

## FOOD DELIVERY RIDER SAFETY CLA's feedback on the draft guide

### Summary

This submission provides feedback on the *Draft guide to managing work, health and safety in the food delivery industry* prepared by the Joint Taskforce on Food Delivery Rider Safety. Our key concern with the draft guide is that it fails to address some of the principal issues affecting the health and safety of food delivery riders. These are issues that we know the riders themselves are concerned about, confused about and frequently ask about. These issues include:

- What are their obligations and entitlements in relation to workers compensation insurance?
- What sources of support, advice, advocacy and arbitration can they turn to?
- To whom can they complain if the food delivery platforms or outlets don't live up to their obligations?
- Who is responsible for preventing exploitation in their industry?
- What protections and remedies are there against abuse and discrimination?

A guide that fails to address these questions will not be useful to riders. In this submission, we elaborate on the above points. We recommend that the guide set out clearly what the current arrangements are in relation to these and other points. But we also argue that the current arrangements are grossly inadequate and that the taskforce should initiate significant improvements to those arrangements. Failure to do so risks further entrenching food delivery riders as a marginalised workforce at significant risk of exploitation and vulnerable to dangerous working conditions.

Civil Liberties Australia (CLA) welcomes the establishment of the Joint Taskforce (the taskforce) to explore the recent deaths of food delivery riders (riders) in New South Wales and identify safety improvements for the industry.

CLA considers basic minimum standards of working conditions to be a fundamental human right. It is recognised in international law through instruments including the International Covenant on Economic, Social and Cultural Rights (ICESCR) which Australia has signed and ratified. Article 7 of ICESCR recognises the right to fair wages, a decent living, safe and healthy working conditions, rest, leisure and reasonable limitation of working hours, as well as periodic holidays with pay.

It seems clear that Australia has failed in its obligation to ensure compliance with these basic human rights when it comes to food delivery riders. In Australia, the issue is compounded by the fact that riders are overwhelmingly recent migrants, many are subject to insecure visa conditions, and few enjoy support and advocacy from unions, local members of parliament or other representatives. These factors place them in an especially vulnerable position.

CLA appreciates the opportunity to provide feedback on the *Draft guide to managing work, health and safety in the food delivery industry* (the guide). In providing the following feedback, CLA gratefully acknowledges the expert advice and input of [REDACTED]

[REDACTED] However, the feedback provided remains CLA's alone and does not necessarily represent the views of [REDACTED]

Unfortunately, CLA believes the guide in its current form will do little to address the serious problems of health and safety in the food delivery industry. And it is not clear – from either the taskforce's website or its terms of reference – whether the guide is intended to form part of a wider and more far-reaching program of reforms or whether it will be the principal outcome of the taskforce's work.

In the absence of that clarity, we provide the feedback below in the hope and expectation that it will be taken into account *either in the refinement of the guide or as part of other reform proposals and initiatives being developed by the taskforce.*

### **Need for a clear language guide**

If one of the target audiences for the guide is the cohort of food delivery riders – for many of whom English is not their first language – and it is intended that they use the guide as a reference, then a serious effort needs to be made to make the language clearer and easier to follow. Although we in CLA have a lot of experience scrutinising complex legal language, legislation and regulations, even we find the guide difficult to understand.

To illustrate, page 1 says “Where a FDR is directly employed by a food outlet the FDR is a worker, not a contractor”. The very next paragraph says “The focus of the is [sic] Guide is specifically on workers ...” which implies that this guide is only relevant to FDRs who are directly employed by food outlets and not to FDRs who are contractors. But, page 2 says that where FDRs are self-employed (i.e. presumably a contractor), then they will be a PCBU “as well as a worker” (note the word “as” is missing in the draft). This confusion runs throughout the guide and most riders will be left wondering, “Am I a PCBU or am I self-employed or am I a contractor or am I a worker? And is this guide relevant to me? And if so which column of the table should I be looking at?”

Note that we also find that the frequent use of the abbreviations FDR, FDP, FO and PCBU makes the guide hard to read and hard to follow. In this submission, we have avoided using these abbreviations except where quoting directly from the guide. Instead, we have chosen to use terms like “rider”, “platform” and “food outlet”. You might like to consider a similar approach in order to make the guide more readable for your target audiences.

### **Self-employed food delivery riders**

The fastest growing sector of the food delivery service sector involves riders engaged through third-party platforms. Typically, the riders are required to set themselves up as independent contractors and “partner” with the platforms. According to the draft guide, when riders are set up as independent contractors, they will be considered to be a Person Conducting a Business or Undertaking as well as a worker.

This would imply that the platforms owe all the protections to self-employed riders that are required of employers to their employees by virtue of the fact that the platforms have caused the riders to be engaged. But, the same section limits this obligation considerably. The guide says the platforms have this duty at all times but only “to the extent that they influence or direct the way the work is carried out” by the riders. This implies that where platforms establish their business model in such a way as to minimise their influence and control over riders, they can correspondingly minimise their responsibility for the health and safety of the

riders. In fact, this is exactly what most platforms have already done and it is difficult to see how the guide improves the lot of the riders.

