

Report of the Inquiry into the Victorian On-Demand Workforce



Genuine choice • Certainty • Fair conduct

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Industrial Relations Victoria
Department of Premier and Cabinet
1 Spring Street, Melbourne, VIC 3000

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The Chair of the Inquiry into the Victorian On-Demand Workforce and the Victorian Government proudly acknowledge Victoria's Aboriginal peoples as the traditional custodians of the lands on which we live and work. We pay our respects to them and their Elders past, present and future, and honour their unique relationship to Country. We hope that our work contributes towards a positive future for the Aboriginal community.

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Letter to the Minister

Tim Pallas MP
Minister for Industrial Relations
1 Treasury Place
East Melbourne VIC 3002

Dear Minister

Pursuant to the Inquiry Terms of Reference I now provide my report for the Inquiry into the Victorian On-Demand Workforce.

The Report sets out information gathered, commissioned research and submissions presented to the Inquiry, and my conclusions and recommendations to address the issues set out in the Terms of Reference.

I understand that the Government has discretion to table this report in Parliament. In this regard, I note that the parliamentary protections for any publication of the Report and its contents are enlivened by tabling of the Report in Parliament.

Thank you for giving me the opportunity to conduct this important Inquiry.

Yours sincerely



Natalie James
Inquiry Chairperson
12 June 2020

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GLOSSARY

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACL	Australian Consumer Law
ACTU	Australian Council of Trade Unions
Ai Group	Australian Industry Group
AIER	Australian Institute of Employment Rights
AMWU	Australian Manufacturing Workers' Union
ANAO	Australian National Audit Office
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASU	Australian Services Union
ATO	Australian Taxation Office
CC Act	<i>Competition and Consumer Act 2010 (Cth)</i>
CPVAA	Commercial Passenger Vehicle Association of Australia
CPVI Act	<i>Commercial Passenger Vehicle Industry Act 2017 (Vic)</i>
CPVV	Commercial Passenger Vehicles Victoria
DHHS	Department of Health and Human Services Victoria
DOT	Department of Transport Victoria
DPC	Department of Premier and Cabinet Victoria
DTF Victoria	Department of Treasury and Finance Victoria
Federal Court	Federal Court of Australia
Federal Full Court	Full Court of the Federal Court of Australia
FW Act	<i>Fair Work Act 2009 (Cth)</i>
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
FYA	Foundation for Young Australians
HACSU	Health and Community Services Union
High Court	High Court of Australia
HILDA Survey	Household Income and Labour Dynamics in Australia Survey
IC Act	<i>Independent Contractors Act 2006 (Cth)</i>
Inquiry	Inquiry into the Victorian On-Demand Workforce
IPA	Institute of Public Affairs
IRV	Industrial Relations Victoria
Labour Hire Act	<i>Labour Hire Licensing Act 2018 (Vic)</i>
LIV	Law Institute of Victoria
LSBP Act	<i>Long Service Benefits Portability Act 2018 (Vic)</i>

MEA	Master Electricians Australia
MEAA	Media Entertainment and Arts Alliance
National Survey	<i>Digital Platform Work in Australia – Prevalence, Nature and Impact</i>
NDIS	National Disability Insurance Scheme
NTEU	National Tertiary Education Union
NUW	National Union of Workers
ODFC Act	<i>Owner Drivers and Forestry Contractors Act 2005 (Vic)</i>
OHS Act	<i>Occupational Health and Safety Act 2004 (Vic)</i>
RCSA	Recruitment, Consulting and Staffing Association of Australia and New Zealand
Reserve Bank	Reserve Bank of Australia
RMIT	RMIT University
RSDAA	Ride Share Drivers Association of Australia
SG Act	<i>Superannuation Guarantee (Administration) Act 1992 (Cth)</i>
TA Act	<i>Transport Accident Act 1986 (Vic)</i>
TAC	Transport Accident Commission
TWU	Transport Workers' Union of Australia
VCCI	Victorian Chamber of Commerce and Industry
VCOSS	Victorian Council of Social Services
VSBC	Victorian Small Business Commission
VTHC	Victorian Trades Hall Council
WIRC Act	<i>Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)</i>
YAC	Youth Affairs Council
VLLEN	Victorian Local Learning and Employment Network

Chairperson's foreword

It feels like a different world from when I was asked in late 2018 by the (then) Minister for Industrial Relations, to Chair this Inquiry for the Victorian Government into the 'on-demand' workforce.

At the time of finalising this report, we are witnessing disruption to our lives and the labour market in response to the contagion coronavirus (COVID-19).

Governments have ordered quarantines, 'lock-downs' and shut-downs of businesses to protect the community. We have been directed to #stayathome

Those of us who can, work from kitchen benches and home offices, testing the capacity of the nation's bandwidth and pushing the boundaries of remote and flexible work.

These events provide the ultimate demonstration of what it means to work 'on-demand'. 'Demand' has been suddenly and unexpectedly curtailed. In Australia, the outcome has been to flatten the curve of the virus, but to create other unwelcome trajectories – a dramatic increase in unemployment and a decrease in hours worked.

In times of economic downturn, it is 'on-demand' workers: casual employees and self-employed 'independent contractors'; who feel the impact first and fast. They are the first to be 'let go'.

These workers are not entitled to ongoing work. Nor do they have leave balances to draw on. This is different from those regularised workers who employers must retain and continue to pay, even if no work is available. COVID-19 has triggered some of the narrow exceptions to this rule: formally standing down workforces or making them redundant.

It was out of the last economic crisis, the global financial crisis, that we saw the emergence of the 'gig' economy: people using technology to promote their skills and identify even the most discrete of work opportunities. Unemployed or under-utilised workers were in this way able to earn extra income through short term temporary work, or to cobble together enough to get by. Business saw the opportunity to systemise this way of working: digital platforms materialised to support real-time identification and matching of 'demand' for 'gigs' to workers who might be able to meet it.

Platforms have played an important role in helping us manage the response to COVID-19. They have supported business to pivot to online delivery and enabled the self-isolating community to source what we need via our devices. Food delivery, rideshare, the buying and selling of goods, along with social interaction and work have all been driven online.

Rideshare and food delivery platforms were among the first businesses to 'lean in' and cover lost income for workers needing to self-isolate due to COVID-19. These workers are not entitled to any sick or carers' leave – unlike regularised workers – so this measure seeks to overcome the incentive for them to 'soldier on' when sick so they can pay the rent. A global pandemic reinforces that these benefits are not just entitlements that benefit individuals but the community at large.

In the context of our Inquiry, focusing as it has on the structure and impact of platform work, it was striking that platforms moved early to bolster worker protections, given many platforms have gone to significant lengths to avoid 'employment' like arrangements applying to their workers. In structuring their models in this way, they need not apply Australia's extensive labour regulation.

The 'work status' of platform workers and the consequences that flow for the workers, businesses and the labour market, is the issue that sits at the heart of this Inquiry.

Work status impacts on entitlements, protections and obligations under superannuation laws, health and safety, insurance for work injuries and tax.

By comparison, there are only limited purpose-built protections or entitlements for individual 'self-employed' workers or 'independent contractors'. Many 'independent contractors' are genuinely autonomous, self-employed workers who choose this way of working. But an increased number of work arrangements are 'borderline'.

And sometimes, the ‘choice’ of work status and the arrangements lies primarily in the hands of only one of the parties to the arrangement.

This has proven to be a common experience for platform workers. While some of these workers are skilled and earning good incomes, others are not. The Inquiry’s National Survey found that vulnerable cohorts – young and migrant workers – are securing work via platforms. Some platform workers are low skilled and have little or no leverage when it comes to the platform or the labour market more generally.

It is the platforms, not the workers, that determine the work arrangements. Platforms generally retain a high degree of discretion and control, with no independent oversight of their arrangements or conduct.

Platforms have greatly enhanced our choices and created flexible work, proving to be highly responsive and agile in enabling people to access services as, and when, we need.

Flexibility and autonomy are highly desirable elements of a modern labour market. And platforms are a new way of facilitating this work, providing access to the labour market for workers who may encounter difficulties getting work.

But platform arrangements also present practical and public policy challenges. The systemised nature of how work is organised is challenging the longstanding foundation of our labour market regulation.

Our current system is underpinned by a great unresolved question about the status of some workers. While the fundamentals of labour market regulation have endured over more than a century, the system has not proven itself to be sufficiently agile or responsive to provide the certainty that a modern labour market demands.

This uncertainty undermines workers’ choice, fair competition and the integrity of the regulatory system. It also undermines the capacity of businesses to operate in clear compliance with the law and arguably permits unfair competition.

The recommendations I propose are designed to address the uncertainty that exists about the status of platform workers and indeed, other ‘on-demand’ non-employee workers.

Choice and autonomy is at the heart of genuine self-employment. These recommendations would protect that choice for all parties. They deliver a more informed choice and fairer conduct for non-employee workers, particularly those being organised as part of a workforce by savvy platforms and, most especially, those ‘low-leveraged’ workers.

The recommendations set out changes to provide genuine choice, fair conduct and greater certainty for workers. The key components of the recommendations would:

- (a) **Clarify and codify work status** to reduce doubt about work status and, therefore, the application of entitlements, protections and obligations for workers and business
- (b) **Streamline advice and support** to workers whose work status is borderline
- (c) **Fast-track resolution** of work status so workers and business do not operate with prolonged doubt about the rules
- (d) Provide for **fair conduct** for platform workers who are not employees, through establishing Fair Conduct and Accountability Standards that are principles based and developed through a consultative process with relevant stakeholders
- (e) **Improve remedies for non-employee workers** to address deficiencies in the existing approach
- (f) **Enhance enforcement** to ensure compliance, including where sham contracting has occurred.

This program is most effectively led by the Commonwealth as part of national system reforms. The Commonwealth controls the levers that would best achieve these changes, in collaboration with states and in consultation with stakeholders. In the absence of Commonwealth action, Victoria also has levers available to it. The Inquiry has closely considered constitutional issues in framing its alternative recommendations for Victoria.

COVID-19 has shown us the importance of national leadership for the benefit of all Australians, in cooperation with states and territories, as a federation.

The post-COVID-19 labour market will demand agility and flexibility, as well as effective protections. Recovery, and future prosperity require a modern, fit-for-future system which balances these imperatives.

These recommendations would go part of the way to revising the 'old' parts of our system while not upending its fundamental constructs.

I have had the benefit and privilege of listening to workers, businesses (platform businesses and those providing services under 'traditional' business arrangements), trade unions, peak union bodies, community groups, academics, regulators and others who are participating in the on-demand economy. This information is detailed, dense and rich. I greatly appreciate the effort made by so many individuals, organisations and businesses to generously share their experiences, insights and knowledge about the on-demand workforce.

The opportunity to work in partnership with the University of Adelaide, Queensland University of Technology and University of Technology Sydney – our National Survey partners – has also meant this Inquiry benefited enormously from the essential data and analysis obtained.

I would also like to sincerely thank Industrial Relations Victoria, the departmental secretariat that has supported this Inquiry and the writing of this report. I extend my gratitude and appreciation to Sharon De Silva, Cate Ellis, Lissa Zass, Andy Lewis and Liz Barrett: for your professional approach, expertise, creativity, flexibility and diligence – especially during the 'home-school' weeks when we were finalising this report. And for letting me make just one more set of edits to this foreword.

Finally, I wish to thank the Victorian Government for the opportunity to chair this inquiry. I am very grateful for the continued and unwavering support of Tim Pallas, Minister for Industrial Relations, throughout the duration of the Inquiry, as well as Natalie Hutchins, the former Minister for Industrial Relations.



Natalie James
Inquiry Chairperson

12 June 2020

Introduction

Technology has made accessing workers and services simpler and faster than ever. It has enabled the matching in real time of available workers with those who are seeking services.

On-demand work arises when workers are sourced on an 'as-needs' basis. Online 'platforms' facilitate, on a large scale, the sourcing of workers 'on-demand', often to perform a particular 'gig' or work task, hence the 'gig economy'.

Although 'platform' technology is relatively new, providing work in response to demand is a long-standing practice, enabled by various legal constructs. Some of these arrangements are underpinned by an 'employment' relationship, while some on-demand workers are self-employed 'independent contractors'.

A worker's status as either an employee or contractor is pivotal. It determines application or otherwise of a broad range of rights, entitlements and related benefits.

The question of the nature, extent and impact of an on-demand way of working was vigorously contested by various participants to the Inquiry, with quite polarised perspectives and information.

Key to this Inquiry's Terms of Reference are two fundamental questions: What entitlements or arrangements apply to platform workers? This is a legal question. Are they fair? This is a public policy question.

Even bodies determining the first of these questions every day can struggle – as one tribunal recently declared¹ (somewhat depressingly) – “the infinite variety of human affairs means that work relationships present a spectrum, some of which are clearly relationships of employment and others of which are clearly relationships of independent contract but some of which are less clear cut”.

The very recent decision of the Fair Work Commission in *Gupta*² emphasises and illustrates that the test is often finely balanced and there is much tension in the test which is intended to delineate, among other things, between 'self-employed' independent workers and workers who are employees of another's business.

Going further to the heart of this Inquiry are the issues of whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations, and based on this definitional problem: how can workers and businesses obtain a quick, inexpensive and authoritative view to rely on in their negotiations and interactions, for their mutual economic benefit?

1. *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario*, [2011] FWAFB 8307, [25].
2. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

Chapter 1 | Establishing the Inquiry

Snapshot

- ▶ The Victorian Government asked the Inquiry to consider 'on-demand' work in the Victorian labour market.
- ▶ On-demand work arises when workers are sourced on an 'as-needs' basis.
- ▶ Online 'platforms' which have emerged and grown over the last decade facilitate on-demand work on a large scale.
- ▶ The arrangements between platforms and workers have been the subject of active and contested debate.

1.1 BACKGROUND TO THE INQUIRY

- 1 On 22 September 2018 the Victorian Government announced the establishment and Terms of Reference (TOR) for an independent Inquiry into the Victorian On-Demand Workforce (the Inquiry).
- 2 Ms Natalie James was appointed Chair of the Inquiry. Ms James was Australia's Fair Work Ombudsman (FWO) for five years, from 2013–2018, and is now a Partner with Deloitte. She has held other senior positions in the Commonwealth public sector, including Chief Counsel, Workplace Relations in the (then) Department of Education, Employment and Workplace Relations. Ms James has a Bachelor of Arts Law and a Master of Law (Commercial-Labour Law) and is a Fellow of the Institute of Company Directors. In 2018, she was named National Small Business Champion by the Australian Council of Small Business Organisations for her work supporting small businesses to understand and comply with their workplace obligations.
- 3 Industrial Relations Victoria (IRV), within the Department of Premier and Cabinet, provided the Inquiry Secretariat, assisting in establishing the Inquiry and supporting its core work. The Secretariat helped with the organisation and running of the Inquiry's formal and informal stakeholder consultations, stakeholder communications and management. It sourced people, bodies and lines of investigation; prepared media communications and Inquiry materials, reviewed and analysed written submissions and legal frameworks; commissioned and conducted research and, with the Chair, prepared this report.
- 4 The Inquiry was formally launched on 29 October 2018, at a public forum, by the former Minister for Industrial Relations, the Hon. Natalie Hutchins MP. Over 64 representatives from the business community, unions, workers, academics and community organisations attended and participants could comment on the draft TOR. The launch received much positive media coverage and community interest.³
- 5 Following the 2018 Victorian state election, the Hon. Tim Pallas MP was appointed to the industrial relations portfolio and has enthusiastically supported the Inquiry's work. In response to a request from the Chair and acknowledging the complexity and importance of the work being finalised, the Minister confirmed an extension of time to complete the report from late 2019 to June 2020.

3. R. Willingham, '[Uber Eats, Deliveroo among companies under review in Victorian workers' rights inquiry](#)' [website] ABC News Melbourne, 21 September 2018; S. Thomsen, '[The Victorian Government is launching an investigation into the gig economy](#)' [website] Business Insider Australia, 22 September 2018; J. Riley, '[Victoria's gig economy inquiry](#)' [website] InnovationAus, 25 September 2018.

1.2 TERMS OF REFERENCE

6 The TOR⁴ for the Inquiry are:

To inquire into, consider and report to the Minister for Industrial Relations on:

- (a) The extent and nature of the on-demand economy in Victoria, for the purposes of considering its impact on both the Victorian labour market and Victorian economy more broadly, including but not limited to:
- (i) the legal or work status of persons working for, or with, businesses using online platforms [TOR 1];
 - (ii) the application of workplace laws and instruments to those persons, including accident compensation, payroll or similar taxes, superannuation and health and safety laws [TOR 2];
 - (iii) whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations [TOR 3];
 - (iv) the effectiveness of the enforcement of those laws [TOR 4].
- (b) In making recommendations, the Inquiry should have regard to matters including:
- (i) the capacity of existing legal and regulatory frameworks to protect the rights of vulnerable workers;
 - (ii) the impact on the health and safety of third parties such as consumers and the general public, for example, road safety;
 - (iii) responsibility for insurance coverage and implications for state revenue;
 - (iv) the impacts of on-demand services on businesses operating in metropolitan, regional or rural settings;
 - (v) regulation in other Australian jurisdictions and in other countries, including how other jurisdictions regulate the on-demand workforce;
 - (vi) Australia's obligations under international law, including International Labour Organization Conventions;
 - (vii) the limitations of Victoria's legislative powers over industrial relations and related matters and the capacity to regulate these matters; and
 - (viii) the ability of any Victorian regulatory arrangements to operate effectively in the absence of a national approach.

1.3 THE INQUIRY'S APPROACH AND ENGAGEMENT WITH THE COMMUNITY

7 The central question posed by the TOR is broad – the Inquiry must consider and report on the extent and nature of the on-demand economy to consider its impact on the Victorian labour market and economy more generally.

8 The Inquiry needed to hear from anyone who could make a meaningful contribution – no matter how small – regardless of their background or experience in inquiries. To encourage participation, the Inquiry actively engaged with businesses (including platforms) unions, workers, academics, community organisations and the broader community through:

- its website, and media
- written consultations
- individual and group consultations
- engagement with regulators.

4. See Appendix 1.

1.3.1 Website and media

- 9 From the start of the Inquiry, information about its activities was available via the Department of Economic Development, Jobs, Transport and Resource's website and, later, via the Engage Victoria website.⁵
- 10 The Chair communicated the Inquiry's work through the media and online, to engage the Victorian community, raise awareness of the issues being considered and encourage participation. Appendix 2 lists media engagements and articles.

1.3.2 Written consultations

- 11 A background paper was released on 20 December 2018 to help interested parties frame their formal submissions.⁶ The deadline for written submissions was extended from nine to 20 February 2019 after many submitters sought extra time.
- 12 The Inquiry received submissions (including supplementary submissions) from more than 90 people and organisations; including workers, unions, businesses and academics (see Appendix 3 for a full list). Additional material was obtained through correspondence.
- 13 The submissions (other than three provided confidentially) are published on the Engage Victoria website. All were reviewed by the Inquiry secretariat to screen for legal and privacy considerations. Some text was redacted to remove personally identifying details in compliance with the *Privacy and Data Protection Act 2014* (Vic) and some to remove potentially defamatory material.
- 14 The Inquiry sought extra information on certain matters by writing to various people, bodies and organisations thought to have valuable additional material.

1.3.3 Individual and group consultations

- 15 The Inquiry convened forums of workers, businesses and other interested parties, sometimes on a sector basis. This included themed roundtable consultations separately organised by the Victorian Chamber of Commerce and Industry (VCCI), Australian Industry Group (Ai Group) and the Victorian Trades Hall Council (VTHC) on behalf of the Inquiry. Individual discussions were also held with people and businesses.
- 16 Over 200 people participated, across more than 30 individual and group consultations. Larger group consultations were recorded, while the Secretariat made notes of small or bilateral discussions. Appendix 4 sets out most consultations with individuals and organisations. The small number of participants who took part confidentially are excluded.
- 17 A less traditional consultation method successfully used by the Inquiry, was an online forum for workers.⁷ The Chair engaged with participants in 'real time' for a set period. This provided valuable information directly from on-demand workers.
- 18 The Inquiry was greatly assisted by high levels of cooperation from participating stakeholders: across platforms, businesses, community organisations, unions and workers.

1.3.4 Engaging with government

- 19 Many differing regulatory frameworks impact the on-demand economy, so the Inquiry sought input from various state and Commonwealth government bodies. Some Commonwealth agencies responded in writing, while the Chair held productive discussions with other representatives. Appendix 4 lists which Commonwealth and state government agencies were contacted and Appendix 5 presents correspondence between the Chair and Commonwealth agencies.

5. Engage Victoria [website](#).

6. Access the Inquiry into the Victorian On-Demand Workforce [Background Paper](#), December 2018, on the Engage Victoria website.

7. On-Demand Workers' Online Conversation, Department of Premier and Cabinet, 19 August 2019.

Chapter 2 | Why have an Inquiry into 'on-demand' work?

Snapshot

- ▶ The practice of workers being available 'on-demand' is longstanding in Australia's labour market. On-demand work offers flexibility for business and workers.
- ▶ On-demand arrangements are less structurally secure than 'regularised' work. These arrangements can result in job and income insecurity.
- ▶ Platforms organise work 'on-demand' across a range of sectors under a vast array of operating models. Most platforms do not engage workers as employees, meaning workers are not extended the entitlements and protections of labour regulation.

20 The Inquiry's TOR go to issues that sit at the heart of the labour market: our employment arrangements and the legal and economic structures that underpin them. This invites a 'systems' level analysis, encompassing labour market and industry level impact, but fundamentally goes to the impact of on-demand work on both individuals and businesses.

21 The questions posed by the TOR touch a wide range of stakeholders: workers across the full spectrum of the labour market, and a diverse range of businesses – large and small, established and mature, embryonic and emergent.

22 The subject matter of the Inquiry also touches the jurisdiction of a number of regulators and government agencies and is of interest to the many consumers who are accessing a range of services 'on-demand'.

2.1 'ON-DEMAND' WORK IS NOT NEW

23 The practice of workers being available 'on-demand' – as needed by a business – is embedded in the structural and legal arrangements that underpin Australia's labour market.⁸ Labour has long been sourced on-demand to carry out work that requires specialised skills or is unplanned, seasonal or ad-hoc.⁹

24 On-demand work arrangements are often referred to as 'irregular' or 'non-standard' work.

25 The regulatory framework enables this way of working via different legal arrangements. Labour hire, casual work, fixed-term engagements and independent contracting all enable work to be sought and carried out 'on-demand'.¹⁰

8. Access the Inquiry into the Victorian On-Demand Workforce Background Paper, December 2018, on the Engage Victoria website.

9. Australian Industry Group, Submission 1, p. 4.

10. Australian Industry Group, Submission 1, p. 16.

- 26 Irregular types of work arrangements may be characterised as precarious, may give rise to job insecurity,¹¹ produce irregular earnings or provide few statutory protections or benefits.¹² Such work may be uncertain, unpredictable and risky.¹³ The arrangements do not provide any assurance that work will be ongoing. They are structurally less secure than ‘regularised’ work arrangements.
- 27 ‘Regularised’ or ‘standard’ workers are engaged on a continuing basis with a legitimate expectation of ongoing work. While no one is guaranteed a particular job ‘for life’, regularised workers generally have more regular hours and income.¹⁴ They may work full-time or part-time hours and usually have guarantees about the number and/or patterns of hours they work. Their terms and conditions must meet minimum requirements in employment standards enshrined in legislation and they can access legislative protections from unfair dismissal. This framework is characterised as providing a high degree of job and income security, in return for workers being ready, willing and able to work at the reasonable direction of their employer, when required to do so.
- 28 There are legitimate and sound commercial reasons for Victorian businesses to utilise on-demand type arrangements. On-demand arrangements facilitate a flexible approach to the engagement of labour that can assist businesses to deal with peaks and troughs in demand, without some of the constraints associated with engaging ongoing employees.¹⁵
- 29 So too, workers may seek different arrangements at different stages in their life, depending on their preferences, skills and life priorities and commitments. A student will want different work arrangements and hours from a person starting out a career, and that same person may want something different again if they decide to start a family. Technology offers many opportunities to work differently and flexibly in some sectors, and businesses’ and workers’ policies and expectations have been adapting.
- 30 Interventions by governments in the labour market in response to the outbreak of coronavirus (COVID-19), that we are experiencing at the time of writing this report, provide a dramatic illustration of the stark distinction between ‘regularised’ and ‘on-demand’ work.
- 31 ‘On-demand’ workers are the first to be let go in a downturn. Employers have no obligations to continue to provide them work or pay them. But they are contractually obliged to continue to employ and, in some cases, pay their regularised workers if they are available to work. If they do not have work for ‘regularised’ workers there are options available to employers, but they are subject to rules – stand downs or directed leave or terminations with redundancy may be available, but only where certain factual requirements are met and/or payouts are made to workers. Other arrangements may be available ‘by agreement’, such as reductions in workers’ hours. The Commonwealth Government’s wage subsidy program, the JobKeeper payment, provides greater flexibility to businesses impacted by the COVID-19 interventions, in return for retaining and making minimum payments to employees even if there is not work for them to do. The eligibility requirements set for access to the JobKeeper scheme have seen large numbers of businesses take up this opportunity. But not all workers can benefit from the payments – many ‘on-demand’ workers are not eligible. Only ‘long-term’ casual employees may receive this support.
- 32 While on-demand work and its relative structural insecurity is not new, there have been changes in how some of this work is being sourced and organised that warrant scrutiny.

11. Z. Adams and S. Deakin, ‘Institutional Solutions to Precariousness and Inequality in Labour Markets’, *British Journal of Industrial Relations* vol. 52, no. 4, 2014, p. 787; S. De Silva, ‘Gender and work in the gig economy: New ways of working for women in Australia with the same old problems?’, Masters minor thesis, University of Melbourne, 2018, p. 43.

12. A. Stewart and J. Stanford, ‘Regulating work in the gig economy: what are the options?’, *The Economic and Labour Relations Review*, vol. 28, no. 3, 2017, p. 28; De Silva, p. 44.

13. A. Kalleberg, ‘Precarious Work, Insecure Workers: Employment Relations in Transition’, *American Sociological Review*, vol. 74, no. 1, 2009, p. 2; De Silva, pp. 43–44; G. Rodgers, ‘Precarious Work in Western Europe: The state of the debate’, in G. Rodgers and J. Rodgers (eds), *Precarious jobs in labour market regulation – the growth of atypical employment in Western Europe*, International Labour Organisation (International Institute for Labour Studies), 1989, p. 3. See also the Australia Institute Centre for Future Work, Submission 9, p. 16.

14. The standard employment relationship is typically defined in much of the literature as one where a worker usually works for one employer, on a permanent full-time basis, at the employer’s place of work, utilising equipment supplied by the employer, with an expectation that employment is ongoing: G. Bosch, ‘Towards a New Standard Employment Relationship in Western Europe’, *British Journal of Industrial Relations*, vol. 42, no. 4, 2004, pp. 618–619; See also Australian Council of Trade Unions, Submission 11, pp. 2, 9–10.

15. Australian Industry Group, Submission 1, p. 12; Institute of Public Affairs, Submission 36, p. 7; Sidekicker, Submission 71, p. 2; Victorian Chamber of Commerce and Industry, Submission 83, p. 3.

2.2 PLATFORM 'ON-DEMAND' WORK – WHAT'S DIFFERENT?

- 33 The emergence of digital platforms that source, sort, organise or deploy workers presents a shift in the efficiency and accessibility of on-demand work over the last decade. In particular, the speed and ease with which workers can be engaged or sourced, terms can be agreed and work then executed via platforms, has created new opportunities at an individual and economic level.¹⁶
- 34 Platform work can provide economic benefits by creating efficiencies in matching buyers and sellers, creating new markets and providing better or improved services.¹⁷ It can provide workers with skills, experience and opportunity that may lead to more traditional work opportunities, reducing unemployment.¹⁸
- 35 Platforms are present in, and organising work, across a range of sectors. Platforms match workers to demand in 'real time', usually in response to an end user requesting services via the platform.
- 36 Platform organised work is distinct from the common scenario where a business uses technology to directly source workers, or to augment its processes to more efficiently manage its directly engaged workforce.
- 37 Platforms act as an intermediary, sometimes referred to as an 'aggregator' or a 'mediator' of the work between the worker and end user. It is the role these third parties play in the relationship, that is structurally distinct (and new) that warrants scrutiny.
- 38 While the platforms resemble '**labour hire**' in that they are an intermediary organising work, they are distinct from the traditional approach used by 'on-hire' businesses.
- 39 Labour hire generally supplies workers to work within a business. Platforms are generally supporting the completion of individual tasks, often being commissioned directly by consumers. Traditional 'on-hire' firms generally employ their workers. Platforms largely deploy workers through non-employment arrangements.
- 40 Platform organised work is also distinguishable from individuals using **online channels** to directly promote their services to potential end users. While the activities are digital, they are akin to, and a natural evolution of, traditional advertising – Facebook and Gumtree are the online equivalents of the annual Yellow Pages book and newspapers. The work is not being organised or accessed through a platform intermediary but being directly accessed through a passive online marketing channel.

16. Victorian Chamber of Commerce and Industry, Submission 83, p. 3; See Uber, Submission 79, p. 9; Australian Chamber of Commerce and Industry, Submission 10, p. 12; Menulog, Submission 50, p. 8; Deliveroo, Submission 28, pp.2, 3; Deliveroo, Submission 28, p. 3 (meta-analysis by Capital Economics of a YouGov survey of restaurants); Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, Individual Consultation via teleconference, 9 July 2019, Department of Premier and Cabinet, 1 Spring St Melbourne; Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019, Department of Premier and Cabinet, 121 Exhibition St, Melbourne; Deloitte Access Economics, *Economic effects of ridesharing in Australia*, Uber, 2016, p. 2.

17. Victorian Chamber of Commerce and Industry, Submission 83, p. 3. At the same time, according to Ai Group, employers are unable to find the right people to fill positions. Ai Group suggests that the labour market is increasingly divided into those who have money but no time and those with time but no money and that, 'the rise of digital talent platforms provides a bridge for these two groups to for mutual benefit', Australian Industry Group, Ai Group Workforce Development, '[Thought Leader Paper: Education & Training Policy Team](#)', *The Emergence of the Gig Economy*, 2016, p. 7.

18. See Uber, Submission 79, pp. 8 and 9; Australian Chamber of Commerce and Industry, Submission 10, p. 12.

2.3 KEY CONCEPTS AND ISSUES

2.3.1 Defining platform work

- 41 The TOR direct the Inquiry to consider the nature of the labour arrangements being used by online platforms and consider the application of workplace laws to these arrangements.
- 42 A range of terminology is used to describe on-demand work, including ‘gig’ work, ‘sharing’ work, ‘collaborative’ work, ‘crowdsourcing,’ ‘independent work’ and ‘freelance’ work. The term ‘gig economy’ along with ‘gig work’ emerged during the global financial crisis in 2009, when many workers lost ongoing, full-time employment, and turned to short term jobs or ‘gigs’ as independent contractors.¹⁹
- 43 Some have observed that the range of work performed and the variety of ways in which that work is structured and organised, make it difficult to construct a simple definition or explanation of ‘What is the gig economy?’²⁰ A consideration of definitions used in the literature relating to ‘gig’ work, indicates a distinct lack of shared agreement about what this term captures. Some argue that the gig economy is simply a smaller part of the wider independent workforce.²¹ Others construe gig work to include any type of short-term job or task and not work gained exclusively via a digital platform.²²
- 44 In this report, we use the following characterisations/terms:
- ‘**Platform work**’ is work accessed through or organised by digital platforms which match workers and clients via internet platforms or ‘apps’.²³ Platform work is a sub-set of ‘**on-demand work**’, by which we mean any work in the labour market being procured ‘on-demand’ (including casual employment and self-employed workers/independent contractors).
- 45 In considering platform work, the Inquiry did not focus on other types of economic activity that is transacted online, even though ‘work’ may be indirectly or incidentally connected to this activity. For example, the buying and selling of goods or the renting of property were not a focus of the Inquiry. It is clear these activities are very popular²⁴ and involve some ‘work’ on the part of participants, but the fundamental basis of the transaction is not the provision of labour.
- 46 Platform work is the key emergent labour market issue that was the focus of this Inquiry.

2.3.2 Platform work – highly contested points of view

- 47 The way platforms facilitate large scale sourcing of workers ‘on-demand’ and the nature of the arrangements in place with these workers, has been the subject of active and contested discussion.
- 48 The way in which technology is enabling ‘on-demand’ work, and the role of ‘platforms’ in facilitating such work was the primary focus of the submissions and feedback provided to the Inquiry.

19. K. Minter, ‘Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales’, *The Economic and Labour Relations Review*, vol. 28, no. 3, 2017, p. 440; L. Hook, ‘Year in a Word: Gig Economy’, *Financial Times*, 30 December 2015; J. Manyika, S. Lund, J. Bughin, K. Robinson, J. Mischke and D. Mahajan, *Independent Work: Choice, necessity, and the gig economy* [website], McKinsey Global Institute, 2016, p. 4; A report by the International Labour Office in 2012 found that following the global financial crisis, involuntary part-time and temporary work had increased in the vast majority of European Union member states, International Labour Organisation, International Institute for Labour Studies, *World of Work Report 2012: Better Jobs for a Better Economy*, International Labour Office, 2012, pp. vii-viii, 1.

20. J. Prassl and M. Risak, ‘Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork’, *Comparative Labor Law & Policy Journal*, 2016, vol. 37, no. 3, p. 619; W. de Groen, Z. Kilhoffer, K. Lenaerts and I. Mandl, *Employment and working conditions of selected types of platform work* [website], Eurofound, 2018, p. 9.

21. Manyika et. al., ‘Independent Work’, pp. 4 and 105.

22. De Groen et al., ‘Employment and working conditions of selected types of platform work’, p. 9; Manyika et al., pp. 4 and 105.

23. V. De Stefano, ‘The Rise of the ‘just-in-time workforce’: On-demand work, crowdwork and labour protection in the gig-economy’, *ILO Conditions of Work and Employment Series*, No. 71, 2016, p. 1; See also Prof David Peetz, Submission 58, p. 7.

24. Survey results indicate just over 60 per cent of participants had bought goods or access creative works through online market places in the previous 12 months of responding with a further 17.4 per cent having done so outside of this period; Nearly 30 per cent had rented premises in the previous 12 months with a further 15 per cent earlier than this. P. McDonald, P. Williams, A. Stewart, R. Mayes and D. Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact*, Melbourne, Queensland University of Technology, The University of Adelaide and the University of Technology Sydney, 2019, p. 77.

- 49 In submissions to the Inquiry, and in public debate, there is much commentary on the operation of the ‘gig economy’ – often emphatically stated generalisations and contradictory assertions. Common and contradictory sentiments expressed about platform work include:
- it is exploitative and low paid
 - it provides flexibility and choice
 - workers are vulnerable
 - it creates valuable ‘entry level jobs’ and ‘jobs’ that never existed before
 - it provides significant economic benefits
 - the jobs are insecure or precarious
 - it is fundamentally changing the structure of the labour market
 - it is only a small part of the economy.
- 50 In spite of the hotly contested assertions, there has been little deliberate, transparent consideration of these issues by Australian Governments prior to this Inquiry, and limited research in the Australian context.
- 51 The Inquiry considered it important to carefully test and closely scrutinise these polarised and passionate assertions, as well as broad generalisations about platform work – to test their accuracy and ubiquity and identify patterns and outliers.
- 52 The National Survey and other information provided to the Inquiry show that on-demand work is occurring in a variety of ways across a diverse range of sectors, with differences in the nature of the work, spectrum of experiences, pay and arrangements arising from platform work. Comments levelled at the ‘on-demand economy’ may be borne out in some sectors, or regarding some platforms, but not be universally true.
- 53 Given the enormous diversity of the work and the platforms’ arrangements, generalised statements require careful consideration. To do this, the Inquiry sought to interrogate parts of the labour market in which platforms are operating and consider the consequences.
- 54 The Inquiry identified features present across most platforms, as well as categorising the ‘main’ modes of operation. The National Survey assisted the Inquiry in drawing common threads across work, workers and platforms (see below).

2.3.3 Work status and entitlements for platform workers

- 55 A recurring and central issue that arises is the ‘work status’ of platform workers.
- 56 The prevailing view is that these workers are not operating under employment arrangements. They are self-employed workers: ‘independent contractors’.
- 57 With a few notable exceptions,²⁵ independent contractors are not subject to workplace regulation. Their pay and work hours are determined by arrangement with another party, subject to commercial arrangements. They are effectively ‘small businesses’ and their remedies are those that apply to any business, such as the law around ‘unfair contracts’ and associated dispute resolution services.²⁶
- 58 In referring to worker status, this report delineates between ‘employee’ workers and ‘non-employee’ workers – noting that this is not always a clear line to draw. Sometimes workers are ‘presumed’ not to be employees because of the nature of their arrangements and the way in which the platform treats them. At times, the report refers to ‘presumed’ status or ‘presumed’ non-employee workers.

25. Independent contractor owner drivers receive certain protections under the *Owner Drivers and Forestry Contractors Act 2005* (Vic); Outworker terms may be included in awards, see *Fair Work Act 2009* (Cth), s140.

26. See discussion of non-workplace law remedies in Chapter 6 and remedies available under the *Independent Contractors Act 2006* (Cth), and the *Competition and Consumer Act 2010* (Cth).

- 59 A particular distinction relied on by many stakeholders, is that platform workers choose when and if to work, so therefore cannot be employees. A worker's status as either an employee or contractor is pivotal. It determines the application or otherwise, of a broad range of rights, entitlements and related benefits. 'Non-employment' workers are provided fewer guaranteed protections than employees.²⁷
- 60 A person's work status determines how they, and those who engage them, must interact with various regulatory frameworks.²⁸ In practical terms, their status also influences where workers may obtain help and advice should they wish to raise a concern or pursue a complaint about their conditions, entitlements or obligations.
- 61 The status of workers is a central issue in considering the nature and impact of platform work. Key public policy concerns go to the nature and status of these workers and whether the arrangements that apply to them are fair and sufficiently certain. This report considers the public policy issues that arise from the fundamental question of whether the non-employment arrangements used by platforms have been legitimately characterised in this manner. It considers the impact of those arrangements for workers, businesses and the labour market, and the challenges in attempting to test their legitimacy.
- 62 A primary challenge in testing these issues is the sheer diversity of platforms, work and arrangements operating in the labour market.

2.3.4 Data about platform work

- 63 Noting the diversity in platform work and the polarised views about its impact, it was imperative for the Inquiry to seek out reliable data. Information direct from individuals and businesses is highly valuable. But the experience of one business or one worker is not necessarily representative of all platform work.
- 64 In considering the existing data sources and research capable of providing insight into platform work, it was evident that these sources were not adequate to inform the TOR of the Inquiry. There was not recent or comprehensive research or data directly going to the extent or nature of platform work in Australia.
- 65 To assist the Inquiry's work, the Victorian Government commissioned a national survey of the platform workforce: *Digital Platform Work in Australia – Prevalence, Nature and Impact* (the National Survey). The survey was the first of its kind in Australia and targeted at identifying and putting questions to people about the work they were doing via digital platforms. It was undertaken in partnership with the University of Adelaide, Queensland University of Technology and University of Technology Sydney.
- 66 The survey asked people if they used or sourced work via digital platforms and, if they did, about various features of the work; including hours worked, income and the nature of the work. The National Survey provided valuable insight into the prevalence and nature of 'gig work', as well as the motivations and preferences of 'gig workers'.

27. R. Johnstone, S. McCrystal, I. Nossar, I. Quinlan, M. Rawling and J. Riley, *Beyond Employment: The Legal Regulation of Work Relationships*, The Federation Press, 2014, p. 189; C. Roles and A. Stewart, 'The reach of labour regulation: Tackling sham contracting', *Australian Journal of Labour Law*, vol. 25, no. 3, p. 259.

28. Minter, 'Negotiating Labour Standards in the Gig Economy' p. 441; Johnstone et al., *Beyond Employment*, p. 58.

The National Survey has greatly assisted the Inquiry to test generalised assertions and be confident that its recommendations are appropriately targeted.

1 Key data National Survey

The Inquiry commissioned a targeted survey into the nature and extent of platform work in Australia. This is a first for Australia – pre-existing sources of data were not accurately capturing platform work.

- ▶ Over 14,000 people surveyed – 988 ‘currently’ participating in platform mediated work (in the 12 months prior to the survey), or 7.1 per cent of respondents (7.4 per cent for Victoria).
- ▶ **Platform work had been done at some point by 1827 participants (13.1 per cent).²⁹**
- ▶ **Only 2.7 per cent of digital workers earned all their income from platform work.³⁰**
- ▶ A significant cohort of digital platform workers (35.2 per cent) were working across platforms, including 11.4 per cent registered to work across four or more.³¹

2.3.5 How is platform work accessed and arranged?

- 67 Platforms build a pool of on-demand workers by registering workers who are available to carry out tasks for end users, that they connect with via the platform. Some platforms are very specific in the type of work they organise, while others enable a broad range of work or tasks to be performed.
- 68 The prompt for work being made available is an end user who will digitally request certain services via the platform. The platform either chooses and allocates a particular available worker to the task or, the end user chooses the worker.
- 69 The operation of the platform is determined by rules set by algorithms operating via the website or internet application (app). This allows the platform business to set prices and fees and the parameters surrounding negotiation and making of payments. Platform businesses may use algorithms to control key aspects of the work, including methods and standards of performance.³² Algorithms may apply reputational rating systems, prescribe route and destinations (for rideshare and food delivery), enforce rules governing access to the platform and to work, and allow some enabled workers to rate clients.³³ Some algorithms also provide performance metrics in real time and can collect and share data about worker and consumer behaviour with other agencies.³⁴

29. McDonald et al., p. 5.

30. McDonald et al., p. 7.

31. McDonald et al., p. 6.

32. McDonald et al., p. 15 (The authors noted in the report that platforms are known to use algorithms in this way citing the research paper by D. Coyle, ‘Precarious and Productive Work in the Digital Economy’, *National Institute Economic Review*, vol. 240, no. 1.

33. McDonald et al., p. 47 (The authors note that ratings of workers by clients were reported to be more common than the other way around).

34. McDonald et al., p. 17 citing F. Flanagan, ‘Theorising the gig economy and home-based service work’, *Journal of Industrial Relations*, vol. 61, no. 1, 2019, pp. 57-78; Australia Institute Centre for Future Work, Submission 9, p. 17.

