

## NSW BRANCH

Level 2, 16-20 Good Street, Granville NSW 2142  
T: 1300 763 223 E: [info@awunsw.com.au](mailto:info@awunsw.com.au) W: [www.nsw.awu.net.au](http://www.nsw.awu.net.au)  
Daniel Walton National and NSW Secretary



ABN: 92 860 257 789

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Policy and Design  
Workers and Home Building Compensation Regulation  
State Insurance Regulatory Authority

By email only: [PolicyDesignWHBCR-SIRA@sira.nsw.gov.au](mailto:PolicyDesignWHBCR-SIRA@sira.nsw.gov.au)

Dear Sir/Madam,

### Consultation by SIRA on Injury Insurance Arrangements for Gig Economy Food Delivery Riders

1. Thank you for the opportunity to make a submission to the consultation by the State Insurance Regulatory Authority (SIRA) on injury insurance arrangements for gig economy food delivery riders.
2. The Australian Workers' Union (the **AWU**) is one of the largest trade unions in New South Wales, representing over 17,000 workers in a variety of industries. Although we do not directly represent workers in the food delivery industry, we have a general interest in ensuring the fair and adequate operation of the State's workers compensation insurance scheme (the **WC Scheme**) as established by the *Workers Compensation Act 1987* (the 1987 Act) and the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

### AWU's Primary Position: Gig Economy Food Delivery Riders Are Deemed Workers

3. The discussion paper issued by SIRA, and the questions for consultation, start from the proposition that there is a lack of clarity at present as to whether food delivery riders engaged by gig economy operators are covered by the WC Acts.
4. The AWU accepts the point made in the discussion paper that there "*has been no definitive judicial consideration*" of whether such workers fall within the coverage of the WC Scheme. However, in our view the 'deemed worker' provisions of the 1998 Act would appear to cover gig economy food delivery riders. As the discussion paper sets out, clause 2 of Schedule 1 to the 1998 Act deems a person a worker if:
  - a. the person has entered into a contract to perform work exceeding \$10 in value;
  - b. the work is not part of or incidental to a trade or business regularly carried on in the person's own name or in a business or firm name;
  - c. the person has not sublet the contract or employed workers to perform the contract.

5. The AWU considers that gig economy food delivery riders would meet this definition. However, even if a rider would not *technically* meet the definition (because of some complexity in relation to the contractual arrangements between the worker and the platform company – which we do not accept would necessarily be the case), it is clearly the *intention* of the legislation that such a worker would be covered by the WC Scheme.
6. Clause 2 of Schedule 1 of the 1998 Act was originally included in Schedule 1 to the 1987 Act. The passage of the 1998 reform legislation (the Workplace Injury Management and Workers Compensation Bill 1998 and Workers Compensation Legislation Amendment Bill 1998) transferred the deemed worker schedule from the 1987 Act to the 1998 Act. The Explanatory Note to the Workers Compensation Bill 1987 identifies that the provisions were themselves transferred from an earlier iteration of the State’s workers compensation legislation.
7. As such, these provisions have been in effect for over 30 years as part of the WC Scheme. Plainly, at the time they were enacted, the gig economy was not in contemplation.
8. However, if one were to ask the average member of the community: does a gig economy food delivery rider satisfy the deemed worker rules in cl 2 of Sch 1 to the 1998 Act? The answer would clearly be ‘Yes’.
9. The intention of the provision is to capture workers who (a) were not employees but (b) were not genuine independent contractors operating a business on their own account.
10. A gig economy food delivery rider is a worker who does not conduct their own trade or business and who does not engage other workers to perform work for them. They are a clear example of the kind of individual for whom the protective features of the WC Scheme’s ‘deemed worker’ provisions were developed.
11. It follows that, in our view:
  - a. as a matter of law, gig economy food delivery riders are already workers within the scope of the WC Scheme;
  - b. however, for clarity and to avoid unintended consequences, the WC Scheme should be clarified in a minor way to make it abundantly clear that gig economy food delivery riders are deemed workers.
12. This conclusion is reinforced by the recent decision of the Fair Work Commission which held that a worker engaged by Deliveroo was an employee of the business. See *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818 (*Franco v Deliveroo*).
13. The discussion paper states that none of the five major gig economy delivery businesses currently hold policies of insurance under the WC Scheme. The ‘deemed worker’ provisions noted above and the decision in *Franco v Deliveroo* suggest that Deliveroo (and other operators) may currently be in breach of s 155 of the 1987 Act (*Compulsory insurance for employers*).

#### **AWU’s Response to Specific Consultation Questions**

##### What benefits and entitlements are most important to food delivery riders?

14. In the AWU’s view, the benefits and entitlements of greatest objective importance to food delivery riders are the same as those of other workers in New South Wales. There is no principled basis

for distinguishing the insurance benefits payable to food delivery riders as compared with other workers in the State. Each should be entitled to payment of medical expenses, income support and permanent impairment compensation equally under the provisions of the WC Scheme.

What insurance pricing principles should be applied to the options and what is their impact? How should safe work practices be best incentivised?

