

Comments on *Draft Guide to Managing Work Health and Safety in the Food Delivery Industry*

Richard Johnstone
Professor, School of Law, Queensland University of Technology

February 2021

These comments largely focus on the first few pages of the Draft Guide, but include some general observations on the common hazards and the action to control hazards on page 3 onwards.

My first major concern with the Draft Guide is that in many places it misdescribes the provisions of the Work Health and Safety Act 2011 (NSW), and I have suggested more accurate explanations of the provisions.

My second major concern is that the Guide has understated an important duty—the section 47 duty of the PCBU to consult all workers carrying out work for the PCBU and who are likely to be affected by a health and safety matter.

My third major concern is the biased tone of the guide—it uncritically assumes the world view of the Food Delivery Platforms, and overemphasises the measures that Food Delivery Riders must take for their own health and safety. These riders have limited control of their working conditions and their working environment and are exposed to very serious risks (as the guide explains from pages 3 onwards). In my view, which I think is consistent with the approach usually taken to codes of practice and guides, the primary focus of the guide should be on the PCBUs with the most control over working conditions. I respectfully submit that the principal focus of the guide should be on explaining the duty of the Food Delivery Platforms. Of course, food delivery riders must comply with their duties under section 28 and, where they could also be said to be running their own businesses, under section 19(5), but the strong emphasis should be on making clear, and on explaining, what Food Delivery Platforms and Food Outlets need to do to comply with their legal duties.

In my suggested revisions I have tried to adopt a neutral tone, consistent with the approach taken in the Act and regulations, and in the existing codes of practice and guides. I also suggest that the columns Food Delivery Rider as Worker and Food Delivery Rider as PCBU be conflated under a heading 'Food Delivery Rider', and that the advice provided in that column fully recognise the weak bargaining position of Food Delivery Riders, and the fact that most riders are not really running their own business in any meaningful sense.

I also note that as Food Delivery Riders have so little control over their working environment, and because they cannot be said to have any specialist expertise, there can be no suggestion that Food Delivery Platforms or Food Operators can in any way 'rely on' Food Delivery Riders to discharge their primary duty of care under section 19. For further discussion of these issues, please see R Johnstone, 'Engaging Expert Contractors: The Work Health and Safety Obligations of the Business or Undertaking' (2014) 27 *Australian Journal of Labour Law* 57-85.

A further suggestion is that for each summary of the rights, duties or obligations of the various parties, there be a brief reference (in parentheses) to the relevant section of the Work Health and Safety Act,

so that (i) it is clear what the summary is referring to, and (ii) so that the reader can follow up, if need be, by reading the provision in full.

I have not made many comments on pages 3 onwards because risk management in the food delivery sector is not within my expertise. My silence should not necessarily be construed as support for the proposed provisions or the way they are explained.

Title

The comma should be removed from the title (ie it should be 'The Guide to Managing Work Health and Safety in the Food Delivery Industry').

Introduction

The introduction should, in the second paragraph, make it clear that one of the main aims of the Act is to protect workers and other persons against harm to their health, safety and welfare through the elimination of risks from work, and if that is not reasonably practicable, to minimise risks as far as is reasonably practicable. Workers and other persons should be given the highest level of protection against harm to their health, safety and welfare as is reasonably practicable. (Sections 3(1)(a) and 3(2)).

Background

I don't think the abbreviations FDR, FO and FDP are at all reader friendly. I suggest writing them out in full each time.

Paragraph 2 first sentence: I strongly suggest changing the wording here – the current wording is not 'neutral' but buys into the perspective being pushed by Food Delivery Platforms. The first sentence should rather read: 'The Guide is directed at food delivery work where Food Delivery Riders are allocated work by a Food Delivery Platform to deliver meals ordered by a customer using the Food Delivery Platform's app.' (Or something similar).