2.3.6 Setting of prices and payment for platform work

- 70 Whilst some platforms determine the price of services, others may enable the negotiation of price and certain terms and conditions, via the platform. The platform may recommend rates or set a minimum or 'floor' in the system, which effectively prescribes a minimum rate.
- 71 The platform will generally facilitate payment to the worker, placing a hold on the payment via the client's credit card, until the task is complete.
- 72 Usually the platform charges fees, prior to – or after, the work is completed. The fee is often described as a 'deduction' from the transaction.
- 73 It could be a percentage of the total amount charged by the worker or referred to as a 'booking fee'.
- 74 The National Survey showed that the overwhelming majority of payments are for completing the task and are not time-based.³⁵
- 75 The digital platform makes it possible for the parties to communicate regarding task and payment and often, but not always, allows them to 'rate' one another.

2.3.7 Platforms' models – structure and type of 'gig'

- 76 While there are many variations in platforms' models, it is possible to identify two distinct categories which are closely related to the nature of the work being organised.
- 77 The key distinction is based on whether the end user or the platform determines which registered worker will carry out the task.³⁶
- a crowd-work system describes a model where workers apply or bid competitively to undertake tasks, ranging from skilled to less skilled. Workers maintain online profiles including information about their experience, qualifications, ratings and feedback. Examples include Airtasker, Upwork and Mable³⁷
 - a work on-demand system is where a platform allocates a task directly to a registered, currently available worker. Tasks are usually homogenous, so distinct skills and qualifications are less relevant. Services are usually expected to meet a pre-determined minimum standard set by the platform.³⁸ Examples include ridesharing and food delivery platforms like Uber, Deliveroo, Menulog and Ola.
- 78 The Australian Council of Trade Unions (ACTU) observes this distinction between platforms.³⁹ Platforms operating in a horizontal fashion facilitate interactions between freelance providers; platforms operating in a vertical fashion, although presenting in a similar way, create a hierarchy between themselves and the worker.
- 79 Platforms can deliver high transparency to buyers about alternative options because of the ease with which end users can compare workers and prices, especially via crowd-work platforms.⁴⁰ Advertisers may nominate a price for the services they wish to purchase.⁴¹ Workers then bid against each other by offering to perform the services for a specific price.⁴² Ratings enable participants to take into account past performance.
- 80 A common theme of platform work is that workers determine when, how often, and where they work.
- 81 The availability (of workers) is what drives when they work. This is a key distinction from regularised employment arrangements (i.e. full and part-time work) where an employee must make themselves available to work in accordance with their employment contract, at hours pre-determined by the employer. While there may be negotiation – for example, the right to seek flexible work is enshrined in the *Fair Work Act 2009* (Cth) (FW Act) – the needs of the business are the prevailing factor in determining the extent to which worker flexibility is on offer.

35. Almost 60 per cent of survey respondents indicated this was the case: McDonald et al., pp. 7 and 41.

36. De Stefano, 'The Rise of the Just-in-Time Workforce', p. 1; See also Prof David Peetz, Submission 58, p. 7; Australian Institute of Employment Rights, Submission 12, p. 4.

37. Australia Institute, Centre for Future Work, Submission 9, p.12; Prof David Peetz, Submission 58, p.7; Australian Institute of Employment Rights, Submission 12, pp. 7-8.

38. Prof David Peetz, Submission 58, p. 7.

39. Australian Council of Trade Unions, Submission 11, p. 2.

40. Media, Entertainment and Arts Alliance, Submission 49, p. 6.

41. Tim Fung, Airtasker, Individual Consultation via Skype, 3 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

42. Tim Fung, Airtasker, 3 July 2019.

- 82 Many platforms emphasised to the Inquiry that their workforce is not obliged to take on any tasks even if they are actively logged onto the app. They may not be required to carry out a task even after they have agreed to do the job (but not yet commenced it).⁴³ If a worker then rejects the job, it can become available for another worker.
- 83 A significant proportion of platform work may be completed remotely or offers workers a choice about where they choose to deliver services.
- 84 Work that is performed online, such as web page design, graphic design, marking of exam papers, translation services and coding, are examples of work that can be done anywhere.
- 85 Work that requires physical proximity, such as trades or domestic tasks, delivery and ridesharing services, enables workers to choose their preferred locations, subject to the work being available in those locations.

2.3.8 Work arrangements

- 86 Platform workers are often operating under arrangements established by the platform to maximise the agility and responsiveness of their operating models.
- 87 While there are a small number of notable exceptions, the arrangements established by the platforms with the workers are usually consciously framed to avoid an employment relationship arising between the worker and the platform.⁴⁴
- 88 Non-employee platforms often structure their arrangements to facilitate direct engagements between the worker and the end user to complete a particular task or job. Platforms cast their services to the worker in terms of access to the platform. Platforms may not always take responsibility for the nature or delivery of the service.⁴⁵
- 89 The complexity of the various arrangements can make it difficult to determine the exact nature of the arrangements – the status of the workers and even the parties to the contracts that may arise can be unclear.⁴⁶ This in turn presents challenges in applying existing laws with any certainty. These issues are explored later in this report.

2.3.9 Secondary income

- 90 Platforms are commonly used by workers to generate additional or supplemental income to that earned through other activities. This may be a ‘traditional’ job or other platform work. The high flexibility of platform work: in terms of when and where it is done, means that it can be done around other commitments, and therefore provides access to ‘additional’ opportunities to generate income.
- 91 This was supported by the National Survey responses.

2.3.10 Platforms are evolving

- 92 Platforms evolve their models and arrangements regularly. They adjust their settings to take into account demand, including in real-time, to increase efficiency and to modify payment structures and policies. Over time, platforms have adjusted their earlier operations on a number of fronts, for example, providing for enhanced safety procedures or insurance arrangements, or covering ‘pay’ over periods where workers cannot work (as has been done by rideshare and food delivery platforms with the outbreak of COVID-19). Platforms have also changed the way in which workers are paid – for example, reducing guaranteed payments and increasing the commission basis for work.

43. The National Survey found that only 22.8 per cent of those surveyed reported that their platform penalises them for declining work: McDonald et al., *Digital Platform Work in Australia*, p. 47.

44. See, Airtasker, [How do I get a payment invoice?](#) [website]; Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019; Australian Council of Trade Unions, Submission 11, p. 2. Prof Shae McCrystal and Prof Andrew Stewart, Submission 47, p. 4.

45. The Didi *Driver Agreement* states, for example, that ‘Once you accept a request for Transportation Services, you have sole responsibility for the provision of those Transportation Services in accordance with the passenger’s request’ (clause 1.2, Didi [Driver Agreement](#)) [website]. See also those on-demand platforms that operate as an open market place where the scope and price of the services is determined by the worker and consumer (buyer and seller of the service): Tim Fung, Airtasker, Platform Business Roundtable Discussion, 22 February 2019, Victorian Chamber of Commerce and Industry, 150 Collins Street, Melbourne; See also Airtasker, Submission 116, [Senate Select Committee on the Future of Work and Workers](#) [website], February 2018.

46. Dr Jim Stanford, Australia Institute Centre for Future Work, Submission 9, p. 15; Prof John Burgess and Prof Alex de Ruyter, Submission 19, p. 3; Clare Amies, Worksafe, Individual Consultation, 16 October 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

Chapter 3 | The labour market – conditions and on-demand comparisons

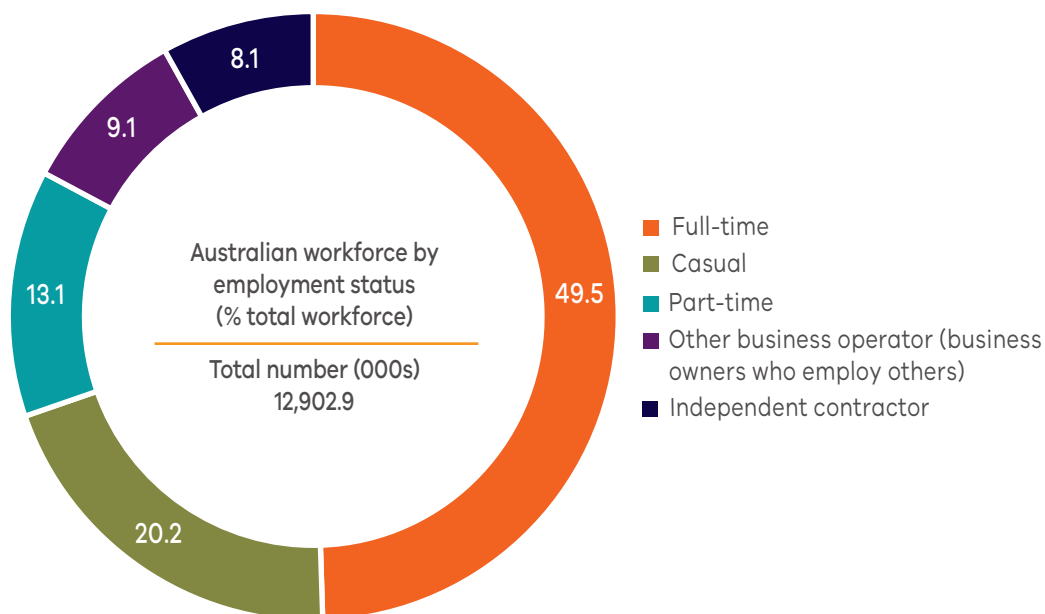
Snapshot

- ▶ Longstanding legal arrangements sit behind both regularised or 'standard' and irregular or 'on-demand' work.

3.1 ONGOING, 'REGULARISED' WORK ARRANGEMENTS

- 93 Australia's labour market has been the subject of close and detailed regulation by statutory frameworks that establish standards, entitlements and obligations primarily to the parties to 'employment' relationships. These legal frameworks are referred to throughout this report.
- 94 The critical dichotomy between 'regularised' and 'irregular' workers is the degree of certainty and protections around regularity of hours worked – both in terms of the total number of hours and the pattern of work, thereby providing job and income security (Figure 1). In the context of COVID-19, we have seen temporary changes made in the system – by the Commonwealth Government as part of the JobKeeper program and by the Fair Work Commission (FWC) – that have provided greater flexibility for changes in both total hours of work and patterns of work.

FIGURE 1: AUSTRALIAN WORKFORCE BY EMPLOYMENT STATUS*



Source: Australian Bureau of Statistics, Characteristics of Employment, Australia, August 2019, Cat.no 6330.0, 9 Dec 2019: Table 1c Median earnings for employees by state, full-time or part-time and status of employment, 2004–2019, Table 9.1 Form of employment by demographic characteristics.

* On-demand workers might be distributed amongst any of these categories.

3.1.1 Full-time employees

- 95 The largest single group of Australian workers are permanent employees under contracts of service to work ‘full-time’ hours.⁴⁷ Most industrial regulations define this as 38 hours a week, though data generally also captures those working 35 hours per week in the ‘full-time’ cohort.⁴⁸
- 96 Full-time employees with paid leave entitlements make up nearly 50 per cent of the workforce.⁴⁹ This has declined since 1992, when 55.6 per cent of employees were engaged full-time, with paid leave entitlements.⁵⁰
- 97 Commonwealth employment laws assign a range of entitlements to ‘full-time’ employees. And, as workplace conditions have evolved, the legislature has generally conferred new entitlements on workers in ongoing employment relationships.
- 98 Current entitlements include minimum rates of pay, additional payments (such as overtime, penalty rates and allowances) for work outside of, or in addition to, standard hours and various forms of paid and unpaid leave. The laws provide access to an independent tribunal to resolve disputes that arise with the employer and to consider the fairness of employment terminations. Workers may have their employment terminated if operational changes mean the employer no longer requires their job to be done but such redundancies must be genuine. The law sets out clear processes and protections.⁵¹ These entitlements are provided for by rules in the FW Act (such as the National Employment Standards), and more detailed rules contained in ‘modern awards’, which apply on an industry or occupational basis. Together, these set minimum standards including pay rates, for employees.⁵²
- 99 Some workplaces are covered by local arrangements detailed in ‘enterprise agreements’. These are intended to be ‘above minimum’ arrangements and agreed to by workers who may be represented by unions in the ‘bargaining’ process. Every worker must be ‘better off overall’ than they would be under the award – a test overseen by the workplace tribunal – the FWC.⁵³
- 100 These entitlements – no matter where they derive from – can be enforced by employees in a court (or the FWC) and penalties imposed if laws are not complied with. Unions or the FWO may also take this action.
- 101 Employees are entitled to be paid superannuation. Employers must comply with obligations in relation to employee workplace health and safety and ensure appropriate insurance is in place to cover employee work injuries.⁵⁴

3.1.2 Part-time employees

- 102 An increasing number of employees work regular hours but for fewer than 38 hours a week under ‘part-time’ arrangements.⁵⁵ In 2019, this cohort represented 13.1 per cent of all workers, and 15.8 per cent of employees.⁵⁶ Part-time work is a longstanding feature of the labour market. A higher proportion of women are in part-time work and the increase in permanent part-time work has been more marked for women.⁵⁷ The participation rate of women in the labour force has increased from 45 per cent in the late 1980s to 60 per cent in 2019. Close to half of all employed females currently work part-time.⁵⁸

47. See Organisation of Economic Cooperation and Development, *OECD Stat Extracts*, 2017, cited in W. Lewchuk, ‘Precarious Jobs: Where are they, and how do they affect well-being?’, *The Economic and Labour Relations Review*, vol. 28, No. 3, 2017, p. 413; Australian Bureau of Statistics, *Characteristics of Employment*, August 2019. Cat.no 6330, 9 December 2019. Table 1c Median earnings for employees by state, full-time or part-time and status of employment, 2004–2019, Table 10. Table 10 Form of employment by industry, occupation and educational qualification; Approximately two thirds of male workers are engaged in standard full-time dependent employment on an ongoing employment contract but only 41 per cent of women are, see R. Wilkins, I. Lass, P. Butterworth and E. Vera-Toscano, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 17 – The 14th Annual Statistical Report of the HILDA Survey*, Melbourne Institute, Applied Economic & Social Research, The University of Melbourne, Melbourne, 2019, p. 72.

48. See Australian Bureau of Statistics, *Labour Force Explained* [website].

49. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019. Cat.no 6330, 9 December 2019. Table 1c Median earnings for employees by state, full-time or part-time and status of employment, 2004–2019, Table 10. Table 10 Form of employment by industry, occupation and educational qualification.

50. Australian Bureau of Statistics, *Australian Labour Market Statistics*, 2004, Cat.no 6105.0, 1 Oct 2004, p. 14.

51. *Fair Work Act 2009* (Cth), s119.

52. *Fair Work Act 2009* (Cth), Part 2–6 generally and s284.

53. *Fair Work Act 2009* (Cth), s189.

54. Note some ‘non-employee’ workers also have entitlements under these laws: see Chapter 6.

55. As at August 2019 there were 1.69 million part-time employees with paid leave entitlements. This is 15.8 per cent of all the employees (10,683,000), 13.1 per cent of workers (12,909,900). In 2004 the figure was 11.7 per cent of all employees. See Australian Bureau of Statistics, *Characteristics of Employment*, August 2019, cat. No 6333.0, 9 December 2019, Table 1c.3 Employees by state, full-time or part-time and status of employment, 2004–19.

- 103 Part-time workers are entitled to the same benefits as full-time workers, on a pro rata basis. Modern awards generally set out a process under which working hours are agreed, usually in writing. These agreements go to both the number of hours each week as well as the rosters or shifts to be worked (although there are some variations between awards). They contain rules about changing these hours – generally requiring agreement in writing with the employee, often with notice. Overtime may be payable for hours worked over the total number of agreed hours.⁵⁹
- 104 Like full-time workers, part-time workers are entitled to unfair dismissal remedies and may access dispute resolution processes.
- 105 The regulation in place means ‘regularised’ arrangements deliver a degree of structural stability and security. They generally provide predictable hours of work, minimum rates of pay, access to remedies if employment is terminated and remedies if entitlements are not provided as they should be.
- 106 However, there are examples where part-time work is less regularised and arguably results in some part-time work being more akin to ‘on-demand’ work.⁶⁰ This may arise through changes in some awards that have enabled patterns of work and/or total amount of hours to be varied more easily above a ‘core’ number of hours – ‘flexing up’ (though generally, still by agreement with the employee).⁶¹ In some workplaces, rules contained in enterprise agreements that provide for regular roster patterns, hours of work and minimum hours, may have been modified during the course of negotiations. Some agreements allow part-time employees to be rostered for up to 38 hours a week without overtime rates.⁶² It is difficult to identify the proportion of part-time employees who have irregular hours. However, in 2018, there were 1.206 million Australian employees who received paid leave entitlements, but who did not work the same number of hours each week (these may be full-time and part-time employees).⁶³ Approximately 1.156 million employees with paid leave entitlements experience variations in pay from one pay period to the next.⁶⁴
- 107 Notwithstanding the above, in the main, part-time work fits more generically with ongoing full-time work, so is structurally included with full-time ongoing work in this report.

56. See Australian Bureau of Statistics, *Characteristics of Employment*, August 2019, cat. No 6333.0, 9 December 2019, Table 1c.3 Employees by state, full-time or part-time and status of employment, 2004-19.

57. Wilkins et al., *The HILDA Survey 2019*, p. 75.

58. Victorian Government [Submission](#), Annual Wage Review 2019–2020 [website], p. 13.

59. See, for example, *Hospitality Industry (General) Award 2010*, clause 12 (part-time employees); *Legal Services Award 2010*, Cl. 10 (part-time employees). See also concerns expressed by participants that part-time work is quasi-casual, with casualised work practices not being confined to casuals: Prof Iain Campbell, Dr Sara Charlesworth and Dr Fiona Macdonald, Submission 21, p. 15.

60. B. Howe, P. Munro, J. Biddington and S. Charlesworth, *Lives on Hold: Unlocking the Potential of Australia's Workforce – The report of the independent inquiry into insecure work in Australia*, Melbourne, Australian Council of Trade Unions, 2012, p. 17; See also S. Charlesworth and A. Heron, ‘New Australian Working Time Minimum Standards: Reproducing the Same Old Gendered Architecture?’, *Journal of Industrial Relations*, vol. 54, no. 2, 2012, p. 176; See award and agreement clauses, *Hospitality Industry (General) Award 2010*, Cl. 12.5; RACV Memberline/SSS [Enterprise Agreement](#) 2017 Cl. 7d).

61. Part-time employees may be guaranteed minimum hours but can be rostered across, and according to, agreed yet variable cycles. Some awards and agreements allow for part-time employees to be flexed up beyond permanent hours at the employer’s discretion. The Fair Work Commission has amended awards applying to the care and hospitality sectors to make it easier for employers to do this. In the care sector, the amendments make it clear part-time workers may be offered additional hours. In the hospitality sector the amendments require employers to guarantee a minimum eight hours per week but they can roster both guaranteed and additional hours unilaterally, as long as the hours are within the part-time employee’s availability and they receive two days off each week. Agreement only needs to be obtained if guaranteed hours are to be changed. Conversely, the Legal Services Award requires overtime to be paid for all hours over contracted hours, unless a written variation of contract is agreed and a copy retained by both employee and employer. See *Hospitality Industry (General) Award 2010*, Cl.12.5; See Prof Iain Campbell, Dr Sara Charlesworth and Dr Fiona Macdonald, Submission 21, p. 13.

62. See, for example, RACV Memberline/SSS [Enterprise Agreement](#) 2017, Cl. 7d.

63. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019, Cat. No. 6330, 9 Dec 2019, Table 7 Employees and OMIES Median weekly earnings in main job – selected employment characteristics – by status of employment in main job.

64. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019, Cat. No. 6330, 9 Dec 2019, Table 7 Employees and OMIES Median weekly earnings in main job – selected employment characteristics – by status of employment in main job.

3.2 LEGAL STRUCTURES THAT SUPPORT WORK 'ON-DEMAND'

Snapshot

- ▶ **Businesses have long been able to source 'on-demand' workers directly, through engaging their own 'on-demand' workers or indirectly via intermediaries.**
- ▶ **Different arrangements can underpin on-demand work including casual work, fixed-term contracts and self-employed independent contractors.**

3.2.1 Fixed and maximum term employees

- 108 Key features of fixed-term work share some, but not all, features of ongoing regularised full or part-time work.
- 109 Fixed-term work is work that provides regular arrangements for a set-term. Fixed-term employees are entitled to minimum rates of pay and leave. They may be entitled to unfair dismissal remedies if they are terminated prior to the end of their set-term, subject to their having served the statutory probation period of 6–12 months.⁶⁵
- 110 There is limited authoritative data available for fixed-term work. Australian Bureau of Statistics (ABS) data from 2014, indicates that three to four per cent of employees were on fixed-term contracts.⁶⁶
- 111 The extent to which a fixed-term arrangement may be akin to 'on-demand' work depends on the duration of the term. Some people argue that short fixed-term work is similar to 'gigs' but, as noted, the employment conditions applying to fixed-term work compared to what is mostly applying to 'gigs', are different.⁶⁷

3.2.2 Casual employees

- 112 Casual work is a longstanding part of the Australian labour market. At law, a casual employee is one who is engaged from shift to shift. They have no guarantee of ongoing work, beyond the particular shift they may be working. They may be asked to work at very short notice although they are not obliged to take on a shift.
- 113 The proportion of casual employees has remained relatively stable over the past 20 years.⁶⁸
- 114 At August 2019, there were about 2.6 million employees (24.5 per cent of employees, 20.2 per cent of workers) in Australia who were engaged in their main job as a casual.⁶⁹
- 115 Like part-time work, the available ABS data shows that casual work is highly gendered. In 2004, approximately 21.6 per cent of male employees were engaged as casual employees in Australia, rising to about 22 per cent in 2018. In 2004, casually employed females made up nearly 30 per cent of female employees, dropping to just under 27 per cent in 2018. The rate of female casuals is notably higher than the rate of males in the period between 2004 and 2018.⁷⁰

65. *Fair Work Act 2009* (Cth), s383.

66. Australian Bureau of Statistics, *Characteristics of Employment*, August 2014, Cat. No. 6333.0. In 2017, *The HILDA Survey* assessed approximately 10.1 per cent of employees as on a fixed-term arrangement, a small increase from 8.3 per cent in 2001: Wilkins et al., *The HILDA Survey 2019*, p. 77; See also A. Stewart, A. Forsyth, M. Irving, R. Johnstone, S. McCrystal, *Creighton & Stewart's Labour Law*, 6th edition, Sydney NSW, The Federation Press, 2016, p. 720. (The authors suggest that, in 2015, higher estimates of fixed-term contractors, at around nine per cent of employees, are more accurate than Australian Bureau of Statistics data which suggests three to four per cent of employees are on fixed-term contracts. Contrast Wilkins et al., *The HILDA Survey 2019* and Australian Bureau of Statistics, *Characteristics of Employment*, August 2014, Cat. No. 6333.0).

67. Precarious work is commonly considered as being characterised by insecure work or jobs (with no guarantee of continuous or ongoing work); it often involves contracts (though some workers may be employees), is frequently casual and produces variable earnings (changes from week to week or paid on a piecework basis). Few statutory protections or benefits apply to these categories of work: M. Rawling, 'Regulating Precarious Work in Australia: A preliminary assessment', *Alternative Law Journal*, vol. 40, no. 4, 2015, p. 252; M. Quinlan, 'The 'Pre-Invention' of Precarious Employment: The Changing World of Work in Context', *The Economic and Labour Relations Review*, vol. 23, no. 4, 2012, p. 5; S. De Silva, 'Gender and work in the gig economy', p. 6; See also Stewart et al., *Creighton & Stewart's Labour Law*, p. 720 regarding a similar view that fixed-term contracts are being increasingly used.

68. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019, Cat. No. 6330.0, 9 December 2020: Table 8 Median Earnings for employees and OMIE's by demographic characteristics; AiGroup, Economics Research, *Casual work and part-time work in Australia in 2018*, June 2018, p. 3.

69. Australian Bureau of Statistics, *Characteristics of Employment*, 2019, Cat. No. 6330 August 2019, Table 7 Employees and OMIES Median weekly earnings in main job – selected employment characteristics – by status of employment in main job.

- 116 Casual employees are, according to award definitions, employees who are engaged or paid as such.⁷¹ They are entitled to shifts of minimum duration (generally 2–4 hours, depending on the award, although some provide for a minimum engagement period of one hour). Other than this rule, they may be rostered on at any time of day for any period (subject to minimum shift requirements) with penalties for work outside the spread of ordinary or maximum weekly hours contained in the national employment standards.⁷²
- 117 Unlike workers engaged under standard employment arrangements, these workers are generally not entitled to paid leave. They are often not able to access remedies for unfair dismissal or entitled to redundancy payments. Their ‘term’ of employment is essentially shift to shift or, at most, rostered period to rostered period, subject to the exceptions below. Casuals are legally entitled to a higher hourly rate of pay than those employed under ‘standard’ arrangements – a ‘loading’ provided for under modern awards to compensate for lack of other entitlements.
- 118 While casual employees may work irregular numbers and patterns of hours, this is not necessarily always the case. Some casuals work regular patterns under modern rostering arrangements – even ‘full-time’ hours. Some may also be employed under casual arrangements for long periods of time. While they may be working long-term and/or regular hours, this regularity is not guaranteed under law and may be the subject of unilateral change by the employer.
- 119 When government orders unexpectedly curtailed business operations in response to the need to protect the community from COVID-19, this cohort was the most immediately affected. These workers have no legal right to ongoing work and were the first to be ‘let go’.
- 120 Recent developments have sought to distinguish between genuine ‘short term’ casuals and those who work regular and systematic hours over a 12-month period. Rules have been included in awards to provide workers with the right to request to ‘convert’ to ongoing arrangements that reflect their regularised hours (to full-time or part-time).⁷³ The Commonwealth Government sought to extend this entitlement to workers not covered by an award. Legislation was introduced, but not passed, before the last federal election.⁷⁴
- 121 If casual employees are engaged on a regular, systematic and ongoing basis they may have access to unfair dismissal remedies. It is this definition that has been used to extend the Government’s COVID-19 wage subsidy, the JobKeeper payment, to ‘long-term’ casuals.
- 122 Courts have also found that some people classified as ‘casual’ workers were effectively ‘full-time’ employees for the purposes of the accrual of leave entitlements, in part because they were working regular and predictable hours.⁷⁵

3.2.3 Labour hire

- 123 Labour hire (also known as on-hire) is another way businesses access workers ‘on-demand’.
- 124 Under these arrangements, workers are directly engaged by a third party – a labour hire company, effectively a ‘broker’ – that places workers into businesses on request and in return for fees. The business in which the workers are placed has no legal relationship as an employer with the ‘indirectly sourced’ workers, although it would generally direct and control their work. The workers are paid by the labour hire company, which determines the work arrangement and manages compliance with employment laws.

70. Victorian Government [Submission](#), Annual Wage Review 2019–2020 [website], pp. 23 and 24.

71. See for example *Hospitality Industry (General) Award 2010*. Cl.13.1.

72. See *Fair Work Act 2009* (Cth), Div. 3, s.62.

73. See for example, *Hospitality Industry (General) Award 2010*, clause 13.6. See also Prof Iain Campbell, Dr Sara Charlesworth and Dr Fiona Macdonald, Submission 21, p. 12.

74. Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 (Casual Conversion Bill) (Notably, this piece of legislation lapsed when the last Parliament was dissolved); ‘Government moves to contain casual leave ruling’, *Workplace Express*, 11 December 2018; ‘All find (different) Problems with the Government’s Casual Conversion Bill’, *Workforce*, Issue 21413, 6 March 2019, p. 3.

75. *Workpac Pty Ltd v Skene* [2018] FCAFC 131; *Workpac Pty Ltd (ACN 111 076 012) v Robert Rossato* [2018] QUD724; *Matthew Petersen v Workpac Pty Ltd* [2019] VID89; ‘Casual Worker entitled to annual leave: Bench’, *Workplace Express*, 16 August 2019; Workpac class actions placed on hold, *Workplace Express*, 18 September 2019; CFMEU seeking to intervene in another Skene-related case, *Workplace Express*, 5 March 2019; See, for example, *Hospitality Industry (General) Award 2010*, clause 13.6; *Road Transport and Distribution Award 2010*, cl. 12.6.

- 125 Research suggests that the proportion of labour hire employees is around 1.1 per cent, and, it has been fairly stable since 2015–2016.⁷⁶
- 126 Data suggests that most workers engaged via labour hire are casuals.⁷⁷ However, there is evidence that some labour hire businesses engage workers on non-employment arrangements.⁷⁸
- 127 Traditionally, using labour-hire could mean that the ‘hiring’ business accessed workers with no requirement to consider their pay and conditions. However, new legislation in some Australian jurisdictions, has altered this situation. This follows significant evidence of some labour hire providers exploiting vulnerable workers in a range of sectors.
- 128 States, including Victoria and Queensland, have regulated labour hire businesses, through licensing schemes, meaning only reputable and responsible labour hire operators can be used by business to access workers under these arrangements.⁷⁹
- The definition of labour-hire used in the *Victorian Labour Hire Licensing Act 2019*, is broadly that: ‘A person (a **provider**) provides labour hire services if:
- (a) in the course of conducting a business, the provider supplies one or more individuals to another person (a **host**) to perform work in and as part of a business or undertaking of the host; and
 - (b) the individuals are workers for the provider.’
- 129 This definition is refined by other sections of the Act, and in the Regulations, to apply to specific circumstances. Outsourcing is covered for some applications under the statutory definition of labour-hire.
- 130 Compared to earlier arrangements, host companies now also have specific obligations in Victoria. It is an offence for a host company to use an unlicensed labour hire provider. To become licensed, the provider must meet a range of criteria including compliance with work laws. This dual responsibility is a key component and strength of the scheme.
- 131 The Commonwealth has also expressed its intention to regulate labour hire providers on a national basis.

3.2.4 Outsourced workers

- 132 Some businesses access workers via outsourced arrangements. Usually this term refers to arrangements where work is done under contract by a third party. This third party is usually responsible for delivering distinct services, such as cleaning services. The business receiving the services does not direct or manage the way the services are delivered or supervise the workers.
- 133 The status of these indirectly sourced workers – full-time, part-time or casual – depends on the arrangement in place between the workers and the outsourced service provider.

3.2.5 ‘Non-employee’ workers

- 134 An important cohort of people in the labour market earn income from running a small business. These people are generally not employees.

76. Australian Bureau of Statistics, *Characteristics of Employment*, Cat. No. 6333.0, August 2014, released 27 October 2015, First Issue; A. Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work – Final Report* [website], Industrial Relations Victoria, Department of Economic Development, Jobs, Transport and Resources, 2016, p. 59; Ibis World, *Temporary Staff Services – Australia Market Research Report, 2019* [website]; L. Brennan, M. Valos and K. Hindle, *On-Hired Workers in Australia: Motivations and Outcomes*, Melbourne, School of Applied Communication, RMIT University, 2003, p. 43 (the researchers collected data from 150 organisations and it suggested that 75 per cent of hosts used 3 per cent or less labour hire workers). Wilkins et al., *The HILDA Survey 2019*, p. 74.

77. Brennan et al., *On-hired Workers in Australia*, cited in, Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work – Final Report* [website], p. 70.

78. Recruitment, Consulting and Staffing Association of Australia and New Zealand, Submission 110, p. 13 cited in Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work – Final Report* [website].

79. See *Labour Hire Licensing Act 2018* (Vic).

- 135 People operating ‘small businesses’ often work as ‘sole traders’ and do not employ others. In working for themselves, they are generally described as ‘independent contractors’.
- 136 A characteristic of ‘independent contracting’ is that the worker exercises a high degree of control, choosing when and how they work. They are usually responsible for supplying their own clothing and equipment, control work processes and procedures and are accountable for the work undertaken.
- 137 Independent contractors now account for about 8.1 per cent of the workforce.⁸⁰
- 138 With a few notable exceptions,⁸¹ non-employee workers are not subject to workplace regulation. Their pay and work hours are determined by arrangement with another party. They are not entitled to ‘leave’ or ‘unfair dismissal’ remedies.
- 139 Their remedies are those that apply to any business, such as the law around ‘unfair contracts’ and associated dispute resolution services.⁸² There are supports and remedies available for ‘small businesses’ that they may be able to access.⁸³
- 140 Sole traders cannot bargain as a group for better conditions as employees may. Such conduct risks action by the Australian Competition and Consumer Commission (ACCC) for being anti-competitive.⁸⁴
- 141 Non-employee workers almost by definition operate as ‘on-demand’ workers because the regulatory framework does not set any rules in relation to their hours of work.
- 142 They work as and when they need to, in order to deliver the services clients or customers have commissioned. This work may involve complex, long-term projects or a single task. The nature of some tasks, particularly those that are simple tasks, means they may be sought at short notice and for short periods, which is comparable to on-demand work.

3.2.6 Bailment

- 143 A very small number of workers are engaged under what are generally characterised as bailment contracts.⁸⁵ These arrangements do not create an employment relationship and do not attract the coverage of employment regulation. Like independent contractors, ‘bailees’ are not entitled to award rates of pay or paid leave. There is some specific regulation for taxi drivers, granting some protections, but they are not treated as employees.
- 144 Bailee arrangements are longstanding in the taxi industry and apply where a taxi driver is granted possession of the vehicle for use in earning fares.⁸⁶ In Victoria, these arrangements have been regulated and provide for set percentages of earnings,⁸⁷ the covering of maintenance costs⁸⁸ and unpaid leave.⁸⁹
- 145 The introduction of Uber and similar services into the Australian market significantly disrupted these more traditional arrangements and generated ongoing industry disquiet. They challenged regulatory arrangements for commercial passenger vehicles.
- 146 Effectively, in Victoria, this market disruption resulted in new commercial passenger legislation.⁹⁰

80. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019. Cat. no 6330, 9 December 2019. Table 1c Median earnings for employees by state, full-time or part-time and status of employment, 2004–2019, Table 10. The term ‘workforce’ includes all categories of employees plus independent contractors, in this context.

81. Independent contractor owner drivers receive certain protections under the *Owner Drivers and Forestry Contractors Act 2005* (Vic); Outworker terms may be included in awards, see *Fair Work Act 2009* (Cth), s.140.

82. Further discussion in Chapter 6. See, for example, remedies available under the *Independent Contractors Act 2006* (Cth), and the *Competition and Consumer Act 2010* (Cth).

83. See discussion of non-workplace law remedies in Chapter 6.

84. See *Competition and Consumer Act 2010* (Cth), s.45 and discussion at Chapter 6. Independent contractors may associate under the FW Act but cannot access the bargaining system. There have been a few instances where groups have been granted permission by the Australian Competition and Consumer Commission to engage in bargaining, despite the risk of it being deemed ‘anti-competitive conduct’. R. Johnstone and A. Stewart, ‘Swimming against the tide? Australian Labor Regulation and the Fissured Workplace’, *Comparative Labor Law & Policy Journal*, 2015, vol. 37, no. 1, p. 60.

85. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 7.

86. Johnstone et al., *Beyond Employment*, p. 73.

87. Johnstone et al., p. 73.

88. Commercial Passenger Vehicles Victoria, 2018, Drivers: [Driver Agreement](#).

89. Commercial Passenger Vehicles Victoria, 2018, Drivers: [Driver Agreement](#).

90. *Commercial Passenger Vehicle Industry Act 2017* (Vic).

Chapter 4 | Platform workers – how many, where, when, who and why they choose this work

- 147 The Inquiry's TOR require us to consider the extent, nature and impact of the on-demand economy. In examining these questions, the Inquiry sought to both understand the experience of individuals and the operation of platforms, and to look to data and research to understand the trends and changes that may have arisen as a result of the emergence of platform work.
- 148 This chapter considers the extent and nature of platform work in Australia — how many workers are accessing platform work, who these people are, why they are doing it and the nature, frequency and duration of their work.

4.1 HOW MANY PEOPLE ARE DOING PLATFORM WORK?

Snapshot

- ▶ Platform work is not being identified in traditional labour market data.
- ▶ The National Survey indicates that platform work is more prevalent than previously thought: 13.8 per cent of Victorian respondents had undertaken platform work at some point.
- ▶ Platform work is a statistically small but significant and growing part of the labour market.
- ▶ The Inquiry considers that targeted, ongoing research about platform work is critical to ensure that policy makers and affected parties can take an evidence based approach in framing settings.

- 149 A key point of contention about platform work is the extent to which it is happening in the labour market. This, in turn, underpins different points of view about whether platform work warrants attention or regulatory intervention.
- 150 The prevailing view has been that the 'gig economy' is a very small part of the labour market. This view has been supported by previous labour market data, as well as research.

4.1.1 What does the labour market data tell us?

- 151 Most workers in the Australian labour market are 'regularised' workers – full and part-time employees working in an ongoing capacity. Full-time employees with paid leave entitlements make up nearly 50 per cent of the workforce.⁹¹ Together with part-time workers (an increasing cohort, now 13.1 per cent of all workers),⁹² these regularised workers are the majority of the workforce, making up about 63 per cent.

91. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019. Cat.no 6330, 9 December 2019. Table 1c Median earnings for employees by state, full-time or part-time and status of employment, 2004–2019, Table 10. Table 10 Form of employment by industry, occupation and educational qualification (49.8 per cent is the workforce). The term 'workforce' includes all categories of employees plus independent contractors, in this context.

92. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019, cat. No 6333.0, 9 December 2019, Table 1c.3 Employees by state, full-time or part-time and status of employment, 2004–19.

- 152 The primary data source relied upon when considering the extent of platform work in the economy is labour market data indicating numbers of casual and self-employed workers in the labour market.⁹³ Indications are that most platform workers are not employees, and would therefore be most likely to be identified in surveys of work status as ‘self-employed’. Those platforms that do use an employment model primarily engage casual workers.⁹⁴ A significant take up of platform work might be expected to be evident in this data.
- 153 Headline data suggests the proportion of casual employees and ‘self-employed’ workers in the labour market has not changed much in the last decade over which the platform economy has emerged.
- 154 At August 2019, casual workers as identified in ABS data, made up 2.6 million employees (representing 20.2 per cent of Australian workers, 24.5 per cent of employees).⁹⁵ Over the past 20 years, the percentage of casuals has remained reasonably steady.⁹⁶
- 155 The more likely, relevant indicator of platform work is data recording the percentage of independent contractors in the labour market.⁹⁷
- 156 Platform workers who are not employees would be a subset of the total percentage of self-employed independent contractors in the workforce. A significant take up of work in the platform economy might be evident in that data.
- 157 Independent contractors now account for about 8.1 per cent of the workforce.⁹⁸ In 2014, 8.6 per cent of workers were engaged as independent contractors.⁹⁹ The data on independent contractors and casuals suggests relatively stable proportions of these workers, hinting that there has not been a significant compositional change in the labour market and platform work is not trending upward.¹⁰⁰
- 158 With headline data showing limited shifts in the number of casual employees and the ‘self-employed’ over the last decade, many submitters to the Inquiry argued that the impact of this way of working is small and does not warrant intervention.¹⁰¹ The Australian Chamber of Commerce and Industry (ACCI) said it would be an over-reaction to target this area for regulation as it is a marginal, non-statistically significant part of the labour market. Self-Employed Australia (SEA) said the sector is ‘a minor, miniscule marginal component’ of the Victorian economy.¹⁰² It advocated that ‘much of the discourse around both the platform economy and the independent workforce is inflated, overstated and alarmist’, going on to state that, ‘[a] good bucket of icy-cold water needs to be tipped over the protagonists of this hyperbole.’¹⁰³

93. For example, Australian Chamber of Commerce and Industry, Submission 10, p. 2; Australian Industry Group, Submission 1, p. 18.

94. Sidekicker, Submission 71, p. 5; Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019; Tom Amos, Sidekicker, Individual Consultation, 24 June 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne; Ben Eatwell, Weploy, Platform Business Roundtable Discussion, 22 February 2019.

95. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019, Cat. No. 6330.0, 9 December 2020: Table 8 Median Earnings for employees and OMIE's by demographic characteristics.

96. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019, Cat. No. 6330.0, 9 December 2020: Table 8 Median Earnings for employees and OMIE's by demographic characteristics; AiGroup, Economics Research, *Casual work and part-time work in Australia in 2018*, June 2018, p. 3.

97. McDonald et al., *Digital Platform Work in Australia*, p. 47; See also, for example, Didi, Legal, *Driver Agreement*, 2020, Cls.1.4 and 1.8(b), Didi Global [website]; Menulog, Submission 50, p. 8; Simon Smith, Ola, Individual Consultation, 3 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne; Airtasker, *How do I get a payment invoice?* [website]; Deliveroo, Submission 28, p. 1.

98. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019. Cat.no 6330, 9 December 2019. Table 1c Median earnings for employees by state, full-time or part-time and status of employment, 2004–2019, Table 10. Table 10 Form of employment by industry, occupation and educational qualification (49.8 per cent is the workforce).

99. Australian Bureau of Statistics, *Characteristics of Employment*, August 2019, Cat. No. 6330, 9 December 2019, Table 10.1 Form of employment by industry, occupation and educational qualification; Australian Bureau of Statistics, *Characteristics of Employment*, 2014, Cat. No. 6330, 9 December 2019, Table 10.1 Form of employment by industry, occupation and educational qualification.

100. Sidekicker, Submission 71, p. 1; Australian Chamber of Commerce and Industry, Submission 10, p. 3; Australian Industry Group, Submission 1, pp. 19 and 20.

101. Australian Chamber of Commerce and Industry, Submission 10, p. 5; Australian Industry Group, Submission 1, p. 18.

102. Australian Chamber of Commerce and Industry, Submission 10, p. 4; Self-Employed Australia, Submission 67, p. 22.

103. Self-Employed Australia, Submission 67, p. 19.

- 159 This position, based primarily on this ‘headline’ data, oversimplifies the question of ‘impact’ of platform work.
- 160 Firstly, ‘impact’ is not just measured in overall numbers, but in the impact to individuals, businesses and the labour market more generally. Evidence to the Inquiry demonstrates that some parts of the labour market have been significantly disrupted by platforms, and with questions remaining about their work arrangements, this warrants attention.
- 161 Secondly, on closer scrutiny, the Inquiry examined the way in which this headline data is captured and sees limitations in relying exclusively on this source as a measure of prevalence or impact.

