



HOUSING INDUSTRY ASSOCIATION



Submission to the
State Insurance Regulatory Authority (SIRA)

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

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contents

ABOUT THE HOUSING INDUSTRY ASSOCIATION	3
1. INTRODUCTION	4
2. COVERAGE OF THE WORKERS COMPENSATION SCHEME	5
2.1 GIG-WORKERS	5
2.2 DEEMING PROVISIONS	6
2.3 CURRENT PROTECTION IN PLACE.....	6
3. CONCLUSION.....	7

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 60,000 member businesses throughout Australia.

HIA members comprise a diversity of businesses that operate in the residential building industry including the top Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

“promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct.”

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors are reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationery, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

HIA provides this submission in response to the discussion paper released by the State Insurance Regulatory Authority (SIRA) in April titled 'Consultation on Personal Injury Insurance Arrangements for Food Delivery Riders in the Gig Economy' (Consultation Paper).

The Consultation Paper examines personal injury insurance arrangements and sets out proposed mechanism and potential options for mandatory injury insurance for food delivery riders in the gig economy in NSW.

The Consultation Paper proposes to amend the *Workplace Injury Management and Workers Compensation Act 1998* (Act) to expressly extend coverage of the scheme to food delivery riders industry in the gig economy.

HIA opposes any changes to the current application and operation of the NSW workers compensation scheme ('the Scheme'). HIA supports a continuation of the status-quo with no changes to the current scheme as to who is, and is not, a 'worker' for the purposes of coverage under the Scheme.

HIA's submission responds solely to Option 6 which proposes to expressly expand the coverage of the Scheme to 'gig workers'.

If adopted Option 6 would represent a significant shift in relation to the operation of the Scheme.

It is also likely that this expansion would lead to an additional monetary burden reflected in increased workers compensation premiums across the broader economy.

Finally, the proposal sits at odds with the existing approach to the determination of who is a 'worker' for the purposes of the Scheme and is contrary to decisions of the Fair Work Commission and the advice of the Fair Work Ombudsman on this matter.

HIA does not support, especially in a system where the Federal Government regulates industrial relations, state-based workers compensation schemes significantly diverging from the common law concept of who is a 'worker' or an employee and entitled to workers compensation.

HIA is also concerned that there will be unintended consequences of the proposal including consequences for independent contracting arrangements in the residential building industry.

The residential building industry relies heavily on contracting as a way of productively managing the needs of building businesses, especially smaller businesses, for short term specialist skills and equipment. Attempts to introduce a new class of contractor in the hope of resolving gig economy issues could inadvertently impact on the independent contracting in the residential building industry which will undermine the contribution of the sector to overall economic growth and exacerbate the challenge of making housing more affordable.

Independent contracting also provides a platform on which new and innovative businesses emerge. Many thousands of new contracting businesses start in residential building each year, some prosper into growing enterprises and some fail. Reclassifying independent contractors as some other type of entity would put this entrepreneurial spirit at risk.

If adopted, Option 6 represents the setting of an inappropriate precedent regarding the classification of workers.



The Scheme does not, and should not, be expanded to cover genuine independent contractors. Such an extension has the potential to undermine the Scheme as a whole.

2. COVERAGE OF THE WORKERS COMPENSATION SCHEME

As outlined in the Consultation Paper, 'Workers' are captured by the Scheme and have a specific definition under the Act.

A 'worker' is *'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)'*¹.

The Act also provides that other individuals may be deemed a worker, subject to specific criteria, such as some sales persons paid on commission or a person engaged by a labour hire agency or group training organisation.

HIA supports the current approach of the Scheme in relation to who is, and who is not considered a 'worker' for the purposes of the statutory regime.

2.1 GIG-WORKERS

Working arrangements via technological platforms are not new. In fact, the Scheme is uniquely designed to respond to all forms of working arrangements through its existing mechanism to deem individuals as workers for the purposes of the Scheme.

To that end HIA would highlight that the current approach under the Scheme, deal with their classification appropriately.

