

# Response to Consultation

Personal injury insurance arrangements for food delivery riders in the gig economy

# 1. Introduction

icare welcomes the consultation on personal injury insurance arrangements for food delivery riders in the gig economy and the opportunity to provide feedback on potential options for mandatory injury insurance for food delivery riders in the gig economy.

The scope of workers compensation coverage for food delivery riders in the gig economy is not a new issue, however the recent injuries and death suffered by food delivery riders has raised community concern about the role of workers compensation for workers in the gig sector. Recent workers compensation claims by gig workers have led to increased uncertainty about how the growth of the gig sector could impact the sustainability and fairness of the NSW workers compensation scheme, as well as the exposure to gig workers themselves.

While the gig economy has been growing with more flexible and tailored services available to consumers, icare notes that the Discussion Paper is confined to food delivery rider in the gig economy. As the gig economy engages independent contractors<sup>1</sup> the status of their employment relationship does not sit neatly within the current definition of a 'worker' for the purposes of the workers compensation Acts. It is icare's experience that similar definitional challenges apply for other 'gig' services and recommends that any solutions developed for food delivery riders should be capable of being extended to all gig economy workers over time.

In 2017, having received its first claim from an Uber driver, icare raised with SIRA its concerns about potential negative impacts of the gig economy on sustainability of the NSW Workers Compensation Scheme and proposed some possible policy responses. Since that time further information has developed about the complexities of the gig environment and the impact for food delivery riders.

The main complexities identified in interpreting the current NSW Workers Compensation legislation to gig economy workers, including food delivery riders, includes determining whether they are "deemed workers" under the legislation and calculating average weekly earnings for those who have multiple casual jobs.

The inconsistencies in legislation and contractual arrangements between workers and gig platforms and across jurisdictions has led to confusion and uncertainty. icare seeks to ensure that injured workers employed within the expanding gig economy have the same clarity of their coverage as other workers.

The more recent creation of private sector injury insurance offerings designed specifically for on-demand workers (including for Airtasker, Roobyx, Uber) provide an alternative pathway to legislative change or legal action. However, the current lack of clarity for workers is further complicated if the benefits are different to those in regulated workers compensation schemes.

icare welcomes the opportunity to support SIRA's policy development process by providing our insights, subject matter expertise (particularly in pricing and underwriting, claims and injury management), operational experience, data and input into proposed policy options as these are developed by SIRA.

icare is also pleased to note SIRA's intent to consult at State, Territory and Commonwealth levels on this issue. This is vital as most of the platform providers operate at a national level and the Commonwealth has employment regulation and other regulatory responsibilities that intersect with the regulation of gig platforms.

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<sup>1</sup> Actuaries Institute. The Rise of the Gig Economy and its Impact on the Australian Workforce. Green Paper. December 2020. Referenced in the Discussion Paper, p. 3.

## 2. Claims Received to Date

The Nominal Insurer has received 207 claims for injuries on the following major food delivery rider platforms since 2019: Deliveroo, Doordash, Easi Australia, Hungry Panda, Menulog, Uber Australia.

Liability for 43 of these claims have been accepted with:

- 40 of the claims for injuries with Deliveroo being accepted before Deliveroo made the decision to adjust its rateable remuneration to exclude the remuneration of its riders as of 14 October 2019. Generally in these claims there was an absence of evidence of concurrent employment, that the rider was carrying on a business on their own account or had sublet their supplier agreement.
- 3 of the claims relating to administration and management staff injuries with Menulog, Easi Australia and Uber Australia.

The rest of the claims have been disputed, closed after provisional payments or liability is yet to be determined.

icare is aware of one claim that has resulted in an injured food delivery rider entering the Lifetime Care Scheme as a result of being hit by a registered motor vehicle.

icare has not yet made any allowances for food delivery riders in its levy setting for the Lifetime Care Scheme due to uncertainty of the exposure, but has flagged it as a risk. The potential for an increased number of entrants to the CTP Care scheme has been incorporated into the levy setting, but no adjustment has been made for level of risk as there is not yet sufficient information to apply risk settings.

## 3. Options proposed

icare understands the six options for food delivery riders under consideration at present include:

1. Maintain the 'status quo', but with increased awareness of existing schemes and benefits available to some workers;
2. Requiring gig platforms to provide personal injury insurance sourced from the insurance market (with prescribed minimum benefits and coverage standards);
3. A new personal injury scheme to provide a safety net focused on short-term income support and medical benefits, lifetime medical care for catastrophic injuries and lump sum compensation for fatalities;
4. A scheme modelled on CTP benefits;
5. A scheme modelled on workers compensation protections; and
6. Extending the existing workers compensation scheme to cover food delivery riders by deeming them 'workers' for the purposes of the existing workers compensation legislation.

