



Small
Business
Commissioner

***Submission to the Consultation on
personal injury insurance arrangements
for food delivery riders in the gig
economy: Discussion paper***

June 2021

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Further information and contacts

We welcome the opportunity to meet and further discuss the ideas outlined in this submission.

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List of recommendations

Recommendation 1 – SIRA to conduct research to understand the preferences of food delivery riders

Minimum standards should be developed based on the preferences of food delivery riders operating in the gig economy. Feedback should be sought on both the advantages and disadvantages of different levels of protection.

Given the large number of people who act as food delivery riders, and the widely varying nature of their participation in the ecosystem, SIRA should conduct a broad survey, customer-mapping and other research to better understand:

- the different usage profiles of the food delivery riders
- the needs of different groups and their insurance preferences
- the sensitivity of each profile to potential costs of different approaches (including potential second-round impacts on earnings and the availability of work).

Recommendation 2 – SIRA to consult on detail options and assess regulatory impact

SIRA should provide detailed options to allow stakeholders to clearly understand the impact of each option and recommend specific improvements. This paper should include findings from the research conducted in Recommendation 1. Robust regulatory impact assessments should assess the costs and benefits of alternative options.

Recommendation 3 – A fit for purpose solution should be developed

The new scheme should be configured in a way that aligns with the typical arm's length relationship between digital platforms and food delivery riders rather than force them into a system designed for more traditional employees. A fit for purpose solution should be developed.

Recommendation 4 – Minimum standards should be adopted industry-wide and opportunities to harmonise across jurisdictions should be explored

Minimum standards should apply universally across the sector, with no ability to opt out. Opportunities for harmonisation should be explored and further development of options should consider the needs of food delivery riders who operate in border regions.

Recommendation 5 – Perform an insurance market study to assess the viability of option 2

The Commission recommends further exploration of option 2 which would require food delivery platforms to provide personal injury insurance that complies with prescribed minimum standards for their food delivery riders.

The Commission notes that the viability of option 2 depends on the ability for insurance markets to offer suitable products to gig economy platforms and participants to the extent required by the prescribed minimum standards. The insurance sector should be engaged to ensure the availability of a minimum number of affordable products prior to introducing new insurance requirements.

Should a market study reveal doubts as to the availability of suitable insurance products, the Commission would welcome further consideration of the establishment of a new scheme (as per options 3 or 4) which would facilitate implementation of equivalent minimum standards.

Recommendation 6 – Consider work status when assessing the suitability of options

The Commission accepts that the business models of some food delivery platforms may be incompatible with certain contractual arrangements. For this reason, the Commission believes that any regulatory changes should minimise unintended consequences impacting the viability of gig economy platforms. This includes considering potential implications for work status when assessing the suitability of options.

Recommendation 7 – Inclusive small business guidance

An inclusive approach should be taken when preparing small business guidance. The potential needs of gig economy participants should be considered when developing guidance materials for small businesses. Communications specifically targeting the gig economy audience is welcome and needed to implement any insurance solutions.

Recommendation 8 – Digital platforms be required to implement transparent and accessible dispute resolution processes

These processes should include:

- publicly accessible information showing internal and external dispute resolution processes including clear internal dispute resolution contact points
- access for account holders to key information such as contracts, history of payments and status of any dispute for a period of several years after their account is suspended.

Introduction

The NSW Small Business Commission (the Commission) provides strategic advice, advocacy and affordable dispute resolution services to small businesses in NSW. The Commission's role includes:

- encouraging government agencies and larger businesses to enter productive working relationships with small businesses
- facilitating and encouraging the fair treatment of small businesses
- promoting a fair operating environment in which small businesses can flourish.

The Commission encourages an inclusive approach when targeting and identifying opportunities to support small businesses. This includes supporting gig economy participants where they share similarities with other operators of non-employing businesses or are regarded as the operators of a small business.

The gig economy is defined in the discussion paper 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." The gig economy generally allows individuals to work more flexibly than traditional employment allows. In some cases, gig economy platforms have created new markets and opportunities that did not previously exist. Care is needed to harness these benefits while ensuring needs of gig economy participants are met.

People working as food delivery riders represent a subset of the gig economy. The discussion paper notes that individuals most often drawn to this work are characterised as, "younger people, males, students, recent migrants and temporary residents and those who speak a language other than English." Food delivery riders typically have little ability to influence the contract or conditions of work while there are relatively low barriers to entry. It is also arguable that food delivery riders generally perform work of a higher risk than other work performed in the gig economy. These factors warrant proper consideration of personal injury insurance arrangements applying to food delivery riders.