4.1.2 Limits on the existing data – main and secondary jobs

- 162 The headline labour market data is based on surveys that ask people about their ‘main job’.¹⁰⁴ For many platform workers, that work would not be their ‘main’ job, but a side hustle and not their main source of income.
- 163 Portfolio workers, that is, workers who have a main source of income (potentially a wage or salary job) and supplement this with earnings from other jobs, is said to be increasing.¹⁰⁵
- 164 The portfolio of work may be performed in parallel with jobs occupied concurrently; or consecutively where the worker completes one job before starting another.¹⁰⁶ The portfolio can include both independent contracting and regularised work.¹⁰⁷
- 165 The National Union of Workers (NUW), which covers a broad range of industries, reported that many members rely on multiple sources of income.¹⁰⁸ Their workers may cycle in and out of industries where platforms are emerging. Uber submitted that it is striving to provide the flexibility needed by portfolio workers.¹⁰⁹
- 166 Much evidence suggests that digital workers are earning income from a range of sources.¹¹⁰ The number of people earning their main income via a digital platform appears small, and workers often do not work many hours in these roles.¹¹¹ Platform generated income is largely supplementary or secondary income and may be intermittently sought.¹¹² The National Survey reinforced this, finding that only 2.7 per cent of digital workers earned all their income from platform work.¹¹³
- 167 The labour market data, which is based on asking people about their main job, would therefore not capture a person who was earning ‘extra’ as a ‘self-employed’ worker via platforms, if in their ‘main’ job they are engaged as an employee.¹¹⁴
- 168 If a worker’s main income is also generated through other self-employment activities, the additional platform work would similarly not be distinct in this data. The data would also not register a change where workers shift to platform work from non-platform, non-employee work. An example of this would be the substitution of one type of non-employee worker (a taxi driver) with another (rideshare driver).¹¹⁵

104. See for example, Australian Bureau of Statistics, *Labour Force, Australia, Detailed Quarterly*, August 2019, Cat. No. 6291.0.55.3, 26 September 2019: Table 13. Employed persons by Status in employment of main job and hours actually worked; Wilkins and Lass, *The HILDA Survey 2018*, pp. 96 and 98.

105. Foundation for Young Australians, *The New Work Reality, FYA’s New Work Order* report series, Foundation for Young Australians in partnership with AlphaBeta, 2018, p. 10.

106. Self-Employed Australia, Submission 67, p. 22; Recruitment, Consulting and Staffing Association of Australia, Submission 62, p. 2.

107. Self-Employed Australia, Submission 67, p. 22.

108. National Union of Workers, Submission 54, p. 2; See also Uber, Submission 79, p. 21.

109. Uber, Submission 79, p. 21.

110. McDonald et al., *Digital Platform Work in Australia*, p. 64.

111. McDonald et al., p. 8.

112. McDonald et al., pp. 7 and 8.

113. McDonald et al., p. 7.

114. Self-Employed Australia, Submission 67, p. 21; See for example, Australian Bureau of Statistics, *Labour Force, Australia, Detailed Quarterly*, August 2019, Cat. No. 6291.0.55.3, 26 September 2019: Table 13. Employed persons by Status in employment of main job and hours actually worked; Wilkins and Lass, *The HILDA Survey 2018*, p. 98.

115. Wilkins and Lass, *The HILDA Survey 2018*, p. 97.

- 169 The National Survey suggested that a significant cohort of digital platform workers (35.2 per cent) were working across platforms, including 11.4 per cent registered to work across four or more.¹¹⁶ Some workers may be ‘multi-platforming’ but doing the same sort of work,¹¹⁷ while others may use different platforms to access a variety of job types, more akin to portfolio work.
- 170 While supplemental income arranged through freelance or independent contracting arrangements are unlikely to be reflected in reports about primary jobs, counting casuals is an even less satisfactory way to measure gig workers. Most platforms don’t engage workers this way and few gig workers identify as casual.
- 171 Given these features of the surveys, they would not be expected to reflect the true extent of platform work or adequately indicate an uptake in platform work.¹¹⁸ Other sources of information must be considered to assist in determining prevalence and impact of platform work.

4.1.3 Secondary jobs data

- 172 The Inquiry considered secondary jobs data to see if that might reveal changes to Australia’s labour market, resulting from the platform economy.
- 173 The ABS records how many people work more than one job. A significant take up of platforms might be expected to show an increase there. There has been a moderate rise in the proportion of secondary jobs, since platforms emerged.¹¹⁹ Between March 2012 and March 2019 it increased from 6.1 per cent to 6.7 per cent.¹²⁰
- 174 Some surveys of secondary employment use a definition that includes independent contracting.¹²¹ Growth in the use of independent contracting by workers to supplement existing income earned through platforms, would be expected to be reflected in secondary employment survey data, but it tends not to be.
- 175 Some digital platform workers may have already been in the secondary jobs data – for example, those working in sectors which have traditionally used freelance/independent contracting arrangements.
- 176 Ai Group noted that professional service platforms tend to match consumers in industries with traditionally high levels of freelancing and independent contracting; like IT and theatre production.¹²² In such cases, platform mediated work may not be additional work but just a replacement of traditional methods of direct engagement. This platform work would not be reflected in changes to the percentage of independent contractors or secondary employment.

116. McDonald et al., *Digital Platform Work in Australia*, pp. 6 and 39.

117. For example, using multiple platforms across the rideshare industry.

118. Self-Employed Australia, Submission 67, p. 21; See for example, Australian Bureau of Statistics, *Labour Force, Australia, Detailed Quarterly*, August 2019, cat. No. 6291.0.55.3, 26 September 2019: Table 13. Employed persons by status in employment of main job and hours actually worked; Wilkins and Lass, *The HILDA Survey 2018*, pp. 97–98.

119. Australian Bureau of Statistics, *Labour Account Australia. Quarterly Experimental Estimates*, June 2019, Cat. No. 6150.0.55.003, 10 September 2019, Table 1. Total all Industries – Trend, Seasonally Adjusted and Original.

120. Australian Bureau of Statistics, *Labour Account Australia. Quarterly Experimental Estimates*, June 2019, cat. No. 6150.0.55.003, 10 Sept 2019, Table 1. Total all Industries – Trend, Seasonally Adjusted and Original.

121. Australian Bureau of Statistics, *Labour Statistics: Concepts, Sources and Methods*, Cat. No. 6102.0.55.001, 12 Feb 2018, p. 53.

122. Australian Industry Group, Submission 1, p. 17.

- 177 There are challenges in relying on some of the existing data, as it relies heavily on extrapolating information from other surveys. Further, prior to 2014, the ABS did not directly ask people how many jobs they had.¹²³ This makes it difficult to identify trends over the critical period when platforms emerged.
- 178 There are aspects of platform work and the way in which traditional labour market data is obtained and produced, that limit the insights that might be obtained from these data sources. None of the data sets directly measure how many people are engaged in platform work or to what extent. In scrutinising this data for indications of platform work, we are reduced to looking for signs of movement within a larger cohort of which platform workers are a subset, and many may not be captured at all. The Inquiry looked to other sources of data that might indicate shifts as a result of platform work.

4.1.4 Other data – ABNs have increased significantly

- 179 Other data that may provide an indication of how many people are engaging in platform arrangements is the number of applications for an Australian Business Number (ABN).
- 180 Many businesses require workers to obtain an ABN when registering to work with their platform.¹²⁴ An ABN is required whether or not this work will provide the applicant's main or supplementary income.¹²⁵
- 181 Mr Michael Andrew, Chair of the Black Economy Taskforce Advisory Board, noted in his submission that between the 2011–12 and 2017–18 financial years there was a 40 per cent increase in ABN applications by individuals.¹²⁶ A Commonwealth Treasury paper on the ABN system indicated that the growth of the gig or sharing economy, may have played some part in the increase.¹²⁷
- 182 Information provided by the Australian Taxation Office (ATO), noted that while the ABN has no gig identifier or tag, gig economy participants are more likely to register as sole traders. These people indicate that they are receiving money for services or contracts, rather than starting a new business.

123. Prior to 2014, the number of jobs respondents held were not recorded. When producing data about secondary jobs, the number of multiple job holders was weighed against 2007 estimates of the number of jobs held by individual job holders. Assumptions used to draw the 2007 estimates would not have incorporated workers in the on-demand economy. Today the number of jobs held by participants is collected, but not by industry. Jobs are allocated to industries in proportions reflecting the extent of multiple job holding by industry derived by the Linked Employer and Employee Dataset (LEED). LEED data does not include owner operators of unincorporated enterprises. For industries where a high proportion of secondary jobs are done through independent contracting, the number of secondary jobs allocated to that industry may not reflect reality. Lastly, only secondary jobs performed in the preceding week are recorded. Secondary jobs performed more intermittently may not be recorded in Australian Bureau of Statistics data. See Australian Bureau of Statistics, *Labour Statistics: Concepts, Sources and Methods*, Feb 2018, Cat. No. 6102.0.55.001, 12 Feb 2018, Data Sources – Labour Force Survey; Australian Bureau of Statistics, *Australian Labour Account: Concepts, Sources and Methods*, July 2017, Cat. No. 6150, 18 July 2017, Jobs – Household Sources; ABS, *Labour Statistics: Concepts, Sources and Methods*, Feb 2018, 12 Feb 2018; Scope of Australian Labour Statistics; Australian Bureau of Statistics, *Information Paper: Questionnaires Used in the Labour Force Survey*, July 2014, Cat. No. 6232.0, 19 December 2014, Sample Labour Force Questionnaire; Australian Bureau of Statistics, *Labour Account Australia, Quarterly Experimental Estimates*, June 2019, 10 Sept 2019, Cat. No. 6150.0.55.003, Summary – Secondary Jobs and Multiple Job Holders in the Labour Account; Australian Bureau of Statistics, *Jobs in Australia*, Cat. No. 6160, 1 August 2018, Summary; Australian Bureau of Statistics, *Labour Statistics: Concepts, Sources and Methods*, Feb 2018, 12 Feb 2018, Linked Employer Employee Dataset (LEED); Australian Bureau of Statistics, *Jobs in Australia*, Cat. No. 6160, 1 August 2018, Table 4: Multiple Job Holding Australian Bureau of Statistics, *Jobs in Australia*, Cat. No. 6160, 1 August 2018, Explanatory Notes; N. Watson, *HILDA Project Technical Paper Series, No. 1/11, September 2011: Methodology for the HILDA top-up sample* [website], September 2011, University of Melbourne, Faculty of Business and Economics, p. 1.

124. Ann Tan, Ola, Individual Consultation, 3 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne; Ride Share Drivers United, Submission 63, p. 5; Westjustice, Submission 92, p. 7; Case studies provided by Jobwatch, Submission 37, p. 4; Mr Ewan Short, worker, Submission 70, p. 5; Susan, consumer, Submission 76, p. 3.

125. Australian Government 'Australian Business Number' [website].

126. Michael Andrew AO – Chair Black Economy Advisory Board, Submission 4, p. 2.

127. Australian Government, The Treasury, 2018, p. 4 *Tackling the Black Economy, Designing a modern Australian Business Number system, Consultation Paper*, Commonwealth of Australia, 2018, p. 4. If an increase in ABN applications can be attributed to growth in the on-demand economy, the number of ABN applications may grow more steeply than the size of the on-demand economy. This is because each person who enters the on-demand economy must apply for an ABN and may leave after a short period. A significant proportion of ABNs at any time, may not be in use.

- 183 The ATO provided a break-down of individuals' ABN registrations by industry and type.¹²⁸ It shows the increases in different sectors:
- 249 per cent increase in the transport, postal and warehousing industry
 - 103 per cent increase in administrative and support services, which includes building, cleaning and gardening services
 - 67 per cent increase in professional, scientific and technical services.¹²⁹
- 184 The ATO observed that these sectors appear to have links to contingent work or the platform economy (or both) and that this data may indicate a shift in the way people are working.¹³⁰
- 185 In the next financial year (2017–18 to 2018–19), there was a further four per cent increase in sole trader registrations and a 10 per cent increase in those receiving payment for services (independent contractors) – higher than average growth.
- 186 The growth included a 50 per cent increase in courier pick-up ABN registrations,¹³¹ while at the same time, there was a small drop for the taxi and road transport industry.¹³² It is possible that growth in rideshare services has occurred as taxi drivers either supplement their income with platform mediated work or transition into rideshare.¹³³

4.1.5 On-demand research

- 187 Given the limits of traditional labour market data, the Inquiry was interested in pre-existing research that sought to measure the size and impact of platform work.
- 188 The Inquiry was directed toward two key pieces of information, from the Grattan Institute and Deloitte Access Economics. Both studies found low levels of income earned via platforms.
- 189 The Grattan Institute assessed income earned by performing services through a peer to peer platform in any one month, estimating that fewer than 0.5 per cent of Australians earned income in this manner in 2015.¹³⁴ This estimation was made by extrapolating figures published by a selection of platform businesses, bank transaction data, other research reports and a meta-analysis of self-reported surveys. In referring to this finding, the report also noted that 'work on platforms, however, is growing fast'.¹³⁵
- 190 In 2017, Deloitte Access Economics analysed NSW user data from Uber, Airbnb, SocietyOne, eBay and HiPages.¹³⁶ It estimated that 92,400 people (1.5 per cent of NSW residents) had earned money via these platforms.¹³⁷ The research included income earned by both buying, selling and renting assets; and by selling labour (performing work) through platforms.

128. Email to the Inquiry from Australian Tax Office dated 25 October 2019, with attached 'On-demand Workforce' presentation document.

129. Email to the Inquiry from Australian Tax Office dated 25 October 2019, with attached 'On-demand Workforce' presentation document, slide 2.

130. Email to the Inquiry from Australian Tax Office dated 25 October 2019, with attached 'On-demand Workforce' presentation document, slide 3.

131. Email to the Inquiry from Australian Tax Office dated 25 October 2019, with attached 'On-demand Workforce' presentation document, slide 3.

132. Email to the Inquiry from Australian Tax Office dated 25 October 2019, with attached 'On-demand Workforce' presentation document, slide 3.

133. Blair Davies, Australian Taxi Industry Association, Small Business Roundtable Discussion, 12 July 2019, Department of Premier and Cabinet, 121 Exhibition St, Melbourne. Mr Davies remarked that on weekend evenings and nights some taxi drivers are driving for Uber because surge pricing can mean they earn more money in rideshare than driving taxis; Researchers conducting the HILDA survey also suggested that growth in rideshare which ought to be reflected in self-employment figures, is being hidden. Instead of new drivers entering commercial passenger vehicle services, taxi drivers move across to rideshare: Wilkins and Lass, [The HILDA Survey 2018](#), p. 97.

134. J. Miniffie, [Peer to Peer Pressure: Policy for the sharing economy](#), Grattan Institute, 2016, p. 34.

135. The author's estimate is based on reports from platforms about the number of workers who use their platform. Platforms use different measures: Uber looked across the previous month, Hipages counted the number of people registered, Airtasker responded 'many thousands work' but the estimate is based on the value of jobs and the equivalent number of full-time workers that the value would support. The author concedes there was little information available about platforms such as Freelancer, Expert360, 99Designs and Etsy. They suggest that 'credible data' available in the US, is in contrast to what's available in Australia: Miniffie, [Peer to Peer Pressure: Policy for the sharing economy](#), pp. 33-34

136. Deloitte Access Economics, [Developments in the Collaborative Economy in NSW](#), NSW Department of Finance, Services & Innovation, 2017, p. 4.

137. Deloitte Access Economics, [Developments in the Collaborative Economy in NSW](#), 2017, p. 4.

- 191 Deloitte said the 2017 report included data from more sources than its 2015 report with the same focus.¹³⁸ However, they conceded that the lack of a universal definition of the on-demand economy, means different studies include different businesses. This has created difficulties in quantifying the on-demand economy's size.¹³⁹
- 192 The Inquiry was also directed to a 2018 paper by the Association of Superannuation Funds of Australia (ASFA) which estimates that '[only] around 150,000 workers [nationally 1.2 per cent of the workforce] utilise web-based platforms to obtain work on a regular basis'.¹⁴⁰ It is not clear to the Inquiry how these figures were derived.
- 193 The Inquiry observes that these studies have their limits in terms of scope and methodology.
- 194 There were indications that gig work is developing at a very fast pace and it might be anticipated to continue to grow as new platforms emerge and existing platforms grow and mature.¹⁴¹ Data may become dated in even a relatively short period of time given the speed with which the sector is developing.
- 195 In 2017, the Productivity Commission observed that the prevalence of the gig economy is often grossly exaggerated. The Commission noted that the gig economy 'may grow in significance, with a greater proportion of workers thus relying on a portfolio of work and a wide range of skills, rather than long-term employment with a limited number of employers and a narrower set of skills'.¹⁴²
- 196 In his review of the operation of the Queensland Workers Compensation Scheme, Professor David Peetz did consider the size of the on-demand economy.¹⁴³ He noted that Australian studies tend to focus on the broader range of income generating activities happening over time – including broader freelancing work, or participation at 'some-time' in the collaborative economy – rather than how many workers at any given time, are working in the gig economy.¹⁴⁴
- 197 Professor Peetz reviewed international research that suggested on-demand work is a small portion of the overall workforce. Research in 2016, by the USA's Pew Research Center, found 8 per cent of adults had used digital work or task platforms in the previous year.¹⁴⁵ Other US research provided much lower estimates. Based on US data in 2015, Katz and Krueger found that 0.5 per cent of workers had worked in the gig economy.¹⁴⁶ And, according to JP Morgan, extrapolating data for payments made in the gig economy, only 0.9 per cent of US adults had ever provided labour in the gig economy.¹⁴⁷ In the United Kingdom, research by the UK Chartered Institute of Personnel and Development, found, in December 2016, that of 5,000 adults surveyed online, four per cent were gig workers.¹⁴⁸
- 198 Other sources such as European research – the Collaborative Economy and Employment Survey – suggested that across 14 European Union countries, on average, 10 per cent of the adult population had used online platforms to obtain work. Just under eight per cent undertook this work with some frequency, while just under six per cent spent at least 10 hours a week performing platform work or earning at least 25 per cent of their income.¹⁴⁹
- 199 These figures are comparable with the findings of the National Survey.

138. Deloitte Access Economics, *Developments in the Collaborative Economy in NSW*, 2017, p. 4.

139. Deloitte Access Economics, *Developments in the Collaborative Economy in NSW*, 2017, p. 5.

140. Australian Chamber of Commerce and Industry, Submission 10, p. 3; See also A. Craston, *Superannuation balances of the self-employed*, 2018, Australian Superannuation Funds of Australia: Research and Resource Centre, p. 11.

141. See for example Richard McEncroe, Submission 48, p. 6; Professor David Peetz, Submission 78, p. 5; Victorian Chamber of Commerce and Industry, Submission 83, p. 3. See also Senate Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, 2018, p. 74, Parliament of Australia.

142. See Australian Government Productivity Commission, *Inquiry Report No. 84: Shifting the Dial 5 Year Productivity Review*, 2017, p. 113.

143. D. Peetz, *The Operation of the Queensland Workers' Compensation Scheme: Report of the second five-yearly review of the scheme*, Queensland, Griffith Business School, Department of Employment Relations and Human Resources, 2018, p. 90.

144. Peetz, *The Operation of the Queensland Workers' Compensation Scheme*, p. 91.

145. A. Smith, *Gig Work, Online Selling and Home Sharing*, Pew Research Center, 17 November 2016, cited in D. Peetz, p. 90.

146. L. F. Katz and A. B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015*, NBER Working Paper No. 22667, Washington DC: National Bureau of Economic Research, September 2016, see also Prof David Peetz, Submission 58, p. 91.

147. D. Farrell and F. Greig, *The Online Platform Economy: Has Growth Peaked?*, New York: JPMorgan Chase Institute, November 2016, cited in D. Peetz, p. 90.

148. Chartered Institute of Personnel and Development, *To Gig or Not to Gig? Stories from the Modern Economy, Survey Report*, London, March 2017, cited in D. Peetz, p. 91.

4.1.6 National Survey – prevalence of platform work

2 Key data National Survey

- ▶ Current on-demand workers were found, on average, to perform 10 hours work per week (10.8 hours for men, 8.2 hours for women).¹⁵⁰
- ▶ The strongest motivation for undertaking platform work was ‘earning extra money’.
- ▶ Other key motivations related to flexibility: ‘working the hours I choose’, ‘doing work that I enjoy’, ‘choosing my own tasks or projects’, ‘working in a place that I choose’, and ‘working for myself and being my own boss’.¹⁵¹
- ▶ 47.3 per cent of workers were of the view that the income they earned was fair.¹⁵²

- 200 Having considered existing labour market data and studies, it was clear to the Inquiry that they did not paint a clear and contemporary picture of the extent and nature of platform mediated work in Victoria.
- 201 To assist the Inquiry’s work, the Victorian Government commissioned a National Survey of the platform workforce: *Digital Platform Work in Australia – Prevalence, Nature and Impact*.
- 202 The National Survey elicited more than 14,000 usable responses as it explored the characteristics and experiences of platform workers. The analysis provided valuable insights into the nature and prevalence of this way of working.¹⁵³
- 203 This study indicated that more people are accessing work via online platforms than labour market data or earlier studies suggest. The National Survey found that 7.1 per cent of respondents were currently working, or seeking to work, via digital platforms (7.4 per cent of Victorians). Almost twice as many respondents – 13.1 per cent – had undertaken digital platform work at some point (13.8 per cent of Victorians).¹⁵⁴

149. The survey targets all platforms – not a selection – and distinguishes clearly between income earned by performing work and income earned by other means. It asks, ‘Have you ever gained income by providing services via online platforms, where you and the client are matched digitally, payment is conducted digitally via the platform and the work is location-independent, web-based’ and also, ‘Have you ever earned income by providing services via online platforms, where you and the client are matched digitally and the payment is conducted digitally via the platform, but work is performed on-location?’ Prevalence in Portugal (15.7 per cent), Spain (15.1 per cent), Romania (14.2 per cent), Italy (13.5 per cent) and the UK (12.5 per cent) was relatively high compared to Finland (6.9 per cent), Sweden (7.8 per cent), Slovakia (8.5 per cent), and France (8.8 per cent) and Hungary (8.9 per cent). These figures are comparable with findings of the National Survey (see section 4). See A. Pesole, M.C. Urzi Brancati, E. Fernandez-Macias, F. Biagi, I. Gonzalez Vazquez, *JRC Science for Policy Report: Platform Workers in Europe – Evidence from the COLLEEM Survey*, European Commission, 2018, p. 3.

150. McDonald et al., p. 44.

151. McDonald et al., p. 59.

152. McDonald et al., p. 52.

153. McDonald et al., p. 31.

154. McDonald et al., p. 5.

- 204 A subsequent survey by Swinburne's Centre for the New Workforce also indicated greater participation than headline labour market data.¹⁵⁵ Their survey indicated that 9.5 per cent of respondents (slightly higher than the National Survey) were currently working as a freelancer or gig worker. A further 13.6 per cent indicated they had previously worked in this way. This figure is very similar to the National Survey result.
- 205 This research, and the data from the National Survey, suggests that participation in platform mediated work is far more common than previously thought and growing. Labour market data is unlikely to be capturing its full extent, indicating the importance of accurate sources of data about this emergent way of working.

4.2 WHERE IS PLATFORM WORK HAPPENING?

3 Key data National Survey

Over 100 platforms were accessed by workers in Australia across transportation and food services; professional services; odd jobs and maintenance work; writing and translation; clerical and data entry; caring; creative and multimedia; software development; skilled trades work; sales and marketing support.

There is a large and diverse range of work available through platforms, from simple to complex.

AGE

- ▶ The largest cohort working via platforms was the 18–34 age group (20 per cent) with the next oldest grouping (35–49) representing 14.8 per cent.

GENDER

- ▶ Females are only half as likely as men to work on digital platforms.¹⁵⁶ Workers in clerical and data entry, sales and marketing support, writing and translation; and carers were more likely to be women, while men were predominant in software development and technology, transport and food delivery, and skilled trade work.¹⁵⁷

OTHER

- ▶ Transport and food delivery workers were more likely to be younger (aged 18–34), to indicate temporary residency status and speak a language other than English at home.¹⁵⁸

155. S. Gallagher, *National Survey Data*, Centre for the New Workforce, Swinburne University of Technology, 2020. The Centre for the New Workforce (CNeW) at Swinburne University of Technology commissioned YouGov to undertake a 'gig and freelancing prevalence in Australia' study, focused on how work is being transformed by digital technologies. In late November 2019, YouGov surveyed 1,060 Australians, 18 to 65+ years, who were in the workforce (906), or actively looking (154). The sample was nationally representative of Australian demographics across factors like sex, age, geography, income, household and industry.

156. McDonald et al., p. 35.

157. McDonald et al., p. 41.

158. McDonald et al., p. 41.

- 206 The Inquiry learned that there are over one hundred platforms operating across industry sectors in Australia. They enable people to seek a range of ‘gigs’, from the simple to the complex.¹⁵⁹
- 207 The nature of the work, remuneration and the impact on the labour market varies between sectors. This is not surprising given the different industry dynamics, demands and regulatory settings.
- 208 Some of the more well-known and highly visible platform examples are ridesharing and food delivery. Odd jobs and one-off domestic tasks are also prominent. These have been operating in the market for some time – since early last decade. They offer commonly needed services and a large range of consumers have used them for short ‘tasks’.¹⁶⁰
- 209 Odd jobs, maintenance, domestic support, food delivery and ridesharing services by their nature require person to person contact.¹⁶¹ This is ‘concrete task work’ where the provider offers a service that translates a user’s precisely defined need into a task or series of tasks and receives payment at the end.¹⁶²
- 210 The National Survey found that transport and food delivery were the most common work conducted via digital platforms.¹⁶³ Three of the platforms most utilised (by workers who accessed work in this way), were for rideshare or food delivery.¹⁶⁴
- 211 While much of the ‘visible’ platform mediated work involves people meeting each other, some tasks are completed remotely, including online. These include professional services like web design, graphic design, coding, photography, translation and clerical or administrative work.
- 212 Professional services were the next most popular type of work.¹⁶⁵ One of the ‘Top 5 platforms’ operating in Australia is a professional services platform.¹⁶⁶ This category was followed by odd jobs and maintenance,¹⁶⁷ then writing and translation; clerical and data entry software development, and skilled trade work.¹⁶⁸
- 213 Care services were also being sought and offered via platforms.
- 214 The five most commonly used platforms were:
- Airtasker – 34.85 per cent
 - Uber – 22.7 per cent
 - Freelancer – 11.8 per cent
 - Uber Eats – 10.8 per cent
 - Deliveroo – 8.2 per cent.
- 215 Airtasker and Freelancer are crowd work platforms.
- 216 The Survey indicated that 55.4 per cent of platform workers worked from home. This ability to work from home, or another place, was a source of satisfaction for 63.4 per cent of those surveyed.¹⁶⁹

159. Australian Council of Trade Unions, Submission 11, p. 3 (The Australian Council of Trade Unions noted that on-demand work is best described as a mode of allocating work that is *pervading all industries*); A Blackham, ‘We are all entrepreneurs now’: Options and new approaches for adapting equality law for the ‘gig economy’, *International Journal of Comparative Labour Law and Industrial Relations*, vol. 34, no. 4, 2018, p. 413; Law Institute of Victoria, Submission 39, p. 3.

160. See National Survey results regarding ‘consumption’ which show that 46.2 per cent of survey respondents had obtained services via platforms in the last 12 months, mostly in the form of work ‘performed in person at a specific location’. Such services included rideshare, food delivery, hiring a worker to do tasks or seeking a support worker or babysitter, McDonald et al., *Digital Platform Work in Australia*, p. 10.

161. McDonald et al., *Digital Platform Work in Australia*, p. 14; Self-Employed Australia, Submission 67, p. 3.

162. Self-Employed Australia, Submission 67, p. 3.

163. For 18.6 per cent of respondents, the ‘main’ platform they used to find work was one that organised personal transport, or delivery of food, packages or goods: McDonald et al., *Digital Platform Work in Australia*, pp. 39 and 40.

164. McDonald et al., pp. 6 and 38.

165. McDonald et al., p. 40.

166. Freelancer covers areas including, information technology and programming, marketing, translation and design. Of the current platform workers surveyed, 11.8 per cent sourced work via Freelancer: McDonald et al., pp. 6 and 40.

167. Of current platform workers, 11.5 per cent perform odd jobs and maintenance. Airtasker was used by 34.8 per cent of these workers – the most commonly used platform. McDonald et al., pp. 6 and 40.

168. See Table 1 on page 34.

169. McDonald et al., *Digital platform work in Australia*, pp. 8, 49 and 52.

4.2.1 Industry/sector data

- 217 The Inquiry also recognised that the 'headline' data is not the only information relevant in considering the question of extent and impact of platform work. It closely considered the different ways that gig work influences the labour market within industries.
- 218 The impact of platform work on different sectors and industries is also considered in the 'Industry in focus' sections in this report. These examine some of the dynamics at play in sectors where platforms are active.
- 219 The information presented to the Inquiry indicated that platform mediated work is being organised by a large number of platforms across different sectors. The National Survey confirms this.
- 220 Table 1 shows the percentage of workers in each sector using digital platforms.

TABLE 1: TYPE OF WORK PERFORMED BY PLATFORM WORKERS ON THEIR MAIN DIGITAL PLATFORM

Type of digital platform work		Per cent of current workers
Transport and food delivery	Taxi services; food delivery; package or goods delivery	18.6
Professional services	Accounting; consulting; financial planning; legal services; human resources; project management	16.9
Odd jobs and maintenance	Running errands; general maintenance; removalist work	11.5
Writing and translation	Academic writing article writing; copy writing; creative writing; technical writing; translation	9.0
Clerical and data entry	Customer service; data entry; transcription tech support; web research; virtual assistant	7.8
Creative and multimedia	Animation; architecture; audio; logo design; photography; presentations; voice overs; video	7.7
Software development and technology	Data science; game development; app, software or web development; server maintenance; web scraping	7.2
Carer	Aged or disability care; pet care; pet services; babysitting; nanny services	7.0
Skilled trades work	Carpentry; plumbing; electrical work	5.8
Sales and marketing support	Social media; marketing; ad posting; lead generation; search engine optimisation; telemarketing	5.0
Education	Tutoring; teaching; mentoring; online coaching	1.2
Personal services	Sport / fitness coaching; massage; adult entertainment; tattoo and piercing	0.9

- 221 ABS labour market data also provides some insight into on-demand work trends within certain industries. Across the period 2014 to 2018, the number of independent contractors in most sectors increased (but not as a percentage of the workforce). This may, in part, reflect increases in the overall size of the labour market. Interestingly, the percentages of independent contractors¹⁷⁰ show reasonable increases in some industries where the National Survey found that platform work was more prevalent.¹⁷¹
- 222 The Inquiry was most interested in sectors where independent contracting increased in greater percentages than overall worker numbers (Table 2).
- 223 Health care and social assistance; accommodation and food services; and transport, postal and warehousing saw higher rates of growth in independent contracting than in overall employment growth.¹⁷² Platforms are operating in all these sectors. The National Disability Insurance Scheme (NDIS) has changed the way funding occurs in the health care and social assistance sector and may be impacting how its labour market is structured (see Industry in focus – Personal care services).
- 224 Interestingly, the number of independent contractors in information media and telecommunications nearly doubled from 12,700 to 22,200 in the period 2014–2018.¹⁷³ However, there was a decline of 7,300 (4 per cent) in the professional, scientific and technical services industries.¹⁷⁴

170. This data has only been collected since 2014: Australian Bureau of Statistics, *Characteristics of Employment*, 2018, Cat. No. 6330, 29 November 2018, Table 11.1 Independent contractors in main job, by whether had authority over own work; Australian Bureau of Statistics, *Characteristics of Employment*, August 2016, Cat. No. 6330.0, 02 May 2017, Table 11.1, Independent contractors in main job, by whether had authority over own work; ABS, *Characteristics of Employment*, August 2014, Cat. No. 6330.0, 27 October 2014, Table 11.1 Independent contractors in main job, by whether had authority over own work; There is also longitudinal data concerning the number of owner managers without employees, used as a proxy for independent contracting, by profession. However, the categories used to describe professions – for example technical and trades, labourers, managers – may be too broad to reveal movements within the industry segments where on-demand platforms operate; See also Australian Bureau of Statistics, *Labour Force, Australia, Detailed Quarterly*, August 2019, Cat. No. 6291.0.55.003, 26 September 2019, EQ07b – Employed Persons by Occupation major group (ANZCO) and Status in employment of main job, February 1991 onward.

171. See also data provided to the Inquiry on the number of self-employed workers by industry between 1991–2018: Australian Industry Group, Submission 1, p. 21; McDonald et al., *Digital Platform Work Australia*, p. 40.

172. Australian Bureau of Statistics, *Characteristics of Employment*, August 2018, Cat. No. 6330.0, 29 November 2018, Table 6 Employees (excluding OMIEs): Median weekly earnings in main job – Industry and occupation of main job – By highest level of non-school qualification; Australian Bureau of Statistics, *Characteristics of Employment*, August 2014, Cat. No. 6330.0, 29 November 2018, Table 6 Employees (excluding OMIEs): Median weekly earnings in main job – Industry and occupation of main job – by highest level of non-school qualification.

173. Australian Bureau of Statistics, *Characteristics of Employment*, August 2018, Cat. No. 6330.0, 29 November 2018, Table 11.1 Independent contractors in main job, by whether had authority over own work; ABS, *Characteristics of Employment*, August 2016, Cat. No. 6330.0, 2 May 2017, Table 11.1 Independent contractors in main job, by whether had authority over own work; Australian Bureau of Statistics, *Characteristics of Employment*, August 2014, Cat. No. 6330.0, 27 October 2014, Table 11.1 Independent contractors in main job, by whether had authority over own work.

174. Australian Bureau of Statistics, *Characteristics of Employment*, August 2018, Cat. No. 6330.0, 29 November 2018, Table 11.1 Independent contractors in main job, by whether had authority over own work; ABS, *Characteristics of Employment*, August 2018, Cat. No. 6330.0, 02 May 2017, Table 11.1 Independent contractors in main job, by whether had authority over own work; Australian Bureau of Statistics, *Characteristics of Employment*, August 2014, Cat. No. 6330.0, 27 October 2014, Table 11.1 Independent contractors in main job, by whether had authority over own work.

TABLE 2 : PERCENTAGE CHANGE IN THE NUMBER OF INDEPENDENT CONTRACTORS BY INDUSTRY 2014–2018.¹⁷⁵

Industry	No. independent contractors 2014	No. independent contractors 2018	Per cent change	No. workers 2014*	No. workers 2018*	Per cent change
Healthcare and social assistance	70,700	91,700	29.0	1,280,300	1,525,700	19.0
Accommodation and food services	10,400	13,100	26.0	681,100	779,700	14.5
Arts and recreation	23,900	26,100	9.0	171,400	193,500	12.8
Transport, postal and warehousing	64,100	68,700	7.2	504,500	536,000	6.3
Professional, scientific and technical	163,200	155,000	-4.4	675,100	788,800	16.8
Technicians and trades workers (occupation)	287,000	301,500	-4.6	1,260,400	1,360,700	7.9

* Ex-owners/managers of incorporated enterprises.

- 225 Given the popularity of crowd work platforms, examples like these are unsurprising:
- the Media Entertainment and Arts Alliance (MEAA) described work being performed by voiceover artists, actors and production technicians¹⁷⁶
 - Master Electricians Australia (MEA) said electricians are doing platform mediated work
 - Orbit Legal Recruitment discussed the procurement of legal services¹⁷⁷
 - Sidekicker provided information about business support, events, promotions, retail and warehousing and logistics services¹⁷⁸
 - the National Tertiary Education Union (NTEU) raised concerns about the use of on-demand platforms to contract educational services like tutoring and exam marking¹⁷⁹
 - Airtasker told this Inquiry (it has also submitted to other Inquiries and widely publicised this) that a wide range of tasks; from child minding or babysitting, to photography, accounting, administration and data entry, through to clothing alterations, furniture assembly, car maintenance and more, are sourced via its platform.¹⁸⁰

175. Australian Bureau of Statistics, 2018, 6330.0 *Characteristics of Employment*, August 2018, Cat. No. 6330.0, 29 November 2018, Table 11.1 Independent contractors in main job, by whether had authority over own work; Australian Bureau of Statistics, *Characteristics of Employment*, August 2014, Cat. No. 6330.0, 27 October 2014, Table 11.1 Independent contractors in main job, by whether had authority over own work; Australian Bureau of Statistics, 2018, 6330.0 *Characteristics of Employment*, August 2018, Cat. No 6330.0, 29 November 2018, Table 6, Employees (excluding OMIEs): Median weekly earnings in main job – Industry and occupation of main job – by highest level of non-school qualification; Australian Bureau of Statistics, *Characteristics of Employment*, August 2014, Cat. No 6330.0, 29 November 2018, Table 6 Employees (excluding OMIEs): Median weekly earnings in main job – Industry and occupation of main job – by highest level of non-school qualification.

176. Media Entertainment and Arts Alliance, Submission 49 pp. 5-7, 8 and 9-10.

177. Orbit Legal Resourcing, Submission 57, p. 2.

178. Email to the Inquiry from Jess Hackett, Sidekicker, dated 27 June 2019, with attached information.

179. National Tertiary Education Union, Submission 51, pp. 2-3.

180. Tim Fung, Airtasker, Individual Consultation, 3 July 2019; Airtasker, [Post a task](#) [website]; Airtasker, Submission 116, [Senate Select Committee on the Future of Work and Workers](#), p. 11.

4.3 PATTERNS OF WORK OF PLATFORM WORKERS

Snapshot

- ▶ Platform work is highly flexible and enables workers to choose their own participation and hours.
- ▶ Most platform workers are not working ‘full-time’ with any one platform.
- ▶ People can earn additional, supplementary income by accessing work via platforms.

- 226 A common feature of platform work is the ability of workers to decide when they wish to be available. By tapping their phone, they can indicate readiness to work and select work opportunities. Platform work is broadly considered to be highly flexible as a result – because unlike in a regularised employment relationship, workers choose when (and if) to work. The nature of some platform work also means they might be able to work at times that ‘traditional’ work opportunities are less available, or can fit the work around other commitments.
- 227 Evidence from the National Survey shows a range of patterns of work by people working via platforms. Most are not working ‘full-time’ patterns or hours and many workers are working in more than one job.

4.3.1 Hours worked

- 228 The National Survey asked people to provide an estimate of how many hours they worked via platforms. It is striking that 37.5 per cent were unable to provide an estimate of the hours that they worked.¹⁸¹ This may be associated with the fact that most platform workers are paid by the task or outcome rather than the hour.¹⁸² The National Survey also reported that almost 40 per cent could not estimate what hourly rate they were earning.¹⁸³ It is difficult to compare hourly rates with national legislated minimum standards if they were an employee under the FW Act.
- 229 According to the National Survey, current platform workers are found on average to perform 10 hours work per week (10.8 hours for men, 8.2 hours for women).¹⁸⁴
- 230 There were distinctions across sectors, with workers in transport and food delivery performing more work (14.5 hours per week), followed by workers in software development and technology (14.3 hours per week). The average hours worked, as found in the National Survey, are presented in Figure 2.

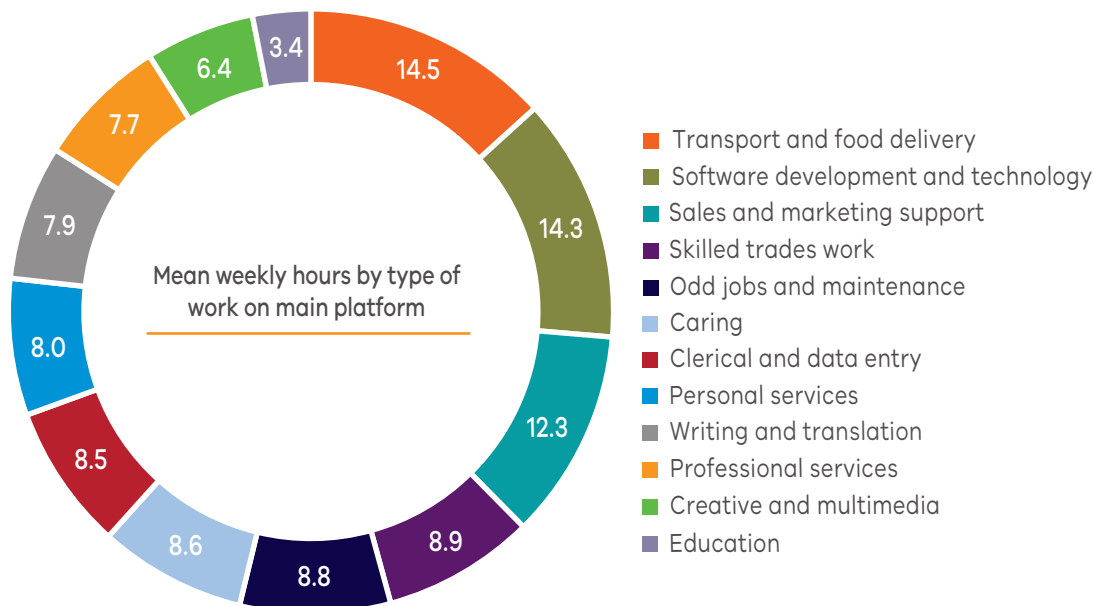
181. McDonald et al., *Digital Platform Work in Australia*, p. 43.

182. McDonald et al., pp. 41 and 42; See also Australia Institute Centre for Future Work, Submission 9, p. 10.

183. Forty per cent of current platform workers were unable to estimate an hourly rate: McDonald et al., p. 42.

184. McDonald et al., p. 44.

FIGURE 2 : NATIONAL SURVEY – MEAN WEEKLY HOURS BY TYPE OF WORK ON MAIN PLATFORM



Source: McDonald et al., Digital Platform work in Australia.

- 231 Most evidence suggests platform workers are not working full-time hours via digital platforms. Some rideshare and food delivery workers participating in the Inquiry were working longer hours, for example, between 25 and 30 hours per week.¹⁸⁵ Another worker in the same discussion said he was on a student visa and worked 20 hours per week – the maximum allowable according to his visa conditions.¹⁸⁶ At a separate roundtable discussion, however, two rideshare workers suggested they worked between 40 and 60 hours per week and another said he understood some drivers are driving up to 80 hours per week.¹⁸⁷
- 232 Some platforms have considered and carried out their own research on this issue and can provide data. Some platforms require workers to be online throughout the completion of their tasks – most obviously ridesharing and food delivery.
- 233 A report commissioned by Uber, by the advisory firm AlphaBeta, suggested that almost half of Uber’s driver partners spend a maximum of 10 hours per week on the Uber app.¹⁸⁸ It also reported that a small proportion of Uber workers (14 per cent) are doing longer hours, more closely comparable to full-time hours of work (30 hours per week or greater).¹⁸⁹
- 234 The estimates provided by platforms and the National Survey are therefore not far apart on these broad percentages of patterns of work.
- 235 Submissions from representatives of employees, including unions, present an alternative view. Findings of a survey of 204 platform workers (167 food delivery riders) conducted by the VTHC suggest that workers average 25 hours per week, with 75 per cent of the food delivery riders surveyed working 20 hours per week or more and 25 per cent, 40 hours per week or more.¹⁹⁰

185. Workers, Uber and Deliveroo, Union and Worker Roundtable Discussion, 7 June 2019, Victorian Trades Hall Council, 54 Victoria St, Carlton.