SIRA is considering the possible benefits structures, insurance principles, funding arrangements, current protections, implications of public and private insurance models and reduction of administration costs in any proposed scheme.

Irrespective of the final solution proposed, icare is ready and willing to work with SIRA to provide insights, subject matter expertise, data and input into these and to explore how the proposed models would interact with the existing workers compensation framework and other schemes (particularly CTP).

icare is well-positioned to provide input in the development of any new food delivery rider/gig economy insurance product and to assist in resolving key issues, including:

- appropriate product range options – benefit and lump sum product options
- pricing, underwriting, system and distribution
- reinsurance and capital issue
- portability of cover and benefits between employers
- premium models, including incentivisation of better safety practices
- risk profiles of different models

icare is keen and ready to participate in a design phase and provides the following insights from its current experience to inform the questions raised in the consultation paper.

### **3.1 Worker/Deemed worker vs independent contractor (as it relates to food delivery riders)**

Should the status-quo, or some other form of workers compensation and/or CTP cover be maintained, clarification and simplification of the existing workers compensation scheme in relation to food delivery riders is required. Of most concern to icare is that the legal relationships between food delivery riders and other gig economy workers, and the online platforms are not always amenable to the definitions of employee and employer under workers compensation laws. This has meant that liability decisions in the workers compensation scheme have significant complexity and may not result in compensation being available to an injured person. Other forms of compensation may not provide sufficient support or incentive for the worker to return to work in a timely fashion.

On a claim by claim basis, legal advice obtained regarding the status of gig-economy workers has been mixed in terms of whether the injured/deceased worker could be considered a worker or a deemed worker for the purposes of the *Workers Compensation Act 1987*. Recent proceedings in the Personal Injury Commission were discontinued as the Applicant had not joined the relevant uninsured entities to the proceedings as required by section 142B of the *Workers Compensation Act 1987*. The Member stated at this time that *"based on the evidence before him, his preliminary view was that there was certainly no contract of service such that the applicant would be considered a worker and indeed he stated that he was having difficulties seeing how the applicant could even be considered a 'deemed' worker. The Member stated that these were only his preliminary views."*

While it is accepted that all claims need to be assessed on a case by case basis, the primary issues are:

- there is often a lack of certainty or evidence as to which entity(ies) was engaging with the worker and;
- the nature of the relationships do not fit in clearly with either section 4 or clause 2 to schedule 1 of the 1998 Act.

The outcome of this is that often more costs are being spent on investigations and legal advice than on benefits and lump sum compensation payments. The absence of clearly defined provisions in the legislation and the lack of any case law increases claim management and administrative costs.

Under current workers compensation legislation, food delivery riders are unlikely to be covered by workers' compensation insurance if their employment status is akin to that of an independent contractor, however there is some lack of clarity in the interpretation of this legislation. Examples include:

- a claim for death benefits made on 13 November 2020 by the family of a delivery rider for HungryPanda who died as a result of a road accident in NSW on 29 September 2020. A decision disputing liability for death benefits on the grounds the deceased was not a worker or deemed worker within the meaning of section 4 of the *Workers Compensation Act 1987* and Schedule 1 of the *Workplace Injury Management and Workers Compensation Act 1998* was issued on 12 January 2021 and has not yet been challenged before the NSW Personal Injury Commission.
- The families of delivery riders for Uber Eats who died as a result of road accidents on 24 September, 21 November and 23 November 2020 have also brought claims for death benefits. Liability for these claims remain undetermined. icare understands that should liability for any of these claims be disputed on the grounds that the deceased was not a worker or deemed worker, the TWU plans to pursue a test case before the Personal Injury Commission.

At this time it has not been confirmed if there are concurrent claims for CTP benefits for these incidents.

Further to this, there appear to be interpretation differences between arrangements such as those related to delivery platforms and those related to task platforms. With the delivery rider/driver related claims, the alleged employer is generally the entity that engaged with the worker for provision of the technology platform and not the end user (ie the person or restaurant who engaged with the rider).

This is not consistent with what is seen with claims related to task based platforms, where the alleged employer was generally the person or entity who posted the task. In one such claim, it was assessed that the person who responded to the task would be likely be a worker and definitely be a deemed worker for the purposes of the 1998 Act. There may be implications for people not engaged in a business activity, who engage through task platforms on an ongoing basis with the same person. These situations may create deemed employment relationships, in which the job tasker would likely never consider that they may be a deemed employer.