New forms of workplace arrangements have been a feature of the Australian economy for decades with celebrated court cases establishing the status of encyclopaedia salespeople, bicycle riding couriers and labour hire workers. Importantly all of these cases were settled using the long standing distinction between common law employees and independent contractors and thus, gig economy workers can and should be managed using these long standing and well developed legal tools.

Where state and federal governments have attempted to codify independent contractors and deem some to be employees they have invariably added complexity, confusion and cost to business operations, particularly for small businesses. HIA would actively discourage any attempt to do the same.

There is no reason why the common law tests could not be applied to the gig economy workers. Not all gig economy workers work in the same way so adding additional regulations to try to resolve the issue would seem counter-productive.

There have been a number of cases that consider the threshold question of whether 'gig-workers' are employees (and therefore workers) or not.

Recent judicial inquiry has more often concluded that, food delivery riders are considered independent contractors, not employees.

For example, a Full Bench of the FWC found that an Uber Eats delivery driver was an independent contractor who had significant control over when they worked, for how long they worked, which delivery requests they performed and the type of vehicle used.¹ In that case the multifactor test was appropriately

¹ [Amity Gupta v Portier Pacific Ltd; Uber Australia Pty Ltd t/a Uber Eats \[2019\] FWC 5008](#)



applied to determine whether the individual was an independent contractor or an employee.² Conversely, in a separate decision the FWC found that a former Foodora driver was an employee.³

Both cases considered well-established case law and applied it to different factual circumstances involving 'gig-workers'. Problematically, the Consultation Paper proposes to lump all such 'gig-workers' into the same category. However, as the two FWC cases illustrate, they are not all the same and the existing legal regime is already equipped to deal with it.

The failure to insure workers is currently an offence under the Act. HIA would suggest that SIRA enforces the current legislative regime for those gig workers who are in fact workers and not independent contractors using existing law.

2.2 DEEMING PROVISIONS

The Consultation Paper notes that an option to cover gig workers, for the purposes of the legislation, is to 'deem' them as such to:

“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.”⁴

The current provisions that deem workers, who would not traditionally be considered workers, include some sales persons paid on commission or a person engaged by a labour hire agency or group training organisation. They would appear to be a small cohort. The proposal would change the use of such 'deeming' provision to make independent contractors workers for the purposes of the Scheme.

HIA opposes this approach.

2.3 CURRENT PROTECTION IN PLACE

Currently, some food delivery riders will have access to entitlements under the motor accidents CTP scheme. 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.

This also applies to food delivery bicycle riders injured in motor accident in NSW who can also apply for statutory benefits if not covered by the workers compensation scheme.

Example of other protections that are already in place are:

- Common law claims for damages under the *Motor Accident Injuries Act 2017* for injured food delivery riders who were not at fault in the motor accident and whose injuries are not classified as 'minor'; and
- Financial compensation claims for certain close relatives under the *Compensation to Relatives Act 1897* where a food delivery dies as a result of a motor accident and was not the at-fault driver.

These current measures provide adequate coverage and protection to injured food delivery riders.

Furthermore, as outlined in the Consultation Paper, deeming 'gig workers' as workers do not necessarily solve the issue as some food delivery riders also delegate gigs to others and log onto

² *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1;160 CLR 16;60 ALJR 194; 63 ALR 513

³ [Kloogger v Foodora Australia Pty Ltd \[2018\] FWC 6836](#)

⁴ Page 7 of 10 of [Consultation Paper](#)



multiple food delivery platforms concurrently. The question then remains on who will benefit from this Scheme.

3. CONCLUSION

HIA considers that the proposal outlined within the Consultation Paper is a major reform and represents a significant shift in approach to who are considered 'workers' for the purposes of the Scheme.

The Scheme is broadly meeting its objectives. HIA opposes the proposal to extend the Scheme to genuine independent contractors (called gig-workers or otherwise).

There has not been an adequate case made out for change. HIA supports a continuation of the status-quo with no changes to the current scheme as to who is, and is not, a 'worker'.