Paragraph 2, last sentence should be revised as follows:

Where a food delivery rider is directly employed by a food outlet the rider is an employee. Under the Work Health and Safety Act 2011 (NSW) both employees and contractors carrying out work for a PCBU are 'workers' (section 7) and are owed the same duties by the PCBU.

Paragraph 3 – the end of the first sentence should be '... and the incidence of serious injury are far less than they are for workers using bicycles, motor scooters or motorbikes.'

I suggest rewriting the sentence in the fourth paragraph as

It is important to note that the Work Health and Safety Act defines a 'worker' as a person who carries out work in any capacity for a person conducting a business or undertaking (section 7(1)). Persons engaged as a contractor by a Food Delivery Platform and employed by a Food Operator are both 'workers' and are owed the same duty by the Food Delivery Platform and Food Operator.

Finally, 'persons conducting a business or undertaking' should be introduced in the background section not under the work health and safety duties section. The notion of a PCBU should be

introduced before ‘worker’ is introduced, because the definition of ‘worker’ depends on an understanding of what is a PCBU. Perhaps this should be done in a paragraph between existing paragraphs 1 and 2. This new paragraph should be something like this:

The Work Health and Safety Act places a series of important duties on a ‘person who conducts a business or undertaking’—referred to as a ‘PCBU’. Individuals (such as sole proprietors, self-employed persons, or each partner in a partnership) and legal entities (such as corporations) can be PCBUs (section 5). Food Delivery Platforms and Food Outlets will always be PCBUs.

Work Health and Safety Duties

I suggest that this section be renamed ‘Work Health and Safety Duties, Rights and Protections’ and that the section contain a brief reference to workers’ rights to elect a health and safety representative, the right to cease dangerous work, and the provisions protecting food delivery riders from discrimination, coercion and misrepresentation (Part 6 of the Act)

The first paragraph of this section should be revised as follows:

The Work Health and Safety Act imposes wide-ranging duties on all PCBUs, officers of PCBUs, and workers.

The second paragraph should be deleted, because its content is now in the Background section.

The third paragraph should be deleted and replaced by:

The Act imposes a series of duties on a PCBU. The most important duty is the ‘primary duty of care’ in section 19, which is owed to ‘workers’ (section 19(1)) and to ‘others’ (persons who are not workers) (section 19(2)).

The section 19(1) duty is owed by the PCBU to all workers who are engaged, caused to be engaged, influenced, or directed by the PCBU while they are work. This means that all Food Delivery Platforms owe a duty to take all reasonably practicable measures to ensure the health and safety of all Food Delivery Riders who carry out work using the Food Delivery Platform’s app. All kinds of workers—‘employees’, ‘independent contractors’, labour hire workers, outworkers, employees of contractors etc—are all owed exactly the same duty by the PCBU.

I suggest the fourth paragraph should be deleted, and replaced by the following:

The PCBU’s duty in section 19 is to ensure the health and safety ‘so far as is reasonably practicable’. This means that the PCBU must take measures to eliminate the risk; and if this is not ‘reasonably practicable’, the PCBU must minimise the risks as far as is reasonably practicable (section 17). In working out what is reasonably practicable, the PCBU must take into account and weigh up all relevant matters, including

- the likelihood of the hazard or risk occurring;
- the degree of harm that would result from the risk;
- the availability and suitability of ways to eliminate the risk;
- what the person concerned knows or ought reasonably to know about these three matters.

Once these factors have been weighed up, the PCBU may consider the **cost** of the measures to eliminate (or minimise) the risk—but a measure is only not reasonably practicable if the cost of implementing it is **grossly disproportionate** to the risk.

I suggest the first sentence of the fifth paragraph be replaced with: ‘Some examples of the measures that must be taken include:’

The second sentence of the sixth paragraph should be revised as follows: 'Other' persons can include, for example, road users, pedestrians, customers at food outlets and receiving delivered food, and other members of the public affected by the food delivery system.

There should be three paragraphs inserted after paragraph six.

