



TWU
Carrying Australia

Submission to the “Safe Work NSW and Transport NSW Taskforce into Food Delivery Worker Deaths”

26 February 2021

The Transport Workers' Union of Australia

About the TWU

1. The Transport Workers' Union of Australia (**TWU**) represents tens of thousands of men and women in Australia's aviation, oil, waste management, gas, road transport, passenger vehicles and freight logistics industries. The Transport Workers' Union of NSW (**TWU NSW**) is the largest branch of the TWU and represents workers within the State of NSW.
2. The TWU represents 70,000 transport workers in Australia today, including 20,000 owner drivers. With over one hundred years' experience in conducting Australia's passenger and freight task, the TWU has been proactive in establishing industry standards that improve the lives and safety of transport workers, their families and the community. This work has included a long history of establishing innovative regulatory systems which have, among many things, helped to ensure that owner drivers, classified as contractors, and other transport workers have access to fair rights, entitlements and safe work.
3. The TWU is the union which also represents workers in the transport sector of the emerging 'gig-economy' which includes rideshare, food delivery and more recently, parcel delivery workers. Since 2018, the TWU has been leading a campaign to ensure that transport workers in the gig-economy are provided access to safe, fair and ethical work standards.

Introduction

4. The TWU welcomes the opportunity to provide feedback to the 'Guide to Managing Work, Health and Safety in the Food Delivery Industry' (**Guidelines**) and the broader work of the NSW Taskforce.
5. The following submission will outline the way in which the proposed guidelines in their current form undermine the existing rights and protections which are owed to workers under the existing *Work Health and Safety Act 2011* (NSW) (**WHS Act**). The TWU categorically rejects the current form of the guidelines and the general nature of the interventions made by the Task Force and NSW Government to date.

Failing of the Taskforce and NSW Government

6. To date, the response of the NSW Taskforce and the NSW Government is failing to address the key risk factors which are placing food delivery workers in danger and leading to some of the highest rates of workplace injury and death at work in NSW. The main source of poor safety outcomes in the food delivery sector is inextricably linked to the unsustainable pressures placed on workers due to a failure to provide minimum standards for rates of pay and other fundamental work rights. So long as dangerous pressures exist, food delivery workers will continue to be injured and killed. The interventions by the NSW Government and the Task Force so far have been piecemeal and will work to only undermine health and safety further by providing the illusion that the underlying health and safety issues have been addressed.
7. More concerningly, some of the NSW Governments interventions are exacerbating poor safety outcomes in the food delivery sector. In recent weeks, the TWU has received reports that 'compliance' activities are being carried out by regulatory authorities in NSW which are targeting food delivery workers. In recent days, this has been included a 'blitz' of food delivery workers cycling on pathways with workers being issued fines for infringements. Such interventions only target the workers who are most often the victims of poor health and safety outcomes and increase the already dangerous economic pressures placed on workers.
8. The TWU would like to once again refer the Taskforce and the NSW Government to the TWU's previous submission to the Taskforce dated 22nd December 2020 (**Annexure A**), which elaborated on the need to ensure that the broader structural issues are addressed and provided a regulatory framework for achieving this in NSW.

Guidelines: Winding Back Protections for Food Delivery Workers

9. The attempt to ensure even a piecemeal approach to addressing health and safety through the production of guidelines ‘misses the mark’ by failing to address the key risk factors and issues in the sector. More concerningly, in its current form, the guidelines will actually undermine health and safety altogether by misrepresenting the relationship between food delivery workers and companies and in doing so, effectively wind back the existing protections for food delivery workers under the current WHS Act.
10. The guidelines have adopted language which misrepresents the relationship between food delivery workers and food delivery companies. Food delivery workers are engaged to perform delivery work by food delivery companies who control the main terms of engagement which includes the ability to unilaterally set and determine rates of pay, remuneration structures and performance metrics. Food delivery workers are entirely dependent on these companies for all the work they receive and have no ability to develop their own clientele or business independent of these food delivery companies.
11. Despite this, the guidelines elect to describe food delivery companies as ‘third-party’ ‘platforms’ which ‘partner’ with food delivery workers suggesting some level of equality exists in this relationship. The framing of the relationship in this way is then in subsequent sections, used to shift obligations which would otherwise sit with the Person Conducting Business or Undertaking (PCBU) which effectively *controls* and directs the work of the food delivery worker.
12. It is important to note in this regard that even Uber Eats has recently abandoned the fallacy that it is an ‘intermediary’ technology platform that merely ‘facilitates’ a relationship with food delivery workers and food delivery outlets. Following a high profile court case which recently scrutinised Uber’s framing of its relationship with so-called ‘delivery partners’, on January 26 Uber Eats announced it will be introducing an allegedly ‘new model’ to Australia. In this, Uber Eats concedes that it is providing delivery services by engaging food delivery workers rather than merely connecting food delivery outlets and restaurant:

This new model will not alter the marketplace fee but will mean restaurants and other merchants will no longer buy & sell delivery from delivery partners as they have in the past. Instead they will focus on selling their goods to customers and Uber Eats will provide delivery services to that customer.¹

¹ Uber Eats Australia, “Continuing to deliver the best delivery experience with a new model for Uber Eats”, Jan 26th, 2021, <https://www.uber.com/en-AU/newsroom/newdeliverymodel/>