In the absence of a definitive legal or policy response to this issue, it is very likely there will be a significant increase over the next five years in claims from gig workers who are not covered by workers compensation or other personal injury insurance, and whose care and support costs contribute to a growing uninsured liability for the Nominal Insurer. The outcomes of such a development would be:

- a growing number of NSW employers failing to take out workers compensation insurance for their deemed employees, including as a result of lack of knowledge of the potential employer status;
- NSW employers paying higher premiums to cover the costs of uninsured injured workers in the no-fault scheme;
- a reduced ability for icare to use the Nominal Insurer's primary lever - aligning premiums to claims performance - to incentivise better safety performance;
- increases in the cost of uninsured liabilities in the Nominal Insurer.

The future scheme design should clearly outline the role of the Nominal Insurer and/or any other provider, and ensure that education is targeted at all gig economy work, not just those of food delivery riders. It should also provide clarity on whether it is intended to be a no-fault scheme.

### **3.2 Calculating weekly benefits**

Calculating weekly benefits is also problematic under the current workers compensation legislation. While claims for injured workers in concurrent employment are not uncommon, claims for food delivery riders are particularly challenging because they are more likely to involve an individual who has multiple employers.

Assessment of claim liability and Pre-injury Average Weekly Earnings (PIAWE) involves a detailed review of the nature of the relationships between the injured person and each “employer”. If an employment relationship is established, then PIAWE is calculated with regard to Schedule 3 of the *Workers Compensation Act 1987*, which may involve all earnings from all employers. This often takes employers in the more traditional employment setting by surprise and icare is concerned that employers may not be aware that PIAWE for their employees may also include income derived from another, or multiple, employers.

It is also likely that gig workers will dispute PIAWE where it does not include all income from all sources, irrespective of the determination with regards to employment relationship, as the injured person is likely to have limited understanding of the nature of the relationship with the gig entity and its interpretation under the Workers Compensation Act.

In most cases PIAWE will be calculated using the sum of:

- actual earnings of the worker, that is all amounts paid or payable to that rider including “drop fees” and bonuses;
- piece rates and commission, and
- the monetary value of non-pecuniary benefits if they are removed.

In some cases it may also be arguable that:

- any administration fee charged by the platform should be subtracted;
- tips could be included in the PIAWE calculation; and
- equipment deposits should also be excluded.

Should weekly benefits be part of the benefits structure for the personal injury insurance solution for food delivery riders, consideration will need to be given to an approach to calculating weekly benefits for those riders.

### **3.3 Risk to the Nominal Insurer**

The food delivery economy presents an increased risk of exposure to uninsured claims responded to by the Nominal Insurer, however icare has been unable to understand the level of the risk as it only has access to the claims lodged and paid for by the Nominal Insurer. The number of riders, the number of injuries in which no claim is made and the wages earned are unknown.

To illustrate the potential impact, over the past two years (2020/2021 policy periods) Uber, Airtasker and Deliveroo have paid total premiums of \$891k and the Nominal Insurer has paid claims cost of \$1.9m. Premiums are only received for administration staff yet claims have been lodged by riders and drivers. When a claim is lodged by a rider the liability determination must consider whether the rider making the claim is a deemed worker. 21 of the 22 claims paid in that period were for Uber drivers.

### 3.4 New private injury insurance for gig workers

Another development running in parallel to legal developments and calls for legislative reform is the rollout of various private sector accident and injury insurance models designed specifically for gig/on-demand workers. Some of these insurance models are paid for by the gig worker, others by the gig platforms.

Existing insurance products (e.g. Airtasker, Roobyx, Chubb) may not prevent an entitlement to workers compensation, meaning the Nominal Insurer is still exposed and workers could potentially make a claim under both policies.

In designing a policy solution, consideration needs to be given to the availability, scope and benefit structure of alternate products and the desired alignment to current workers compensation benefits. Two examples are:

- *Airtasker* In August 2017, Airtasker introduced an opt-in personal injury insurance policy, allowing workers to direct part of their earnings on the platform towards an insurance policy offered by Roobyx. The premium was calculated weekly based on how much the Airtasker worker earned in the previous week on the platform.

From 1 April 2018, Airtasker has provided all registered Airtasker workers with some protection in the event of an accident resulting in injuries covered under the policy<sup>2</sup>. The cover operates while the Airtasker worker is performing the task and during their direct travel to and from the task location, and is valid regardless of the party whose negligence resulted in the accident (no-fault). Benefits are listed as:

- Accidental death or permanent disablement: Lump sum payments of up to \$100,000
- Accidental broken or fractured bone(s): Lump sum payments of up to \$6,000

Airtasker refers to this insurance as a minimum safety net: “Taskers are also encouraged to review and increase the proposed cover to a level which is in keeping with their personal work/lifestyle requirements. Likewise Taskers are encouraged to take out Income Protection insurance which is also available from Roobyx.”