Paragraph seven should state:

All PCBUs have a duty to consult, as far as it can be suitably accomplished in the circumstances, with all workers who carry out work for the business or undertaking and who are likely to be directly affected by a health and safety matter (section 47). In particular, consultation is required when the Food Delivery Platform is conducting risk management activities as required by its section 19 duty, when it proposes any changes that might affect the health and safety of riders, and when it makes decisions about procedures for consultation, issue resolution, monitoring, and providing information and training to riders. PCBUs' other duties include duties to negotiate with workers to establish work groups, to facilitate the election of health and safety representatives for those work groups, to confer and consult with those representatives and to provide them with reasonably necessary resources, facilities and assistance (Part 5).

Paragraph eight should state that: PCBUs have other duties under the Act and the Regulation, including immediately notifying Safe Work New South Wales of all deaths, serious injuries or illnesses, or dangerous incidents arising at work (Part 3).

Paragraph nine should state that:

Each officer of a PCBU must exercise due diligence to ensure that the PCBU complies with all its duties and obligations (section 27). This means that each officer (for example, each director and each senior manager) must acquire up-to-date knowledge of health and safety matters, understand the PCBU's operations and the hazards and risks arising from those operations, and must ensure that the PCBU is properly resourced and properly implements a systematic approach to managing health and safety.

The last paragraph in the draft (the duties of workers), now paragraph ten, should be amended as follows. The second dot point should begin with the words 'take reasonable care to'; in the third dot point the words 'to allow the PCBU to comply with the Act' should be added at the end of the sentence; and in the fourth dot point the words 'work health and safety' should be inserted between 'reasonable' and 'policy'.

I suggest a new paragraph 11 along these lines.

All workers have the right to negotiate work groups with their PCBU and to elect work health and safety representatives for these work groups. Elected health and safety representatives are given broad powers under the Act, including rights to inspect places where work is carried out, to receive work health and safety information, to issue provisional improvement notices where they detect a breach of the Act, and to direct that dangerous work cease. Individual workers are entitled to cease work if they have reasonable concern that they have been exposed to an immediate or imminent serious risk to their health and safety (Part 5 of the Work Health and Safety Act 2011). Any discrimination against a worker or health and safety representative for seeking to exercise their rights under the Act, or any attempt to coerce them not to exercise their rights, or to exercise them in a certain way, is prohibited and is an offence under the Act (see Part 6 of the Act).

Who has duties in the Food Delivery Industry?

Duties of a Food Delivery Platform

I suggest the first three paragraphs and paragraph 5 be replaced with the following four paragraphs:

The Food Delivery Platform is a PCBU. It designs, produces and oversees the technology in the app used to order and deliver the food. It markets the service to Food Outlets and to Food Delivery Riders who are workers and who can register with the app to be able to work as a Food Delivery Rider in the system developed by the Food Delivery Platform.

A Food Delivery Platform owes the section 19(1) duty to all Food Delivery Riders that it engages, causes to be engaged, influences or directs. It owes the section 19(2) duty to all other persons—including customers receiving the food delivery, their families and visitors, customers and visitors to the Food Outlet, road users, pedestrians, and members of the public—whose health and safety might be affected by the food delivery system that the Food Delivery Platform has established.

The Food Delivery Platform's section 47 duty to consult all workers who carry out work for the Platform requires the Platform to do all it can in the circumstances to consult Food Delivery Drivers on health and safety matters that affect them (see the Code of Practice Work Health and Safety Consultation, Cooperation and Coordination). Consultation will be facilitated by encouraging, and supporting, drivers to elect health and safety representatives as provided for in the Act.

Duties of the Food Outlet

The Food Outlet is also a PCBU, and owes the section 19(1) duty to Food Delivery Riders and its own workers, and the section 19(2) duty to its customers and all other persons affected by its business.

Paragraph 4 does not adequately explain 'reasonably practicable' and should be deleted. I have proposed a more accurate explanation of 'reasonably practicable' in the previous section.