186. Worker, Uber Eats, 7 June 2019.

187. Workers, rideshare, Workers’ Roundtable Discussion, 29 July 2019, Department of Premier and Cabinet, 35 Collins St, Melbourne.

188. AlphaBeta, Strategy and Economics, *Flexibility and fairness: What matters to workers in the new economy*, Report produced for Uber, Sydney, NSW, 2019, p. 16.

189. AlphaBeta, Strategy and Economics, pp. 6, 16 and 22.

190. Victorian Trades Hall Council (supplementary submission), Submission 89, p. 34, (2019 Gig Workers Survey).

- 236 Similarly, a survey of 259 food delivery workers conducted by the Transport Workers' Union of Australia (TWU) in 2018 found that 76 per cent of workers work 20 or more hours per week and 26.4 per cent reported working 40 or more hours per week.¹⁹¹ Another survey of 1,153 rideshare drivers, also conducted by the TWU in 2018 but in partnership with the Ride Share Drivers Cooperative, found that 50 per cent of drivers were working full-time hours.¹⁹²
- 237 VTHC, Uber (AlphaBeta), and the TWU used different methodologies in carrying out these surveys. VTHC reported to the Inquiry that in surveying workers, it performed 40 on-street sessions in which interviews were conducted face-to-face.¹⁹³
- 238 AlphaBeta confirms that, as part of its research, it commissioned YouGov to conduct a representative survey of active Uber drivers. Uber provided YouGov with a randomly generated geographically representative sample of 10,000 'active drivers'.¹⁹⁴ AlphaBeta found that 48 per cent of drivers drive less than 10 hours per week but also, these drivers account for only 10 per cent of total hours driven by Uber drivers.¹⁹⁵
- 239 AlphaBeta also reported that 69 per cent of road hours driven by Uber drivers are driven by drivers who drive in excess of 20 hours per week.¹⁹⁶
- 240 The National Survey derived its estimate of average weekly hours from a sample comprising workers who reported undertaking platform work over a lengthy period (i.e. the preceding 12 months)¹⁹⁷ as opposed to focusing on current drivers and riders.
- 241 For many platforms, time spent on the platform may not be an indicator of the duration of work. Many platforms are only accessed to source and agree the details of the work, not to do the work itself.
- 242 VTHC submitted that within the hours of work undertaken by delivery riders, there are long periods of unpaid labour.¹⁹⁸ The Inquiry also asked workers about the number of hours they work each week (in 'food delivery') and delivery riders tended to base estimates on the time that they are logged into the app and dedicated to both waiting for job offers and performing tasks.¹⁹⁹
- 243 In contrast, Deliveroo told the Inquiry that its self-employed delivery riders choose to work, on average, 15 hours per week.²⁰⁰ Deliveroo's estimate is based on the time that riders are actually working on a task – from accepting an order to completing a delivery – because this is the only period for which the rider is performing a service directly for Deliveroo. It is therefore the most faithful representation of the time an individual can be considered to be working for the company.²⁰¹
- 244 Airtasker has noted that the diversity of tasks performed makes it difficult for it to accurately estimate hours performed by workers and quantify labour by hourly rates.²⁰² Airtasker, in its submission to the [Senate Select Committee on the Future of Work and Workers](#), previously released data on the degree of engagement of taskers with the platform (see next page).

191. Transport Workers' Union of Australia, Submission 78, p. 5.

192. Transport Workers' Union of Australia, Submission 78, p. 7.

193. Email to the Inquiry from Victorian Trades Hall Council, dated 7 February 2020, with attached report.

194. AlphaBeta, Strategy and Economics, [Flexibility and fairness](#), p. 27.

195. AlphaBeta, Strategy and Economics, p. 16.

196. AlphaBeta, Strategy and Economics, p. 16.

197. McDonald et al., *Digital Platform Work in Australia*, pp. 88-89.

198. Victorian Trades Hall Council (supplementary submission), Submission 89, p. 5.

199. Worker, Uber Eats, Union and Worker Roundtable Discussion, 7 June 2019; Worker, Union and Worker Roundtable Discussion, 7 June 2019.

200. Email to the Inquiry from Libby Hay, Deliveroo, dated 18 May 2020; See also Deliveroo, Submission 28, p. 4.

201. Email to the Inquiry from Libby Hay, Deliveroo, dated 18 May 2020.

202. Tim Fung, Airtasker, Individual Consultation, 3 July 2019.

4.3.2 Frequency of engagement

- 245 The National Survey asked digital platform workers how often they engaged with digital platforms to seek or undertake work.
- 246 The largest cohort (28.3 per cent) responded that they do so less than once every month.
- 247 A group of almost equal size (27.5 per cent) selected the most regular option presented to them – at least a few times each week.
- 248 Information provided to the Inquiry by some platforms supports this.²⁰³
- 249 There were some industry based themes, with workers carrying out creative and multi-media work engaged less frequently (perhaps indicating the more complex or longer duration of their ‘tasks’).²⁰⁴ This can be contrasted with transport and food delivery workers who were more likely to report participating at the highest level of least a few times per week.²⁰⁵
- 250 In its submission to the [Senate Select Committee on the Future of Work and Workers](#), Airtasker was able to identify the number of tasks workers perform each month.²⁰⁶ By pairing this with Airtasker’s analysis of the average income per task, it was possible to gain an understanding of patterns of engagement with Airtasker’s platform. Airtasker submitted to that Committee that 70 per cent of workers performing tasks through Airtasker’s platform perform less than five tasks per month.²⁰⁷ In early 2018, the average value of tasks performed on the Airtasker platform was \$140.²⁰⁸ A worker performing five tasks across the month could therefore be expected to earn about \$700. It may be inferred that Airtasker is not used as a main source of income by the average worker and these workers are not using the platform to obtain full-time equivalent work.²⁰⁹

4.4 WHO IS DOING PLATFORM WORK?

Snapshot

- ▶ Workers from across all ages, education and skill types are accessing work via platforms.
- ▶ ‘Vulnerable’ worker cohorts such as young workers, students and migrant workers are more likely to access platform work.

- 251 National Survey findings indicated that individuals working on digital platforms are a very diverse group working across many industries. This reflects the range of platforms in operation across so many different sectors.
- 252 Digital platform workers are people across the age spectrum of both genders, living in cities and regional and remote areas.
- 253 The National Survey found the largest cohort working via platforms was the 18–34 age group (20 per cent) with the next oldest grouping (ages 35–49) representing 14.8 per cent.

203. AlphaBeta Strategy and Economics, *Flexibility and fairness*, p. 12 (One in four Uber drivers use Uber to earn supplemental income); Deliveroo, Submission 28, p. 4; Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019.

204. McDonald et al., *Digital Platform Work in Australia*, p. 55.

205. McDonald et al., p. 55.

206. Airtasker, Submission 116, [Senate Select Committee on the Future of Work and Workers](#), p. 9.

207. Airtasker, Submission 116, p. 9.

208. Airtasker, Submission 116, p. 12.

209. Some submitters referred to the predominance of micro tasks, small discreet tasks in advertisements on on-demand platforms, see Prof Alysia Blackham, Submission 18, p. 2; Australian Council of Trade Unions, Submission 11, p. 8.

- 254 This is broadly similar to the outcome of a survey conducted in late 2019 by Swinburne University, in which the largest age cohort – who were working or had worked in gig and freelancing work – was the 25–34-year-old age group (36.3 per cent of workers aged 25–34 were gig and freelance workers). The smallest group – 7.8 per cent of workers aged 65+ – were gig and freelance workers, and 19.4 per cent of the 18–24-year-old cohort were gig and freelance workers.²¹⁰
- 255 Persons surveyed in the National Survey had a range of education and qualifications, from less than Year 12, through to postgraduate qualifications (Table 3).

TABLE 3 : NATIONAL SURVEY – HAVE YOU EARNED INCOME BY WORKING OR OFFERING SERVICES THROUGH DIGITAL PLATFORMS?

Highest education level	No	Yes (not in last 12 months)	Yes currently or within last 12 months	N
Less than Year 12	91.8	3.3*	4.8*	784
Year 12 or equivalent	91.9	4.0*	4.1*	1821
Vocational qualification	89.3	4.7	6.0	4161
Bachelor degree	83.1	8.0	8.9	4190
Postgraduate qualification	85.0	6.9	8.1	3051

Source: McDonald et al., *Digital Platform Work in Australia*, p. 34.

* Relative standard error > 10% Unweighted N=14013.

- 256 This is consistent with other research. The Swinburne University survey indicated that:
- 13.3 per cent of workers who had no tertiary qualification were gig or freelance workers (representing 12.7 per cent of all gig and freelance workers),
 - 14.5 per cent of workers who had a TAFE qualification were gig or freelance workers (representing 18 per cent of all gig and freelance workers) and
 - 32.6 per cent of workers who had a university qualification were gig or freelance workers (representing 69.4 per cent of all gig and freelance workers).²¹¹
- 257 The Swinburne survey also asked participants about household income. Around one quarter of survey respondents (25.4 per cent) who reported being in households with incomes that were less than \$50,000 a year, were doing gig and freelance work. A similar proportion of survey respondents (26.9 per cent) were earning between \$50,000 and \$99,000 and doing gig and freelance work. Lastly, 26 per cent of survey respondents who reported being in households with income over \$150,000, were doing gig and freelance work.²¹²
- 258 Some groups are more likely than others to be earning income through platform mediated work. They include young people, people who reside in a major city, people with a disability, temporary residents and people who speak a language other than English at home, students, Aboriginal and Torres Strait Islanders and men.²¹³
- 259 Unsurprisingly, the demographics were different for different sectors, with indications that less skilled/entry level work was more likely to be carried out by workers who were younger and had indications of a migrant background (i.e. temporary residence status and/or a language other than English spoken at home).

210. S. Gallagher, *National Survey Data*, Centre for the New Workforce, Swinburne University of Technology, 2020.

211. Gallagher, *National Survey Data*.

212. Gallagher, *National Survey Data*.

213. McDonald et al., *Digital Platform Work in Australia*, p. 35. Note the National Survey also indicated that Aboriginal and Torres Strait Islanders and those with a higher level of education are also more likely than not to participate in digital platform work; however because of the sample of respondents, the authors suggest that these results need to be interpreted with caution.

- 260 For example, the National Survey found that transport and food delivery workers are more likely to be younger (18–34 years of age), to have indicated temporary residency status and to speak a language other than English at home.²¹⁴ This is consistent with other research into the demographics of food delivery workers.²¹⁵
- 261 By contrast, Airtasker believed their workers to be much older on average, than food delivery workers, with a significant number of retiree participants.²¹⁶ Statistics provided by Airtasker for the 2019 financial year show that the most common age band for its taskers was 20–29 years (40.91 per cent), but 5.96 per cent of taskers were aged 50–59 years of age and 1.75 per cent were 60–69 years of age.²¹⁷ Airtasker does not keep data on its workers' cultural and linguistic background, or gender.²¹⁸

4.4.1 Potentially vulnerable workers

- 262 The TOR require a focus on 'vulnerable workers' in considering the central question of the impact of on-demand work. A range of factors contribute to a person's position in the labour market and impact on their leverage in that market and whether they might be in a 'vulnerable' situation at, or when seeking, work.
- 263 The characteristics of the worker including: their experience in the workplace, work based skills, capability and confidence around their workplace entitlements, and raising issues are all relevant. Workers with higher levels of education and experience encounter vastly different experiences when engaged in platform work than those in unskilled work.
- 264 The FWO has consistently called out the vulnerabilities that exist with respect to both young and migrant workers.²¹⁹ Both cohorts are more likely to be in lower skilled 'entry level' positions. They are less likely to understand their rights or act on them. Inexperience and cultural and language differences may heavily impact on a worker's capability or confidence to seek improved conditions.
- 265 Migrant workers are disproportionately represented in the FWO's requests for assistance and enforcement action.²²⁰ In February 2017, young workers made up approximately 15 per cent of the workforce, but generated 25 per cent of complaints to the FWO. The national workplace regulator considered young workers a priority for its compliance activities.²²¹
- 266 Also relevant to a worker's position in the labour market is the availability of other suitable jobs in the relevant labour market – in other words, alternative or potentially better work options. While unemployment prior to the COVID-19 interventions was relatively low, certain cohorts or regions experienced much higher unemployment and therefore, competition for jobs.²²²
- 267 Workers who may experience discrimination, poor treatment or non-compliance in 'traditional' employment can be in a more precarious position in the labour market.
- 268 These structural, situational and legal aspects together, impact on the degree of leverage that a worker may have within a work situation.

214. McDonald et al., p. 41.

215. Deliveroo suggested that some 80 per cent of food delivery workers were visa holders, Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

216. Tim Fung, Airtasker, Individual Consultation, 3 July 2019.

217. Email to the Inquiry from Nathan Chadwick, Airtasker, dated 21 October 2019.

218. Tim Fung, Airtasker, Individual Consultation, 3 July 2019; Email to the Inquiry from Nathan Chadwick, Airtasker, dated 21 October 2019.

219. Fair Work Ombudsman, Submission 32, p. 2. The Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2018–2019*, pp 19 and 21. See also, WEstjustice, Submission 92, pp. 5–6.

220. The Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2018–2019*, p. 21.

221. Fair Work Ombudsman, *Annual Report 2013–2014* [website], pp. 29–30; Fair Work Ombudsman, *Fair Work Ombudsman out to smash myths relating to young workers* [website], (Media Release, 13 February 2017).

222. The unemployment rate in north western Melbourne, including Broadmeadows, Bulla and Sunbury is 6.2 per cent. In western Melbourne, including Melton, Werribee and Footscray, it is 6.6 per cent. In south east Melbourne, including Dandenong, Cranbourne and Frankston, it is 5.9 per cent. This compares to north eastern Melbourne, stretching from Ivanhoe to Kinglake and Lilydale and Healesville, with an unemployment rate of 3.7 per cent and inner metropolitan Melbourne with an unemployment rate of 4.5 per cent: Source, Australian Government, *Labour Market Information Portal* [website]. For some suburbs in particular, the unemployment rate is significantly higher than the national rate. In around 2016, Broadmeadows had an unemployment rate of 15.8 per cent, and Greater Dandenong had an unemployment rate of 10.3 per cent, compared to Australia's unemployment rate of 6.9 per cent: Source, Australian Bureau of Statistics, *Broadmeadows, (SA2) (210051242)* [website], Australian Bureau of Statistics, *2016 Census Quickstats* [website], Greater Dandenong (C).

4.4.2 Younger workers

- 269 Younger workers were over-represented in platform work, according to the National Survey.²²³ The Inquiry spoke to workers in this cohort over the course of its consultations.
- 270 There are different perspectives about whether young people are adopting platform work because they prefer it or because there may be limited suitable alternatives. Depending on your point of view, the opportunities opened up by platform work are either providing valuable job options or are exploitative of vulnerable young workers.
- 271 Young people who have not attained full-time work by age 25 encounter greater barriers to entering the labour market including: limited work experience, lack of education, lack of career skills and not enough jobs.²²⁴ Prior to the COVID-19 interventions triggering a new wave of unemployment, the youth unemployment rate of 11.8 per cent was significantly higher than the general unemployment rate of 5.2 per cent.²²⁵
- 272 The roles more accessible to young people in the ‘traditional’ labour market are in sectors more likely to encounter compliance issues, such as hospitality.²²⁶
- 273 The Ai Group submitted that the flexibility provided by many platforms allowed younger workers to combine paid work with their study commitments.²²⁷ This was supported by some student workers who spoke to the Inquiry.²²⁸ The Institute of Public Affairs (IPA) is of the view that young workers embracing the on-demand economy ‘is encouraging’ as it indicates they are confident in their abilities to do so and most will have the determination to succeed.²²⁹
- 274 The Foundation for Young Australians (FYA) is of the view that more research needs to be done on whether there is an increasing preference amongst young people for on-demand work or whether it is a last resort because they do not have access to more traditional forms of employment.²³⁰ The FYA submitted that young people are over represented in the casual workforce and often cannot find enough work, despite overall higher education and training attainment than other age groups.²³¹
- 275 FYA’s research suggests that almost one in three young Australians are unemployed or underemployed and it takes an average of 2.6 years to obtain full-time work after completing full-time education.²³² This is supported by other studies. For example, Graduate Outcome surveys show that more than 30 per cent of university graduates did not secure full-time employment within four months of leaving university. Those who do, often find work in areas not directly related to their studies.²³³
- 276 In their joint submission, the Victorian Local Learning and Employment Network (VLLEN) and Youth Affairs Council (YAC) reported that young people now piece their income together from a range of sources.²³⁴

223. McDonald et al., *Digital Platform Work in Australia*, pp. 5 and 32.

224. Foundation for Young Australians, *The New Work Reality*, 2018, p. 8.

225. Data provided by email to the Inquiry from the Department of Treasury and Finance (Victoria), dated 25 February 2020.

226. The industries for which the Fair Work Ombudsman received the highest number of anonymous reports (hospitality by far, followed by retail and then building and construction) employ large numbers of young workers, The Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2018–2019* [website], p. 19; Australian Government, Department of Jobs and Small Business, *Australian Jobs 2019*, 2019, p. 13. See also address by the Fair Work Ombudsman, [2019 Annual National Policy-Influence-Reform Conference](#), 3 June 2019.

227. Australian Industry Group, Submission 1, p. 22.

228. Deliveroo and Uber Eats worker, Deliveroo and previously Uber Eats worker, Deliveroo worker, Supp workers, On-Demand Workers’ Online Conversation, Department of Premier and Cabinet, 19 August 2019.

229. Institute of Public Affairs, Submission 36, p. 10.

230. Foundation for Young Australians, Submission 33, p. 3.

231. Foundation for Young Australians, Submission 33, p. 2.

232. Foundation for Young Australians, Submission 33, p. 2-3.

233. Quoted in *Building the Lucky Country #7*, p. 33.

234. Victorian Local Learning and Employment Networks – Youth Affairs Council, Submission 86, p. 2.

- 277 The VLLEN and YAC also submitted that reliance on multinational platforms (as opposed to new community and worker-controlled platforms) to provide entry level jobs, impacted upon young peoples' early experiences of work and the environment that gives them the best chance of a long-lasting successful career (including contact with mentors and more experienced workers).²³⁵ They stated that multinational platforms decrease the viability of local enterprises where young people would otherwise work and research has shown that 'local economies are critical to young people's understanding of work, belief in what is possible and therefore attachment to school, and development of job search skills and work experience'.²³⁶
- 278 The FWO suggested that young and migrant workers are often unaware of their workplace entitlements or feel unable to question their employers about them.²³⁷ The MEAA suggested younger people working as voice over artists 'find themselves overwhelmed and forced to take work at unsustainably low rates'.²³⁸ However, the IPA submitted that the precarity of entry level work and the higher proportion of young workers complaining of exploitation, are long-term features of the labour market and should not be linked to platform work.²³⁹
- 279 Job outcomes for young workers remained less favourable than other workers after the global financial crisis. A significant number of young people work in sectors impacted by the COVID-19 interventions, in particular, hospitality. Many of these workers are casual, meaning they may not be eligible for the COVID-19 JobKeeper payment. In the recovery phase they will be competing for work in even tougher circumstances.

4.4.3 Migrant workers

- 280 The Inquiry considered a range of evidence about the extent to which migrant workers were accessing platform work.
- 281 The Report of the Migrant Workers' Taskforce stated that migrant workers, who are in Australia on a temporary basis, are particularly vulnerable to exploitation because they 'may have poor knowledge of their workplace rights, are young and inexperienced, may have low English language proficiency and try to fit in with cultural norms and expectations of other people from their home countries'.²⁴⁰ Further, even if migrant workers are aware that they are being underpaid they might not know what to do to fix this, or be fearful about speaking to public officials due to their experiences in less democratic countries or because they have not fully complied with their visa conditions. They also might feel compelled to take whatever employment is available in a competitive labour market or feel that they benefit from underpayment arrangements if income is not declared to the ATO.²⁴¹
- 282 WEStjustice stated that, whilst there are considerable risks associated with platform work that left unaddressed will result in ongoing exploitation of workers, it provides immense opportunities for migrant workers given its low barriers to entry and the flexibility offered.²⁴² This is consistent with comments from Arie Moses of Thrive Refugee Enterprise. Mr Moses said refugees or asylum seekers, who have low English literacy because they have recently arrived in Australia, have no issue utilising technology to engage in food delivery or rideshare work. Many have used platform work to repay loans and do more than make ends meet, because the flexibility also allows them to perform other work.²⁴³ Mr Moses stated that in relation to platform users:
- So we've had only so far positive experiences with our clients. It's our favourite lending group because it seems to be fairly safe in terms of income generation. So it's a group of people that we actually like lending to.*²⁴⁴

235. Victorian Local Learning and Employment Networks – Youth Affairs Council, Submission 86, p. 2.

236. Victorian Local Learning and Employment Networks – Youth Affairs Council, Submission 86, p. 2.

237. Fair Work Ombudsman, Submission 32, p. 2.

238. Media Entertainment and Arts Alliance, Submission 49, p. 7.

239. Institute of Public Affairs, Submission 36, p. 10.

240. *Report of the Migrant Workers' Taskforce*, March 2019, p. 13.

241. *Report of the Migrant Workers' Taskforce*, March 2019, p. 13.

242. WEStjustice, Submission 92, p. 18.

243. Arie Moses, Thrive Refugee Enterprise, 12 July 2019.

244. Arie Moses, Thrive Refugee Enterprise, 12 July 2019.

- 283 Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen, academics who had conducted research and provided the Inquiry with a submission, said that the desire of the food delivery workers they interviewed (predominately non-Australian residents with low English skills) to perform this work, was a function of their limited labour market power. They noted that frequently there were visa conditions placed on interviewees' ability to find work and they did not have access to the Australian welfare system.²⁴⁵ This meant some food delivery workers were relying upon charities such as soup kitchens.²⁴⁶
- 284 Migrant workers have also been impacted by the COVID-19 interventions, as they occupy jobs affected by shut downs but are not eligible for most government support. Platform work may be one of the few ways for such workers to access sources of income, although visas may limit the nature and extent to which they might work in this way.
- 285 One former Uber driver suggested that international students are working as cleaners because of the difficulties they face in getting work in their areas of study.²⁴⁷ Other international students stated that they were working as food delivery riders because it was preferable to working in the hospitality industry where their experience was that international students are only paid \$15 per hour or needed to be working between 50 and 70 hours per week.²⁴⁸
- 286 According to Dr Barratt, Dr Goods and Dr Veen, migrant workers' uncertainty about how to measure their hours, fuels concern about compliance with immigration law.²⁴⁹ This is borne out by statements to the Inquiry that many international students (whose visas restrict them to working 40 hours per fortnight) are confused about whether the time they signal on the app as being available, or just the hours that they are providing a ride, count as work.²⁵⁰

4.4.4 Women platform workers

- 287 The National Survey results indicate that women are half as likely as men to be engaged in platform work.²⁵¹ Also, they are likely to participate less frequently than men (at least in relation to those that estimated their hours) and work significantly less hours than men.²⁵² The findings also showed that women earned less than men, as an hourly rate on average, and were more likely to participate in work traditionally dominated by women.²⁵³
- 288 Workers in clerical and data entry, sales and marketing support, writing and translation and caring were more likely to be women, while men were predominant in software development and technology, transport and food delivery, and skilled trade work.²⁵⁴
- 289 The National Survey research team suggested that it may be that platform work 'reproduces the gendered features of labour markets and the gender pay gap that exists in the broader economy'.²⁵⁵
- 290 Other scholars, such as Associate Professor Alysia Blackham, told the Inquiry that the use of online profiles containing significant amounts of personal information (including a photograph) may encourage and facilitate discrimination.²⁵⁶ The amount of information and the large number of individuals listed on platforms, may cause information overload and mean people rely more on cultural stereotypes when hiring.²⁵⁷ She reported that women are more likely to be successful in applications for stereotypically female jobs.²⁵⁸ Associate Professor Blackham also referred to research that average hourly rates requested by women are 37 per cent below those of men for comparable work (tasks).²⁵⁹ Note that in the National Survey, the average income reportedly earned by men was \$2.67 per hour higher than the comparable rate reported by women.²⁶⁰ On the other hand, Associate Professor Blackham wrote that the flexible arrangements offered in the platform economy may be attractive to women, especially because they often have caring responsibilities.²⁶¹

245. Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen, Submission 14, p. 3 (The researchers interviewed 58 food delivery platform workers in Perth and Melbourne in the first half of 2017).

246. Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen, Submission 14, p. 3.

247. Worker, former Uber driver, Workers' Roundtable Discussion, 29 July 2019.

248. Worker, Deliveroo and Foodora rider, Union and Worker Roundtable Discussion, 7 June 2019; Worker, Deliveroo and former Uber Eats rider, On-Demand Workers' Online Conversation, 19 August 2019.

249. Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen, Submission 14, p. 3.

250. Gabrielle Marchetti, JobWatch and Rose Steele, Victorian Trades Hall Council, Workers' Roundtable Discussion, 29 July 2019.

251. McDonald et al., *Digital Platform Work in Australia*, p. 35.

252. McDonald et al., p. 44.

253. McDonald et al., p. 81.

254. McDonald et al., p. 41.

255. McDonald et al., p. 82.

256. Blackham, 'We are all entrepreneurs now', p. 420.

- 291 Shebah's submission corroborates this view. Shebah's average driver 'is seeking casual flexible work that fits around her family and other priorities'. Shebah said many of its drivers are carers for ageing parents and children with a disability and the female driver's child can travel with her, if passengers do not object.²⁶²
- 292 However, other submitters suggested platform work may place pressure on women who have caring responsibilities. The ability of platform workers to balance their work with domestic, care or other personal commitments may not be easy if working hours are irregular.²⁶³ The Australian Services Union (ASU) is also concerned that the emergence of care work facilitated by digital platforms (with the capacity to track worker availability, job acceptances and ratings or rankings) may mean the boundaries between work and personal life for home community support workers has become even more porous.²⁶⁴
- 293 The ASU's submission referred the Inquiry to data suggesting direct home care workers and psychosocial disability workers are predominantly female.²⁶⁵ The ASU submitted that the use of digital platforms to engage people to perform this work, risks widening the gender pay gap in these industries even further.²⁶⁶
- 294 Women have also expressed safety concerns about working as rideshare drivers. A participant in one of the workers' roundtables worked as a rideshare driver in the Geelong region, but now works as a cleaner. She stopped working as a rideshare driver because she felt unsafe driving people affected by alcohol and drugs, despite having the safety button on the app. She told the Inquiry that, on one occasion, people who were heavily intoxicated had refused to leave her car when she refused to drive them.²⁶⁷ Similarly, Shebah's Chief Executive Officer (Ms George McEncroe) stated that she had signed up twice to be a driver with Uber but had been too scared to pick up intoxicated men.²⁶⁸ The release of Uber's safety report in the US late in 2019, lends further support to the views expressed by participants in this Inquiry.²⁶⁹ That report stated that there were 6,000 reports of sexual abuse (including many incidents of serious sexual assault) involving riders and drivers in 2017 and 2018 in the US.
- 295 Evidence suggests that the COVID-19 interventions have had a more severe impact on women than men. According to the ABS, 8.1 per cent of jobs held by women disappeared after March 14, compared with 6.2 per cent of jobs held by men. Based on the National Survey, women may be less likely to access platform work as an alternative source of income.

257. Blackham, p. 420.

258. Blackham, p. 420.

259. Blackham, pp. 420-421; Other research has found similar outcomes, see: A. Renan Barzilay and A. Ben-David, 'Platform Inequality: Gender in the Gig-Economy', *Seton Hall Law Review*, vol. 47, 2017, p. 398; C. Cook, R. Diamond, J. Hall, J. A. List and P. Oyer 'The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers', Working Paper No 24732, *National Bureau Economic Research*, 2018. This study found that male Uber drivers surveyed earned 7 per cent more than female Uber drivers per hour, on average.

260. McDonald et al., *Digital Platform Work in Australia*, p. 42.

261. Blackham, 'We are all entrepreneurs now', p. 419.

262. Shebah, Submission 68, pp. 2-3.

263. Barzilay and Ben-David, 'Platform Inequality', p. 403; De Silva, 'Gender and work in the gig economy', p. 4.

264. Australian Services Union, Submission 13, p. 14.

265. Australian Services Union, Submission 13, p. 13.

266. Australian Services Union, Submission 13, p. 13.

267. Worker, formerly rideshare, Workers' Roundtable Discussion, 29 July 2019.

268. Shebah, Submission 68, p. 1.

269. K. Conger, '[Uber Says 3,045 Sexual Assaults Were Reported in U.S. Rides Last Year](#)' [website], *The New York Times*, 5 December 2019; J. Abbruzzese, '[Uber riders and drivers share fears about safety after company releases assault numbers](#)' [website], *NBC News*, 7 December 2019.

4.5 WHY ARE PEOPLE WORKING IN THIS SECTOR?

Snapshot

- ▶ Platforms provide highly flexible opportunities for work.
- ▶ Platforms have generated new job opportunities.
- ▶ Platforms have relatively low barriers to entry and provide a diverse range of entry-level and skilled job opportunities.
- ▶ Australia's labour market conditions inhibit job opportunities for some workers: fewer entry-level jobs, high youth unemployment and under-employment are creating more competition, particularly for lower skilled workers.
- ▶ Labour market conditions and the personal characteristics of some platform workers can place them in a precarious position in the labour market.
- ▶ These 'low-leveraged' workers have fewer alternatives to earn income and face higher competition for work, including from under-utilised employees seeking additional income.
- ▶ Systemic non-compliance with employment laws is impacting the quality of available entry-level/low-skilled jobs for workers. This affects their choices.
- ▶ Because of their relatively fewer choices, low-leveraged workers are more likely to accept structurally precarious job arrangements.
- ▶ Low-leveraged workers are more reliant on platform work.

296 The National Survey asked respondents about their motivations for seeking work via platforms.

297 The strong and recurring theme was the flexible nature of the work. While not every worker was entirely satisfied with all elements of platform work, the ease with which it can be accessed and the options around time and place of work were seen to be very attractive when compared with alternatives available to those workers in the 'traditional' labour market.

298 The National Survey found that the strongest motivation for undertaking platform work was 'earning extra money'. The other key motivations related to flexibility: 'working the hours I choose', 'doing work that I enjoy', 'choosing my own tasks or projects', 'working in a place that I choose', and 'working for myself and being my own boss'.²⁷⁰ As well as these motivations, the Inquiry also received submissions that people were performing platform work because it was what was being offered in their sector.

299 These themes were echoed throughout submissions and discussions with workers. An Uber worker indicated to the Inquiry that he found the work flexible and quite sociable. It was a really good way to earn extra income around his other job as a commercial cleaner.²⁷¹ Several workers suggested that platform work enabled them to work around study commitments, and another said, "I actually enjoy it."²⁷² Ewan Short, a worker, submitted that he enjoys the physicality of food delivery work, that people are happy to see him when he arrives and that he finds it rewarding when, from time to time, he delivers to people with disabilities.²⁷³

270. McDonald et al., *Digital Platform Work in Australia*, p. 59.

271. Worker, Uber, Workers' Roundtable Discussion, 29 July 2019.

272. Workers, food delivery and rideshare, Workers' Roundtable Discussion, 29 July 2019.

273. Ewan Short, (worker), Submission 70, p. 4.

- 300 Some insight into the reasons workers are accessing jobs in this way, comes from understanding why those who were once, but are no longer doing platform work, stopped. The National Survey found that the primary reason workers had stopped gig work in the preceding 12 months was that they had insufficient time (23.8 per cent). The next most significant reason was that the worker had obtained other work, including full-time work or that their ‘main’ job had improved (15.3 per cent). A similar proportion cited insufficient pay in return for their time and effort as the reason, followed by 9 per cent saying not enough work was available. Seven per cent referred to concerns about trust and fairness on the platform. Only 3.8 per cent said they stopped because they did not enjoy the work.
- 301 Some digital workers see their irregular platform work more as a pastime than a job.²⁷⁴ Tim Fung of Airtasker suggested that platforms give people “new work opportunities” – the chance to monetise a broad range of skills that, in the past, may not have materialised into an economic transaction.²⁷⁵ Findings from the National Survey do suggest that, for a small proportion of workers, connecting socially and doing something they enjoy are important motivators.²⁷⁶ SEA said work is an ‘elastic analytic category’ and that many activities done through platforms could not be compared to ‘employee work’.²⁷⁷ These views suggest that, when some workers are asked if they have another job, the tasks they perform through platforms do not come to mind.²⁷⁸

4.5.1 Earning ‘extra’

- 302 The survey findings that earning extra was a key motivation, was consistently echoed by others throughout the Inquiry.
- 303 SEA suggest that the primary function of platform work is to ‘smooth income and labour market fluctuations’.²⁷⁹
- 304 Platforms submitted that workers engaging in platform work are often motivated by the desire to earn supplementary income.²⁸⁰ This is consistent with a range of data that indicates platform income offers secondary rather than primary income for the majority of platform workers. There are distinctions across different sectors, with transport and food delivery drivers more likely to say that platform work generated 100 per cent of their income and was essential for meeting basic needs.²⁸¹
- 305 Uber’s submission noted that, according to its 2018 survey of Australian driver-partners who were regularly using its app, the opportunity to earn supplementary income and being able to choose their own hours (which came first) were the two key motivations for driving with Uber.²⁸² Airtasker previously stated that about 70 per cent of people who complete tasks each month complete less than five tasks per month and that while people are ‘monetising’ a greater variety of new skills, turning the work into full-time work may be challenging.²⁸³ Sidekicker similarly stated that it provides supplementary income and cannot provide enough work to sustain people full-time. Sidekicker further submitted that platform work is very likely to suit different life stages, because a living wage is very different for a student versus a mortgage holder.²⁸⁴

274. Oscar Wong, worker, On-Demand Workers’ Online Conversation, 19 August 2019.

275. Tim Fung, Airtasker, Individual Consultation, 3 July 2019; See also Airtasker, Submission 116, [Senate Select Committee on the Future of Work and Workers](#), p. 11.

276. McDonald et al., *Digital Platform Work in Australia*, p. 60.

277. Self-Employed Australia, Submission 67, p. 14.

278. Further, if workers believe that a secondary job means being engaged by another person or entity in a long or medium-term work relationship, then what they do ‘on-demand’ may again not come to mind.

279. Self-Employed Australia, Submission 67, p. 2.

280. For example, Menulog, Submission 50, p. 8; Jordan Murray, Supp, Restaurant and Catering Roundtable Discussion, 16 July 2019, Department of Premier and Cabinet, 35 Collins St, Melbourne.

281. McDonald et al., *Digital Platform Work in Australia*, pp. 56 and 58.

282. Uber, Submission 79, p. 8.

283. Airtasker Submission 116, [Senate Select Committee on the Future of Work and Workers](#), p. 9, referred to by Tim Fung, Airtasker, Individual Consultation, 3 July 2019.

284. Tom Amos, Sidekicker, Individual Consultation, 24 June 2019.

- 306 Workers accessing care sector work through platforms generally also seem to be motivated by supplementing their other sources of income. Research involving interviews with ten disability workers found that nine were multiple job holders, primarily because their main job did not provide sufficient income.²⁸⁵ According to National Disability Services (NDS), when they interviewed disability workers about platform work in 2017, respondents stated that the advantages of digital platforms included the ability to supplement insufficient hours offered by traditional providers.²⁸⁶ Another survey of Australian disability support workers found that some wanted permanent contracts, additional hours and certainty, while others wanted work that would fit around other commitments.²⁸⁷
- 307 The option of supplementing income via gig work has clearly been attractive and critical to some people. It should be considered against the backdrop of underutilisation in the labour market. Many people are finding that traditional jobs are either not offering sufficient hours or not providing work they are able to access. Other dynamics that may be impacting on the attractiveness of gig work include long-term low wages growth and high levels of non-compliance with minimum wages in certain parts of the labour market.
- 308 This may be as much a reflection of some unappealing aspects of the traditional labour market as of the appeal of gig work.

4.5.2 Flexibility and autonomy

- 309 The National Survey reinforced that working the hours they choose is a significant motivator for platform workers. When asked about their degree of satisfaction with various aspects of platform work, workers indicated they were most satisfied about being able to choose the hours they work, and working for themselves and being their own boss. These were followed by being able to choose their own tasks or projects, then working from a place, or at a pace, of their choosing.²⁸⁸
- 310 Choice and flexibility were therefore strong themes arising from this cohort of workers. And this factor is a significant characteristic influencing who carries out platform work.
- 311 A number of business platforms advised the Inquiry that the feedback they receive is that workers do not want 'rostered' shifts and that workers choose if, when and where they want to work.²⁸⁹ For example, Deliveroo submitted that 'Flexible work is the number one thing riders value about working with Deliveroo'.²⁹⁰ According to Uber, 'Nearly 80 per cent of driver partners said they would be unlikely to continue using Uber if they had to drive fixed shifts'.²⁹¹ It is possible that this may reflect consideration by drivers of the compensation provided. The VCCI reported that one business informed it that workers who undertake high-end independent contracting assignments in consulting and IT are attracted to this work due to both the flexibility offered and high levels of remuneration. Most preferred this work to traditional employment.²⁹²
- 312 However, according to the VTHC survey, most riders work to cover living costs. Just one in eight riders do so because it provides a flexible way of working.²⁹³
- 313 There is increasing demand for flexible work that enables workers to better accommodate their full range of preferences and responsibilities. The Recruitment, Consulting and Staffing Association of Australia and New Zealand (RCSA) observed that Australia's capacity to create employment opportunities in the future 'will be determined by our ability to create a labour market environment that is flexible and responsive to market demands' and that the growing 'diversity of the workforce means the old standard 'one size fits all' approach is no longer relevant'.

285. F. Macdonald, E. Bentham and J. Malone, 'Wage theft, underpayment and unpaid work in marketised social care', *The Economic and Labour Relations Review*, vol. 29, no. 1, 2018, pp. 87.

286. National Disability Service, Submission, Submission 53, p. 4.

287. Dr Carmel Laragy, Submission 38, p. 1.

288. McDonald et al., *Digital Platform Work in Australia*, p. 51.

289. Ann Tan, Ola, Platform Business Roundtable Discussion, 22 February 2019; Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019.

290. Deliveroo, Submission 28, p. 4.

291. Uber, Submission 79, p. 4.

292. Victorian Chamber of Commerce and Industry, Submission 83, p. 4.

293. Victorian Trades Hall Council Supplementary Submission 89, p. 34.

4.5.3 'It's what is being offered in their sector'

- 314 Workers may also be working for platforms because their industry has transitioned in this manner. The ASU submits that, with social and community work becoming less secure, ASU members work within the on-demand economy as a last resort rather than choosing to work this way.²⁹⁴ The MEAA also noted that voiceover work is now increasingly being offered on platforms like Airtasker, Fiverr and Freelancer, at below industry 'market' rates.²⁹⁵
- 315 The ACTU reported that one third of workers are in platform work because they have debts to pay.²⁹⁶ They also reported that 85 per cent of drivers are unhappy with the income received.²⁹⁷ However, this assertion is different to the National Survey results which found that 47.3 per cent of workers were of the view that the income they earned was fair.²⁹⁸
- 316 NatRoad referred to survey results indicating that drivers in the freight industry who have used platforms, are dissatisfied with pricing and compliance with safety regulations.²⁹⁹ Again, the information provided by employee/worker organisations and platform businesses is quite different. Deliveroo, for example, reports that according to internal surveys, 90 per cent of workers are happy working with Deliveroo.³⁰⁰
- 317 Current platform workers surveyed by the National Survey were moderately to fairly satisfied with platform work. On dimensions related to flexibility, respondents' satisfaction ratings varied from 4 out of 5 (with respect to choosing the hours they worked) and 3.89 out of 5 (on the aspect of working for themselves or being their own boss).³⁰¹ On dimensions related to pay, the average satisfaction rating was 3.35 out of 5.³⁰² Overall, more workers were more positive than negative about these aspects of platform work. However, when compared with those working in professional services work, those in transport and food delivery were significantly less satisfied with being able to set the price for their services and to improve their existing skills.³⁰³ In some ways these results are unsurprising. The work platforms operating in the transport and food delivery industry tend to set prices,³⁰⁴ and offer little task variability.

4.5.4 Access to the labour market

- 318 One of the themes of the Inquiry was that workers found platform work easier to access, making it particularly attractive to people who may otherwise face challenges entering the labour market.
- 319 Registration processes for many platforms are not onerous: for example, checking identity, base level qualifications such as a driver's licence and, in some cases but not all, the right to work in Australia (visa holders).³⁰⁵ Others are more involved; enabling or requiring certain qualifications. Some platforms verify qualifications while others do not.³⁰⁶
- 320 After a person has secured access to the platform, they are able to access a large population of potential clients via the platform. Once access to the platform is obtained, workers can generally make themselves available at times that suit them.

294. Australian Services Union, Submission 13, p. 16.

295. Media Entertainment and Arts Alliance, Submission 49, p. 5.

296. Australian Council of Trade Unions, Submission 11, p. 4.

297. Australian Council of Trade Unions, Submission 11, p. 4.

298. McDonald et al., *Digital Platform Work in Australia*, p. 52.

299. NatRoad, Submission 55, p. 4.

300. Deliveroo, Submission 28, p. 3.

301. McDonald et al., *Digital Platform Work in Australia*, p. 51.

302. McDonald et al., p. 51.

303. McDonald et al., p. 53.

304. Menulog, Submission 50; Deliveroo, Submission 28.

305. Uber drivers must meet, and Uber verifies, relevant criteria including accreditation, background check and right to work, Uber, Submission 79, p. 30; Maggie Lloyd, Uber, Individual Consultation, 19 July 2020, Department of Premier and Cabinet, 1 Spring St Melbourne. Adherence to Airtasker terms and conditions require that the worker has the right to provide the services undertaken and right to work in the jurisdiction the services are performed, but Airtasker does not check this, see Airtasker, [Terms and Conditions](#) [website], Cl.3.9.

306. For example, Mable verifies qualifications for tasks required to be done by qualified persons: Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019. Airtasker does not screen workers' qualifications as a condition of participating on the platform, but does have a process for workers to apply for 'badges' indicating that workers have been verified by a relevant third party for a particular skill or licence, for example Airtasker, [Airtasker Help: What is an electrical badge? How do I get one?](#) [website].