- *Uber Eats* In Australia, Uber Eats delivery-partners are now covered by a group insurance policy with Chubb should an accident or injury occur while they are on trip.

Under this policy for its riders eligible dependents can receive a maximum of a \$400,000 lump sum and potentially \$5,000 for each spouse or dependent, but this falls short of the death benefits available under NSW workers' compensation laws of a lump sum up to \$834,200 and weekly payments for each dependent child until 16 years of age<sup>3</sup>.

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2 Airtasker website, <https://support.airtasker.com/hc/en-us/articles/360000852967-What-is-Personal-Accident-Cover-and-how-does-it-work-for-Taskers->

3 Tech Crunch, 23 May 2018, <https://techcrunch.com/2018/05/23/uber-expands-its-accident-insurance-across-europe/>

### **3.5 Evolving employment structures**

Policy development needs to consider the degree to which the options respond to future employment structures. For example, Menulog are piloting employment trials.

Before a Senate select committee inquiry on 12 April 2021, Menulog announced it was commencing an employment trial with its Sydney couriers. While this trial is not yet a commitment to a long-term employment plan, Menulog will trial minimum wages and benefits for its couriers and intends establishing a new award in consultation with the FWC and Transport Workers Union (TWU)<sup>4</sup>.

To date Uber Eats and Deliveroo have declined to follow Menulog's lead but have indicated they would support portable sick leave and personal leave benefits through pooling contributions from independent contractors<sup>5</sup>. It is not clear how these provisions may impact on access to personal injury insurance cover (whether under workers compensation, CTP or other models) and determinations, for example, of PIAWE or other benefits.

### **3.6 Other Considerations**

In icare's view any policy development should consider the following factors:

- Nature of the work performed by food delivery riders is generally of a higher-than-average risk (e.g. on-road drivers, heavy manual work) and how premiums could be structured to incentivise safety;
- Consideration needs to be given to other 'gig' economies such as task based services, and the structure of the legislation to cover current and future potential categories;
- Lack of knowledge/understanding by employers of various working relationships that require workers compensation coverage is likely to result in under-insurance;
- Employers entering into complex contracts with workers may remove their own liability (e.g. Uber, Airtasker, Deliveroo), but not that of the Nominal Insurer, which limits the Nominal Insurer's ability to recover from the employer;
- Claims and administrative costs for uninsured liabilities are generally higher than other claims due to the investigative costs, compounded by lost premium and a low percentage of recovery;
- There is an unpredicted financial impact on gig employers resulting from recovery of claims costs and regulatory penalties which may impact the market;
- Significant impact on food delivery riders and employers due to lack of certainty over coverage and entitlements, often resulting in increased litigation and adversarial relationships; and
- As a result of lack of clarity over coverage, the claims process can be delayed many months until an injured worker consults a legal representative for guidance. This can contribute to higher claims costs, administration and legal costs and poorer recovery rates. It also means that there is an existing level of exposure that is yet to be realised by the Nominal Insurer.

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4 Luke Henrique-Gomes, Menulog announces pivot towards 'employment model' for all couriers within coming years, The Guardian, 12 April 2021, <https://www.theguardian.com/business/2021/apr/12/menulog-announces-pivot-towards-employment-model-for-all-couriers-within-coming-years>

5 Tech Crunch, 23 May 2018, <https://techcrunch.com/2018/05/23/uber-expands-its-accident-insurance-across-europe/>



Development of new policy approaches to managing these risks must ensure that:

- the Nominal Insurer does not remain on-risk for the cost of uninsured liabilities in the workers compensation scheme, without having available the operational and premium levers to effectively manage these risks;
- the Lifetime Care and Support Authority and the CTP Care Schemes are able to adjust future levies for delivery riders injured on the road.

## 4. Conclusion

icare is ready to work with SIRA to provide input and its experience into understanding the implications of the various possible models and proposed benefits structures.

As stated previously, icare welcomes the opportunity to support SIRA's policy development process by providing insights, subject matter expertise, data and input into proposed policy options as these are developed by SIRA.

icare can contribute its experience in private and public underwriting markets (including reinsurance), application of benefits and experience in Lifetime Care, CTP Care and workers compensation schemes to inform both the trajectory of claims for food delivery riders and the coverage implications for food delivery riders and other gig economy workers.

Given the pace of economic environment change since icare first received a claim from an Uber driver in 2017, and irrespective of the policy approach of incremental change or wholesale reform ultimately supported by Government, icare advocates for a response that is amenable to this changing environment and responds to the personal injury insurance needs of gig economy workers.