The Commission believes further rounds of detailed consultation are needed before a final approach can be determined. A key aspect is to ensure the views of food delivery riders are considered, including with regards to both the potential costs and benefits of different approaches. Trade-offs relating to earnings and availability of platform work ought to be considered. This consultation should inform the development of a minimum set of standards, based on the preferences of food delivery riders, applying across the industry.

The Commission generally favours exploration of solutions building on private insurance markets but supports further analysis to determine the availability and affordability of suitable insurance products. The Commission's view is this should ultimately inform the suitability of options presented in the discussion paper.

This submission will set out the Commission's views and make recommendations on key aspects of this consultation.

Need for policy intervention

The Commission acknowledges that food delivery riders will not generally be entitled to the same level of protection and support as is afforded to workers who injure themselves while performing traditional work. This is largely driven by their designation and potentially a preference to be treated as contractors rather than employees.

Under current arrangements, work status (whether a gig economy participant is an employee or non-employee) is an important factor determining regulated support available to food delivery riders in the event of an accident while performing work. Whether gig economy participants, including food delivery riders, are engaged in a contract of service (employee) or a contract for services (non-employee) will depend on the circumstances and substance of the contractual arrangement.

There is a prevailing view that food delivery riders are not covered by the NSW workers compensation scheme, though this would ultimately depend on the specifics of any individual arrangement. The discussion paper notes:

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.

The Commission notes some recent cases which provide different perspectives on work status.

The work performed by food delivery riders is generally of a higher risk than other work performed in the gig economy. It could be argued that this, and some other factors, justify the need for policy intervention to facilitate appropriate personal injury insurance arrangements.

While there are other cohorts of independent contractors performing work of a similar risk profile, there are unique challenges for food delivery riders as they face relatively low barriers to entry and may not plan to do the work either regularly or for a long time. For example, data from a survey about gig economy workers indicates that 28 per cent of participants access a platform less than once a month, 47 per cent spend less than 5 hours a week on a platform, and over 60 per cent have been involved with the work for less than 2 years.¹

This may mean that gig economy participants spend less time considering the types of challenges and risks they may encounter in the gig economy and their insurance needs. They may also be reluctant to pay a fixed, up-front cost when they are unsure how much they will actually use the

¹ Prof Paula McDonald, Dr Penny Williams, Prof Andrew Stewart, Dr Damian Oliver, A/Prof Robyn Mayes. [Digital Platform Work in Australia: Preliminary findings from a national survey](#). Victorian Department of Premier and Cabinet; 18 June 2019, 45 pages.

platform, especially as 14 per cent of those who have been on a digital platform for more than 12 months report that they “did not get any work” during that time.²

The Commission believes these factors justify considering options to ensure appropriate personal injury insurance arrangements for food delivery riders and welcomes the discussion paper to inform the issues and develop an evidence base.

The Commission believes food delivery riders, when fully informed, are the best judge of their own individual needs.

Further development of the options should be informed by close engagement with food delivery riders to understand their preferences, especially considering the potential impacts on their earnings or the availability of work. Food delivery riders may find it difficult to engage in the current consultation process and SIRA should make proactive efforts to target this group. Engagement channels could include surveys and focus groups. Food delivery riders should clearly hear both the advantages and disadvantages of different approaches, including by making clear the potential costs of higher minimum standards. Some policy features (such as income supplementation) may not be desirable for all food delivery riders.³

As part of this, SIRA should also undertake additional research to understand the specific needs of food delivery riders to capture the broad range of perspectives within the sector. This should include looking at those who use the platforms with varying frequency, those who may use multiple platforms and those who are reliant on this work as their primary source of income.

Recommendation 1 – SIRA to conduct research to understand the preferences of food delivery riders

Minimum standards should be developed based on the preferences of food delivery riders operating in the gig economy. Feedback should be sought on both the advantages and disadvantages of different levels of protection.

Given the large number of people who act as food delivery riders, and the widely varying nature of their participation in the ecosystem, SIRA should conduct a broad survey, customer-mapping and other research to better understand:

- the different usage profiles of the food delivery riders
- the needs of different groups and their insurance preferences
- the sensitivity of each profile to potential costs of different approaches (including potential second-round impacts on earnings and the availability of work).

² Prof Paula McDonald, Dr Penny Williams, Prof Andrew Stewart, Dr Damian Oliver, A/Prof Robyn Mayes. [Digital Platform Work in Australia: Preliminary findings from a national survey](#). Victorian Department of Premier and Cabinet; 18 June 2019, 45 pages.