Duties of a Food Delivery Rider

I suggest that the three paragraphs in the draft guide be replaced with the following.

A Food Delivery Rider 'carries out work for' both the Food Delivery Platform and the Food Delivery Outlet, and is therefore a 'worker'. The rider must take reasonable care for their own health and safety and the health and safety of others (road users, pedestrians, customers at the Food Outlet, the customers receiving the delivery and their family, visitors and neighbours). They must also follow the reasonable health and safety instructions, policies and procedures of the Food Delivery Platform and the Food Outlet (section 28).

In many circumstances, the Food Delivery Driver will be self-employed. In these cases, the rider will also be a PCBU and will owe a duty to ensure, as far as is reasonably practicable, their own health and safety while at work (section 19(5)), and that the health and safety of other people is not put at risk from their activities at work (section 19(2)).

Shared Duties

I suggest this heading is misleading because it might create the impression that the responsibility is to be shared equally. The Act does not suggest that the duties are 'shared'—rather duty holders must fully discharge the duties they owe and must consult, cooperate and coordinate with other duty holders in doing so. A more accurate heading would be '**Consultation, cooperation and coordination in implementing the duties**' or something like that.

I suggest that paragraph 1 be amended by not using acronyms, and by replacing 'possible' with 'reasonably practicable'.

I suggest that the first sentence of paragraph 2 be replaced with

As this guide illustrates, more than one person can owe the same duty and one person can owe more than one duty.

I suggest that dot point two of paragraph 3 be replaced with

- a duty cannot be transferred or delegated to another person.

Paragraph 4 needs to be replaced with the following;

Where more than one person owes a duty under the Act (note that it does not have to be the same duty) in relation to a work health and safety matter, each person with the duty must consult, cooperate and coordinate their health and safety activities with those of each other person (section 46). This requirement to consult, cooperate and coordinate applies to all duties, including the section 19 duty and the section 47 duty to consult workers.

Managing Risks in the Food Delivery Industry

I suggest amending the second paragraph to read:

When deciding on measures to address hazards, the Food Delivery Platform is required to eliminate the risks arising from the hazard if it is reasonably practicable to do so. If it is not reasonably practicable to do so, all reasonably practicable measures must be taken to minimise the risk.

I suggest that the first subheading be 'Identifying Hazards', and that the first paragraph read:

Common hazards that cause injuries and ill-health to workers in the food delivery industry include:

I suggest that at the end of the section on identifying hazards, the following paragraph be inserted.

When identifying hazards and assessing risks, Food Delivery Platforms must consult with all Food Delivery Workers or their health and safety representatives (section 47).

I also suggest that the guide refer to the Code of Practice: How to Manage Work Health and Safety Risks in both the hazard identification and the controls sections.

Action to be taken by Duty Holders to Control Common Hazards

I suggest that at the beginning of the section on controlling hazards, the following paragraph be inserted.

When determining controls, Food Delivery Platforms must consult with all Food Delivery Workers or their health and safety representatives (section 47); and must consult, co-operate and coordinate with all other PCBUs.

Throughout the section of the table addressing 'equipment unsuitable for the task', Food Delivery Platforms are advised that they should 'advise' riders and others. I am not sure that this is all that the section 19(1) duty to 'ensure health and safety' requires. I suggest consideration be given as to whether this advice be expressed as requiring the Food Delivery Platform to ensure that equipment is suitable.

Summary

I suggest this section be revised to reflect the revisions suggested to the earlier sections. For instance, the responsibility for managing the risks to FDRs is not 'shared'—the primary duty is on the Food Delivery Platforms and the Food Operators; the Food Delivery Platforms' duty is owed to workers that they engage, cause to engage, influence or direct (not just to workers they influence or direct); the Food Delivery Platforms' systematic approach to managing health and safety includes health (which includes psychosocial) issues; etc.