mechanisms.

Recommendation 2. Industry-wide 'BlueCard' training initiative

94. Other high-risk industries such as construction (White-card) and rail (Rail Safety Worker Induction) have long recognised the importance of ensuring a minimum industry-wide training certification. Regulators have yet to mandate a similar compulsory training competency in the transport industry, despite transportation being one of the most dangerous industries to work in.

95. As a result, major transport companies and the TWU have for years jointly created and implemented the 'Bluecard' training competency for road transport workers through the Training Education Audit Compliance Health Organisation (TEACHO).

96. TEACHO should be engaged to design and administer an industry-wide training competency for food delivery workers in the on-demand economy by building on the current Bluecard competency. The certification should be provided to any worker seeking to perform food delivery or other on-demand transport work in the industry in order to ensure basic safety training is being effectively administered.

97. Training costs should be funded by an industry levy to ensure that training is readily accessible in the sector and to avoid an overlap in accreditation.

Recommendation 3. Ensuring enforcement of existing WHS law

98. The safety crisis in the transport sector must in the first instance be addressed by recognising the role which competitive pressures and a lack of working standards play in encouraging dangerous work practices.

99. In addition to this, there is a need to address the lack of enforcement of existing safety obligations in the on-demand economy. There is a need for all industry stakeholders to act to urgently address these issues.

100. The TWU recognises the ongoing work of Safe Work NSW in ensuring that companies in the food delivery sector are discharging their obligations under WHS laws. Notwithstanding such, Safe Work NSW is under resourced and incapable of ensuring compliance in the burgeoning sector alone. In order to address this:

- Safe Work NSW should be provided additional funding and resources to ensure a dedicated permanent team of inspectors to audit on-demand transport companies and ensure compliance.
- Relevant trade unions should be provided an ancillary role helping to support ongoing enforcement and auditing work being conducted by Safe Work NSW. This can be achieved by for example allowing trained union officials to issue improvement notices to companies breaching their obligations under the WHS Act.

Recommendation 4. Ensuring all workers in the transport sector are provided workers compensation

101. The rise of gig and other non-standard forms of employment in the transport sector is leaving a growing section of the workforce without access to workers compensation.

102. The current NSW system rests on the incorrect assumption that workers not classified as employees will take out their own workers compensation policy. In reality, workers will not do so, particularly when issues of low pay among such sections of the workforce are taken into consideration.

103. The TWU recommends the NSW Government act to ensure:

- a. Clarify, or where necessary, expand the scope of the deemed worker provisions under the WC Act to provide workers compensation coverage to all workers in the on-demand transport sector.