³ For example, if income protection insurance would reduce fees paid to food deliver riders.

Robust regulatory impact assessment to inform assessment of options

The discussion paper clearly sets out the objectives of this stakeholder engagement exercise and helpfully invites feedback early in the process. The early feedback provided by stakeholders should inform further development and detail about the options it proposed which in the discussion paper are presented at a very high-level. While the Commission has preliminary views, it has insufficient information and detail on the proposed options to identify a preferred option.

A suggested approach is to narrow down the set of potential options with further clarity over what they would mean in practice. This includes indicating:

- levels of protection proposed under each option (including potential sub-options in the event different levels can be achieved under each option)
- coverage and scope of protection
- how any costs would be paid for.

This additional detail will allow stakeholders to provide more specific feedback including suggestions for possible improvements. Once consultation has concluded, robust regulatory impact assessments should assess the costs and benefits of alternative options, including how they align with the preferences of food delivery riders. The regulatory impact assessment should be prepared in line with NSW Government policies and guidelines as described in NSW Treasury TPP19-01⁴

Recommendation 2 – SIRA to consult on detail options and assess regulatory impact

SIRA should provide detailed options to allow stakeholders to clearly understand the impact of each option and recommend specific improvements. This paper should include findings from the research conducted in Recommendation 1. Robust regulatory impact assessments should assess the costs and benefits of alternative options.

Workers compensation system not fit for purpose

The Commission does not, in general, support the use of the existing workers compensation system for participants of the gig economy that are not otherwise considered to be employees.

A key focus on the workers compensation system is to help an injured employee return to work. Steps to achieve that may include changing work patterns, assuming alternative responsibilities for a period or slowly building up hours in the staff member's normal role. The workers compensation system has also developed in a manner recognising that employers have a relatively high degree of control over the workplace and the manner in which work is performed.

Some of these functions are compatible with employment but are not necessarily easily integrated into arrangements underpinning the services performed by food delivery riders.

⁴ This guide can be found on Treasury's website (<https://www.treasury.nsw.gov.au/sites/default/files/2019-01/TPP19-01%20-%20Guide%20to%20Better%20Regulation.pdf>)

Given potential incompatibilities, the Commission favours solutions that recognise the arms-length relationship between digital platforms and food delivery riders.

Recommendation 3 – A fit for purpose solution should be developed

The new scheme should be configured in a way that aligns with the typical arm's length relationship between digital platforms and food delivery riders rather than force them into a system designed for more traditional employees. A fit for purpose solution should be developed.

The Commission's preferred approach

The Commission's preliminary view is to favour further exploration of option 2 which would require food delivery platforms to provide personal injury insurance for their food delivery riders that meets prescribed minimum standards. This option is preferred because it appears impractical for food delivery riders to secure their own insurance given the diversity in hours worked, tenure of performing this type of work, demographics and composition of participants, and limited barriers to entry. Under this approach, neither the digital platform nor the food delivery rider should be able to opt-out of minimum standards, however platforms and food delivery riders should be able to opt into higher requirements if they choose.

Standard of protection

The Commission believes SIRA should draw on all available research to develop a standard of protection that is universal across food delivery platforms. In accord with Recommendation 1, this should be informed by the preferences of food delivery riders. Once developed, the standard should be used to inform further refinement of implementation options and should not be used as a means of defining or redefining employment or contractual status.

Cross-border implications

There would be merit in consulting with other Australian jurisdictions to facilitate a nationally-consistent approach to the greatest extent possible. Implications for border communities should be understood when further developing options (such as food delivery riders working in Tweed Heads and Albury).

Universality and cost pass-through

The discussion paper does not provide any information on how additional insurance costs would be paid or their likely magnitude, though the Commission believes there is merit in ensuring industry-wide adoption so that market conditions do not limit the ability for platforms to factor these costs into their pricing.

Market-based solutions

Given the Commission's view that the existing workers compensation scheme is not fit for purpose, the Commission recommends further exploration of option 2 which would require food delivery platforms to provide personal injury insurance that complies with prescribed minimum standards for their food delivery riders.

The Commission's preliminary support for option 2 is based on a preference for exploring market-based solutions before considering government schemes. That said the Commission notes that the viability of option 2 depends on the ability for insurance markets to offer suitable products and alternative approaches may need to be considered.

Recommendation 4 – Minimum standards should be adopted industry-wide and opportunities to harmonise across jurisdictions should be explored

Minimum standards should apply universally across the sector, with no ability to opt out. Opportunities for harmonisation should be explored and further development of options should consider the needs of food delivery riders who operate in border regions.