- 321 Securing work opportunities may be affected by customer ratings, reviews and so on. Maintaining access to the platform may be subject to meeting certain performance and/or behavioural standards.³⁰⁷
- 322 The Inquiry heard evidence from many people, students for example, for whom this access was very important.
- 323 This is significant in the case of lower skilled workers because there are fewer options in the labour market for people seeking such roles. Those who are looking for 'entry level' jobs can encounter substantial difficulties obtaining work.
- 324 Anglicare Australia's 'Jobs Availability Snapshot 2019' found that, in its sample month of May 2019, only 10 per cent of vacancies were suitable for someone who did not have qualifications or work experience. This had reduced from 22 per cent when records began in 2006.³⁰⁸
- 325 Their analysis found that at least five job seekers with barriers to employment are competing for each of these roles across Australia (and almost four job seekers with barriers to work are competing for each of these roles in Victoria). Anglicare noted that these job seekers were also up against applicants with greater skills and likely to also be competing with underemployed workers.³⁰⁹
- 326 The Australian calendar year headline unemployment rate of 5.2 per cent (pre-COVID-19) can divert from the fact that the calendar year youth unemployment rate was then 11.8 per cent.³¹⁰ Young workers generally have fewer skills and less work experience.
- 327 Also, whilst participation rates have slowly increased, underemployment continues to be an issue for the Australian labour market, with 8.3 per cent of working Australians wanting more work than they are able to obtain.³¹¹
- 328 Non-compliance with workplace laws may also be distorting choices for low-leveraged workers. Some sectors have been identified as being culturally less compliant, meaning that the minimum conditions – rates of pay, honouring rules about minimum shifts and roster patterns – may not be as they should be. These sectors tend to be those that offer a higher number of entry level roles and have a higher proportion of casual workers, such as hospitality. Platform work, even if it generates relatively low income, may be a comparable option for workers.
- 329 The extent to which barriers to entry are reduced depends on the nature of the work. In the case of rideshare or food delivery, access to a vehicle is required. Rideshare requires a nicer (or at least newer) vehicle than food delivery.³¹²
- 330 Uber noted that there were lower barriers to entry on its Uber Eats platform because of the higher standards required of rideshare workers.³¹³
- 331 Some platforms enable skilled workers to access work (for example, Expert360 connects white collar professionals with large enterprises and some smaller businesses for project work).³¹⁴ The National Survey found that 16.9 per cent of respondents indicated that professional services work (such as financial, legal and consulting services) was the type of work performed through their main digital platform.³¹⁵

307. For example Shebah, Submission 68, p. 3; Tom Amos, Sidekicker, Individual Consultation, 24 June 2019; Lucas Groeneveld, Uber, Individual Consultation, 19 July 2019.

308. Anglicare Australia 2019 [Jobs Availability Snapshot 2019](#). Anglicare Australia: Canberra, p. 4.

309. Anglicare Australia 2019 [Jobs Availability Snapshot 2019](#). Anglicare Australia: Canberra, pp. 4 and 11.

310. Email to the Inquiry from Department of Treasury and Finance (Victoria), dated 25 February 2020.

311. Email to the Inquiry from Department of Treasury and Finance (Victoria), dated 25 February 2020.

312. Worker, food delivery, Union and Worker Roundtable Discussion, 7 June 2019. See also [Uber Vehicle requirements](#), where a requirement for an Uber car is that it is no more than 10 years old, whereas for Uber Eats, the car can be as old as a 1990 model.

313. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019.

314. Jonathan Hunter, Expert360, Platform Business Roundtable Discussion, 22 February 2019.

315. McDonald et al., *Digital Platform Work in Australia*, p. 40.

- 332 In the case of more skilled work, the requisite skills or qualifications would still be required. However, the Inquiry notes that the extent to which platforms scrutinise skills and qualifications varies. For example, Airtasker does not screen workers' qualifications as a condition of participating on its platform. Instead, it has a process for workers to apply for 'badges', indicating that they have been verified by a relevant third party for a particular skill or licence. Mable, on the other hand, verifies qualifications for tasks required to be done by qualified persons.³¹⁶ A consultant contractor commented that there were more people than ever in the space and it is highly competitive obtaining work through Expert360.³¹⁷
- 333 The Inquiry heard that a Supp worker was offered employment at a popular bakery after completing shifts through the Supp app; as a casual employee.³¹⁸ A student working on the Deliveroo, Uber Eats, Freelancer and Airtasker platforms stated that working under an ABN taught him to set up and manage a business, which would be a useful skill for him to have before he graduates.³¹⁹

4.5.5 Leverage and precariousness in the labour market

- 334 There is a great range of work done and income earned via platforms. Some workers, who may not otherwise secure work, are gaining access to income via platforms. These same workers are likely to be more vulnerable in their workplace arrangements and in the labour market more generally.³²⁰
- 335 Those who are highly skilled, educated and have capabilities in high demand, may be in a good position to secure quality work and earn a fair income.
- 336 However, the degree of leverage that lower skilled and vulnerable workers are able to exercise is less evident. They may have autonomy and flexibility about when they work, but they may also be earning low incomes and have little control over their workplace arrangements. This makes the structure of their arrangement all the more significant. As non-employee workers, they do not have the protections and entitlements extended to regularised employees.
- 337 A range of information presented to the Inquiry suggested these cohorts are vulnerable to exploitation in relation to their employment arrangements and entitlements.³²¹
- 338 When describing the circumstances that lead workers to choose platform sourced work, the ACTU suggested it is to be viewed in light of the wider emergence of precarious work arrangements.³²² Other submitters have also referred to platform work as precarious.³²³
- 339 According to the Australia Institute Centre for Future Work, 'digital surveillance and freedom to fire' [staff], '[c]ombined with weak labour market conditions (as evidenced by widespread under-employment, especially among certain groups of vulnerable workers such as migrants and youth) ... can compel workers to accept relatively low wages, while still meeting desired effort and productivity benchmarks'.³²⁴

316. Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

317. Worker, Expert360, Workers' Roundtable Discussion, 29 July 2019.

318. Worker, Supp, Workers' Roundtable Discussion, 29 July 2019.

319. Worker, On-Demand Workers' Online Conversation, 19 August 2019.

320. Beyond Blue, Submission to the Inquiry into the On-Demand Workforce, 22 October 2019, p.1 (Beyond Blue suggest that precarious employment is associated with job Insecurity and financial Instability. Research has demonstrated that working within these precarious conditions can be psychologically destabilising. This is exemplified in the gig economy, which is a defined by freelance work, short-term or task-based contracts).

321. For example, Recruitment, Consulting and Staffing Association of Australia, Submission 62, p. 4.

322. Australian Council of Trade Unions, Submission 11, p. 9.

323. For example, Prof John Burgess and Prof Alex de Ruyter, Submission 19, p. 1; Law Institute of Victoria, Submission 39, p. 4.

324. Australia Institute Centre for Future of Work, Submission 9, p. 18.

- 340 The Centre for Future Work notes that macroeconomic forces play a role in supporting precarious forms of employment.³²⁵ They suggest that it requires a pool of under-utilised labour comprising unemployed, underemployed and those who, unless other responsibilities can be accommodated, choose not to work.³²⁶ Many platform workers might not perform the work if they had access to permanent, predictable and better paying opportunities.³²⁷
- 341 Taking the position that business platforms reflect a resurgence of practices that date back hundreds of years, the Centre for Future Work argues that the core features of platform work are not novel. On that basis, they suggest, 'the resurgence of insecure or contingent employment practices in recent years cannot be understood as a technological outcome'.³²⁸
- 342 The NUW also submitted that a generational shift in workforce thinking is occurring.³²⁹ Employers commonly contend that the career ladder is giving way to a preference for obtaining experience across multiple employers. The shift to greater use of skilled autonomous work is being accompanied by a shift to engage workers as independent contractors on short-term arrangements.³³⁰ This encourages the growth of precarious, non-permanent employment.³³¹ These changes are something that platforms may be a part of but, as described, are not the cause of.

325. Australia Institute Centre for Future Work, Submission 9, p. 16.

326. Australia Institute Centre for Future Work, Submission 9, p. 17.

327. Australia Institute Centre for Future Work, Submission 9, p. 17.

328. Australia Institute Centre for Future Work, Submission 9, p. 17.

329. National Union of Workers, Submission 54, p. 9.

330. National Union of Workers, Submission 54, p. 9.

331. National Union of Workers, Submission 54, p. 9. The National Union of Workers also reflect on the diminished bargaining experienced by those engaged as independent contractors in isolation, unless their skills are in demand.

Chapter 5 | Conduct of platforms income, choice and leverage

- 343 While certain platforms may characterise their workers as ‘entrepreneurs’, some platform workers do not fit the typical epitome of self-determined, self-employed small businesses or ‘non-employee’ workers. Further, some platforms are highly controlling in how they organise elements of the work including, in some cases, setting prices for end users.
- 344 A characteristic of ‘independent contracting’ is that the worker exercises a high degree of control, choosing when and how they work. They are usually responsible for supplying their own clothing and equipment, control their own work processes and procedures, negotiate or set their own prices and are accountable for the work undertaken.

5.1 INCOME EARNED VIA PLATFORM WORK

Snapshot

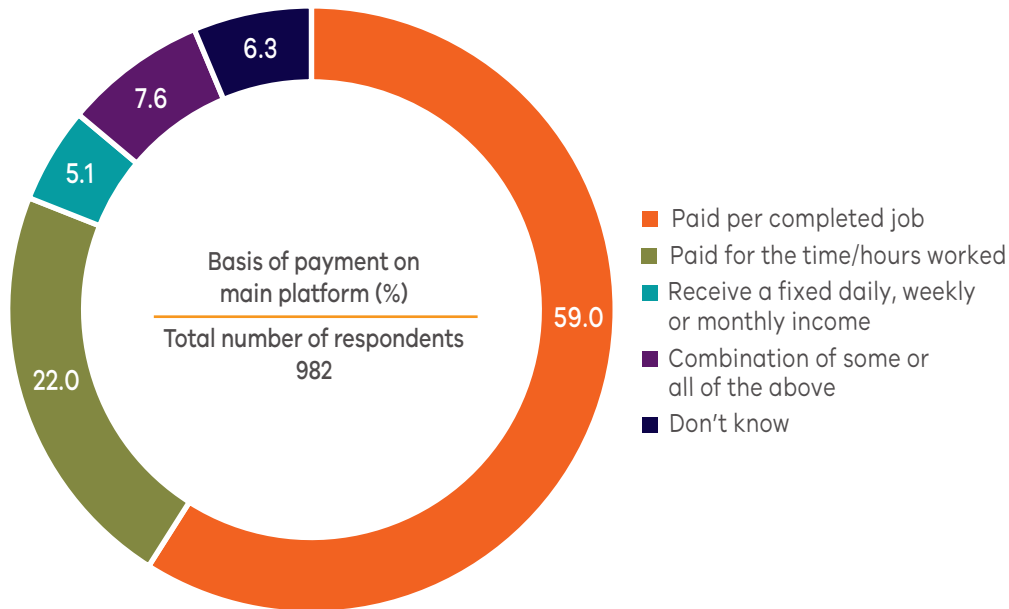
- ▶ Income generated from platform work varies, with some workers (particularly skilled ones), earning relatively well.
- ▶ Conversely, some platform workers get less than the ‘federal minimum wage’ (whatever methodology is used to arrive at the rate).
- ▶ Most platform workers are paid per completed task.
- ▶ Remuneration is set either by the end user or the services or the platform.
- ▶ Most workers don’t get an hourly rate and may not estimate or convert their income this way.
- ▶ It is hard to work out equivalent ‘rates’ of pay to enable a direct comparison with minimum wages paid to employees for a range of reasons, including factoring in costs and ‘real time’ worked.
- ▶ Other factors impact on platform earnings, including workers’ skill levels and performance and their choices about how often and when to work and platforms’ settings.
- ▶ Platforms influence earnings in various ways including by setting or guiding prices, setting fees and levies and in some cases controlling processes for allocating work and access to the platform.

- 345 Some platform-organised work appears to be paid amounts that would be around or above minimum rates of pay attributable to the worker, if the worker were an employee. But some are being paid less than these standards, whilst still having to account for costs and unpaid activities associated with their work.
- 346 Guaranteed minimum wages don’t apply to on-demand workers working under non-employment arrangements. Pay is determined by the platform, or agreed to by the worker and the end user of the services.

347 Conversely – as noted elsewhere in this report – on-demand workers engaged as ‘employees’ are entitled to minimum hourly rates. The Inquiry heard from platforms in hospitality, administration and disability care services that engage casual workers at relevant modern award levels.³³²

348 The National Survey asked people how they were paid their pre-tax hourly rate via their digital platform. Fifty-nine per cent were paid per completed task.³³³ Only 22 per cent were paid based on time worked (Figure 3).³³⁴

FIGURE 3 : BASIS OF PAYMENT ON MAIN PLATFORM



Source: McDonald et al., *Digital Platform Work in Australia*, p. 41.

349 A significant 40 per cent didn't know their hourly rate.³³⁵ The National Survey Report notes that this suggests they have either not calculated, or couldn't recall, it.³³⁶

350 For those who did estimate their hourly rate, the mean (with the top and bottom five per cent of responses trimmed) was \$32.16.³³⁷

351 There was a great deal of variation across industries. The trimmed mean hourly rate for professional services workers was \$56.85. This cohort is the second most common group of platform workers. At the other end of the spectrum are clerical and data entry workers who earned under \$20 per hour.³³⁸ Care sector workers, who are often required to have minimum qualifications depending on the tasks they are performing, earned only a little more at \$21.60 per hour.³³⁹

332. Sidekicker places workers in hospitality. As it employs, it pays award rates. Its algorithms match work descriptions to an award and pay grade and set pay, including applicable penalty rates. Sidekicker also:

- breaks down costs like wages and payroll tax
- allocates super
- emails job ads to suitably qualified, experienced employees at award rates.

Sidekicker acknowledges there are complexities and grey areas, but says the programming to complete these functions is clearly achievable. The Hireup app places employees in the care sector at a minimum wage of \$30.98 per hour, excluding super. Like Sidekicker, Hireup pays the award relevant to the worker's classification, including penalties. Hireup advised the Inquiry that its approach to wages helps it enjoy a 'very healthy rate of retention'.

333. McDonald et al., *Digital Platform Work in Australia*, p. 42.

334. McDonald et al., p. 42.

335. McDonald et al., p. 42.

336. McDonald et al., p. 42.

337. McDonald et al., p. 42.

338. McDonald et al., p. 43.

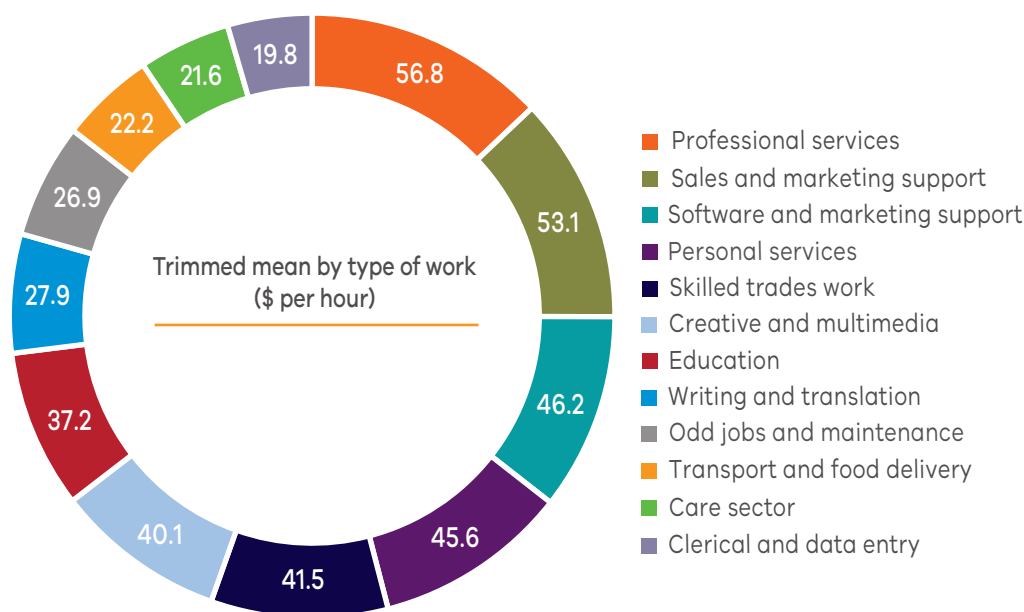
339. McDonald et al., p. 43.

- 352 The trimmed mean hourly rate (Figure 4) for the most common platform workers – in transport and food delivery – was \$22.19.³⁴⁰ This is reasonably consistent with estimates by some platforms: for example, Deliveroo estimated that its workers earn \$22 per hour.³⁴¹ A study commissioned by Uber and conducted by advisory firm, AlphaBeta, found Sydney drivers earn \$21 per hour after expenses and commissions.³⁴²
- 353 However, a Transport Workers’ Union (TWU) survey of 1,153 drivers on rideshare platforms like Uber, Ola, Taxify and Didi, suggested that rates were lower for some workers – \$16 per hour before fuel, insurance and other costs.³⁴³
- 354 Personal care platform Mable, estimated its workers averaged between \$32.50 and \$33 per hour and noted that, as a result of market transparency and discussions between workers and clients, the average price was increasing.³⁴⁴

5.1.1 The bottom line – is the income fair?

- 355 While platform workers are operating under different arrangements, statutory minimum wages provided for under the Fair Work framework are an obvious reference point when considering the adequacy of platform worker pay. They have been established by an independent tribunal that adjusts minimum wages each year in a transparent and accountable process, with reference to criteria that balance economic factors, workforce participation and the need to provide a safety net for the low paid.³⁴⁵
- 356 The Inquiry acknowledges that there are other factors that platform workers value about their work that do not have a directly translatable monetary value. But in considering questions of fairness and the impact of platform work outside of labour market regulation, the comparison is an appropriate exercise.

FIGURE 4 : NATIONAL SURVEY – AVERAGE APPROXIMATE AMOUNT PER HOUR (TRIMMED MEAN) BY TYPE OF WORK ON MAIN PLATFORM



Source: McDonald et al., Digital Platform Work in Australia, p. 43.

340. McDonald et al., p. 43.

341. Deliveroo, Submission 28, p. 4.

342. AlphaBeta Strategy and Economics, *Flexibility and fairness*, p. 19.

343. Transport Workers’ Union of Australia, Submission 78, pp. 6-7.

344. Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

345. See *Fair Work Act 2009* (Cth), s284.

- 357 Comparing workers' take-home earnings across employment and non-employment categories is not straightforward. Several elements must be considered before making such a comparison, and any comparison is relying on several assumptions and estimates.
- 358 A valid comparison must compare actual earnings with wages the workers would receive if they were an employee doing the same type of work. This also requires considering the time spent doing the work and work related expenses.
- 359 Each of these factors can be difficult to verify. The complexity of the workplace relations system requires close consideration of the nature and patterns of work to determine the right rates of pay that apply at different times and in different circumstances.

5.1.1.1 The bottom line – what would a platform worker be paid under an award?

- 360 The Fair Work System provides national minimum rates for full-time, part-time and casual workers. At July 2019, the national minimum adult hourly wage was \$19.49 per hour.³⁴⁶ Casual employees are entitled to a minimum \$24.36 per hour.
- 361 Modern awards cover many types of work and provide higher hourly rates of pay for most covered workers. Coverage is determined by their work classification which is based on the work they are doing. Junior employees, apprentices and trainees are generally paid lower rates of pay reflective of their experience and skills. Modern awards also provide penalties or loadings additional to these 'base rates', for hours worked over and above standard or rostered hours and for weekend or public holiday work, plus other allowances and penalties.³⁴⁷
- 362 The simplest approach, and used for the purpose of this exercise, is to reference the national minimum wage. As a nationally applying 'default', it is used here, noting that in many cases the actual award rate that would apply, would be higher.
- 363 Of on-demand workers who were able to estimate their hourly income, the National Survey found 14.8 per cent were in wage brackets near or below the minimum wage.³⁴⁸ This included clerical, data entry, writing and translation workers.³⁴⁹
- 364 The National Survey reveals that some industries reward workers well, but others' wages may fall well below the national minimum wage.³⁵⁰ For example, rates for platform workers in certain sectors indicate that some receive high wages that compensate them for the lack of employment-like entitlements. Platform hospitality workers report similar hourly rates to casual employees in the same business, but this is before platform fees are deducted. Other entitlements are absent.³⁵¹
- 365 These comparisons also need to be considered in light of actual time worked and the true costs of doing the work, in order to compare 'true' take-home pay.

5.1.1.2 The bottom line – 'real' time worked

- 366 Most non-employed people are paid per completed task. To make a comparison with minimum wages, an hourly rate must be derived based on time spent working and income earned (also accounting for all other expenses, such as insurance and tools and equipment).
- 367 Often there may be uncertainty around what 'time' or activities relate to earning an income, or, what should be counted. Activities that could be 'counted' may not be consistently considered by workers or in studies. For example, time spent searching for jobs or waiting for work. Estimates vary depending on how workers think about tasks and their memory or systems for recording time on such activities.
- 368 The significant number of respondents to the National Survey who couldn't estimate their hourly rate, shows the challenge involved in making an accurate comparison.

346. Fair Work Commission, *National Minimum Wage Order 2019* [website].

347. See for example, *Hospitality Industry (General) Award 2010* (Cth), Cl. 20 Minimum Wages, Cl. 28. Superannuation, Cl. 32. Penalty Rates, Cl. 33. Overtime.

348. McDonald et al., *Digital Platform Work in Australia*, p. 42.

349. McDonald et al., p. 43.

350. Forty per cent of current platform workers were unable to estimate an hourly rate. This reflects arrangements in the on-demand economy that involve payment on a task-by-task basis, and it may be that many on-demand workers find it difficult to recall or calculate an hourly rate, McDonald et al., p. 42.

351. Worker, Supp, Workers' Roundtable Discussion, 29 July 2019.

369 The National Survey asked how much unpaid time workers spent working or seeking work from their main platform (Figure 5). Forty-six per cent answered that they did not know.³⁵² Possibly they found it hard to calculate or, could not recall. Of participants who could estimate it, the weekly average number of unpaid hours was 4.9.

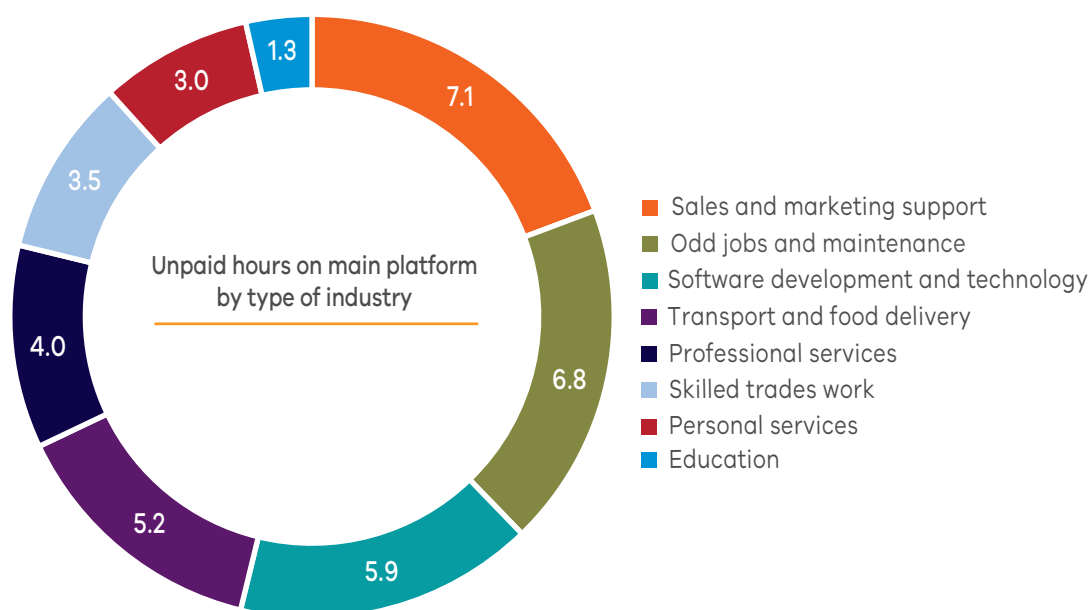
370 Unpaid tasks identified in the National Survey included:

- bidding for work
- updating profiles
- posting information
- other unpaid tasks.³⁵³

371 The National Survey indicated industry-based distinctions in relation to unpaid time, with higher unpaid hours in:

- transport and food delivery – 5.2 hours
- software development and technology – 5.9 hours
- odd jobs and maintenance – 6.8 hours
- sales and marketing support – 7.1 hours.

FIGURE 5 : UNPAID HOURS BY INDUSTRY



Source: McDonald et al., *Digital Platform Work in Australia*, p. 45.

372 Some submitters emphasised the impact of unpaid wait times, or time spent traveling between jobs. In rideshare and food delivery, waiting for jobs or being en-route to pickups is not directly remunerated. The Transport Workers' Union (TWU) is concerned about the unpaid time that food delivery riders spend waiting to pick up orders at restaurants and waiting for jobs.³⁵⁴

373 Uber Eats worker, Ewan Short, referred to the unpaid time involved in traveling to restaurants, climbing stairs, standing at lifts in big apartment complexes and waiting for customers who do not answer their door.³⁵⁵

352. McDonald et al., *Digital Platform Work in Australia*, p. 45.

353. McDonald et al., p. 45.

354. Transport Workers' Union of Australia of Australia, Submission 78, p. 5.

355. Ewan Short, Worker, Submission 70, pp. 2-4.

- 374 Rideshare and delivery rider applications provide a record of hours logged in to the app and aggregate income, in a worker's daily report.³⁵⁶ However, multi-apping or periods driving without being logged in, complicate the estimation of hourly rates.³⁵⁷ It is therefore useful to analyse the time it takes for a single task and work upward to an hourly rate.
- 375 During the Inquiry's consultations, one food delivery rider³⁵⁸ revealed it took seven minutes and 30 seconds to do his most recent delivery. The job paid \$9.22 which, after Uber took its commission, left him with \$5.99. However, the 15–20 minute ride to collect the food³⁵⁹ was unpaid. Taken together, this information suggests he was earning about \$14 per hour,³⁶⁰ excluding bicycle maintenance and time waiting at the restaurant or delivery address.
- 376 By law, employees must be paid for all hours worked, including training and other compulsory activities. Generally, they also receive allowances or compensation for out-of-pocket work expenses.
- 377 However, many employees are also doing unpaid work.³⁶¹ According to a study by the Australia Institute Centre for Future Work, the average full-time employee is doing 7.07 hours (17.9 per cent of work time) unpaid work a week³⁶² and part-timers 4.15 hours (18.2 per cent).³⁶³ There is a distinct trend (and expectation of employers), towards unpaid work across the total workforce.
- 378 Given most on-demand workers are not engaged as employees, it can be more useful to try to compare on-demand workers with other self-employed workers. The Centre for Future Work found self-employed workers average 8.39 hours a week of unpaid work (26.2 per cent of work time).³⁶⁴

5.1.1.3 The bottom line – real costs of platform work

- 379 Unfortunately, it isn't clear whether National Survey respondents reported gross earnings or net after platform services fees or expenses, or how these were calculated. Responses may have depended on how they understood the question.³⁶⁵
- 380 There are generally costs expended by a worker in earning their income. Certain costs are inherent in getting work, with some costs easier to actively manage than others. Understanding and comparing 'take-home' pay needs to take into account these costs.³⁶⁶
- 381 Full costs may not be easily estimated. Some are directly attributable to costs imposed by platforms; others are managed to varying degrees by the worker. Platform imposed costs may include fees to access the platform, or fees per task, or both. There are other costs expended in securing or performing the work which an employee in an equivalent role would not be expected to cover, like vehicle upkeep and insurance or training.
- 382 Much of the information the Inquiry received about costs focused on rideshare and food delivery work.
- 383 Studies and surveys have tried to work out hourly rates after costs for ridesharing and food delivery. This is made easier by the services' homogenous nature and universal fees. Platforms have also combed through their systems information and undertaken surveys.

356. See Uber, Ridesharing Driver, [How to use the Uber driver app: Every feature explained](#) [website].

357. Reportedly Uber allow you to cash out payments at any time. Ola cash out automatically at the end of the day provided you have earned a minimum of about \$5. Rideshare Driver, Workers' Roundtable Discussion, 29 July 2019. It is debatable whether commute to location should or should not be included in estimates of hours at work. See AlphaBeta Strategy and Economics, [Flexibility and fairness](#), p. 17.

358. Worker, Uber Eats, Workers' Roundtable Discussion, 29 July 2019.

359. Worker, Uber Eats, 29 July 2019.

360. Worker, Uber Eats, 29 July 2019. The Commercial Passenger Vehicle Association of Australia also took a slightly different approach to estimating income. Based on estimated running costs for a commercial sedan of 80c per kilometre and an estimate that Uber remunerates its drivers at a rate of about \$1.38 per kilometre, the Commercial Passenger Vehicle Association of Australia (CPVAA) submitted that after deducting commission (27 per cent with Uber) and tax remittances, drivers make a profit of only .07 cents per kilometre. See Commercial Passenger Vehicle Association of Australia, Submission 24, p. 9.

361. T. Henderson and T. Swann, [Excessive Hours and Unpaid Overtime: 2018 Update](#) [website], the Australia Institute Centre for Future Work, 2018.

362. Henderson and Swann, p. 14.

363. Henderson and Swann, p. 14.

364. Henderson and Swann, p. 14.

365. McDonald et al., *Digital Platform Work in Australia*, p. 91.

366. Australian Institute for Future Work, Submission 9, p. 19.

- 384 The Commercial Passenger Vehicle Association of Australia (CPVAA) and the Centre for Future Work have considered the costs associated with driving rideshare vehicles.³⁶⁷ Some, such as vehicle maintenance, insurance and depreciation are delayed.³⁶⁸ Combined with tax obligations, the expenses add up and some drivers are unsure how much these factors affect earnings.³⁶⁹ Both CPVAA and the Centre for Future Work suggest many workers leave the industry once they understand the true costs.³⁷⁰ The Centre for Future Work describes this as a 'deferred realisation' and maintains it is a 'factor behind very high turnover rates in the Industry'.³⁷¹
- 385 As noted previously, Deliveroo has estimated riders earn \$22 per hour logged in to their app.³⁷²
- 386 AlphaBeta's work also previously referred to an after-cost (or net) hourly rate of \$21 per hour.³⁷³ It also estimated costs at \$8.46 per hour, which included:
- GST
 - fuel
 - maintenance
 - insurance
 - vehicle depreciation.
- 387 The Centre for Future Work estimated an after cost hourly rate of \$18 per hour for Sydney and Canberra drivers in 2018.³⁷⁴ However, this analysis by Professor Stanford, found that the average take-home pay across Australian capital cities was \$14.62 per hour,³⁷⁵ with Perth the lowest at \$11.³⁷⁶ Melbourne's rate was \$12.88 per hour.³⁷⁷ According to Professor Stanford's methodology, Uber drivers take home only about one third of revenue after vehicle expenses, taxes and Uber's commission.³⁷⁸ The commission has been said to be anywhere from about 20 to 27.5 per cent.³⁷⁹ Other submitters, including Ride Share Drivers Association of Australia (RSDAA) and Unions NSW, support Professor Stanford's estimate.³⁸⁰
- 388 One rideshare driver at an Inquiry roundtable estimated a fifty-hour week gave him \$1,600 (after commissions).³⁸¹ He would then subtract \$300 for expenses and \$160 for GST, making it \$1,140 per week or \$22.80 per hour.³⁸²

367. Commercial Passenger Vehicles Association of Australia, Submission 24, p. 9; The Australia Institute Centre for Future Work, Submission 9, pp. 19 and 31.

368. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 9; Ride Share Drivers Association of Australia also suggest that where rideshare drivers use existing vehicles, or vehicles purchased by others, vehicle costs, finance and depreciation are not factored into the drivers 'mental equation', see Ride Share Drivers Association of Australia, Submission 64, p. 5.

369. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 9; The Australia Institute Centre for Future Work, Submission 9, p. 19.

370. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 9; Australia Institute for Future Work, Submission 9, p. 19.

371. The Australia Institute Centre for Future Work, Submission 9, p. 19.

372. Deliveroo, Submission 28, p. 4. Deliveroo do not indicate whether the amount is net of any service fees.

373. This figure is the net hourly rate after Uber's commission and average operating costs for drivers of \$8.46 per hour are subtracted: AlphaBeta Strategy and Economics, *Flexibility and fairness*, p. 19.

374. J. Stanford, *Subsidising Billionaires: Simulating the Net Incomes of Uber X Drivers in Australia* [website], 2018, The Australia Institute Centre for Future Work, p. 4.

375. The Australia Institute Centre for Future Work, Submission 9, p. 20.

376. Stanford, *Subsidising Billionaires*, p. 11.

377. The Australia Institute Centre for Future Work, Submission 9, p. 20.

378. The Australia Institute Centre for Future Work, Submission 9, p. 20.

379. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019; The Australia Institute Centre for Future Work, Submission 9, p. 19; Deloitte, *Economic effects of ridesharing in Australia* [website], p. 16; The Australia Institute Centre for Future Work, Submission 9, p. 20; Unions NSW, Submission 80, p. 7.

380. Ride Share Drivers Association of Australia, Submission 64, p. 5; Australian Council of Trade Unions, Submission 11, p. 4; Unions NSW, Submission 80, p. 7.

381. Rideshare Driver, Workers' Roundtable Discussion, 29 July 2019.

382. Rideshare Driver, Workers' Roundtable Discussion, 29 July 2019. While this figure does not account for depreciation of the vehicles value and the cost of servicing or maintaining his vehicle, it is assumed that these costs would be relevant work-related deductions.

- 389 At another Inquiry roundtable, an Uber Eats worker explained that it was more realistic to talk about earnings or deliveries per day.³⁸³ His conservative goal was \$50, or 10 deliveries, per day. Pushing harder, the worker said he might achieve \$80 per day or \$400 per week. He suggested a worker could try for \$1,200 dollars per week but, given the hours and nature of the work, you'd be "absolutely knackered ... and you can't work the same the next week".³⁸⁴
- 390 Researchers from the University of Queensland undertook a qualitative survey of Brisbane drivers and concluded that drivers averaged about \$15 per hour, net of expenses.³⁸⁵ Interestingly, the researchers found that more experienced drivers earned closer to \$17.50 per hour.³⁸⁶ Based on information provided by drivers, researchers estimated 50 per cent of income is absorbed by things like depreciation, petrol, maintenance, booking fees and commissions.³⁸⁷ In addition, there's significant unpaid work like cleaning vehicles and running the business.³⁸⁸

5.1.2 The bottom line – it's not always what it should be: the impact of non-compliance

- 391 However the comparison is made, it is clear that some platform workers get less than the 'federal minimum wage' (however this might be calculated), noting the different payment structures and costs that apply to non-employee platform workers.
- 392 The direct comparison with statutory minimum wages also assumes that all employees receive the hourly rates to which they are entitled. Sadly, this is not always the case. Underpayment of wages, some of which is longstanding, has been reported by businesses large and small in recent years. Some sectors are notorious for non-compliance being 'the norm'. Media reports have highlighted numerous examples of non-compliance by companies both big and small.³⁸⁹
- 393 Alternative employment roles that are available to low-leveraged, less skilled workers in the 'traditional' labour market may be in sectors more likely to encounter non-compliance with awards, agreements and minimum terms; such as is the case in the hospitality industry.³⁹⁰
- 394 The Inquiry heard from workers who had chosen the less secure option of food-delivery, having worked in 'regular' hospitality jobs where they had been underpaid.³⁹¹
- 395 The Inquiry notes that many of the jobs directly impacted by the response to COVID-19, are low skilled jobs that require face-to-face interaction – such as some of those in hospitality. Temporary visa workers, commonly working in this sector, are not eligible for government assistance if they have lost their job.
- 396 Like during the global financial crisis, we are seeing new reasons for workers, including low-skilled workers, to access work via platforms as a way to 'get by'.

383. Worker, Uber Eats, Workers' Roundtable Discussion, 29 July 2019.

384. Worker, Uber Eats, 29 July 2019.

385. University of Queensland Research Network on Automation, Ethics & Society, Submission 81, p. 2.

386. University of Queensland Research Network on Automation, Ethics & Society, Submission 81, p. 2.

387. University of Queensland Research Network on Automation, Ethics & Society, Submission 81, p. 2.

388. University of Queensland Research Network on Automation, Ethics & Society, Submission 81, p. 2.

389. Woolworths – up to \$300m; Commonwealth Bank – \$53.1m; Super Retail Group – \$32m; (Rebel Sport, Supercheap Auto, BCF, Rays, etc); Michael Hill – \$25m, after ASX disclosure; ABC – up to \$22.98m, provision for historical underpayments; Coles – \$20m, after ASX disclosure; Target – \$9m, after ASX disclosure; World Vision – \$8.9m; MAdE Establishment – \$7.8m; Qantas – \$7m; Bunnings – \$3.89m, without compensation, \$6.1m with compensation; Sunglass Hut – \$2.3m. See various media articles: C. Houston, '[George Calombaris underpayment scandal blows out to \\$7.8 million](#)', *The Age* [website], 18 July 2019; D. Powell, '[Bunnings reveals underpayment bill of \\$6.1 million](#)', *Sydney Morning Herald* [website], 29 November 2019; Australian Associated Press, '[Coles underpaid workers by \\$20m over six years](#)', *The Guardian* [website], 18 February 2020; P. Ryan and D. Chau, '[Woolworths investigated after admitting it underpaid 5,700 staff up to \\$300 million](#)' [website], *ABC News*, 30 October 2019; K. Offer, '[Sunglass Hut staff underpaid \\$2.3 million](#)' [website], *The Sydney Morning Herald*, 24 September 2019.

390. The industries for which the Fair Work Ombudsman received the highest number of anonymous reports (hospitality by far, followed by retail and then building and construction) (The Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2018–2019*, p. 19) are also industries that employ large numbers of young workers (Australian Government Department of Jobs and Small Business, *Australian Jobs 2019*, p. 13. See also address by the Fair Work Ombudsman, *2019 Annual National Policy-Influence-Reform Conference*, [website], 3 June 2019; M. McKenzie, 'The erosion of minimum wage policy in Australia and labour's shrinking share of total income' *Journal of Australian Political Economy*, No. 81, p. 57.

391. Worker, Deliveroo and Foodora rider, Union and Worker Roundtable Discussion, 7 June 2019; Worker, Deliveroo and former Uber Eats rider, On-Demand Workers' Online Conversation, 19 August 2019.

5.1.3 What impacts how much platform workers can earn?

397 Income earned by platform workers depends on a range of factors. Some are controlled or heavily influenced by the platforms' models, while others are determined by worker capability and choices.

5.1.3.1 A worker's skills and capabilities and past performance

398 A worker's choices, skills, capabilities and past performance influence the extent to which they can get work and their prices.

399 Much of the below commentary applies to low skilled work without specific qualifications. But, the 'on-demand workforce' includes people with a broad range of skills and qualifications, including post-secondary qualifications and degrees. Skilled work requires certain qualifications which workers can spruik via the platform. Ratings and reviews also play a role.

5.1.3.2 Platforms' influence on earnings – pricing models, system design and fees

400 Platforms' models have a direct impact on earning capacity through setting or recommending price structures. Platforms impose direct costs on workers, or set conditions that involve costs, or both.

401 Some platforms set prices. For example, food delivery and transport apps generally determine pay 'per delivery', sometimes with payment for distance traveled added. Platforms retain high discretion around changing these models and the Inquiry heard evidence of changes that directly impact on income, being made with little or no notice in these sectors.

402 According to CPVAA, Uber pays \$1.38 per kilometre and then takes about a 27 per cent fee – different submitters and sources suggest this is somewhere between 20 to 27.5 per cent.³⁹² This appears typical of rideshare platforms, although the quantum may vary. Food delivery platforms take different approaches. At Uber Eats, payment is made up of pick-up and drop-off fees and a per kilometre fee.³⁹³ At Deliveroo, the platform retains the customer's delivery fee and restaurant commission and riders are paid for the route and time taken.³⁹⁴ At Menulog, the rider receives the delivery fee paid by the customer and amounts for distance and time. They may be compensated for time waiting at a restaurant.³⁹⁵

403 Crowd-work platforms do not set prices – they allow a deal to be brokered between the worker and end user. A person seeking the task gets offers from workers competing for the job – effectively creating an 'auction'. Some platforms enable all taskers to see the competing offers, others do not.

404 On Airtasker, only the person posting the job can see the competing bids. Although workers may still bid against themselves, this reduces competitive underbidding.³⁹⁶ According to Airtasker, taskers were now doing jobs for more than the 'asking price' since the platform's inception, suggesting the race is not always downwards.³⁹⁷

405 In its submission to the Senate Select Committee on the Future of Work and Workers, Airtasker described a spread between the initial price posted by the purchaser and the agreed price.³⁹⁸ In that submission it stated that the agreed price tends to be less than the average price offered by workers, but also more than the posted price.³⁹⁹ Airtasker reports that the spread between the purchaser's offer and the price finally agreed with the worker, is growing.⁴⁰⁰ As at January 2018, agreed prices averaged 15 per cent higher than the initial purchaser offer.⁴⁰¹ Moreover, only 39 per cent of tasks went to the lowest offer.⁴⁰²

392. Commercial Passenger Vehicles Association of Australia, Submission 24, p. 9. By contrast Maggie Lloyd, Uber, Individual Consultation, 19 July 2019, (fee paid to Uber 25 per cent plus GST); The Australia Institute Centre for Future Work, Submission 9, p. 19; Deloitte, *Economic effects of ridesharing in Australia* [website], p. 16.

393. Uber, Submission 79, p. 30. See for example Unions NSW, Submission 80, p. 7 and Commercial Passenger Vehicles Association of Australia, Submission 24, p. 9.

394. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

395. Menulog, Submission 50, p. 10.

396. Airtasker, Submission 116, [Senate Select Committee on the Future of Work and Workers](#), p. 11.

397. Airtasker, Submission 116, p. 13.

398. Airtasker, Submission 116, p. 13.

399. Airtasker, Submission 116, p. 13.

400. Airtasker, Submission 116, p. 13.

401. Airtasker, Submission 116, p. 13.

402. Airtasker, Submission 116, p. 13.

- 406 Airtasker has revised its system to allow payment to be increased during or after the task, with over two thirds of price increases initiated by the purchaser.⁴⁰³ In its submission to the Senate Select Committee on the Future of Work and Workers, Airtasker noted that the average task price at January 2018 was \$140 – a \$40 increase from July 2014.⁴⁰⁴ On average, workers complete less than five tasks a month.⁴⁰⁵ This information reveals the average Airtasker worker isn't using the platform for full-time work, but mostly to supplement other income.
- 407 Some platforms while not setting prices, recommend rates, often with reference to an hourly minimum.⁴⁰⁶ Airtasker has entered an arrangement with Unions NSW to provide recommended rates equivalent to the award.⁴⁰⁷ Under the arrangement Airtasker publishes task price guides for common categories of work, setting out recommended rates for different skills and requirements.⁴⁰⁸ However, someone posting a task may not have been channelled towards this information up-front.⁴⁰⁹
- 408 Some platforms set parameters to encourage or require minimum standards being met. This 'floor' effectively prohibits exchanges on the platform below certain amounts.
- 409 Supp is an app that sources hospitality workers for business, with a wages floor coded into its system.⁴¹⁰ Businesses post jobs for a three-hour minimum at no less than \$25 per hour.⁴¹¹ Individuals can also set a minimum hourly wage.
- 410 Businesses that get workers through Supp determine whether they're employees or independent contractors⁴¹² and must ensure compliance with applicable regulations.⁴¹³ Supp's website 'strongly encourages' businesses and individuals to ensure award payment and encourages workers to report those who don't.⁴¹⁴ Supp did not reveal how many businesses engaging workers as independent contractors comply with these recommendations.
- 411 The Mable app, placing workers into caring jobs, also has a safety net coded into its platform. Mable's fees were 10 per cent and its lowest wage \$23.50 per hour.⁴¹⁵ Mable told the Inquiry it thought the average hourly rate for personal care, social support and domestic assistance was approximately \$32.50–\$33 after fees. Mable suggested its platform enables workers and clients to match wages to service needs, and over time this may result in pushing up the average wage.⁴¹⁶
- 412 Some submissions asserted that references to minimum rates were potentially misleading as they did not incorporate worker's costs or account for missing entitlements like penalties, overtime and super.
- 413 According to a Health and Community Services Union (HACSU) submission, accounting for the fact that a direct casual employee also gets a casual loading of 25 per cent and a super contribution of 9.5 per cent, Mable's minimum rate is lower than the minimum wage and minimum award wage in the sector. HACSU further submitted that the rate of \$37 (which, less service fee, is \$33.30) would also undercut the minimum award wage for a Certificate IV qualified disability support worker.⁴¹⁷ However, the Inquiry understands that not all work conducted via the platform requires a Certificate IV (Mable's average hourly rate is higher than the level one casual home care rate of \$26.50).

403. Airtasker, Submission 116, p. 14.

404. Airtasker, Submission 116, p. 12.

405. Airtasker, Submission 116, p. 9.

406. Supp recommends businesses pay the award rate and sets a minimum of \$25 per hour, see Supp, 'FAQ's' [website].

407. Unions NSW, Submission 80, p. 10.

408. Unions NSW, Submission 80, p. 10.

409. Airtasker publishes recommended rates via a page on its website, see Airtasker [Task Price-Guide](#), [website].

410. Supp, [FAQ's](#) [website].

411. Supp, [FAQ's](#) [website].

412. Supp, [FAQ's](#) [website].

413. Jordan Murray, Supp, Restaurant and Catering Roundtable Discussion, 16 July 2019, Department of Premier and Cabinet, 35 Collins St, Melbourne; Supp, [FAQ's](#) [website].

414. Supp, [FAQ's](#).

415. Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

416. Peter Scutt, Mable, 19 July 2019.

417. Health and Community Services Union, Submission 34, p. 5; See also, Unions NSW, Submission 80, p. 13.

5.1.3.3 Service fees and commissions

- 414 In addition to price setting and influencing behaviours, platforms impose direct costs on workers via fees and commissions. In an employment context, such fees would likely amount to unlawful deductions from wages and not be permitted.⁴¹⁸
- 415 The approach varies across different platforms – there may be an ongoing service fee or a percentage based cut to pay. These commissions and charges can generally be changed by the platform at will.
- 416 Commissions differ depending on a range of things. For example, the Inquiry heard Uber Eats applies different levies depending on whether the delivery is by push bike, motor bike or car.⁴¹⁹ On his last bicycle delivery, from a payment of \$12.24, one worker said Uber Eats took \$4.28 – basically a third. The worker suggested that Uber takes a smaller commission from drivers.
- 417 Didi’s includes platform service fees – which depend upon the state the worker is in and have increased over time, in some of them. For instance, in NSW the service fee has stayed at 5.5 per cent of the fare,⁴²⁰ while, in Victoria, it increased to 13.75 per cent on 18 November 2019. Shebah’s service fee is 15 per cent.⁴²¹
- 418 Airtasker calculates its service fee based on tiered pricing of 15–20 per cent.⁴²² Higher earners enter a higher tier and pay a lower service fee. This encourages more regular engagement with the platform.

5.1.3.4 Platform workers’ choices – when to work?

Snapshot

- ▶ Platform workers can choose when, or if, to accept work via the platform.
- ▶ Natural peaks in demand impact on these choices.
- ▶ Some platforms, particularly in rideshare and food delivery, strongly incentivise workers to be ready to work in peak periods and there may be negative consequences for workers if they do not make themselves regularly available.

- 419 While platform systems have a high impact on income earning capacity, so too do a range of worker characteristics and choices.
- 420 By definition, on-demand work requires workers to be available when there is demand.
- 421 Many platform workers are sourcing income from multiple sources and this impacts on the timing and regularity with which they engage with platform work. In turn, this affects income generated.
- 422 The National Survey found only 2.7 per cent of respondents earned all their income from platform work with a further 15.4 per cent considering the income ‘essential for meeting basic needs’.⁴²³ Most respondents (just over half) said the income was ‘nice to have but can live without it’. And 11.4 per cent were registered with four or more platforms.⁴²⁴ This might mean that the income earned from any one platform may not be a good indication of their total success (or perceptions of success) in meeting their needs.
- 423 Rideshare and food delivery workers in particular, usually earn more during busy times. Certain sectors, particularly food delivery, have natural peaks. Information provided to the Inquiry indicated workers have to be available during these times to earn a decent income.

418. *Fair Work Act 2009* (Cth), Division 2 – Payment of Wages.

419. Worker, Uber Eats, Union and Worker Roundtable Discussion, 7 June 2019.

420. Didi Mobility (Australia) Pty Ltd, *Driver Agreement* [website], Cl. 23 – General terms: Didi’s Service Fee’, 2020.

421. Georgia McEncroe, Shebah, Platform Business Roundtable Discussion, 22 February 2019, Victorian Chamber of Commerce and Industry, 150 Collins St, Melbourne.

422. Airtasker, Airtasker Help, *What is the service fee?* [website].

423. McDonald et al., *Digital Platform Work in Australia*, p. 7.

424. McDonald et al., pp. 6 and 39.

- 424 An Uber Eats worker said that earning close to \$21 per hour⁴²⁵ was only achievable by working peak hours. He worked about 30 evening hours a week⁴²⁶ and said working more hours (presumably outside peak times) is not worth it.⁴²⁷ He worked every day except Tuesdays and found Sunday nights to be the most lucrative.⁴²⁸ When reflecting on the wage per delivery, another worker went further, suggesting on-demand food delivery “isn’t a long-term prospect.”⁴²⁹
- 425 Platforms may provide incentives for work to be carried out at particular times to enable them to manage high demand.
- 426 For example, Deliveroo extends priority to workers who use its self-service booking tool. The booking system estimates the level of service required in a particular area, then allocates riders. Numbers are capped according to predicted demand.⁴³⁰ Priority goes to riders who book and work a lot of shifts at times of high demand.⁴³¹ Those who cancel shift bookings at late notice, or who don’t work regularly, lose priority.⁴³²
- 427 Some platforms increase fees payable to respond to increased demand – most commonly rideshare platforms. Uber runs ‘price surges’ to encourage working at times of high demand. During a price surge the fare, service fee and take-home pay is increased.⁴³³ Some platforms let workers ‘chase the surge’ looking for work where it is available and needed.⁴³⁴ When demand is met in that area, the surge payment decreases. Others require that workers pre-register to be available for work in an area.⁴³⁵ Deliveroo suggests its self-service booking tool, referred to previously, provides certainty to workers, because it caps rider numbers within an area, based on projected demand. Those booked are more likely to gain work.⁴³⁶

5.2 PLATFORM DISCRETION/LEVERAGE

Snapshot

- ▶ Platforms establish systems to maximise agility and responsiveness to meet demand.
- ▶ Platforms determine the work arrangements, including ‘work status’ in contracts which are generally offered on a ‘take it or leave it’ basis.
- ▶ Arrangements are not distinct to individual workers: they are generic and underpin a system designed and controlled by the platform.
- ▶ Platforms’ contracts maximise their discretion to change central elements of the arrangements at will and with little or no notice.
- ▶ There is often no requirement to consult with workers.
- ▶ Workers do not always understand how work is allocated or made available and there is a degree of suspicion about the operation of ‘algorithms’ that determine these factors.

425. Worker, Uber Eats, Workers’ Roundtable Discussion, 29 July 2019.

426. Worker, Uber Eats, 29 July 2019.

427. Worker, Uber Eats, 29 July 2019.

428. Worker, Uber Eats, 29 July 2019.

429. Worker, Uber Eats, 29 July 2019.

430. Deliveroo, Submission 28, p. 4.

431. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019. For further detail on the Self Service Booking Tool, see also Deliveroo, [Work in more zones with the booking tool](#) [website].

432. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019. For further detail on the Self Service Booking Tool, see also Deliveroo, [Work in more zones with the booking tool](#) [website].

433. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019.

434. Georgia McEncroe, Shebah, Platform Business Roundtable Discussion, 22 February 2019; Simon Smith, Ola, Individual Consultation, 3 July 2019.

435. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019; Menulog, Submission 50, p. 8.

436. Deliveroo, [Introducing the new self-serve booking tool](#) [website].

- 428 Platforms create systems that are primarily designed to maximise their efficiency and agility, to enable them to evolve and respond to demand and their market. The arrangements with workers reflect this. They are generally determined solely by the platform and enable the platform to adjust them unilaterally and with little notice.
- 429 A common theme in information to the Inquiry was that the arrangements are determined by platforms and core aspects may be changed as and when platforms decide, without consultation. This includes aspects that can directly impact on workers' capacity to access work and earn income.
- 430 Most platforms are not using employment models and are not subject to independent oversight or subject to minimum standards about consultation or the resolution of disputes.

5.2.1 Establishing and working under platforms' arrangements – take it or leave it?

- 431 From the outset of the relationship, many platforms determine the arrangements that apply and the way the platform operates. Worker contracts with platforms are usually standard form⁴³⁷ and some, more than others, are offered on a 'take it or leave it' basis.⁴³⁸
- 432 Central elements of the arrangements – such as amounts payable to workers or the mechanisms for determining rates, fees and charges – are often not included in the contract, but sit outside the agreement and may be modified by platforms.⁴³⁹
- 433 Some contracts may allow unilateral changes with no or minimal notice.⁴⁴⁰ The changes to policies and practices may be difficult for workers to dispute, challenge or question.⁴⁴¹
- 434 Conversely, in an employment relationship, terms and conditions are underpinned by minimum requirements for consultation. Typically, arrangements have been set or approved by an independent tribunal and material changes are the subject of consultation with workers. Disputes can be considered by an independent tribunal.
- 435 In the National Survey, nearly 30 per cent of current platform workers reported that their platform had changed contract terms and conditions.⁴⁴² A further 26.6 per cent said they did not know.⁴⁴³ This information is consistent with some submissions to the Inquiry indicating that terms of arrangements are often unilaterally determined.⁴⁴⁴

437. Victorian Trades Hall Council, Submission 88, p. 3; See for example, Menulog Pty Ltd, [Courier Agreement](#) [website]; Deliveroo Australia Pty Ltd, 'Supplier Agreement' provided at Individual Consultation, 17 July 2019; Raiser Pacific Pty Ltd, Uber B.V. [Services Agreement](#) [website], 2017; Expert360 [Terms](#) [website]; Freelancer, [User Agreement](#) [website], 2019; Airtasker, [Terms and Conditions](#) [website], 2019.

438. Victorian Trades Hall Council, Submission 88, p. 3; See for example, Menulog Pty Ltd, [Courier Agreement](#), 2018; Deliveroo Australia Pty Ltd, 'Supplier Agreement', provided at Individual Consultation, 17 July 2019; Raiser Pacific Pty Ltd, 2017, Uber B.V. [Services Agreement](#) [website]; Expert360 [Terms](#) [website], 2020; Freelancer, [User Agreement](#) [website], 2019; Airtasker, [Terms and Conditions](#) [website].

439. Note: Didi's agreement confirms the percentage commission it will take.

440. Uber's agreement with food couriers provides at Cl. 4.2 that it may make changes to the calculation of delivery fees and at Cl. 31 may add supplemental terms to the agreement with two weeks' notice. The agreement between Uber and rideshare drivers similarly states that it may make changes to the service fee payable by drivers, provided two weeks' notice is given. In each case the worker may elect to terminate immediately. Didi's agreement with drivers provides that it may make any changes to terms provided seven days' notice is given.

441. Rather than providing terms of remuneration under contract, it appears work on-demand platform businesses present the proposed payment to the worker at the time a job is allocated. The worker may accept or reject the offer. However, a worker who relies on working with the platform may feel compelled to continue working with the platform even when the method of calculating the amounts offered has been changed to the worker's disadvantage. See Luigi, Worker, On-Demand Workers' Online Conversation, 19 August 2019. The agreements used by Airtasker and Uber do not provide the service fees payable by workers on the income earned through the platform. See Airtasker, [Terms and Conditions: User Agreement](#), [website], Cl. 4; Raiser Pacific Pty Ltd, Uber B.V. [Services Agreement](#) [website], Cl. 10, 2017. The agreements used by Expert360 and Freelancer refer to fee schedules, policies that may be amended from time to time. See Expert360 [Terms](#), [website], Cl. 71, 2020; Freelancer, [User Agreement](#) [website], Cl. 6, 2019.

442. McDonald et al., *Digital Platform Work in Australia*, p. 46.

443. McDonald et al., p. 46

444. Ride Share Drivers Association of Australia, Submission 64, p. 16; Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen, Submission 14, p. 3.

- 436 Professor Andrew Stewart, Dr Penny Williams and Simon Guthrie examined several platforms' contracts to consider the potential application of unfair contracts remedies under consumer law.⁴⁴⁵ This study indicated that conditions are drafted and imposed by the platforms and found that almost all of the 13 platforms examined, enabled one party to vary the terms, including the most common platforms identified in the Inquiry's National Survey.⁴⁴⁶
- 437 Dr Barratt, Dr Goods and Dr Veen interviewed 58 food delivery platform workers in Perth and Melbourne in the first half of 2017. The researchers commented that two food delivery platforms considered in their research unilaterally vary terms and conditions, and do so regularly, shifting risks to the worker.⁴⁴⁷ This was supported by examples from rideshare and food delivery workers, who told the Inquiry that these platforms vary terms from time-to-time.⁴⁴⁸
- 438 The Inquiry heard of a case where changes to an agreement had to be accepted before a worker could continue to access the platform's app.⁴⁴⁹ Usually, changes may be notified via the app and workers must accept them before continuing to work. Old and new agreements are not presented for comparison.
- 439 The TWU reports that contracts have changed over time, particularly by transitioning from hourly to piece rates.⁴⁵⁰ Some submitters argued that platform businesses make changes to terms, so workers retain independent contractor status.⁴⁵¹
- 440 Ongoing access to the platform can be dependent on compliance with policies and contracts that have not been negotiated with workers.⁴⁵² Professor Stewart's examination of platforms' contracts found that most retained the capacity to determine whether a breach of contract has occurred or unilaterally interpret the meaning of the contract.
- 441 The TWU submitted that Deliveroo had increased the maximum distance for food deliveries and reduced pay for workers by 30 to 40 per cent. A platform worker reported that, over time, platforms increased their commission.⁴⁵³

5.2.2 Prices, work allocation and priority

- 442 Some platforms exert a high degree of control over the allocation of work and its payment. Rideshare and food delivery platforms both set prices and allocate work. These platforms generally allocate work in the form of an offer⁴⁵⁴ with:
- an estimated price
 - the collection point of the passenger or item
 - sometimes a proposed route and the delivery address or destination.⁴⁵⁵
- 443 Uber revealed to the Inquiry that the principles driving its algorithm are:
- increasing access
 - delivering reliability
 - improving choice
 - aligning needs
 - being upfront about pricing.⁴⁵⁶

445. In a recent paper prepared for the Association of Industrial Relations Academics in Australia and New Zealand (AIRAANZ) conference, Professor Andrew Stewart, Dr Penny Williams and Simon Guthrie outlined some findings from their study which reviewed 13 Australian platform contracts for potentially unfair terms. See further discussion later in the report: : Stewart, Workplace Express, 14 February 2014; A. Stewart, P. Williams and S. Guthrie, 'Regulating the Fairness of Gig Economy Contracts', Association of Industrial Relations Academics of Australia and New Zealand, 2020 Annual Conference.

446. 'Time for ACCC to step up on gig contracts: Stewart', *Workplace Express*, 14 February 2014; A. Stewart, P. Williams and S. Guthrie, 'Regulating the Fairness of Gig Economy Contracts', Association of Industrial Relations Academics of Australia and New Zealand, 2020 Annual Conference.

447. Dr Tom Barratt, Dr Caleb Goods, Dr Alex Veen, Submission 14, p. 3.

448. Workers, Uber, Workers' Roundtable Discussion, 29 July 2019.

449. Uber Eats Worker, Union and Worker Roundtable Discussion, 7 June 2019.

450. Transport Workers' Union of Australia, Submission 78, p. 4.

451. Dr Tom Barratt, Dr Caleb Goods, Dr Alex Veen, Submission 14, p. 3.

452. Ride Share Drivers Association of Australia, Submission 64, p. 16.

453. Anonymous Worker 4, Submission 8, p. 4.

454. See for example Menulog, Submission 50, p. 10; Worker, Deliveroo, Workers' Roundtable Discussion, 29 July 2019.

455. See for example, Deliveroo and Uber, although each provides different information: Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019; Lucas Groenveld, Uber, Individual Consultation, 19 July 2019.

456. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019.

- 444 To increase access, Uber reviewed estimated driver arrival times and the most efficient path from A to B. Where the algorithm previously selected the closest driver, it now selects one heading in the same direction.⁴⁵⁷
- 445 Ola also informed the Inquiry it sets service fees, to drive competition.⁴⁵⁸ For example, its lower service fee increased driver revenue by 30 per cent.⁴⁵⁹
- 446 Workers and their representatives frequently cited uncertainty about platform operations, including in relation to how they rank and provide work to workers, the consequences for workers of rejecting or cancelling a job, insurance coverage, setting prices and providing access to the platform.⁴⁶⁰
- 447 The RSDAA submitted that rideshare platforms withhold the destination from drivers so they have to take the job 'blind'.⁴⁶¹ According to one driver, this means he might expend effort and money traveling to collect a passenger "but they might be going only one kilometre and you end up [with] \$5."⁴⁶² The Uber app allows drivers heading home to get trip requests for destinations in that approximate direction.⁴⁶³ Uber drivers can also set the app to remain in a particular region, however this option may earn the driver a marginally lower hourly rate.⁴⁶⁴
- 448 The National Survey reinforces these concerns. A substantial minority of surveyed workers did not know how specific features of their main digital platform operated, including whether it:
- had a dispute settlement process – 32 per cent did not know
 - could restrict access if their work was unsatisfactory – 26.7 per cent
 - could change their contract or terms – 26.6 per cent.⁴⁶⁵
- 449 Rideshare and food delivery workers expressed concerns about how commissions and payments were determined. In particular:
- the impact of up-front fees
 - payment for distance traveled
 - that 'surge' charges do not form part of enforceable terms and conditions and could be unilaterally changed at will.⁴⁶⁶
- 450 Participants told the Inquiry that changes to service fees, work methods and ways of calculating wages have reduced worker incomes.⁴⁶⁷
- 451 While platforms maintain that workers can freely accept or reject jobs without penalty,⁴⁶⁸ some terms, conditions and policies mean workers might be suspended or refused access to work, if they do not complete a job they accepted or reject too many jobs.⁴⁶⁹

457. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019.

458. Simon Smith, Ola, Individual Consultation, 3 July 2019.

459. Simon Smith, Ola, 3 July 2019.

460. For example, Allan MacGill, Victorian Trades Hall Council, Union and Worker Roundtable, 7 June 2019; Unions NSW, Submission 80, p. 8; Victorian Trades Hall Council (supplementary submission), Submission 89, p. 39.

461. Ride Share Drivers Association of Australia, Submission 64, p. 3.

462. Worker, Workers' Roundtable Discussion, 29 July 2019.

463. Lucas Groeneveld, Uber, Individual Consultation, 19 July 2019.

464. Alphabet Strategy and Economics, *Flexibility and fairness*, 2019, p. 19.

465. McDonald et al., *Digital Platform Work in Australia*, p. 46.

466. Jack Boutros, Transport Workers' Union of Australia, On-Demand Workers Online Conversation, 19 August 2019; Australian Small Business and Family Enterprise Ombudsman, Individual Consultation by tele-conference, 10 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne; Worker (with JobWatch), Workers' Roundtable Discussion, 29 July 2019; Worker, Deliveroo, Workers' Roundtable Discussion, 29 July 2019.

467. Transport Workers' Union of Australia, Submission 78, p. 4; Worker (with JobWatch), Workers' Roundtable Discussion, 29 July 2019, Department of Premier and Cabinet, 35 Collins St, Melbourne; Deliveroo Worker, Workers' Roundtable Discussion, 29 July 2019; Worker, Ola, Uber and Didi, Workers' Roundtable Discussion, 29 July 2019.

468. Uber, Submission 79, p. 20; Menulog, Submission 50, p. 8. Deliveroo submitted that 93 per cent of riders had rejected at least one job in the last six months and, on average, each job gets rejected once before it is accepted. Deliveroo, Submission 28, p. 4.

469. See for example Didi Global, *Driver Suspension and Disqualification Policy* [website]; Unions NSW, Submission 80, p. 7; Ewan Short (Worker), Submission 70, p. 3. Mr Short notes that drivers may incur a suspension if they decline too many jobs.

- 452 Deliveroo told the Inquiry that its algorithm updates itself in response to a range of factors including weather and traffic, learning from how orders are carried out in practice.⁴⁷⁰
- 453 Several submitters suggested that platforms' algorithms function to reward and deter certain behaviour.⁴⁷¹ This functionality sits outside the terms agreed between platform and rider.⁴⁷² The absence of concrete evidence about how the algorithms operate, however, makes it hard for a driver or rider to complain if they feel disadvantaged by one.
- 454 Submissions were also received about the manipulation of surge pricing on rideshare platforms. According to the CPVAA, there is evidence of drivers initiating surges by coordinating logging off periods. There are also reports of 'fake surges' falsely inducing drivers on to the road.⁴⁷³
- 455 Uber submitted that driver wages reflect the surge price but, there are limits on the number of drivers who are paid it.⁴⁷⁴ Uber explained that its algorithm sets the surge in an area of high demand, but removes this once demand is met and the price reverts to the former price.⁴⁷⁵ It is hard to confirm if concern over algorithm transparency is real. Other regulatory agencies, such as the ACCC, informed the Inquiry that where the operation or effect of the algorithms of platform businesses raise concern under the *Competition and Consumer Act 2010* (Cth) (CC Act), the ACCC can investigate. In its investigations, the ACCC can use its compulsory information gathering powers under the CC Act to compel platforms to provide evidence of algorithm operation at a point in time, including archived versions, where certain statutory conditions are met. However collecting and confirming information about the workings of algorithms can still be difficult.⁴⁷⁶

5.2.3 Platform enhancements

- 456 While there were countless cases of workers encountering changes they did not like, there were also occasions where platforms had chosen to consult and engage with their workforces. This includes to develop fair standards of operation and provide more beneficial arrangements, especially in relation to safety and insurance.
- 457 For example, Uber's changes include:
- a 'share my trip' function so drivers can share their location in real time⁴⁷⁷
 - on trip accident insurance
 - counselling services⁴⁷⁸
 - 'green light hubs' for workers to meet with Uber staff and resolve issues.⁴⁷⁹
- 458 Airtasker's 'badging' system was introduced to allow workers, who have proven their qualifications to Airtasker, to promote these when bidding for work. This system appears to provide a verification tool, letting consumers know the worker possesses the qualifications he/she says they have.⁴⁸⁰

470. Deliveroo, Individual Consultation, 19 February 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne; Email to the Inquiry from Libby Hay, Deliveroo, dated 18 May 2020.

471. It has been alleged that drivers who fail to accept jobs quickly enough will receive less jobs in the future. See the Australia Institute Centre for Future Work, Employment Rights, Submission 12, p. 29; It has been alleged that algorithms stop allocating jobs to workers who cancel them, Worker, Uber, Union and Worker Roundtable Discussion, 7 June 2019; It has been alleged that algorithms prefer workers on scooters and bicycles over cars, *Survey shows Uber Eats drivers struggle with bankruptcy and homelessness*, Transport Workers' Union of Australia [website]. It has been alleged that false price surges are created in areas adjacent to airports to encourage workers to drive in the vicinity of the airport, but on arrival the surge is cancelled, Anonymous Worker 4, Submission 8, p. 3; Commercial Passenger Vehicle Association of Australia, Submission 24, p. 3; It has been alleged that rejecting jobs will affect ratings and eventually lead to being banned from the app, Mr Ewan Short (Worker), Submission 70, p. 3.

472. See for example Menulog, Legal and Policies, *Courier Agreement* [website]; Didi Mobility (Australia) Pty Ltd, Legal, *Driver Agreement* [website], Cl. 23 - Disputes, Cl. 22 - Term and Termination, Cl. 21 - Suspension and Disqualification; Didi Mobility (Australia) Pty Ltd, Legal, *Driver Suspension and Disqualification Policy* [website]; Rasier Pacific Pty Ltd, Uber B.V. *Services Agreement* [website], 2017; Portier Pacific Pty Ltd, Uber Portier B.V. *Services Agreement* [website], 2017.

473. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 3.

474. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019.

475. Maggie Lloyd, Uber, 19 July 2019.

476. Australian Competition and Consumer Commission, Individual Consultation by tele-conference, 20 August 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

477. Uber, Submission 79, p. 12.

478. Uber, Submission 79, p. 5.

479. Uber, Submission 79, p. 11.

480. Airtasker, Airtasker Help, *What are badges and how can I get them?* [website], 2019.

- 459 As mentioned above, under its voluntary agreement with Unions NSW, Airtasker publishes recommended minimum rates for various tasks on its site.⁴⁸¹ Airtasker informed the Inquiry that in negotiating this agreement, it and Unions NSW both shared an interest that workers were safe and not exploited.⁴⁸²
- 460 Deliveroo presented findings of an internal survey of self-employed delivery riders to the Inquiry. The Inquiry notes that the survey contemplated possible modifications to Deliveroo's processes including: providing riders payment for waiting at restaurants; enabling riders to choose which restaurants to receive tasks from; providing riders visibility on the number of riders and orders in a given area; and offering discounts on petrol, food and tax advice.⁴⁸³ Deliveroo's survey reflects competition between platforms to attract workers.
- 461 Associate Professor Alysia Blackham submitted that the power imbalance between platforms and workers is exacerbated by the lack of transparency in how work is allocated and the algorithms to rank and assess workers. She suggested this opaqueness makes it difficult to assess the fairness of the algorithm and rating systems.⁴⁸⁴ Associate Professor Sarah Kaine, from the Centre for Business and Social Innovation at the University of Technology Sydney, submitted that workers' lack of knowledge about their rights can lead to exploitative practices, which is why initiatives to improve transparency are needed.⁴⁸⁵ The Australia Institute expressed similar concerns and referred to research that online consumer ratings reflect their biases and prejudices.⁴⁸⁶
- 462 Generally non-employee platforms are prioritising efficiency and service delivery when it comes to making changes to their operations, including changes that impact significantly on workers. An employer would not be able to make unilateral changes to conditions that impact on remuneration, for example, or impose fees and charges on employees.
- 463 Awards and enterprise agreements contain model consultation clauses which, among other things, ensure employees are entitled to be consulted about major workplace change,⁴⁸⁷ like job restructuring and changes to how the workforce operates. Employers must provide written notice of changes, including their nature and expected impact.⁴⁸⁸ Employers must discuss changes with an employee, including how to minimise adverse impacts, while also considering any matters employees raise.⁴⁸⁹ An employer must recognise any employee representative during this process.⁴⁹⁰

481. See Airtasker, [Task price guide](#) [website].

482. Tim Fung, Airtasker, Individual Consultation, 3 July 2019.

483. Email to the Inquiry from Libby Hay, Deliveroo, dated 18 May 2020. (Deliveroo told the Inquiry that it routinely surveys and engages riders about a whole range of potential policies or possible operational changes in order to inform the company's efforts to continually improve what it offers riders); Deliveroo, Individual Consultation, 17 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

484. Associate Prof Alysia Blackham, Submission 18, p. 2.

485. Centre for Business and Social Innovation, University of Technology Sydney, Submission 23, p. 8.

486. The Australia Institute Centre for Future Work, Submission 9, p. 18.

487. See for example, *Hospitality Industry (General) Award 2010*, Cl. 8; Fair Work Regulations 2009, Schedule 2.3. The model consultation term at schedule 2.3 is taken to be a term of an enterprise agreement if the agreement does not include a consultation term that requires the employer to consult with employees and their representatives about major workplace changes that are likely to have a significant effect on employees. See also *Fair Work Act 2009* (Cth), s.205.

488. For example, *Hospitality Industry (General) Award 2010*, Cl. 8.5.

489. For example, *Hospitality Industry (General) Award 2010*, Cl. 8.2.

490. For example, *Hospitality Industry (General) Award 2010*, Cl. 8.4.

5.3 CONSULTATION AND DISPUTE RESOLUTION

Snapshot

- ▶ Platform workers find it challenging to resolve concerns or disputes.
- ▶ Non-employee platforms' rules that govern dispute resolution are generally framed in commercial terms and not required to meet minimum standards or involve independent assessment of the dispute.
- ▶ Platforms' policies and 'standards' can result in platform workers losing access to work or the platform, temporarily (e.g. suspensions) or permanently, without access to independent review or procedural fairness.
- ▶ Several platforms outlined approaches designed to include fairness and transparency for workers but the Inquiry heard multiple cases where workers' access was removed with little or no warning.

- 464 Given the very broad discretion of platforms, options for resolving concerns or complaints are critical. The worker's ability to enforce terms and rights or resolve issues, depends on the processes available to them for raising concerns or resolving disputes.
- 465 The Inquiry heard a lot of evidence about how platforms make decisions that impact people's access to work and their pay and what happens if something goes wrong.
- 466 Employee workers are generally entitled to be consulted about major workplace change, like job restructuring and changes to how the workforce operates, and to escalate disputes to an independent tribunal.⁴⁹¹ Employers must generally provide written notice of changes, including their nature and expected impact.⁴⁹² Employers must discuss changes with an employee, including how to minimise adverse impacts, while also considering any matters employees raise.⁴⁹³ An employer must also recognise any employee representative during this process.⁴⁹⁴
- 467 Employees may enforce the minimum entitlements provided for under employment laws, assisted by a union or the FWO.
- 468 For non-employee platform workers, this is regulated by commercial law. Non-employee platforms' work arrangements are not underpinned by universal minimum standards. They do not have a clear right to dispute resolution or any standards of fairness, independence or review.
- 469 Platforms are largely able to determine how they operate and interact with workers, with little independent oversight or accountability. Remedies for self-employed small businesses do provide relief against 'unfair' arrangements. These are discussed in more detail in Chapter 6. They do not set standards or provide for dispute settlement but focus on varying terms that are 'unfair' and, as discussed in Chapter 6, there are legitimate questions as to their accessibility, applicability and effectiveness for platform workers.

491. See for example, *Hospitality Industry (General) Award 2010*, Cl. 8; Fair Work Regulations 2009, Schedule 2.3. The model consultation term at schedule 2.3 is taken to be a term of an enterprise agreement if the agreement does not include a consultation term that requires the employer to consult with employees and their representatives about major workplace changes that are likely to have a significant effect on employees. See also *Fair Work Act 2009* (Cth), s.205.

492. For example, *Hospitality Industry (General) Award 2010*, Cl. 8.5.

493. For example, *Hospitality Industry (General) Award 2010*, Cl. 8.2.

494. For example, *Hospitality Industry (General) Award 2010*, Cl. 8.4.

5.3.1 Platform approaches

- 470 Many platforms had policies addressing conduct, work standards and disputes that might be invoked, to address a range of issues: including those relating to workers' interactions with customers and those relating to the platform's operation.
- 471 Platforms may require standards in maintaining qualifications, performance and behaviours. Good client ratings and reviews might also be important. Platforms may also impose controls over how work is done and spell this out in the contract or related policies which must be followed.
- 472 Customer-worker disputes may arise about quality or payment. The conduct or behaviour of either party can present further issues. These can be distinguished from other disputes around the platforms' operations like entitlements, payment, the nature of terms and conditions, performance and so on. More serious are disputes that see a worker suspended or terminated from the platform.
- 473 The processes used for disputes are of a different nature when they involve a dispute between the worker and the platform, particularly where disciplinary action like suspension or exclusion from the platform may be a potential consequence.
- 474 The Inquiry heard many workers felt the dispute resolution process was unclear, unfair and even capricious, especially if it ended with suspension or termination of access to the platform.
- 475 In the National Survey, 40.7 per cent of current platform workers felt they received adequate support to resolve disputes over payments or tasks. This was one of the lowest results for questions regarding satisfaction with platforms throughout the survey.
- 476 The Inquiry notes that the information provided to it represents a point in time, with some platforms outlining changes and improvements to consultation and resolving issues, since. These include new online dispute resolution services and places where disputes can be raised in person.⁴⁹⁵ Given this, it appears that procedures for dispute resolution are evolving.
- 477 The Inquiry also notes information from food delivery and ride sharing platforms indicating they have evolved their practices over time, building in greater access to 'human' interaction and introducing elements of procedural fairness into their processes.

5.3.2 Dispute resolution clauses and policies

- 478 The Inquiry reviewed some platforms' dispute resolution procedures in standard form agreements and where they were available, dispute and disciplinary processes and policies.
- 479 The Inquiry observed different approaches for resolving worker-customer disputes, depending on whether the platform facilitated crowd-work or 'work on-demand'.
- 480 Generally in crowd-work, the worker and client directly determine the work's nature, timing, quality and price. The platform is not allocating or overseeing the work. Several platforms' disputes policies set out the process for resolving disputes between the worker and user. Some crowd-work platforms retain the customer's payment while any dispute is being resolved, ensuring if it is settled in the worker's favour, that they receive their payment.⁴⁹⁶
- 481 Work on-demand platforms largely determine work processes and payment methods, and have focused on processes for resolving worker-platform disputes.⁴⁹⁷ For example, worker problems about access to work, the platform, pay, ratings or end user complaints.⁴⁹⁸ End user complaints may apply to worker under-performance.⁴⁹⁹

495. See Airtasker, [What is Airtasker's dispute process?](#) [website]; Uber, Submission 79, p. 11.

496. See Airtasker, [Airtasker's dispute process stage 3](#) [website]; See Airtasker, [Terms and Conditions](#), [website], 2019, Cl. 18.4, see also Airtasker, Airtasker Help, [Dispute resolution](#) [website].

497. Documents addressing dispute resolution at work on-demand platforms tend to emphasise resolution of disputes between platform and workers, see for example See for example Menulog, Legal and Policies, [Courier Agreement](#), [website], Cl. 12, Service Disputes; Didi Mobility (Australia) Pty Ltd, Legal, [Driver Agreement](#) [website], Cl. 22 – Disputes, Cl. 21 – Term and Termination, Cl. 20 – Suspension and Disqualification [website]; Didi Mobility (Australia) Pty Ltd, Legal, [Driver Suspension and Disqualification Policy](#) [website]; Rasier Pacific Pty Ltd, Uber B.V. [Services Agreement](#) [website], 2017, Cl. 34; Portier Pacific Pty Ltd, Uber Portier B.V. [Services Agreement](#) [website].

498. See Uber, [Uber's Community Guidelines](#). The guidelines are broad and cover both end user and worker.

499. See for example Airtasker, [Terms and Conditions](#) [website], Cl. 18; Airtasker, Airtasker Help, [What is Airtasker's dispute process?](#), [website], 2020; Freelancer, [User Agreement](#) [website], Cl. 25, Cl. 26, 2019; Freelancer, [Milestone Dispute Resolution Policy](#), [website]; Expert360, Expert360 [Terms](#) [website], Cl. 14.3, 2020.

- 482 Procedures reviewed by the Inquiry follow a familiar pattern for commercial contracts. In the case of customer-worker disputes, the clause may commonly require an initial stage of seeking to resolve the matter directly, before seeking platform arbitration.⁵⁰⁰ If they cannot be resolved, either party can ask the platform to decide.⁵⁰¹ The formality of the process seems to depend on the nature and value of the tasks.
- 483 Agreement clauses across platforms vary on how they escalate or deal with dispute resolution. Some clauses require parties to first try to resolve the dispute informally, including by mediation. Failing that, the dispute can proceed to arbitration.⁵⁰² Others direct parties to mediation from the outset and then arbitration.⁵⁰³ Still other approaches include negotiation first, and if this is unsuccessful, an agreement on how to resolve things.⁵⁰⁴
- 484 For some platforms, a clause determines who chooses the dispute resolution practitioner⁵⁰⁵ or whether they must be chosen by agreement.⁵⁰⁶
- 485 Some platforms maintain that seeking support to resolve a dispute outside of the terms of their agreement breaches the agreement and allows the platform to seek costs.⁵⁰⁷ Clauses to this effect tend to function where arbitration is compulsory.⁵⁰⁸
- 486 Another important distinction is whether the clause limits the time to resolve a dispute. Some agreements provide the number of days for informal dispute resolution before escalation. For example, Menulog provides 30 days and Uber 60.⁵⁰⁹ If an on-demand worker is suspended from a platform, it is important to seek a quicker resolution.
- 487 As noted earlier, the average value of a task on Airtasker is less than \$200. After deciding on arbitration, Airtasker parties fill out a form detailing events. Airtasker then makes a decision based on the information provided.
- 488 By contrast, the Freelancer platform:
- gives seller and purchaser a timeframe to respond
 - asks for an arbitration fee⁵¹⁰ that is refunded to whoever the outcome favours
 - contemplates the evidence submitted
 - sets a timeline for making final offers
 - anticipates that the dispute may concern milestone rather than full payments.
- 489 Not all crowd-work platforms provide dispute resolution services. As Expert360 submitted, 'Expert360 will not and is not obliged to provide any dispute assistance in relation to disputes arising between "Experts" (workers) and Clients.'⁵¹¹ Similarly, Mable's agreement suggests home care service disputes must be resolved directly between the customer and the support worker, and that while Mable can, it is not obliged to get involved.⁵¹²
- 490 Uber provides a web portal for complainants that is focused on the end user.⁵¹³ Its agreements provide that it will manage complaints reasonably.⁵¹⁴

500. See Airtasker, Airtasker Help, [What is Airtasker's dispute process?](#) [website], 2020.

501. See Airtasker, Airtasker Help, [What is Airtasker's dispute process?](#) [website], 2020.

502. For example, Menulog, 'Legal and Policies, [Courier Agreement](#) [website], Cl. 12 - Service Disputes; Didi Mobility (Australia) Pty Ltd, Legal, [Driver Agreement](#) [website], Cl. 22 - Disputes.

503. Rasier Pacific Pty Ltd, Uber B.V. [Services Agreement](#) [website], Cl. 34, 2017; Portier Pacific Pty Ltd, Uber Portier B.V. [Services Agreement](#) [website].

504. Didi Mobility (Australia) Pty Ltd, Legal, [Driver Suspension and Disqualification Policy](#) [website].

505. Menulog, Legal and Policies, [Courier Agreement](#) [website], Cl. 13 - Service Disputes.

506. Didi Mobility (Australia) Pty Ltd, Legal, [Driver Suspension and Disqualification Policy](#) [website].

507. Freelancer, [User Agreement](#), [website], Cl. 28 - Dispute Resolution, 2019; Mable Technologies, [Mable User Agreement \(Terms of Use\)](#) [website], Cl. 28 - Dispute Resolution, 2019.

508. See for example Freelancer, [User Agreement](#) [website], Cl. 28 - Dispute Resolution, 2019; Mable Technologies, [Mable User Agreement \(Terms of Use\)](#) [website], Cl. 28 - Dispute Resolution, 2019. However, not all agreements under which Arbitration is compulsory confirm that costs will be sought if a dispute is brought other than according to the dispute resolution procedure, see Rasier Pacific Pty Ltd, Uber B.V. [Services Agreement](#) [website], Cl. 34, 2017.

509. Menulog, Legal and Policies, [Courier Agreement](#) [website], Cl. 13, Service Disputes, 2019.

510. Five dollars or 5 per cent of the disputed payment, whichever is greater; Freelancer, [Milestone Dispute Resolution Policy](#) [website].