We recommend that – in further refining this guide and in its broader program of work – the taskforce should carefully consider the recent UK Supreme Court decision (*Uber BV and others (Appellants) v Aslam and others (Respondents)* [2021] UKSC 5) in which the Court found unanimously that gig workers must be considered as workers and not as self-employed. In reaching its decision, the Court reasoned that the purpose of employment legislation “is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation which exercises control over their work. The legislation also precludes employers, frequently in a stronger bargaining position, from contracting out of these protections” (quoted from the Court’s press statement of its judgement).

### **Compensation and insurance**

Workers compensation insurance is an area of considerable concern to riders and the diverse practices across the industry are causing significant uncertainty<sup>1</sup>. This is also being revealed in a current NSW Select Committee inquiry<sup>2</sup>. Recent reporting also suggests that decisions by platforms not to insure riders is exposing the state insurer to increasing costs of uninsured claims. The same reporting indicates that, once again, confusion and uncertainty over whether riders may be considered employees, workers, or contractors lies at the heart of this issue<sup>3</sup>.

We strongly recommend that the situation with regard to workers compensation insurance – whatever that situation may be – needs to be made clear in the guide for all parties. And we strongly urge the taskforce to examine improvements that can be made to the current arrangements.

While clarifying that riders – even riders who are self-employed/contractors – are workers who have been “caused to be engaged” by the platforms, the draft guide says nothing about what this means for the requirement (if any) of platforms to have workers compensation insurance for riders. It says nothing about informing riders about their workers compensation insurance entitlements and/or obligations. It says nothing about how riders can and should inform themselves about compensation and what their obligations and entitlements might be. Similarly, if as self-employed contractors, riders may be required – either by law or by the platforms – to take out workers compensation insurance for themselves, this too is not explained in the guide.

Furthermore, the guide says nothing about what entitlements riders may have to coverage under the NSW safety net, the Uninsured Liability Indemnity Scheme, if they are injured and they do not otherwise have workers compensation insurance. And it does not explain for the benefit of platforms – or food outlets – whether they may be subject to cost recovery under this Scheme. These arrangements need to be explained clearly.

Finally, the current draft of the guide says nothing about public liability insurance. The guide should explain for the benefit of riders, platforms and food outlets the rules regarding public liability in the event that riders

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<sup>1</sup> See for example “Accidents, stress and uncertainty: food delivery riders lift lid on work conditions”, The Guardian, 1 May 2018 (accessed at: [www.theguardian.com/business/2018/may/01/accidents-stress-and-uncertainty-food-delivery-riders-lift-lid-on-work-conditions](http://www.theguardian.com/business/2018/may/01/accidents-stress-and-uncertainty-food-delivery-riders-lift-lid-on-work-conditions))

<sup>2</sup> As reported for example in “Hungry Panda food delivery company under scrutiny over riders’ insurance, failure to report death to SafeWork NSW”, *ABC News online*, 23 February 2021 (accessed at: [www.abc.net.au/news/2021-02-23/hungry-panda-scrutiny-over-delivery-riders-safety-gig-economy/13182772](http://www.abc.net.au/news/2021-02-23/hungry-panda-scrutiny-over-delivery-riders-safety-gig-economy/13182772)).

<sup>3</sup> See for example “Uninsured food delivery riders expose state insurer to rising costs”, *Sydney Morning Herald*, 23 February 2021 (accessed at: [www.smh.com.au/business/workplace/uninsured-food-delivery-riders-expose-state-insurer-to-rising-costs-20210222-p574k9.html](http://www.smh.com.au/business/workplace/uninsured-food-delivery-riders-expose-state-insurer-to-rising-costs-20210222-p574k9.html)).

cause loss, damage or injury to third parties, including to customers of the service. It should explain any requirements for public liability insurance. It should explain any obligations on the part of riders and platforms to report any loss, damage or injury. And it should explain to riders what their obligations may be if required – either by law or by the platforms – to take out public liability insurance.

### **Access to the FairWork Ombudsman and to SafeWork NSW**

Again, while the guide appears to clarify that riders – even riders who are self-employed/contractors – are workers, it says nothing about what access (if any) they have to the FairWork Ombudsman and what services and support they can expect from the Ombudsman.

Again, this needs to be made clear as it is an area of considerable uncertainty. If it is the case that riders are not eligible for services and support from the Ombudsman, then this needs to be made clear to them. But, if that is the case, this issue should be examined as part of the taskforce’s agenda with a view to proposing reforms.

The guide is also silent about SafeWork NSW except for one reference to the platforms needing to notify SafeWork NSW of “serious incidents”. This silence is especially strange in a guide produced by a taskforce co- led by SafeWork NSW. For example, are riders able to use the Speak Up Save Lives app to report concerns (including anonymously) about health and safety issues? If so, why would the guide fail to mention this? This should be explained in the guide along with explanations of any other services and support available to riders from SafeWork NSW.