Recommendation 5 – Perform an insurance market study to assess the viability of option 2

The Commission recommends further exploration of option 2 which would require food delivery platforms to provide personal injury insurance that complies with prescribed minimum standards for their food delivery riders.

The Commission notes that the viability of option 2 depends on the ability for insurance markets to offer suitable products to gig economy platforms and participants to the extent required by the prescribed minimum standards. The insurance sector should be engaged to ensure the availability of a minimum number of affordable products prior to introducing new insurance requirements.

Should a market study reveal doubts as to the availability of suitable insurance products, the Commission would welcome further consideration of the establishment of a new scheme (as per options 3 or 4) which would facilitate implementation of equivalent minimum standards.

Other considerations

Work status of gig economy participants

The discussion paper notes, "There has been no definitive judicial consideration of whether people providing food delivery gig economy services are workers...". The Commission notes recent court decisions have prompted ongoing discussion on this subject.

While that question remains unresolved, the Commission notes that some food delivery platforms have expressed a view that work status, together with the requirements of their business model, constrain the nature of benefits they offer riders using their platforms.^{5,6} This is because the

⁵ Uber. Submission to "Inquiry into Impact of technological and other change on the future of work and workers in New South Wales." Sydney: NSW Parliament; 31 August 2020. 16 p. Submission No 13

⁶ Deliveroo. Submission to "Inquiry into Impact of technological and other change on the future of work and workers in New South Wales." Sydney: NSW Parliament; 31 August 2020. 16 p. Submission No 10 para 6.4.2

provision of some benefits may have implications for work status giving effect to other regulatory requirements which are incompatible with their business model.

In submissions to these reviews, some gig economy platforms have argued for changes to Commonwealth legislation to allow the provision of benefits to contractors (including insurance for accident and injury, third party liability and income protection) without affecting work status.⁷

Recommendation 6 – Consider work status when assessing the suitability of options

The Commission accepts that the business models of some food delivery platforms may be incompatible with certain contractual arrangements. For this reason, the Commission believes that any regulatory changes should minimise unintended consequences impacting the viability of gig economy platforms. This includes considering potential implications for work status when assessing the suitability of options.

Information and guidance for gig economy participants

The Commission notes option 1 would include increased education and awareness about existing personal injury and income protections. Regardless of whether it is the preferred option, the Commission believes better education and awareness should complement the final approach.

Information and advice intended for small business audiences may be useful for gig economy participants even though this information is not generally prepared with gig economy participants in mind. NSW Government and other stakeholders have an opportunity to further support gig economy participants by leveraging existing resources; information and advice currently provided to small businesses could be further targeted to incorporate the needs of gig economy participants.

As a starting point, the Commission is reviewing its own information and guidance to identify opportunities to improve useability for gig economy participants. Equivalent initiatives across other government agencies that interact with gig economy participants would be similarly beneficial.

Recommendation 7 – Inclusive small business guidance

An inclusive approach should be taken when preparing small business guidance. The potential needs of gig economy participants should be considered when developing guidance materials for small businesses. Communications specifically targeting the gig economy audience is welcome and needed to implement any insurance solutions.

Dispute resolution and transparency

The Commission has previously heard from gig economy participants who have indicated difficulties communicating with a digital platform (such as in the event access to a platform is suspended), but it is noted that these enquiries have involved other types of gig economy platforms not directly

⁷ Deliveroo. Submission to “Inquiry into Impact of technological and other change on the future of work and workers in New South Wales.” Sydney: NSW Parliament; 31 August 2020. 16 p. Submission No 10 para 6.4

involved in food delivery. These cases pose potential considerations when developing appropriate administrative arrangements for any new insurance requirements. In developing appropriate arrangements, consideration should be given to:

- appropriate channels to communicate with digital platforms, including email and phone numbers
- ensuring timely responses to enquiries
- transparency around decisions
- the accessibility of important information such as contracts.

When designing options, the Commission recommends SIRA include clear requirements for digital platforms to provide simple and transparent ways to view entitlements, start a claim process and escalate any ongoing disputes. These processes must be available to food delivery riders regardless of the status of their account.

Recommendation 8 – Digital platforms be required to implement transparent and accessible dispute resolution processes

These processes should include:

- publicly accessible information showing internal and external dispute resolution processes including clear internal dispute resolution contact points
- access for account holders to key information such as contracts, history of payments and status of any dispute for a period of several years after their account is suspended.