511. Expert360, Expert360 [Terms](#), [website], Cl. 14.3, Dispute Resolution.

512. Mable Technologies, [Mable User Agreement \(Terms of Use\)](#) [website], Cl. 28 - Dispute Resolution, 2019.

513. Uber B.V., [Trip Issues and Refunds](#) [website], 2019.

514. Uber B.V., [Terms and Conditions](#), Cl. 6, 2019.

- 491 Didi's complaint management policy⁵¹⁵ applies equally to end users and workers. Complaints are acknowledged within seven business days and Didi seeks to resolve them within 14 days. If it looks like it will take longer, Didi will let the complainant know the reason. Didi records the investigation and all relevant information and circumstances around the complaint. Complainants are called, or written to, with the outcome and the complainant can request a written summary of the investigation and findings.
- 492 Uber told the Inquiry it maintains green light hubs; places where drivers and riders can meet with other workers and speak face-to-face with Uber staff to resolve issues. It also provides 24-hour phone and in app support. In its submission, Uber said that, in January 2019, it responded to 89 per cent of in app messages within six hours and 86 per cent of phone calls within 60 seconds. However, this does not indicate the average time it takes Uber to address a worker query or resolve a complaint or issue.
- 493 In his written submission to the Inquiry, a food delivery rider suggested that seeking assistance to resolve disputes involved negotiating a labyrinth of forms and menus.⁵¹⁶ When completed, it could take days to get a response. Even then, the response felt 'copy and pasted' and like the issue has been 'brushed over or ignored'.⁵¹⁷
- 494 According to this rider, his platform's help line number was not widely published and not available via the app.⁵¹⁸ A worker would need to ask colleagues what number to call. He also said helpline staff only manage issues related to the current task. If the worker is suspended or excluded from the app, for example because they didn't submit a form, they can't seek resolution by phone.
- 495 Commercial Passenger Vehicles Victoria (CPVV) informed the Inquiry that booking service providers must have a complaints management system.⁵¹⁹ However, the obligation is focused on supporting passengers and the community, not drivers.⁵²⁰ Nevertheless, CPVV reported that it has met with platforms about their system and learned that many providers utilise artificial intelligence that can pick up key words. It has the capacity to put a complaint in human hands within minutes.⁵²¹ Such technology can support drivers and passengers.
- 496 At a roundtable discussion conducted by the Inquiry, an on-demand worker in the food delivery industry said that he had contacted the platform to raise a complaint about how long drivers were expected to wait for food at a particular restaurant. According to the worker, the platform dismissed his complaint and his only recourse was to rate the restaurant a 'thumbs down'.
- 497 One education worker claimed platforms only gave a generic contact email address which responded slowly and inadequately.⁵²²
- 498 Hospitality workers sourcing work via Supp said that advance commitment to hours and wages and the ability for workers to rate restaurants if they were treated badly, reduced the incidence of disputes.⁵²³ One of these workers also noted that Supp's commitment to insure workers for personal injury avoids disputes about compensation.⁵²⁴
- 499 For their part, Supp said they have acted to resolve underpayment disputes. In one case, a manager refused to pay a barista.⁵²⁵ The barista had a good record with the platform so it worked to resolve the issue. Ultimately Supp paid the worker and removed the cafe manager from the platform. But Supp also said disputes are rare when the number of disputes it manages are compared with the large numbers of complaints received by the FWO about underpayments in hospitality.⁵²⁶

515. Didi Mobility (Australia) Pty Ltd, Legal, [Complaint Handling Policy](#) [website].

516. Ewan Short (worker), Submission 70, p. 3.

517. Ewan Short (worker), Submission 70, p. 3.

518. Ewan Short (worker), Submission 70, p. 3.

519. Information provided by Commercial Passenger Vehicles Victoria, Individual Consultation, 29 August 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

520. Information provided by Commercial Passenger Vehicles Victoria, 29 August 2019.

521. Information provided by Commercial Passenger Vehicles Victoria, 29 August 2019.

522. Anonymous Worker 3, Submission 7, p. 4.

523. Worker, Supp, Workers' Roundtable Discussion, 29 July 2019.

524. Worker, Supp, 29 July 2019.

525. Jordan Murray, Supp, Restaurant and Catering Roundtable Discussion, 16 July 2019.

526. Jordan Murray, 16 July 2019.

- 500 By contrast, CEO of care sector platform Mable, Peter Scutt, indicated that good dispute resolution was a function of the quality of the client-provider relationship.⁵²⁷ Mr Scutt suggested this was a benefit of a system based principally on relationships and entered into freely.⁵²⁸ According to Mr Scutt, those who take a long-term view of the relationship will be incentivised to resolve disputes.⁵²⁹ Those who do not, are free to end the relationship, following Mable's arrangements.⁵³⁰ Mr Scutt emphasised that, as small business owners, care providers need to work out their own processes for resolving disputes. He also confirmed that if the client does not send payment through to Mable, the provider won't get paid.⁵³¹
- 501 Personal care work involves workers going into homes and delivering very personal services and support. It can present a broad range of issues about the quality of the service and the conduct of either party.
- 502 The National Disability Insurance Scheme Quality and Safeguards Commission (NDIS QSC) informed the Inquiry that complaints can be made against any provider if they breach the NDIS Code of Conduct.⁵³²
- 503 This Code sets out enforceable standards and expectations for ethical conduct in delivering support and services.⁵³³ It includes obligations to provide safe and competent services and report on issues that may impact on the safety and quality of service, to behave with integrity, honesty and transparency and to take steps to prevent and respond to violence, neglect, abuse and sexual misconduct.⁵³⁴ The NDIS QSC may issue a compliance notice or ban a provider for serious breaches.⁵³⁵
- 504 The NDIS QSC hears complaints about breaches of the Code.⁵³⁶
- 505 A platform worker could, for example, complain about unsafe practices against the provider and under the Code. However, the system is directed towards clients complaining about the support provided.⁵³⁷ The NDIS QSC advised the Inquiry that, if a worker has a complaint, recourse is usually through existing workplace laws like the *Occupational Health and Safety Act 2004* (Vic) (the OHS Act) or the applicable award, if the worker is an employee.⁵³⁸

5.3.3 Suspensions and terminations from the platform

- 506 The most serious outcome of dispute resolution procedures is that workers may, in the end, lose access to the platform, either temporarily or permanently, and therefore their capacity to seek work. Losing access to the platform is akin to a termination of employment. An employee in this scenario may have access to independent review in the form of unfair dismissal and/or model dispute resolution procedures.
- 507 Most non-employment platforms retain the right to terminate agreements and access at their discretion, or with short notice.⁵³⁹ Work on-demand platforms also tend, even where notice periods for termination are given, to reserve the right to restrict access for more serious breaches and during investigations.⁵⁴⁰ The grounds for termination in some other agreements are broad.⁵⁴¹

527. Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

528. Peter Scutt, Mable, 19 July 2019.

529. Peter Scutt, Mable, 19 July 2019.

530. Peter Scutt, Mable, 19 July 2019.

531. Peter Scutt, Mable, 19 July 2019.

532. NDIS Quality and Safeguards Commission, Individual Consultation by teleconference, 28 August 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

533. NDIS Quality and Safeguards Commission, [NDIS Code of Conduct \(NDIS Providers\)](#), 2019 [website].

534. NDIS Quality and Safeguards Commission, 2019, [NDIS Code of Conduct \(NDIS Providers\)](#) [website].

535. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

536. NDIS Quality and Safeguards Commission, 28 August 2019.

537. NDIS Quality and Safeguards Commission, 28 August 2019.

538. NDIS Quality and Safeguards Commission, 28 August 2019.

539. Deliveroo Australia Pty Ltd, 'Supplier Agreement, Cl. 11, Termination'. Document provided by Worker, Union and Worker Roundtable Discussion, 7 June 2019; Mable may terminate its agreement at any time or in its sole discretion, modify, terminate or suspend access to its services, Mable, [Terms of Use](#) [website], Cl. 24.1; Airtasker may terminate at any time and for any reason, Airtasker, [Terms and Conditions](#) [website], Cl. 19; Menulog may terminate for any reason given seven days' notice, Menulog, [Courier Agreement](#) [website], Cl. 14; Expert360 may terminate the agreement at any time and for any reason, see Expert360, [Terms](#) [website], Cl. 8.1; Freelancer reserves the right to ban or suspend services and remove access, although it sets out conduct that may give rise to such a course of action, see Freelancer, [User Agreement](#) [website], Cl. 49, 2019.

- 508 Uber advised the Inquiry that its Community Guidelines address when it can suspend or exclude a driver from the app.⁵⁴² While Uber retains some discretion regarding suspensions or exclusions from its platforms, the guidelines provide much detail about its policies on these matters.⁵⁴³
- 509 Under Didi's Driver-Partner Suspension and Disqualification Policy, drivers can be suspended for 'poor passenger ratings' or 'high cancellation rates'.⁵⁴⁴
- 510 Ride Share Drivers United (RSDU) submitted that workers raising concerns must negotiate a complex email system, often with no practical right of appeal.⁵⁴⁵ They can be deactivated without notice and without reason. If they want to find out what the complaint was about, a passenger's privacy rights can prohibit disclosure.
- 511 Some rideshare and food delivery platforms 'performance manage' workers who aren't achieving performance ratings metrics.⁵⁴⁶ Uber reports drivers and riders who regularly provide a poor quality service are notified before losing access to its app.⁵⁴⁷ According to CPVV, some booking service providers offer customer service training to rideshare drivers and riders with low customer ratings.⁵⁴⁸ Uber reported riders and drivers are only excluded following a very serious incident.⁵⁴⁹ According to Didi's website, if it intends to limit, suspend or deactivate a driver partner, it will provide notice and reasons.⁵⁵⁰
- 512 However one delivery rider claimed 'performance management' measures may be based on analysis of performance metrics, such as ratings, alone.⁵⁵¹ A rider may receive a poor rating from a restaurant if they are late, notwithstanding the fact they rode 10 kilometres to collect the food because the algorithm found no other available riders. This rider suggested, if performance management happened, management's lack of involvement in operational matters would leave limited scope to consider the circumstances that lead to poor ratings.
- 513 Case studies provided by JobWatch on food delivery riders and rideshare drivers⁵⁵² suggested that, at the time these matters were raised, the processes used by work on-demand platforms provided fairly arbitrary outcomes. In one instance, a driver who had worked for two years and earned 10,000 positive reviews, reported having been suspended due to eight passenger complaints over that time. Another driver complained a passenger had tried to assault him and that he was suspended when he followed this up in writing.
- 514 Employees can also be suspended pending investigation, but with pay.⁵⁵³ When an on-demand platform does this, the worker cannot earn an income. Further, according to one submitter when app access is denied, documentary evidence about the dispute, work history and a copy of the worker's agreement that may be on it, cannot be obtained either.⁵⁵⁴

540. Menulog may terminate the agreement if services are not performed in a manner consistent with its 'community respect guide' and during investigations, Menulog, [Courier Agreement](#) [website], Cl. 14.3; Uber reserves the right to deactivate drivers for violations of its 'Community Guidelines', Portier Pacific Pty Ltd, Uber Portier B.V. [Services Agreement](#) [website], Cl. 2.3 – Your legal relationship with Uber Group; Didi may suspend a driver who fails to meet standards in its [Driver Suspension and Disqualification Policy](#) [website], Didi Mobility (Australia) Pty Ltd, Legal, [Driver Agreement](#) [website], Cl. 21 – Suspension and Disqualification.

541. Didi for example retains the right to terminate in circumstances reasonable to protect its business interests, Didi Mobility (Australia) Pty Ltd, Legal, [Driver Agreement](#) [website], Cl. 21 – Suspension and Disqualification.

542. Lucas Groeneveld, Uber, Individual Consultation, 19 July 2019.

543. Uber, '[Uber Community Guidelines](#)' [website], 2020.

544. Didi Mobility (Australia) Pty Ltd, Legal, [Driver Suspension and Disqualification Policy](#).

545. Ride Share Drivers United, Submission 63, p. 3.

546. At Uber riders and drivers must hold an average rating of 4.6 out of 5, Maggie Lloyd, Uber, Individual Consultation, 19 July 2019; See also Didi Mobility Australia, Legal, [Driver Agreement](#), Cl. 21 – Suspension and Disqualification.

547. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019.

548. Commercial Passenger Vehicles Victoria, Individual Consultation, 29 August 2019; Maggie Lloyd, Uber, 19 July 2019 (Uber do).

549. Maggie Lloyd, Uber, 19 July 2019.

550. Didi Mobility Australia, Legal, [Driver Agreement](#), Cl. 21 – Suspension and Disqualification.

551. Ewan Short (worker), Submission 70, p. 3.

552. JobWatch, Submission 37, p. 5.

553. See for example relevant provisions in the *Fair Work Act 2009* (Cth) s.324, s.524.

554. JobWatch, Submission 37, pp. 4 and 6.

- 515 Information from some platforms' systems seek to reduce arbitrary outcomes. For example, Ola uses a demerit system in parallel with a ratings system.⁵⁵⁵ Drivers incur demerit points⁵⁵⁶ and are sent a warning letter when they hit a set number.⁵⁵⁷ If they receive a certain number more, they're taken off the road and offered training.⁵⁵⁸ As demerit policy forms part of the driver-Ola contract, decisions can be appealed.⁵⁵⁹ Shebah also submitted that its workers have an appeal process.⁵⁶⁰
- 516 For serious complaints, Ola and Menulog will seek the worker's point of view and work with riders and drivers to verify the complaint.⁵⁶¹ Deliveroo told the Inquiry that there is a high bar for termination and it must be certain the rider is repeatedly doing the wrong thing, first.⁵⁶² Deliveroo said it takes steps to investigate allegations of serious misconduct. Uber said it will only suspend or terminate platform access unilaterally for very serious breaches.⁵⁶³ As noted elsewhere in the report, a driver with ongoing ratings and customer service issues may receive training from the relevant platform.
- 517 Platforms' dispute resolution procedures continue to evolve. A recent change to Menulog's courier agreement removed the commitment to mediation, following informal attempts to resolve a dispute. It also removed Menulog's commitment to pay reasonable mediation costs. Dispute resolution now takes couriers directly to arbitration following informal processes and the time limit for resolving disputes has been extended from 20 to 30 days. These procedures do not favour workers, and do not involve independent or transparent review processes.
- 518 Employers also exercise discretion when applying performance management and disciplinary processes. Importantly, unlike platforms, unless the policy breach constitutes grounds to dismiss, an employer cannot lawfully withdraw employee access to work or pay (though of course there will be instances where this might happen in practice and the worker can pursue a remedy for an unfair dismissal or adverse action claim).

5.4 EMPLOYMENT-BASED PLATFORMS

- 519 Platforms using employment models have workers who are generally covered by an award with dispute settlement processes. These usually involve initial efforts at a workplace level to resolve things and the option to have the matter heard by the FWC. This is the case for Sidekicker as it places casual employees in the hospitality industry.
- 520 Sidekicker told the Inquiry it has dealt with disputes where an allegation of underperformance impacted the worker's ratings, but the worker suggested the issue was outside of their control, for example the car broke down.⁵⁶⁴ Sidekicker also said it has attended the FWC to resolve disputes about adverse action and award classifications.⁵⁶⁵ Further, it suggested that it had in the past agreed to pay go-away-money to workers who know how to game the system, while it had also heard of instances where workers with genuine concerns do not want to pursue a claim, and so it is possible that their concerns may go unresolved.⁵⁶⁶
- 521 Sidekicker's terms and conditions, suggest it can terminate the engagement of workers undertaking regular and systematic work with notice.⁵⁶⁷ Those regular and systematic casual employees may also have access to unfair dismissal remedies.⁵⁶⁸

555. Ann Tan, Ola, Individual Consultation, 3 July 2019.

556. Ann Tan, Ola, 3 July 2019.

557. Ann Tan, Ola, 3 July 2019.

558. Ann Tan, Ola, 3 July 2019.

559. Ann Tan, Ola, 3 July 2019.

560. Shebah, Submission 68, p. 3.

561. Ben Carter, Menulog, Individual Consultation, 16 August 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne; Ann Tan, Ola, Individual Consultation, 3 July 2019.

562. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

563. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019.

564. Tom Amos, Individual Consultation, 24 June 2019.

565. Tom Amos, 24 June 2019.

566. Tom Amos, 24 June 2019.

567. Sidekicker, [Terms of Use](#), [website], Cl. 4.2, 2020.

568. See *Fair Work Act 2009* (Cth) s.383, s.384.

5.5 INDUSTRY IN FOCUS | HOSPITALITY

Snapshot

- ▶ The hospitality sector is recognised as having low compliance with work laws.
- ▶ Platforms' entry into food delivery and placing workers 'in house' to hospitality businesses has created new choices for consumers, workers and businesses.
- ▶ Platforms are providing flexible, entry level work opportunities for low-skilled workers in this sector.
- ▶ Food delivery platforms do not employ riders and drivers.
- ▶ Food delivery is among the most closely managed platform work and the arrangements contain features of both employment and non-employment relationships.
- ▶ Some platforms offer 'in-house' hospitality placement under non-employment arrangements while others employ and place workers.
- ▶ Hospitality outlets benefit from platform facilitated food delivery services but the cost-benefit analysis is not always favourable.
- ▶ Restaurants and take-away businesses may be motivated to enter into unfavourable arrangements with food-delivery platforms in order to remain competitive.
- ▶ Platforms using non-employment modes of engagement can provide services or workers at a lower cost than those complying with work laws, creating an uneven playing field and impacting on the sustainability of employment-based workforces.
- ▶ Work laws and regulation that would apply to food delivery workers who are employees would likely inhibit existing food delivery platforms' models.
- ▶ It is in the public interest that platforms' work arrangements are lawful, sustainable and fair.

5.5.1 The sector

- 522 The hospitality sector in Australia is made up of a range of businesses: pubs, clubs, cafes, restaurants, hotels and take-away outlets. In the 2018–2019 financial year, the accommodation and food services sector employed 905,174 workers in Australia across more than 90,349 businesses, with an annual revenue of \$110.2 billion. Government imposed closures of businesses to respond to the COVID-19 pandemic have had a dramatic and devastating impact on this sector. Hospitality workers were among the first to be displaced by this crisis, and only time will tell how and when this vibrant and critical sector will recover.
- 523 Competition between restaurant, cafe and take-away outlets has traditionally been high, with price and quality being significant areas of competition.

- 524 Hospitality employees are predominantly engaged on a casual basis.⁵⁶⁹
- 525 Forty-five per cent of hospitality workers are aged 15–24 years⁵⁷⁰ and many of the young workers within the fast food, restaurant and cafe sector are on migrant visas.⁵⁷¹
- 526 The National Survey found that transport and food delivery workers are more likely to be younger (18–34 years of age), to have indicated temporary residency status and to speak a language other than English at home.⁵⁷²
- 527 This is consistent with other research into the demographics of food delivery workers.⁵⁷³
- 528 Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen who interviewed 58 food delivery platform workers in Perth and Melbourne in the first half of 2017, found that the riders were ‘predominantly young, non-Australian residents (47 of the 58 interviewees indicated that they held temporary work or student visas) and had low English language skills’.⁵⁷⁴
- 529 The findings of the 2019 Gig Workers Survey conducted by the VTHC indicated that on-demand food delivery riders (who comprised 167 of the 204 respondents to this survey) are predominantly young men of culturally and linguistically diverse backgrounds.⁵⁷⁵ The average age of riders who participated in this survey was 26 years of age and two thirds of riders were under the age of 30.⁵⁷⁶ Food delivery riding is male-dominated with 90 per cent of riders identifying as male.⁵⁷⁷ Forty per cent of riders listed a preferred language other than English.⁵⁷⁸ Just one in ten riders were Australian citizens, with the vast majority (80 per cent) being temporary visa holders and two thirds international students.⁵⁷⁹
- 530 During consultations Deliveroo confirmed that 80 per cent of its food delivery riders are visa holders.⁵⁸⁰
- 531 We all know that many restaurants, cafes and coffee shops are small businesses.⁵⁸¹ The standard hours of operation for these types of businesses mean that patterns of work inevitably involve periods that attract overtime and penalty rates; like Saturday, Sunday, early and late shifts.
- 532 The labour-intensive nature of the hospitality sector means that wages account for 31.6 per cent of costs as a share of revenue in the restaurant sector, 31 per cent in the fast food and take-away sector and 29.5 per cent in the cafe and coffee shop sector.⁵⁸²
- 533 The sector has been identified by the FWO as chronically non-compliant and is a priority for education and enforcement as a result.⁵⁸³

569. Parliament of Australia, Department of Parliamentary Services, ‘Characteristics and use of casual employees in Australia’, 19 January 2018, p. 10.

570. Australian Government Department of Jobs and Small Business, *Australian Jobs 2019*, p. 20.

571. The Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2018–19* [website], p. 20.

572. McDonald et al., *Digital Platform Work in Australia*, p. 41.

573. Deliveroo suggested that some 80 per cent of food delivery workers were visa holders, Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

574. Dr Tom Barratt, Dr Caleb Goods, Dr Alex Veen, Submission 14, p. 3.

575. Victorian Trades Hall Council, Supplementary Submission 89, pp. 30 and 33.

576. Victorian Trades Hall Council, Supplementary Submission 89, p. 33.

577. Victorian Trades Hall Council, Supplementary Submission 89, p. 33.

578. Victorian Trades Hall Council, Supplementary Submission 89, p. 33. The five most common preferred languages (after English) were Mandarin, Spanish, Hindi, Malay and Chinese (dialect not specified).

579. Victorian Trades Hall Council, Supplementary Submission 89, p. 33.

580. Joanne Woo, Deliveroo, Individual Consultation, 17 July 2019.

581. IbisWorld Australia Industry (ANZSIC) Report H4511b, *Cafes and Coffee Shops in Australia*, Bao Vuong, May 2019; IbisWorld Australia Industry (ANZSIC) Report H4511a, *Restaurants in Australia*, Matthew Barry, October 2019.

582. IbisWorld Australia Industry (ANZSIC) Report H4511a, *Restaurants in Australia*, Matthew Barry, April 2020; IbisWorld Australia Industry (ANZSIC) Report H4512, *Fast Food and Takeaway Food Services in Australia*, James Caldwell, April 2020; IbisWorld Australia Industry (ANZSIC) Report H4511b, *Cafes and Coffee Shops in Australia*, Matthew Barry, April 2020.

583. Address by the Fair Work Ombudsman, *2019 Annual National Policy-Influence-Reform Conference* [website], 3 June 2019. The industries for which the Fair Work Ombudsman received the highest number of anonymous reports (hospitality by far, followed by retail and then building and construction) (The Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2018–2019*, p. 19) are also industries that employ large numbers of young workers (Australian Government Department of Jobs and Small Business, *Australian Jobs 2019*, p. 13. See also address by the Fair Work Ombudsman, *2019 Annual National Policy-Influence-Reform Conference* [website], 3 June 2019; McKenzie, ‘The Erosion of Minimum Wage Policy in Australia’, p. 57.

5.5.2 The emergence of hospitality platforms

- 534 The Inquiry heard about two ways platform work is being used in the hospitality sector that are changing the way businesses access a workforce.
- 535 The first is the emergence of **food ordering and delivery** platforms.
- 536 The second is platforms enabling outlets to source workers to supplement their existing **in-house hospitality workforce**, whether that be bar or wait-staff or back of house workers.
- 537 Writing generally about the impact on the services industry, Ai Group submitted that on-demand platforms have led to a broader take up of paid services by individuals.⁵⁸⁴ It has been suggested that rideshare use has increased patronage to restaurants, theatre and the arts.⁵⁸⁵ In 2018, Deliveroo said that it underpinned the creation of \$313 million in additional revenue for the Australian restaurant market and supports the generation of \$452 million in revenue to the Australian economy.⁵⁸⁶

5.5.3 Food ordering and delivery

- 538 Food ordering and delivery is a highly visible and widely used service offered by platforms.
- 539 Prior to the emergence of platforms, food was delivered by some outlets using their own infrastructure and directly sourced workforces – either employed or engaged as independent contractors. Both large networked businesses (for example, pizza delivery businesses) and small self-owned outlets, offered these services over different geographic areas and in different ways.
- 540 Many businesses had moved to online ordering with the uptake of devices and technology.
- 541 Businesses that first emerged were initially largely focused on providing online ordering capability, but not delivery. Menulog was one of the first to do so in 2006.
- 542 This changed in 2014 with the arrival of Deliveroo, followed by Foodora in 2015, which bought a Sydney based delivery service, Supptime. These platforms combined online ordering infrastructure with a delivery workforce; organised and engaged by the platform as opposed to the outlets. They were followed by Uber Eats in 2016 and others since. The Inquiry's Survey identified approximately four platforms operating in this space.
- 543 This opened up the possibility for outlets that had not previously engaged delivery workers to offer the end-to-end service, including outlets not previously focused on take-away but on eat-in dining. This rapidly expanded choice for consumers and restaurants.

5.5.4 Models

- 544 Food delivery platforms operate 'work on-demand' models. They distribute delivery work to workers who may log-on when they choose. When they are allocated work, workers go to the outlets, collect the food and deliver it to the requested address. Workers may usually delegate their work and are permitted to accept and carry out jobs from other platforms simultaneously.
- 545 There are several different approaches to the payment of workers by platforms. At Uber Eats riders receive a pick-up fee, a drop off fee and a distance fee calculated using the most direct route.⁵⁸⁷ Uber Eats receives the commission paid by the restaurant.⁵⁸⁸ Uber Eats' customer terms suggest that the delivery fee paid by the customer is remitted to the rider,⁵⁸⁹ but the relationship between Uber's method of calculating pay to the rider and the delivery fee is not clear. At Deliveroo, riders are paid for the route and time taken and the platform retains the customer's delivery fee and restaurant commission.⁵⁹⁰ At Menulog, the rider receives the delivery fee paid by the customer, a 'transit fee' based on factors including distance and time, and any supplement (for example, to compensate for time waiting at a restaurant).⁵⁹¹ The Inquiry understands that Menulog did not charge restaurants a set-up fee, they just charged a commission, the amount of which they did not disclose to the Inquiry.⁵⁹²

584. Australian Industry Group, Submission 1, pp. 13 and 17.

585. Confidential Submitter, Submission 56, p. 5.

586. Deliveroo, Deliveroo Newsroom, [New report reveals Deliveroo's significant impact on the Australian economy](#) [website], 14 May 2019. The Restaurant and Catering Industry Association estimate the annual revenue of the restaurant industry at \$35b. See also Wes Lambert, Restaurant and Catering Industry Association, Restaurant and Catering Roundtable Discussion, 16 July 2019.

587. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* [2019] FWC 5008 at [64] (Commissioner Hampton's findings were in relation to Uber Eats operations in January 2019).

588. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* [2019] FWC 5008 at [65] (Commissioner Hampton's findings were in relation to Uber Eats operations in January 2019).

- 546 Food delivery platforms do not employ delivery workers.⁵⁹³ They are emphatic that an employment-based model would not be compatible with their systems.⁵⁹⁴
- 547 Outlets, like restaurants and cafes, are charged fees using several approaches by the platforms. Some platforms charge 'on-boarding' or 'activation' fees⁵⁹⁵ in combination with a per delivery or percentage fee.⁵⁹⁶

5.5.5 Workers

- 548 In the National Survey, the median income estimated by transport and food delivery workers was \$20 per hour.⁵⁹⁷ Deliveroo estimated riders earn \$22 per hour logged on to their app.⁵⁹⁸ Delivery worker platforms provide a record of hours logged on to the app and aggregate income in the worker's daily report.⁵⁹⁹ However, estimation of hourly incomes using this data does not factor in time that might be spent 'multi-apping', or monitoring activity without working or alternatively, engaging in activity associated with work while logged onto an app.
- 549 The National Survey found that transport and food delivery workers are more likely to be younger, to have indicated temporary residency status and to speak a language other than English at home.⁶⁰⁰ This is consistent with other research into the demographics of food delivery workers.⁶⁰¹
- 550 Food delivery platforms provide 'low-leveraged' workers with access to flexible jobs with low barriers to entry; especially young people, students and visa workers. But the roles appear to provide, on average, less income per hour than the casual minimum wage (considering costs).
- 551 Impacting on workers' choices is the fact that alternative roles available to young workers and migrant workers in the 'traditional' labour market may be in sectors more likely to encounter non-compliance with awards, agreements and minimum terms, such as in the hospitality industry.⁶⁰² Indeed, the Inquiry heard from international students who said part of what led them to food delivery was that conditions were better than those they received in the hospitality industry; noting that at least with platforms they could work when they wanted to.⁶⁰³

589. Portier Pacific Pty Ltd, Uber Portier B.V., [Services Agreement](#) [website], 2017, Cl. 4.

590. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

591. Menulog, Submission 50, p. 10.

592. Ben Carter, Menulog, Individual Consultation, 16 August 2019.

593. The agreements of Deliveroo, Menulog and Uber Eats contain express provisions confirming that workers are not employees and other clauses that could be directed to establishing that workers are not employees Menulog Pty Ltd (2019), [Courier Agreement](#) [website], Cl. 10.3; Deliveroo, Submission 28, pp. 4-5, 7; Portier Pacific Pty Ltd (2017), Portier Pacific Pty Ltd, Uber Portier B.V. [Services Agreement](#), Cl. 13.1.

594. Deliveroo, Submission 28, pp. 4-5, 7; Victorian Chamber of Commerce and Industry, Submission 83, p. 6; Uber, Submission 79, pp. 5 and 26.

595. Ed Kitchen, Uber Eats and Joanne Woo, Deliveroo, Restaurant and Catering Roundtable Discussion, 16 July 2019.

596. Ben Carter, Menulog, Individual Consultation, 16 August 2019.

597. McDonald et al., *Digital Platform Work in Australia*, p. 43.

598. Deliveroo, Submission 28, p. 4, Deliveroo do not indicate whether the amount is net of any service fees.

599. See Ridesharing Driver, [How to Use the Uber Driver App: Every Feature Explained](#) [website].

600. McDonald et al, *Digital Platform Work in Australia*, p. 41.

601. Dr Tom Barratt, Dr Caleb Goods, Dr Alex Veen, Submission 14, p. 3; Victorian Trades Hall Council Supplementary, Submission 89, pp. 30 and 33.

602. The industries for which FWO received the highest number of anonymous reports (hospitality by far, followed by retail and then building and construction) (The Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2018-2019*, p. 19) are also industries that employ large numbers of young workers (Australian Government Department of Jobs and Small Business, *Australian Jobs 2019*, p. 13. See also address by the Fair Work Ombudsman, [2019 Annual National Policy-Influence-Reform Conference](#), 3 June 2019; McKenzie, 'The Erosion of Minimum Wage Policy in Australia', p. 57.

5.5.6 Food outlets

- 552 There were a combination of views put to the Inquiry from outlets about using platform delivery services. It was seen as a good option to reach more customers and platforms asserted that their outlets were increasing market share.
- 553 Fast food, cafes and coffee shops offering take-away coffee and made-to-order meals to the inner-city white-collar market, have reduced the revenue of many inner-city restaurants. Food delivery platforms also allow restaurants to compete with the fast food and take-away food services industry and to derive revenue from the home delivered take-away market.⁶⁰⁴
- 554 Deliveroo stated that, according to a study in 2017, over a third of Australian restaurants partnering with them had reached previously untapped customer markets, while 17 per cent had expanded their restaurant operations.⁶⁰⁵ Similarly, Menulog submitted that its delivery service drives on average \$64,000 in sales for each of its restaurant partners.⁶⁰⁶
- 555 Menulog asserted that, unlike other online businesses that might reduce sales to local Australian businesses, it supports their growth.⁶⁰⁷ It stated that only 14 per cent of Australian restaurants have their own drivers and so it provides an opportunity for the remaining 67,000 businesses to tap into the online ordering and delivery market.⁶⁰⁸
- 556 Craveable (which partners with Uber Eats for its Oporto business but utilises its own employees for delivery in the Red Rooster business) and McDonalds, both considered the efficiencies achieved by partnering with platforms. Craveable indicated that it has been useful to operate at arms-length from industrial relations matters by utilising food delivery platforms.⁶⁰⁹ McDonalds suggested that delivery was not something they could effectively manage in-house as a 'hamburger business'. It suggested that the Uber partnership provided efficiencies that enabled them to meet customer demands.⁶¹⁰
- 557 However, there was a strong theme from the sector, including the Restaurant and Catering Association (RCA), that increases in revenue were not matched by an increase in profit because of the platforms' fees and the additional costs associated with extra labour to service additional work. The RCA recently reported on a survey of its members which found that nearly 54 per cent of respondents experienced an increase in revenue but a decrease in profits.⁶¹¹
- 558 The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) noted that, along with the fees taken by platforms, the other main subject of individual disputes was businesses' expectations that Uber Eats would represent great revenue growth.⁶¹²
- 559 The RCA survey found that 63.3 per cent of respondents signed up to platforms to increase their customer base, but 32 per cent felt they were forced to do so to match competitors.⁶¹³

603. Worker, Deliveroo and Foodora rider, Union and Worker Roundtable Discussion, 7 June 2019; Worker, Deliveroo and former Uber Eats rider, On-Demand Workers' Online Conversation, 19 August 2019.

604. IbisWorld Australia Industry (ANZSIC) Report H4511a, *Restaurants in Australia*, Matthew Barry, October 2019.

605. Deliveroo, Submission 28, p. 2.

606. Menulog, Submission 50, p. 5.

607. Menulog, Submission 50, p. 3.

608. Menulog, Submission 50, p. 3 (Note that this assessment was made at the time Menulog made its submission, and prior to the advent of on-demand delivery services the proportion of restaurants that undertook their own deliveries was probably different).

609. Annette Milne, Craveable, Food Retail Roundtable Discussion, 14 March 2019, Australian Industry Group, 441 St Kilda Road, Melbourne.

610. Scott Paterson, McDonalds, Food Retail Roundtable Discussion, 14 March 2019.

611. Restaurant & Catering Australia, Media Release, [Online Delivery Gobbles Up Profits as Restaurants Find Themselves Forced Into Partnering With Them](#), 14 November 2019.

612. Australian Small Business and Family Enterprise Ombudsman, Individual Consultation, 10 July 2019.

613. Restaurant & Catering Australia, Media Release, [Online Delivery Gobbles Up Profits as Restaurants Find Themselves Forced Into Partnering With Them](#), 14 November 2019.

- 560 At the Inquiry's roundtable for restaurants, catering and platform businesses, Belinda Clarke from the RCA suggested that in relation to restaurants partnering with platforms:
- They jump on board because everyone in the house is doing it, so it must be the great thing to do and then they are changing the model of their business so they can't order the extra coffee, there's no extra glass of wine or wine at all, there's no dessert. So then of a sudden they are changing their model, the model is not going to work, but then I can't stop because I have cannibalised my brand.*⁶¹⁴
- 561 The RCA said that some outlets are being 'pushed to the brink' and feel 'forced' to offer food delivery in spite of the significant costs.
- 562 This echoed evidence before the Inquiry that many outlets felt they needed to 'keep up' by offering home delivery and the platforms were still a less expensive option than directly engaging workers.⁶¹⁵
- 563 Domino's Pizza suggested that, for the most part, food delivery is cannibalising existing customers. And McDonalds' drive through customers are now using online delivery.⁶¹⁶ The ASBFEO suggested that, even where the opportunity to increase profit is not clear, restaurants felt compelled, as a result of what their competitors were doing, to partner with food delivery platforms.⁶¹⁷ McDonalds confirmed that a factor in entering into arrangements with Uber Eats, was keeping up with competition and the changing demands of customers.⁶¹⁸
- 564 The conduct of some platforms with respect to food outlets raised concerns. The ACCC investigated Uber Eats over unfair contracts - in particular that its contract terms made restaurants responsible for the delivery of meal orders, in circumstances where they had no control over the delivery process once the food left their restaurant. The ACCC also investigated whether a contract clause which referred to Uber Eats not providing logistics services was misleading. Uber Eats subsequently agreed to amend these contract terms.⁶¹⁹
- 565 Some agreements between food delivery platforms and restaurants restrict restaurants from adding a premium to menu prices for delivery.⁶²⁰ This may serve to encourage customers to use delivery, with food delivery platforms ensuring there is little disadvantage to customers in seeking to have their food delivered rather than picking up food or dining in.⁶²¹ This kind of restriction, however, may disadvantage the food business unless the delivery service can significantly increase the sales and market share of the food business.
- 566 ASBFEO and Marketing4Restaurants also raised concerns about Menulog's approach to the use of domain names for businesses.⁶²² Menulog emphasised to the Inquiry that it would return domain names if requested but there nevertheless seemed to be anxiety on the part of outlets about this.⁶²³

614. Belinda Clarke, Restaurant & Catering Australia, Restaurant and Catering Roundtable Discussion, 16 July 2019.

615. Vasuki Paul, Australian Industry Group, Restaurant and Catering Roundtable Discussion, 16 July 2019.

616. Mark Jenson, Red Lantern, Restaurant and Catering Roundtable Discussion, 16 July 2019; Nick Knight, Domino's Pizza, Individual Consultation, 28 May 2019.

617. Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, Individual Consultation 10 July 2019; Marketing4Restaurants, Submission 44, p. 3.

618. Scott Paterson, McDonalds, Food Retail Roundtable Discussion, 14 March 2019.

619. Australian Competition and Consumer Commission, Media Release, [Uber Eats amends its contracts](#) [website], 17 July 2019.

620. See for example Uber Portier, Portier Pacific Pty Ltd, [Uber Eats – General Terms](#) (Australia).

621. Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, Individual Consultation, 10 July 2019.

622. Marketing4Restaurants, Submission 44, p. 2; Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, 10 July 2019.

623. Ben Carter, Menulog, Individual Consultation, 16 August 2019.

5.5.7 Competitors

- 567 The Inquiry heard from businesses who used their own delivery workers. They were generally larger businesses with extensive networks and a history of directly employed delivery workers.
- 568 Domino's Pizza (which utilises the Uber Eats purchasing platform but uses its own delivery riders to deliver food ordered through Uber Eats) estimated that overall, the costs associated with a non-employee platform worker are about half of one of its award paid employees, not including penalties. It would also be more than 50 per cent cheaper for a regular family business restaurant that does not utilise employees as efficiently as Domino's Pizza.⁶²⁴
- 569 Marketing4Restaurants suggested that platforms charge only about two thirds of the in-house cost of delivery and can afford to do so because they do not provide hourly rates, leave and other entitlements, and there is no minimum engagement that workers need to be paid.⁶²⁵
- 570 Domino's provided the Inquiry with information about its approach to health and safety for its delivery employees; including the fact that it completed safety checks of the vehicles involved. It provides policies and training for workers, including limiting deliveries in inclement weather.⁶²⁶ In contrast, the Inquiry heard from food delivery riders in the On-Demand Online Workers Conversation that they are busy during bad weather, when it is dangerous to ride, because this is when consumers prefer to place an order from their homes rather than go out.⁶²⁷
- 571 Platform workers provide their own vehicles and might need to obtain their own insurance for them, as the extent of insurance cover provided by platform businesses varies. For example, Menulog said that couriers must obtain their own insurance.⁶²⁸ In its submission, Uber said it has partnered with Chubb to provide market leading personal injury insurance free of charge.⁶²⁹ There are other newer platforms operating in food delivery; for example, Door Dash and Easi. The Inquiry does not have information about the protections these businesses provide to workers.
- 572 Particular difficulties seem to arise for cyclists who find obtaining insurance for work purposes challenging.⁶³⁰
- 573 Menulog told the Inquiry that it has not seen a "wholesale movement" away from direct engagement of workers by outlets. Menulog suggested that some businesses they work with have been in delivery for a long time and may continue to use employees as well as on-demand delivery riders.⁶³¹
- 574 Marketing4Restaurants submitted that the use of self-employed persons by food delivery businesses creates an unequal playing field.⁶³² According to Marketing4Restaurants, the use of these arrangements 'creates the ability to underpay workers',⁶³³ enabling platforms to charge restaurants less for delivery than it would cost to engage workers in-house.⁶³⁴
- 575 Marketing4Restaurants maintains that much of the on-demand food delivery market involves, 'cannibalising orders and deliveries from restaurants that traditionally employed staff to provide the deliveries'.⁶³⁵ It raises concerns that, once on-demand food delivery has dismantled the current delivery infrastructure of restaurants with workers, on-demand platforms may raise prices charged to restaurants.⁶³⁶

624. Nick Knight, Domino's, Individual Consultation, 28 May 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

625. Marketing4Restaurants, Submission 44, pp. 2-3.

626. Email to the Inquiry from Nathan Scholz, Domino's Pizza, dated 22 July 2019.

627. 'DR1' and 'Rider', On-Demand Workers' Online Conversation, 19 August 2019.

628. Lisa Brown, Menulog, Individual Consultation, 16 August 2019.

629. Uber, Submission 79, p. 13.

630. For example, Bicycle Network's insurance does not cover cyclists when they are riding to derive a commercial benefit, Bicycle Network, [Bike riding insurance](#) [website].

631. Ben Carter, Menulog, Individual Consultation, 16 August 2019.

632. Marketing4Restaurants, Submission 44, p. 2.

633. Marketing4Restaurants, Submission 44, p. 2.

634. Marketing4Restaurants, Submission 44, p. 2, platforms charge between 25 and 35 per cent of the menu price for delivery. By analysis of Domino's arrangement the cost when using employees is 43.6 per cent.

635. Marketing4Restaurants, Submission 44, p. 3.

636. Marketing4Restaurants, Submission 44, p. 3.

5.5.8 The role of regulators

- 576 Regulators have considered the arrangements of food delivery platforms. As noted elsewhere in the report, the FWO has considered the models of Foodora (asserting the model unlawfully classified its workers, but having to abandon its action following the company's collapse) and Uber (forming the view that the model was not unlawful).
- 577 This sector has also produced several 'test cases' so far, in the FWC. These cases have generally upheld the platforms' models.
- 578 The ATO has considered platforms' models from a tax perspective but the ATO view is not known, other than with respect to Foodora.⁶³⁷ The ACCC has also intervened in relation to platform arrangements with food outlets, but not with respect to matters affecting platform workers.

5.5.9 Impacts

- 579 The emergence of online delivery platforms has created opportunities for workers and businesses and increased choice for consumers.
- 580 But there are also costs: direct and indirect, some visible, some less immediately obvious. At business and individual level, the direct costs are not always fully appreciated at the time of signing up and the opportunity for the entities and people to understand the cost implications not obvious. People are making choices but they may not be well informed; particularly low-leveraged workers and food outlets that feel compelled to 'stay in the market' of food delivery. No one forces them to remain with the platforms, but there may be elements that limit alternatives should they decide to leave.
- 581 There are also implications more generally for the labour market – especially given that platforms are competing against businesses which carry the costs of employing their workforces. As long as the platforms' non-employment models go untested, it is not clear that this is a level playing field.
- 582 In the face of COVID-19 shut-downs, many outlets previously not offering take-away have been able to pivot to home delivery models easily, utilising food delivery platforms.
- 583 So too, grocery and even retail outlets have been using these delivery platform services with clear commercial and public benefit. But this too has been controversial, with platforms' fees being raised as a concern at a time when the hospitality sector is grappling with forced shut downs, threatening the viability of the sector.⁶³⁸ Uber Eats has indicated that, during the pandemic, it will waive activation fees for new restaurants joining the platform and offer restaurants the option to receive daily payments; also that restaurants will not pay service fees on pick up orders until 30 June 2020.⁶³⁹ Menulog is also waiving costs for restaurants seeking online food ordering and delivery functionality over the coming months and halving commission on pick up orders.⁶⁴⁰ Deliveroo states that it has reduced onboarding fees for new restaurants and announced a move to daily payments for restaurants, to help ease cash flow pressures.⁶⁴¹
- 584 Uber and Deliveroo both confirmed that they will provide financial support for drivers and riders diagnosed with COVID-19 or placed in quarantine by a public health authority.⁶⁴²
- 585 It is in the public interest that these models be sustainable, lawful and fair.

637. See D. Marin-Guzman, '[Tax Office Investigating Foodora before exit over millions in unpaid taxes](#)' [website], *Australian Financial Review*, 28 August 2018.

638. Z. Hope and C. Waters '[Zero contact: Food delivery giants to drop at your door, as they face pressure over commissions](#)' [website], *The Sydney Morning Herald*, 16 March 2020.