15. The same pricing principles should be applied to the gig economy as to other sectors of the economy engaging workers. That is, premiums should be set according to the same principles as for other employers and deemed employers. A gig economy operator with a poor safety record should incur a higher premium than a safe operator, just as a construction company with a poor record does relative to better performing peers. The existing premium and incentive structure of the WC Scheme is appropriate to the gig economy.

What is the preferred funding arrangement and key considerations? And why?

16. The AWU's preferred funding arrangement is the arrangement currently applicable under the WC Scheme. The reasons for that view are the same as those set out above – gig economy food delivery workers fall squarely within the class of workers for whose benefit the 'deemed worker' provisions exist.

What are the current private insurance policy protections, costs and administration arrangements? What are current private insurance challenges for food delivery riders?

17. The AWU is not in a position to answer the first part of this question. As to the second question, individual riders would currently suffer the substantial disadvantage (from a pricing and administration perspective) of purchasing insurance on an individual basis if the platform operator for whom they are engaged refuses to purchase a collective insurance policy.
18. In addition, if they work for multiple operators, they suffer the disadvantage of needing to ensure they are insured in relation to their engagements by each operator. Individual riders subject to a collective policy are 'at the mercy' of the gig economy operator – for instance, if the insurance policy lapses and it is not renewed due to administrative error. By contrast, under the WC Scheme, workers do not bear the risk of non-insurance or failure to renew by employers.
19. (For the reasons set out in the first section, the AWU is of the view that the gig economy operators are already required to hold policies of insurance under the WC Scheme. However, we have answered this question on the basis of the information in the discussion paper which notes that these operators currently do not hold such insurance.)

What are the risks/benefits of private underwriting and service delivery by licensed insurers compared with public underwriting and service delivery for any newly developed personal injury scheme?

20. The AWU considers that the observations made in the recent *iCare and State Insurance and Care Governance Act 2015 Independent Review*, conducted by the Honourable Robert McDougall QC (the **McDougall Report**), are relevant here. Those comments were made at [186]-[189] (p 280). In particular, the reviewer stated at [188]-[189], in response to submissions by certain stakeholders that the WC Scheme return to a private underwriting model to drive improved performance and accountability:

Those propositions are at best debateable. It is entirely unclear how the economics and performance of the scheme can be improved if some of the underwriting participants are seeking to make profits for shareholders. There is no reason to think that a proliferation of management activity would do anything other than increase costs overall. Nor is there reason to think that closer management, aimed at cutting costs, would do anything other than cut down on the payment of benefits.

In my view, this policy objective - a single default statutory insurer - is as sound today as it was in 2003.

21. The AWU adopts the reviewer's position and submits that there is no principled basis to distinguish the insurance of gig economy food delivery rider injuries from other workplace injuries.

What scheme design features of any new personal injury insurance scheme are critical to minimise administrative costs and disputation levels?

22. The AWU submits that the simplest way to minimise additional administrative costs is to maintain (and clarify, if necessary) existing coverage under the WC Scheme.
23. The AWU considers that the creation of a second scheme for gig economy food delivery workers, alongside the WC Scheme, is itself likely to cause substantial levels of disputation due to the need in every case to analyse the facts of the engagement so as to identify scheme coverage. This is likely to be complicated in light of the contractual differences between different gig economy operators.
24. The only way to avoid such disputation would be for the benefits in each scheme to be identical – so as to remove any incentive to establish eligibility for one scheme over the other. However, if that is the outcome, it makes more sense to simply confirm that gig economy food delivery riders fall within the current WC Scheme.

Do you have a preferred model and why?

25. As set out above, the AWU's preferred model is Option 6 – clarification of the 'deemed worker' provisions of the WC Scheme to put it beyond dispute that gig economy food delivery riders fall within its coverage.
26. That position is adopted for the following reasons:
- a. equity – injuries to gig economy food delivery riders are workplace injuries and should be treated as such. Riders are not genuine small business operators; they are workers in the ordinary sense of the word.
  - b. efficiency – the creation of a second scheme with different statutory eligibility criteria for would duplicate administrative costs both for insurers and employers. It would also create incentives for disputation to ensure coverage by the more beneficial scheme. The diversity of contractual arrangements between gig economy operators (eg, the recent *Franco v Deliveroo* decision and the stated intention of Menulog to move towards a direct employment model) means scheme design will be difficult in comparison with clarification of the existing deeming provision.

- c. current state of the law – it is clear, in our view, that the intent of the current ‘deemed worker’ provisions is to cover vulnerable workers not in an employment relationship such as gig economy food delivery riders. The status quo should be maintained in the absence of evidence in support of an alternative scheme, subject to clarification to confirm the intent of the provisions in light of the rise of the gig economy.

27. Please contact Alistair Sage, Senior Legal Officer, should you wish to discuss this submission further on **0418 818 139** (or via [alistair.sage@awunsw.com.au](mailto:alistair.sage@awunsw.com.au)).

Yours sincerely,

**The Australian Workers’ Union**

A handwritten signature in black ink, appearing to read 'T. Callinan', with a horizontal line extending to the right.

**Tony Callinan**

Branch Assistant Secretary