### **Complaints, arbitration and advocacy**

Further to the previous point, the guide says nothing about what avenues are available to riders for making complaints to any independent body about health and safety issues that affect them and whether they are able to provide complaints under conditions of anonymity – a priority issue for many riders given their insecure employment and visa conditions.

Similarly, the guide says nothing about whether riders have access to any form of independent arbitration. Nor does it say where riders can turn to for support, advice and advocacy – especially recognising the low levels of English skills and unfamiliarity with Australian laws and practices among many riders.

Just as we have recommended in the previous sections, CLA believes the guide should explain clearly what are the current arrangements that apply to riders in relation to making complaints, accessing arbitration, and seeking advice and advocacy. In the event no such arrangements exist, then that too needs to be made clear in the guide, but we would also recommend that these are issues the taskforce should seek to address as part of its work.

It is CLA’s strong view that all of these arrangements are currently inadequate. While we understand the purpose of this guide is to set out current arrangements and obligations, we put it to the Taskforce that unless these current inadequate arrangements are changed, the welfare of food delivery riders is unlikely to improve and tragic events will continue to occur.

### **Interactions between riders and platforms**

In many places, the guide refers to the obligation on riders to “consult, cooperate and coordinate” with the platforms or to provide “feedback” to the platforms on everything from app design and algorithms to training. To us, this totally misunderstands the nature of the relationship between riders and platforms, and the access riders have to decision-makers in the platforms. Generally, interactions the riders have with the

platforms are tightly constrained and are often limited to interaction via the app itself or via social media pages.

Similarly, the guide also refers to riders having a phone number for the platform, for them to be able to contact the platform or for the police to be able to contact the platform. But the guide says nothing about any obligation on the platform to maintain a phone number in the first place where they can be contacted and where the rider and the police can expect a prompt response.

## **GPS**

While the guide refers to the use of the GPS, it says nothing about obligations – either on the part of the platform or the rider – to ensure GPS used is accurate and does not lead riders who are unfamiliar with local conditions astray. It says nothing about any other obligation on the part of the platform to ensure riders receive directions – either through GPS or by other means – that take into account changing conditions and hazards.

## **Riding on footpaths**

Rules regarding riding on footpaths vary across Australia and New South Wales has among the most restrictive rules. We recommend that this issue be considered by the taskforce either as part of the further development of the guide or as part of its wider work.

## **Remedy in the event of abuse by members of the public**

The guide says nothing about what remedies riders may have in the event that they come in for abuse from members of the public – either customers of the food delivery service or from other road users. Nor does it say anything about what obligations platforms have to provide a safe workplace for riders that is free of abuse. This needs to be made clear. Again, if there are no remedies or obligations, this too needs to be made clear in the guide so that everyone understands what the situation is, but we also recommend that the taskforce consider improvements that will better reflect an obligation on the part of platforms to ensure a safe workplace for riders that is free of abuse and discrimination.

## **Weight of loads**

The guide only requires platforms to “consider human factors” in relation to the weight and distribution of loads. The obligation falls on the riders to ensure the weight “is tolerable”. In our view, this is unsatisfactory. Stricter weight limits should apply and the obligation to respect those weight limits – as well as secure packaging and weight distribution requirements – should be more fairly shared among platforms, food outlets and riders.

## **Secondary employment and study**

The guide requires riders to provide platforms with information on secondary employment and/or study. We understand this is included so that platforms can work with riders to better manage fatigue. We are not convinced that this reflects the real world of how platforms interact with riders. There are also privacy considerations. Furthermore, many riders will be wary about providing work and study information given sensitivities over visa conditions for many riders. We would not like to see failure to provide secondary employment and study information as a convenient excuse for platforms to avoid responsibility and duty of care.

## **Theft of equipment**

Theft of vehicles and equipment is not addressed in the guide, but it is a major factor in the safety of riders. The guide refers to things such as Go Pro cameras, mobile phones and GPS. It does not reflect concerns among riders about the loss through theft of expensive equipment and the vulnerability they feel to attack and robbery. The guide says nothing about any responsibility on the part of the platform in the event of losses incurred by riders through theft or any obligation to ensure riders are safe as they go about their work. It says nothing about where responsibility for insuring equipment lies. This needs to be addressed.

## **COVID, hygiene and access to toilets**

While we understand the guide is intended for long-term use, we would still recommend that the guide explain the obligations and expectations of platforms, riders and food outlets in relation to social distancing and safety practices under COVID.

Similarly, we recommend that the guide explain the obligations on platforms and food outlets to assist the riders to maintain good hygiene practices – for example, by ensuring they have access to the bathroom facilities and hand sanitiser of the food outlets – so that they are fit to handle food despite their arduous physical work.

## **Inspection and compliance**

Finally, the guide says nothing about what (if any) obligations platforms, food outlets and riders have to cooperate with any inspectors or regulators (including SafeWork NSW itself) that enforce the guidelines and rules relating to rider safety contained in the guide or elsewhere. This should be remedied.

In the event that there is no rigorous system of inspection and compliance checking, this should be addressed in the work of the Taskforce.

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