13. The importance of framing this relationship accurately cannot be understated for the purposes of these guidelines as it has implications for how a PCBU's primary duty of care is discharged and where other obligations should apply. One such example in subsequent parts of the guidelines relates to shifting the obligation to provide personal protective equipment (PPE) to food delivery workers. Section 44 (1) of the *Workplace Health and Safety Regulation 2017* (NSW) (**WHS Reg**) states that a PCBU who directs work must provide personal protective equipment. Safe Work NSW's own website advises "If *contractors* do not have PPE, it needs to be issued by the employer/PCBU".² Yet for food delivery workers, who remain in at least some of the most dependent contracting arrangements today and in one of the most dangerous industries, the guidelines assign the obligation to provide PPE to the food delivery worker. The spin-off is that the by providing their own PPE, food delivery workers who are already paid below minimum wage, are placed under great economic pressure, exacerbating poor safety outcomes in the sector.
14. Another example of the influence of this misrepresentation is found in the way in which the guidelines elect to describe a food delivery worker as both a 'worker' and a 'PCBU' *for the purposes of performing a risk assessment*. Throughout the subsequent table, the dual categories are used to shift obligations (like PPE) which should otherwise be the responsibility of a food delivery company, as the PCBU, which determines the nature and structure of such delivery work.
15. Finally, and as has been stated from the outset of this submission and the previous submission of the TWU to the Taskforce, WHS Law does not inhibit any risk factor from being addressed and does not create a divide between nominally 'industrial' and 'safety' issues. Economic and contracting pressures are a safety issue in the road transport sector and particularly in the food delivery sector where there is a strong relationship between for example, low rates of pay, remuneration structure, and a lack of protections from unfair dismissal and risk taking behaviours like working fatigued, speeding or poor vehicle maintenance. The guidelines do nothing to recognise the responsibility food delivery companies must have in effectively addressing these issues.
16. In preparation for this submission the TWU has requested that Professor Richard Johnstone, a leading expert³ in the field of Work Health and Safety,

² Safe Work NSW, "Personal Protective Equipment (PPE)", <https://www.safework.nsw.gov.au/safety-starts-here/physical-safety-at-work-the-basics/personal-protective-equipment-ppe>

³ Richard Johnstone was the foundation Director of the National Research Centre for Occupational Health and Safety Regulation at the Australian National University, and Director of the Socio-Legal Research Centre at

provide some feedback to the guidelines. Professor Johnstone has kindly offered to provide this assistance and his submission has been now included in **Annexure B**.

17. In his submission, Professor Johnstone outlines three major concerns being (1) the way in which the guidelines misdescribe provisions of the WHS Act (2) the failure to include reference to the important duty under section 47 of the Act and (3) the 'biased tone' of the guidelines which "overemphasises the measures that food delivery riders must take for their own health and safety". The TWU supports the submission of Professor Johnstone in full.
18. In preparation for this submission, the TWU has also invited Professor Quinlan, an academic and practitioner with leading expertise⁴ in Work Health and Safety in the road transport sector, precarious employment and industrial relations, to provide feedback to the guidelines. Professor Quinlan's submission is provided under **Annexure C**.
19. Professor Quinlan notes "the guidelines fails to comprehend the realities of work arrangements in the food delivery industry, notably the strong pressures on delivery workers and their dependency/relative powerlessness, which combined with their piecework payment systems poses a significant risk to their safety, health and well-being. Professor Quinlan continues on to cite evidence which supports this link. The TWU supports the submission of Professor Quinlan in full.

Griffith University. He is now a Professor in the School of Law at Queensland University of Technology. He is also a member of the Queensland Work Health and Safety Board.

⁴ Michael Quinlan is emeritus professor in the School of Management and Director of the Industrial Relations Research Centre. His major expertise is the field of occupational health and safety (OHS) and risk, particularly aspects related to work organisation, management and regulation. In addition to publishing widely on OHS he has undertaken inquiries, investigations and audits for governments in Australia and New Zealand on safety in the trucking industry, mining and OHS regulatory regimes. He has also served as an expert on a number of government advisory bodies in Australia and New Zealand as well as helping to prepare reports on OHS for the World Health Organisation, European Commission, European Agency on Safety and Health at Work and International Labour Organisation. He currently serves on the editorial board of six academic journals based in Australia and the UK.

Conclusion

20. Workers in the food delivery sector are engaged in highly exploitative arrangements. Food delivery riders are some of the most low-paid workers in the country, work in one of the most dangerous sectors – and these two features are inextricably linked. The Taskforce was set up to respond to this very crisis. An effective response will require nothing less of a recognition of this link and a complete overhaul of the food delivery sector.
21. A piecemeal approach which seeks to ‘guide’ food delivery companies towards complying with existing WHS laws will not be effective in an industry where food delivery companies have demonstrated true innovation and expertise in circumventing their obligations under an outdated industrial relations system. Not only do the current guidelines not ensure compliance with WHS law, but in their current form, wind back existing protections by misrepresenting the nature of food delivery work and shifting obligations to food delivery workers.
22. The TWU reiterates the need to ensure the establishment of a tribunal which can set safe, sustainable and universally binding standards throughout the food delivery industry and urges the NSW Government and the Taskforce to work towards this end.