639. J. Auster, Uber, '[Supporting restaurants across Australia and New Zealand amid the COVID-19 epidemic](#)' [website], 17 March 2020.

640. Menulog, '[Additional support for Menulog restaurants through COVID-19](#)', 18 March 2020.

641. Deliveroo, '[How are you supporting restaurants?](#)' [website].

642. 'Financial cover for sick, quarantined gig workers', *Workplace Express*, 10 March 2020.

5.5.10 In-house hospitality workforce

5.5.10.1 Model

586 Platforms providing workers to work ‘in-house’ in hospitality, operate on a crowd-work basis. They allow businesses to post ‘shifts’ for different roles. Workers who are available, respond. The National Survey did not identify any platforms operating in this way; however, the Inquiry heard from two: Sidekicker and Supp. Sidekicker employs workers⁶⁴³ whereas Supp predominantly matches workers to outlets which may engage them either as independent contractors or employees.⁶⁴⁴ This information provided the Inquiry with an example of employee, and to some extent, non-employee based models operating side by side.

5.5.10.2 Workers

587 Sidekicker pays workers in accordance with the award, including penalty rates if applicable.⁶⁴⁵

588 Supp allows businesses to post jobs with a minimum of three hours duration at no less than \$25 per hour.⁶⁴⁶ Supp workers have reported remuneration similar to the rate provided to casual employees in the same business, but platform fees are then deducted and other entitlements are absent.⁶⁴⁷

589 At the Workers’ Roundtable, Supp workers reported that they: appreciated the flexibility associated with the platform; could work ‘on and off’ around their other commitments; knew upfront what their duties were going to be, what they were going to be paid and what hours they would be working (although there was sometimes discussion with the restaurant about varying them, they largely reflected what was on the app); and could rate their experiences working at a particular venue so their feedback was taken on board. One worker raised the concern that, as Supp has become more popular, she is less likely to get a job because there are so many more competitors.⁶⁴⁸

590 Both Supp and Sidekicker stated that the main motivation of workers on their platform was to earn supplementary income.⁶⁴⁹ Supp suggested that workers on its platform are predominantly hospitality workers who find that their main employer is unable to provide sufficient hours.⁶⁵⁰

5.5.10.3 Food outlets

591 Catering companies suggested that on-demand hospitality staff are used to supplement their employee workforce during very busy periods or when employees are not available.⁶⁵¹ Going Gourmet uses them reluctantly because of the price premium associated with platforms.⁶⁵² Supp suggested that on-demand hospitality workers may be called upon when there is an unplanned increase in patronage – at the time the platform only provided for the engagement of on-demand workers one shift at a time.⁶⁵³ It suggested that a lot of the shifts being performed on Supp would previously have been done in the ‘black market’ and paid for out of the till. Supp said it solves the problem of needing staff temporarily at very short notice and being able to do it properly with greater compliance.⁶⁵⁴

643. Sidekicker, Submission 71, pp. 6-8.

644. Supp, [FAQ's](#) [website], 2019. Jordan Murray, Supp, Restaurant and Catering Roundtable Discussion, 16 July 2019.

645. Tom Amos, Sidekicker, Individual Consultation, 24 June 2019.

646. Supp, [FAQ's](#) [website], 2019.

647. Worker, Supp, Workers’ Roundtable Discussion, 29 July 2019.

648. Workers, Supp, Workers’ Roundtable Discussion, 29 July 2019.

649. Jordan Murray, Supp, Restaurant and Catering Roundtable Discussion, 16 July 2019. Tom Amos, Sidekicker, Individual Consultation, 24 June 2019.

650. Jordan Murray, Supp, 16 July 2019.

651. Alistair Coleman, Going Gourmet and Clinton Arthur, Peter Rowland, 16 July 2019.

652. Alistair Coleman, Going Gourmet, 16 July 2019.

653. Jordan Murray, Supp, 16 July 2019.

654. Jordan Murray, Supp, 16 July 2019.

5.6 INDUSTRY IN FOCUS | PERSONAL CARE SERVICES

Snapshot

- ▶ The personal care workforce has been highly disrupted by the implementation of the NDIS.
- ▶ Platforms' entry into the care sector has created new and important choices for care recipients, enabling them to curate services to better suit their needs; and for care workers, offering flexible work opportunities.
- ▶ Some platforms offer care services under non-employment arrangements while others employ their on-demand workers.
- ▶ There are legitimate concerns about the impact of platforms on this sector, particularly in relation to health and safety and insurance, unpaid work and the long term training needs of the workforce.
- ▶ Platforms using non-employment modes of engagement can provide services or workers at a lower cost than those complying with work laws, creating an uneven playing field and impacting on the sustainability of employment-based workforces.
- ▶ It is in the public interest that platforms' work arrangements are lawful, sustainable and fair.

5.6.1 The sector

- 592 Demand across platforms in the care sector is driven by individuals who receive funding through the National Disability Insurance Scheme (NDIS) and Home Care Packages.
- 593 Workers from a range of professions are drawn upon to provide aged and disability care. These include aged and disability support workers and nursing support and personal care workers, as well as allied health practitioners.
- 594 The need for personal care services is expected to grow as Australia's population ages and to meet the objective of people receiving care in their own homes rather than in residential care. The aged care and disability support sector employed 175,800 workers in 2018.⁶⁵⁵ This is expected to grow to 245,000 by 2023.⁶⁵⁶

5.6.1.1 The NDIS

- 595 The NDIS commenced in 2013 following a public inquiry into providing a long-term disability care and support scheme. The inquiry, conducted by the Productivity Commission, found that individuals and families could not adequately prepare for the risk and financial impact of significant disability.⁶⁵⁷ It found that the existing system was underfunded, unfair, fragmented and inefficient and gave people with disability little choice and no certainty of access to support.⁶⁵⁸
- 596 The NDIS provides people with a disability the opportunity to directly engage and manage their own disability support services.⁶⁵⁹

655. Australian Government: Job Outlook, *Aged and Disabled Carers* [website].

656. Australian Government: Job Outlook, *Aged and Disabled Carers* [website]. It is useful to note that the nursing support and personal care sector employed 97,900 workers in 2018. This sector is also expected to experience significant growth over the next five years – to 109,300 by 2023. Australian Government, Job Outlook, *Nursing Support and Personal Care Workers* [website]. The larger residential care services sector employed 258,000 workers in May 2019. By 2024 this is expected to have increased to 288,100, an increase of 30.1 per cent; See Australian Government, Labour Market Information Portal, *2019 Employment Projections – for the five years to May 2024* [website].

657. Australian Government, Productivity Commission, *Disability Care and Support – Productivity Commission Inquiry Report: Overview and Recommendations*, no. 54, 2011, p. 1.

658. Australian Government: Productivity Commission, p. 1.

659. C. David and R. West, 'NDIS Self-Management Approaches: Opportunities for choice and control or an Uber-style wild west?', *Australian Journal of Social Issues*, vol. 52, no. 4, 2017, p. 332.

- 597 The system is overseen by the NDIS QSC and the National Disability Insurance Agency (NDIA). Support services are provided by registered NDIS service providers, as well as non-government organisations and other NDIS service providers operating as unregistered providers, mainstream businesses and individuals.
- 598 Under this system, the government provides financial support via Funded Support Packages (FSPs), provided to individual NDIS participants based on their needs.⁶⁶⁰
- 599 People may directly choose, control and purchase their support services (self management), may have an intermediary to manage their budget and find support providers on their behalf (plan management), or have the NDIA pay the service provider directly, in accordance with the participant's NDIS plan (NDIA managed).⁶⁶¹
- 600 Specialist services, such as physio, nursing and behavior support, must be delivered by 'registered' providers able to demonstrate that their workers have the requisite skills and capacities to meet NDIS standards for the services they deliver.⁶⁶² Other services, such as meal preparation, dressing and washing, cleaning and home maintenance, may be provided by any person operating as an unregistered provider (although those persons may have undertaken available training courses).
- 601 For plans managed by the NDIA, only registered service providers can be used.⁶⁶³ Participants who are self managing or who are using a registered plan management provider, can choose whether to use a registered provider or an unregistered provider.⁶⁶⁴

5.6.1.2 Home care packages

- 602 In aged care, consumer directed care has been implemented for the administration of home care packages to aged care recipients.⁶⁶⁵ These packages may be used to fund personal care such as showering and grooming; nursing; therapy services; meal preparation; home maintenance and modifications; and other domestic assistance.⁶⁶⁶

5.6.2 The emergence of care services platforms

- 603 Some specialised platforms have emerged to enable care recipients to directly engage providers for a range of services, from domestic support to more specialised services. The Inquiry heard that support services can also be accessed via platforms such as Airtasker,⁶⁶⁷ although it appears that this does not include specialised services such as physio or nursing.
- 604 Clients can use on-demand platforms to negotiate the type, quantity and scheduling of support services. The online platforms undertake administrative and payroll services.⁶⁶⁸ These are responsibilities that would normally fall upon the client when engaging support workers directly.⁶⁶⁹

5.6.3 Care platforms

- 605 Specialised care services platforms, Hireup and Mable, engaged with the Inquiry. Hireup is a registered provider and may offer all services to all NDIS participants. Mable is not a registered provider so it offers services to self and plan managed NDIS participants and those with home care packages.
- 606 Hireup began delivering disability support services in 2015.⁶⁷⁰ Hireup employs its workforce on a casual basis⁶⁷¹ under the *Social, Community, Home Care and Disability Services Award 2010*.⁶⁷²

660. National Disability Insurance Scheme, [Glossary](#) [website].

661. David and West, 'NDIS Self-Management Approaches', pp. 333-335.

662. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

663. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

664. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

665. Ausmed Education Limited, [What is Consumer-Directed Care?](#) [website], 2019.

666. Australian Government: My Aged Care, [Home Care Packages](#) [website].

667. Dr George Taleporos, Latrobe University, Care Sector Roundtable Discussion, 19 July 2019.

668. Mable, [Support worker safeguards](#) [website]; Hireup, [How do I manage my support team?](#) [website].

669. David and West, *NDIS Self-Management Approaches*, p. 341.

670. University of Sydney: Faculty of Medicine and Health, [How Jordan O'Reilly is fixing up disability support with a mobile app](#), [website], 2018.

671. Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019. Hireup also mentioned it was looking at conversion of some employees to permanent part-time.

672. Fair Work Ombudsman, [Social, Community, Home Care and Disability Services Industry Award 2010](#) [website].

- 607 Mable began matching workers to NDIS and home care package recipients in 2014.⁶⁷³ Workers register with Mable as independent contractors and are engaged via the platform by the client.⁶⁷⁴
- 608 This sector provides a good case study, enabling a comparison between platforms deploying similar services via employment-based and non-employee models.
- 609 Hireup's onboarding process involves providing two referees; checking qualifications; police, working with children and vulnerable persons checks; and a review of an online application form detailing a worker's experience.⁶⁷⁵ Hireup suggested there is an assumption of risk in its use of employment arrangements, that is valued by workers.
- 610 Mable does not undertake an onboarding process however it safeguards clients by undertaking police checks and reviewing qualifications prior to approving publication of worker profiles on its website.⁶⁷⁶
- 611 Mable and Hireup operate similarly to the extent that workers use their websites to post their profile containing experience, qualifications and other relevant personal information. End users consider the information to help them select workers to provide services.
- 612 Platforms offer clients an opportunity to view the work history and personal attributes of prospective support workers.⁶⁷⁷ The availability of user profiles enables clients to choose workers based on 'soft' skills as well as qualifications.⁶⁷⁸ On the Mable platform, clients rate worker performance. These ratings are attached to the worker's profile. Mable says that ratings provide the best quality assurance.⁶⁷⁹
- 613 Hireup does not use ratings. Its representatives expressed the view that ratings are too subjective.⁶⁸⁰
- 614 Hireup and Mable both emphasised the importance of relationships between clients and workers on their platforms.⁶⁸¹ The average relationship on the Hireup platform lasts nine months or 52 bookings.⁶⁸²

5.6.4 Workers

- 615 According to the Inquiry's National Survey, care platform workers estimated earning, on average, \$21.60 per hour.⁶⁸³
- 616 Hireup pays award wages, matching the support requested to an award level.⁶⁸⁴ Hireup's minimum hourly wage for support workers at the time of the Inquiry was \$30.98, excluding super.⁶⁸⁵
- 617 Mable advised the Inquiry that it has coded a safety net hourly rate into its platform. At the time Mable engaged with the Inquiry, the lowest wage payable for work mediated through Mable's platform was \$23.50 per hour.⁶⁸⁶ Workers using the Mable platform negotiate both scheduling and remuneration.

673. Mable, [About Us](#) [website].

674. Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

675. Hireup, [Become a Support Worker](#) [website].

676. Mable, [Client Safeguards](#) [website].

677. David and West, *NDIS Self-Management Approaches*, p. 338.

678. National Disability Services, Submission 53, p. 3.

679. Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

680. Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019.

681. Harriet Dwyer, Hireup, 19 July 2019; Peter Scutt, Mable, 19 July 2019.

682. Harriet Dwyer, Hireup, 19 July 2019.

683. McDonald et al, *Digital Platform Work in Australia*, p. 43 (this category also covers pet care, child-care and baby-sitting).

684. Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019.

685. Hireup, [Hireup pricing](#) [website], July 2019.

686. Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

- 618 HACSU submitted that Mable’s minimum rate is well below the legal minimum wage in the sector⁶⁸⁷ which is \$26.22 per hour for level one casual home care workers.⁶⁸⁸ HACSU also suggested that the average wage, after deducting the service fee and factoring in the absence of superannuation and casual loadings, is below award rates applicable to nursing or personal care.⁶⁸⁹ However, many of the services performed through Mable, for example social support or domestic assistance, would not require award level two qualifications.⁶⁹⁰
- 619 Mable advised the Inquiry that the average hourly rate, after service fees paid to Mable, is between \$32 and \$33 per hour, closer to the level two award rate than the level one rate.⁶⁹¹ The hourly wage varies with qualifications. There are some workers, according to Mable, making \$45 per hour. Others offering meal preparation and companionship, could be charging \$30 per hour (take home pay may be less after platform fees).
- 620 Having reviewed wages across platforms, Dr Taleporos of Latrobe University said there was no evidence wages on platforms were lower than those paid by other providers.⁶⁹²

5.6.5 Health and safety

- 621 Health, safety and workers’ compensation arrangements for platform workers depend in part on the status of the worker. In the instance of a workplace accident or injury, Hireup employees have access to state based workers’ compensation schemes.
- 622 The platform fee paid by Mable workers includes an amount for insurance provided on their behalf; including professional indemnity, public liability and ‘good’ personal accident cover.⁶⁹³
- 623 There was concern and confusion about who was responsible for the health and safety of non-employee caring platform workers, especially given they may be entering and working in care recipients’ homes. The COVID-19 pandemic and the essential nature of caring services reinforces the importance of clarity.
- 624 The Inquiry asked the NDIS QSC about health and safety and was informed that the health and safety of on-demand care workers rested with those responsible for administering health and safety laws.⁶⁹⁴
- 625 For non-employee workers, this means they must take responsibility for their own health and safety; including when they are entering and working in domestic settings. It suggests they may be in a precarious and unsupported situation if something goes wrong. It was not clear to the Inquiry that this policy issue has been properly considered.
- 626 The Inquiry also sought information about the training, health and safety of workers; particularly platform workers from the NDIA. The NDIA confirmed that when participants engage a provider, be they a sole trader or organisation, it is the provider’s responsibility to comply with health and safety laws.⁶⁹⁵ However, it indicated it was seeking advice about the responsibilities of participants when they choose to employ a worker to provide supports.⁶⁹⁶
- 627 The Inquiry requested further detail, including about action taken to provide information about work health and safety responsibilities to workers they engage directly, as employees or otherwise. At the time of writing, the NDIA had not responded.

687. Health and Community Services Union, Submission 34, p. 5.

688. *Social, Community, Home Care and Disability Services Award 2010*.

689. Health and Community Services Union, Submission 34, p. 5; See also, Unions NSW, Submission 80, p. 13.

690. Dr Raelene West, Submission 94, p. 6; Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

691. Peter Scutt, Mable; 19 July 2019. See also, *Social Community Homecare and Disability Services Award 2010*, Cl. 17. Mable suggested that its platform enables workers and clients to match wages to service needs and as a result the average wage on its platform had risen.

692. Dr George Taleporos, Latrobe University, Care Sector Roundtable Discussion, 19 July 2019.

693. Peter Scutt, Mable, 19 July 2019. The Inquiry has not however received information that would allow it to compare insurance and protections provided to independent contractors in the care sector with those provided to employees.

694. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

695. Email to the Inquiry from National Disability Insurance Scheme, dated 16 October 2019 with attached correspondence.

696. Email to the Inquiry from National Disability Insurance Scheme, dated 16 October 2019 with attached correspondence.

5.6.6 Competition and impact

- 628 The labour market has evolved in this sector, in response to changes in funding arrangements and the opportunity and expectation of care recipients to exercise greater choice. In so doing, however, concerns have arisen about workers' pay and conditions,⁶⁹⁷ their health and safety⁶⁹⁸ and training and professional development requirements for the sector.⁶⁹⁹
- 629 Employees working in this sector are entitled to award rates, minimum shifts and other allowances for things like travel and phone costs.⁷⁰⁰ Non-employee workers are not entitled to these conditions.
- 630 Having interviewed on-demand workers, Dr Macdonald of RMIT suggested that without collegiate interactions that set appropriate expectations, inexperienced independent contractors see platform minimums as standards and lower their rates accordingly.⁷⁰¹ However, the NDS suggested that use of independent contracting, with lower overheads, had potential to increase wages.⁷⁰²
- 631 It was suggested that because of lower overheads, consumers can access more hours of support for the same amount of funding.⁷⁰³
- 632 The NDS submitted that the consumer choice model provided under the NDIS may be giving rise to shorter shifts. The NDS suggests that, in concert with the rise of platform businesses in the sector, workers are being asked to work several shorter two or three hour shifts over a weekend, instead of doing a standard 9am to 3pm arrangement each day.⁷⁰⁴ Workers are not being compensated for the additional travel back and forth between these shorter shifts.⁷⁰⁵
- 633 In this environment, existing providers – who would have to provide minimum shift lengths and cover the cost of travel – may not be able to balance flexibility and choice with provision of ongoing work to workers.⁷⁰⁶
- 634 The NDIS QSC suggested that Hireup already requires its employees to participate in community workshops, attend community-based training and interact with the profession.⁷⁰⁷
- 635 However, the ASU submitted that the low rates provided under the NDIS, leave little to no scope for providers to provide workers with mentoring, training and professional development activities and still remain profitable or viable.⁷⁰⁸ Citing research, the ASU suggested that the NDIS, through design, enables only lean, platform-based businesses to operate profitably.⁷⁰⁹

697. Dr Raelene West raised concern that a significant number of migrant workers are entering the NDIS workforce. Being grateful just to have a job and unaware of their rights, they may not be in a position to negotiate wages and conditions. Dr Fiona Macdonald suggested that independent contracting in the system has resulted in workers receiving below award wages when other entitlements are factored in because many are unaware of their rights. See Dr Raelene West, Dr Fiona Macdonald, RMIT University, Care Sector Roundtable Discussion, 19 July 2019.

698. Professor Sarah Charlesworth of RMIT contrasted the on-demand system with more regular 'organised work', suggesting that conversations with managers don't happen and there are no health and safety checks. Under the consumer directed care system, there are no checks of peoples' houses for things like live wires and other hazards. See Professor Charlesworth, 19 July 2019.

699. See for example Dianne Hardy, National Disability Services, Thomas Costa, Unions NSW and Leon Weigard, Australian Services Union, Care Sector Roundtable Discussion, 19 July 2019; P. Baines, F. Macdonald, J. Stanford and J. Moore, *Precarity and Job Instability on the Frontlines of NDIS Support Work*, The Centre for Future Work at the Australia Institute, 2019, p. 5.

700. See *Social Community Home Care and Disability Services Award 2010*, Cl. 20, 'Allowances'.

701. Dr Fiona Macdonald, RMIT University, Care Sector Roundtable Discussion, 19 July 2019.

702. Dianne Hardy, National Disability Services, 19 July 2019.

703. Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, Individual Consultation, 9 July 2019; Confidential Submission, Submission 43, p. 10; Peter Scutt, Mable, 19 July 2019. The NDS also suggested there is scope for independent contractors to earn higher wages by engaging directly with clients rather than via an employer who must factor in other costs, Diane Hardy, National Disability Services, 19 July 2019.

704. National Disability Services, Submission 53, p. 3. See also Australian Services Union, Submission 13, p. 12, Those who work for council in regularised employment arrangements are, by contrast, paid for minimum hours, including travel. There are a few experienced care workers in these arrangements but now they are the exception. Employers do not intend to replace these workers with like for like arrangements.

705. National Disability Services, Submission 53, p. 3.

706. National Disability Services, Submission 53, p. 3.

707. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

708. Leon Weigard, Australian Services Union, Care Sector Roundtable Discussion, 19 July 2019.

709. Australian Services Union, Submission 13, p. 7.

- 636 Dr Macdonald also raised the issue that generally platforms “don’t increase accountability” for what happens in the workplace.⁷¹⁰ Agreeing, HACSU told the inquiry there was a real opportunity for dedicated workers to be exploited because they’re willing to take risks, work unpaid overtime and do things they shouldn’t be doing.⁷¹¹
- 637 Dr George Taleporos described how traditional service providers had not “sent the workers [he] anticipated and [he found] they were unreliable.”⁷¹² Dr Taleporos suggested that he had avoided these issues using on-demand platforms.⁷¹³
- 638 On-demand platforms may assist in addressing labour market challenges.⁷¹⁴ There is potential for on-demand platforms to draw workers into the sector and retain them.⁷¹⁵ Mable suggested its model helps connect people within local communities, encouraging new entrants.⁷¹⁶ Platforms also cater for workers who are struggling to obtain enough work. Support workers who have not yet built up a regular schedule can obtain shifts.⁷¹⁷ Further, the NDS also believes that, by publicising demand, platforms can play a role in overcoming service gaps.⁷¹⁸

5.6.7 The role of regulators

- 639 There has not been any action in court or at a tribunal concerning the work status of on-demand workers in the care sector or seeking entitlements based on characterisation of their work status.
- 640 Care sector specific regulator, the NDIS QSC, seeks to ensure quality service for care recipients. The NDIS practice standards cover providing a safe workplace. If a registered provider is to meet accreditation requirements, they will need to be able to demonstrate that health and safety requirements for workers have been met.
- 641 When registering with the NDIS QSC, a service provider, including sole traders, must prove qualifications and demonstrate they meet the NDIS standards.⁷¹⁹ Registered providers such as Hireup are then subject to auditing by the NDIS QSC. The audit includes inquiry into human resource and administrative processes, including processes for checking qualifications of workers.⁷²⁰
- 642 Unregistered providers are not subject to audit. Both registered and unregistered providers must, however, abide by the NDIS Code of Conduct.⁷²¹ The Code of Conduct focuses on protecting care recipients and ensuring quality service. Compliance with the Code requires that services are performed in a safe and competent manner.⁷²²
- 643 The NDIS QSC informed the Inquiry that it can receive complaints about both registered and unregistered providers in relation to the NDIS Code of Conduct.⁷²³ The focus of the process is on engagement with parties to see if the complaint can be resolved.⁷²⁴ If there is a serious breach or continued breaches of obligations, the NDIS QSC can ban a provider.⁷²⁵
- 644 However, the process is participant focused. Workers who wish to raise issues must generally raise them under existing workplace laws, for example health and safety laws.⁷²⁶

710. Dr Fiona Macdonald, RMIT University, Care Sector Roundtable Discussion, 19 July 2019.

711. Elizabeth Doidge, Health and Community Services Union, Care Sector Roundtable Discussion, 19 July 2019.

712. Dr George Taleporos, Care Sector Roundtable Discussion, 19 July 2019.

713. Dr George Taleporos, 19 July 2019.

714. Confidential Submission, Submission 43, p. 2; National Disability Services, Submission 53, p. 4; The Productivity Commission noted that workforce pressures would rise as the population aged and the aged care system expanded. The capacity of the system to expand would depend on attracting new workers. Australian Government, Productivity Commission, *Disability Care and Support - Productivity Commission Inquiry Report: Overview and Recommendations*, p. 49.

715. National Disability Services, Submission 53, p. 4.

716. Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

717. Dr Raelene West, Submission 93, p. 4.

718. Dianne Hardy, National Disability Services, Care Sector Roundtable Discussion, 19 July 2019.

719. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

720. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

721. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

722. Australian Government, NDIS Quality and Safeguards Commission, *NDIS Code of Conduct (NDIS Providers)* [website]. Email from DHHS to the Inquiry, 15 May 2020 (If a registered provider wants to meet accreditation requirements they will need to be able to demonstrate that these health and safety requirements for workers have been met).

723. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

724. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

725. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

726. NDIS Quality and Safeguards Commission, Individual Consultation, 28 August 2019.

5.7 INDUSTRY IN FOCUS | RIDESHARE

Snapshot

- ▶ Rideshare platforms were the first to emerge and have been highly disruptive to the more traditional, ingrained and highly regulated models of passenger transport services.
- ▶ Rideshare services have created new transport options for consumers and businesses.
- ▶ Rideshare platforms are providing new choices for flexible, entry level work opportunities for low-skilled workers.
- ▶ Rideshare services do not employ drivers and by and large do not compete against businesses using employment modes of engagement (taxi drivers are also not employees but work under 'bailment' arrangements).
- ▶ Rideshare platform work is among the most closely managed platform work and the arrangements contain features of both employment and non-employment relationships.
- ▶ It is in the public interest that platforms' work arrangements are lawful, sustainable and fair.

5.7.1 The sector

- 645 The demand for passenger services has grown in recent times.
- 646 The Inquiry consulted four rideshare platforms operating in Victoria; Uber, Ola, Shebah and Didi.⁷²⁷ The Inquiry received some information from on-demand platforms on the demographics of their workforces.
- 647 Ola stated it did not currently collect demographic information on its drivers in a readily accessible form.⁷²⁸ Uber told the Inquiry that most driver partners are Australian citizens but the proportion of visa holders in food delivery may be higher than in rideshare.⁷²⁹ Uber also stated that the majority of its partners are male, but the percentage of women working on its Uber Eats platform is higher and the demographics are changing slowly.⁷³⁰ Shebah submitted that fewer than 10 per cent of Uber drivers were women.⁷³¹
- 648 Rideshare services compete with the traditional taxi sector.
- 649 As at January 2020, there were 70,905 vehicles registered to provide booked services only, in Victoria.⁷³² Whilst this would include traditional hire cars, the majority are vehicles registered for rideshare. This compares with 10,013 vehicles registered to provide unbooked services, mostly taxis providing rank and hail services.⁷³³
- 650 A report by advisory firm AlphaBeta on behalf of Uber, indicated that Uber has 60,000 driver partners in Australia. According to Uber, more than 30,000 of those drivers are located in Victoria.⁷³⁴ Another platform suggested it had 12,000 registered drivers.⁷³⁵

727. Platform Business Roundtable Discussion, 22 February 2019; Uber, Submission 79, Shebah, Submission 68.

728. Email to the Inquiry from Isaac Jeffrey, Ola Australia, dated 15 November 2019.

729. Maggie Lloyd and Lucas Groeneveld, Uber, Individual Consultation, 19 July 2019.

730. Lucas Groeneveld, Uber, Individual Consultation, 19 July 2019.

731. Shebah, Submission 68, p. 3.

732. Commercial Passenger Vehicles Victoria, [Commercial passenger vehicle industry statistics: Statistics end of January 2020](#) [website].

733. Commercial Passenger Vehicles Victoria, [Commercial passenger vehicle industry statistics: Statistics end of January 2020](#) [website].

734. Uber, Submission 79, p. 4.

735. Confidential Submission, Submission 56, p. 1.

651 According to the TWU, the ‘taxi and other road transport’ section of the transport, postal and warehousing industry grew by 32.3 per cent (6,150 units) in the period 2015–16 to 2016–17.⁷³⁶ The TWU suggested that these figures could reflect the growth of the rideshare workforce.⁷³⁷ Similarly, the CPVAA highlighted a 750 per cent increase in commercial passenger vehicle numbers since August 2017.⁷³⁸

5.7.2 The emergence of rideshare platforms

652 Rideshare is one of the most visible and widely used services offered by platforms.

653 Uber was the first platform to deliver ‘rideshare’ services. It was conceived in 2008 on a cold winter night in Paris, when founders Travis Kalanick and Garrett Camp couldn’t get a ride.⁷³⁹ On 5 July 2010, an Uber driver provided the first ride to a passenger in San Francisco.⁷⁴⁰ This marked the beginning of rideshare. Uber has operated in Australia since 2012.⁷⁴¹ Since that time, other platforms have begun offering rideshare services to Victorians. These include Ola, Didi, Taxify and Shebah.

5.7.3 Rideshare services

654 Passengers request a trip via the platform application on their phones and are provided a proposed fee. The passenger then chooses whether to confirm the request. Once the request is confirmed, the task is posted to a driver located close to where the rider wishes to be collected from. The driver is provided information about the collection location and the passenger receives the driver’s name, vehicle type and registration plate. If the driver rejects the task, it is sent to another driver close by.

655 Once the trip is complete, both driver and passenger may rate one another and payment is made via the passenger’s credit card. In recent times, some platforms have enabled passengers to ‘tip’ drivers, that is, to pay extra on top of the prescribed fee.

656 Rideshare may become an important part of a future transport mix.⁷⁴² Where existing public transport infrastructure is used for the majority of a journey, rideshare platforms submit that rideshare could be used for the ‘first and last mile’, that is, the distance between the home and the train station.⁷⁴³ There is an inverse correlation between mobility and disadvantage. So, increasing access to transportation in disadvantaged areas may lead to better employment outcomes.⁷⁴⁴

5.7.4 Models

657 Rideshare platforms do not employ their workforces. Workers generally work when they want and there is no minimum obligation to work.⁷⁴⁵

658 The platforms set prices and take a ‘cut’ of the fares. Workers are generally not inhibited from working across other rideshare platforms. The Inquiry heard that it was possible for drivers to ‘multi-app’ that is, monitor work across several rideshare apps simultaneously.⁷⁴⁶

736. Transport Workers’ Union of Australia, Submission 78, p. 3.

737. Transport Workers’ Union of Australia, Submission 78, p. 3.

738. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 7.

739. Uber, [Uber Newsroom](#) [website], 2020.

740. Uber, [Uber Newsroom](#) [website], 2020.

741. Uber, Submission 79, p. 4.

742. Uber, Submission 79, p. 15.

743. Uber, Submission 79, p. 15.

744. K. Rosier and M. McDonald, *The relationship between transport and disadvantage in Australia*, CAFCA resource sheet’ [website], 2011, Australian Government: Australian Institute of Family Services.

745. Didi, Legal, [Driver Agreement](#) [website], Cl. 1.5; Raiser Pacific Pty Ltd, Uber B.V., [Services Agreement](#) [website], Cl. 4, 2017.

746. Didi Legal, [Driver Agreement](#), [website], 2020, Cl. 1.5, Didi Cl. 10; Raiser Pacific Pty Lt: Uber BV, Uber B.V., [Services Agreement](#) [website], Cl. 4, 2017.

- 659 It has been suggested that algorithms closely manage driver behaviours when they are logged on; discouraging the rejection of jobs,⁷⁴⁷ imposing consequences such as suspensions for failing to accept jobs quickly⁷⁴⁸ and cancelling jobs.⁷⁴⁹ Information obtained by the Inquiry confirms that platforms seek to reward workers for accepting jobs. For instance, Didi provides financial incentives for high job acceptance rates.⁷⁵⁰
- 660 To a degree, ratings systems and price setting enable platforms to standardise the customer experience.⁷⁵¹ In addition, control is exercised through policies or 'community guidelines'.⁷⁵²

5.7.5 Workers

- 661 The Inquiry received a variety of estimates of driver income. In the National Survey, current food delivery and transport sector workers reported a median income of \$20 per hour.⁷⁵³ Estimates for drivers in Sydney were \$21⁷⁵⁴ or \$18 per hour⁷⁵⁵ after expenses and platform services fees. A rideshare driver who participated in the Inquiry estimated take-home pay at \$22.80 per hour.⁷⁵⁶
- 662 Other estimates were lower, ranging from \$12.88 per hour for Melbourne drivers⁷⁵⁷ to \$17.50 per hour for more experienced Brisbane drivers.⁷⁵⁸ A national average of \$14.62⁷⁵⁹ was provided and an average across platforms of \$16 per hour.⁷⁶⁰ It has been reported that entrepreneurial drivers will chase the price surge across platforms.⁷⁶¹
- 663 Drivers undertake significant unpaid work administering their business and cleaning vehicles. Estimates of driver costs, including platform fees, ranged from half to two thirds of revenue.
- 664 Rideshare platforms do not conduct job interviews.⁷⁶² Low barriers to entry mean it can be an option for the long-term unemployed.⁷⁶³ Thrive Refugee Enterprise said that rideshare works well for refugees. The CEO of Thrive, Mr Arie Moses, told the Inquiry:

*I mean, we've found these platforms pretty fantastic. They really opened up a new industry, so people who would otherwise be up on the scrap heap would now be able to work.*⁷⁶⁴

747. Mr Ewan Short, Submission 70, p. 3.

748. See Australian Institute Centre for Future Work, Employment Rights, Submission 12, p. 29.

749. See Worker, Uber, Union and Worker Roundtable Discussion, 7 June 2019.

750. Didi, Legal, [Driver Agreement](#) [website], Fee Schedule.

751. McDonald et al., *Digital Platform Work in Australia*, p. 15.

752. Policies and community guidelines largely reflect legal requirements and/or are structured to avoid unlawful behaviour. Drivers must accept passengers with service animals and must take trips using only approved vehicles. They must take the route requested by the passenger or the most direct and practicable route and must not make any unauthorised stops unless requested by the passenger. Physical or sexual contact, any form of discriminatory behaviour and use of illicit drugs and alcohol by either driver or passenger are not permitted.

In some provisions the policies step beyond what is legally required. Uber's community guidelines prevent drivers from accepting cash or from contacting a passenger after the trip. They prevent drivers from accepting trips from passengers who appear to be under the age of 18 and prevent drivers from carrying passengers other than the requesting passenger or their guests. See Uber, [Uber's Community Guidelines](#), [website]. See also Commercial Passenger Vehicles Victoria, [Main offenses associated with the provision of Commercial Passenger Vehicle Services](#), 2020. Ola has a broad set of community guidelines, these also cover legal requirements but also, matters such as the use of air freshener. Ola's website does not say whether there are consequences for breach of its guidelines; Ola, [Driver Guidelines](#) [website].

753. McDonald et al, *Digital Platform Work in Australia*, p. 43.

754. This figure is the net hourly rate after Uber's commission and average operating costs for drivers of \$8.46 per hour are subtracted: AlphaBeta Strategy and Economics, [Flexibility and fairness](#), p. 19.

755. Stanford, [Subsidising Billionaires](#), p. 4.

756. Worker, Rideshare Driver, Workers' Roundtable Discussion, 29 July 2019. While this figure does not account for depreciation of the vehicles value and the cost of servicing or maintaining his vehicle, it is assumed that these costs would be relevant work-related deductions.

757. Australia Institute Centre for Future Work, Submission 9, p. 20.

758. University of Queensland Research Network on Automation, Ethics and Society, Submission 81, p. 2.

759. Australia Institute Centre for Future Work, Submission 9, p. 20.

760. Transport Workers' Union of Australia, Submission 78, p. 7.

761. The passenger for example may be notified the price will be 1.5 times the usual. In this circumstance the driver will receive payment in direct proportion, that is 1.5 times the usual payment. Similarly, operating as a percentage of the payment to the driver, Uber's commission will be 1.5 times as large. Ola suggested that the estimates of the Australia Institute may not account for surge pricing and other incentives, Simon Smith, Ola, Individual Consultation, 3 July 2019.

762. Uber, Submission 79, p. 30; Ann Tan, Ola, Individual Consultation, 3 July 2019.

763. Confidential Submitter, Revised Submission 56, p. 7.

764. Arie Moses, Thrive Refugee Enterprise, Small Business Roundtable Discussion, 12 July 2019.

- 665 Thrive suggested rideshare provided essential income to people who must supplement low income jobs and work around those commitments.⁷⁶⁵ They also suggested that, in other forms of franchising, cultural biases of customers impact what refugees earn.⁷⁶⁶
- 666 Others however, suggested that many workers leave the industry once they have factored in their true operating costs.⁷⁶⁷
- 667 Drivers may be suspended or excluded from platforms if customer ratings metrics and service standards are not met. Platforms told us that, in these circumstances, training would be offered to drivers.⁷⁶⁸ Drivers would not be suspended unilaterally⁷⁶⁹ unless a serious incident had occurred and would be provided notice and reasons beforehand.⁷⁷⁰ Shebah and Ola also mentioned appeals processes available to drivers.⁷⁷¹
- 668 In contrast, RSDU suggested that in practice, there is no right of appeal and drivers can be deactivated without notice and without being given reasons.⁷⁷²

5.7.6 Health and safety

- 669 Some of the health and safety practices required by CPVV are summarised below under – The role of regulators.
- 670 Some submitters suggested that user ratings and route tracking⁷⁷³ make rideshare safer than taxi services, while technology that records who booked the trip improves passenger behaviour.⁷⁷⁴ Others pointed to emergency buttons and 24/7 support teams.⁷⁷⁵
- 671 However, in summarising survey results, the TWU reported that amongst 1,153 rideshare drivers surveyed, there had been 969 reports of harassment or assault or both.⁷⁷⁶ Other submitters raised concern about the safety of women.⁷⁷⁷
- 672 Driver fatigue is also a significant issue in the industry with reports that some rideshare drivers drive up to 80 hours per week.⁷⁷⁸ App functions introduced to limit log in time and require a break before logging in again⁷⁷⁹ may not be effective given drivers work multiple jobs and across multiple platforms.⁷⁸⁰ For comparison however, there is no way of recording how long a taxi driver has been driving.⁷⁸¹
- 673 It was suggested that the lack of vehicle livery for rideshare vehicles makes it possible for dangerous people to masquerade as drivers⁷⁸² and makes it difficult to enforce zero-alcohol limits.⁷⁸³
- 674 Some rideshare platforms provide personal accident cover to drivers⁷⁸⁴ and contingent liability policies for third party property damage and injury to third parties.⁷⁸⁵ See further information in Chapter 6. However, insurance cover in the industry is patchwork and in respect of personal injury, cannot be easily compared to the state workers' compensation scheme available to taxi drivers.⁷⁸⁶

765. Arie Moses, 12 July 2019.

766. Arie Moses, 12 July 2019.

767. Commercial Passenger Vehicles Association of Australia, Submission 24, p. 9; Australia Institute for Future Work, Submission 9, p. 19.

768. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019; Ann Tan, Ola, Individual Consultation, 3 July 2019.

769. Maggie Lloyd, 19 July 2019.

770. Didi Mobility Australia, Legal, [Driver Agreement](#) [website], Cl. 21 – Suspension and Disqualification; Ann Tan, Ola, Individual Consultation, 3 July 2019.

771. Ann Tan, 3 July 2019; Shebah, Submission 68, p. 3.

772. Ride Share Drivers United, Submission 63, p. 3.

773. Law Institute of Victoria, Submission 39, p. 4.

774. Ride Share Drivers Association of Australia, Submission 64, p. 4.

775. Confidential Submission, Submission 56, pp. 10-11; Uber, Submission 79, pp. 12-13.

776. Transport Workers' Union of Australia, Submission 78, pp. 6-7.

777. Leanne (consumer), Submission 40, pp. 1-2; Rodney Barton MP, Submission 15, p. 1; Becca (consumer), Submission 16, p. 1.

778. Victorian Trades Hall Council, Submission 88, p. 5.

779. Uber, Submission 79, p. 12.

780. Brendan O'Sullivan, Shebah, Platform Business Roundtable Discussion, 22 February 2019.

781. Commercial Passenger Vehicles Victoria, Individual Consultation, 29 August 2019.

782. Uber, Submission 79, p. 17; Commercial Passenger Vehicle Association of Australia, Submission 24, p. 5; Rodney Barton MP, Submission 15, p. 1.

783. Uber, Submission 79, p. 17; Commercial Passenger Vehicle Association of Australia, Submission 24, p. 5; Rodney Barton MP, Submission 15, p. 1.

784. Uber, Submission 79, p. 13; Confidential Submission, Submission 56, p. 12.

785. For example Uber, [Every trip is insured: A policy that helps drivers](#) [website].

786. See *Workplace Injury Rehabilitation and Accident Compensation Act 2013* (Vic), Schedule 1, Part 1, s.7.

- 675 While many platforms expressed concern about conferring additional 'benefits' on drivers for fear that those workers might be reclassified as employees, in extraordinary times, platforms have shown that they are prepared to throw caution to the wind and provide additional benefits to workers. Uber, Didi and Ola are implementing policies to support drivers who are diagnosed with COVID-19 or are asked to self-isolate. Some of these initiatives are:
- Uber will provide 14 days financial assistance to drivers diagnosed or asked to self-isolate – the amount will be based on the driver's average weekly earnings⁷⁸⁷
 - Ola will pay an amount equal to 14 days expected income based on average daily earnings to drivers who must self-isolate or are diagnosed⁷⁸⁸
 - For drivers diagnosed, Didi will provide a one-off payment equal to the driver's net earnings for the past 28 days. Those asked to self-isolate will be provided an amount equal to the last 14 days' earnings. Those who are suspended following information from a public health authority, will receive average net daily earnings multiplied by the number of days suspended. Didi has also reduced its service fee to five per cent of fares.⁷⁸⁹

5.7.7 Competition and impact

- 676 Relative to taxi services, some of the benefits reported to the Inquiry include improved reliability and being able to track the car prior to pick up.⁷⁹⁰
- 677 Transactions also occur entirely online⁷⁹¹ and the price is fixed in advance of the trip. These characteristics are enjoyed by passengers.
- 678 Deloitte remarked that rideshare has lower transaction costs compared with traditional taxi services⁷⁹² and, on 2016 service levels, consumers were saving \$31 million per year by using rideshare. Deloitte reported that 80 per cent of taxi drivers had experienced fare evasion and that cash free on-demand services may reduce this.⁷⁹³ They suggested that, at 2016 service levels, there existed an annual consumer benefit of \$49.6 million.⁷⁹⁴ Although prices have changed overtime, rideshare could be as much as 40 per cent cheaper than a taxi.⁷⁹⁵
- 679 Consumers may also save on wait time. Some reports found that the wait time for rideshare averages four minutes, compared to 10–20 minutes when booking a taxi.⁷⁹⁶
- 680 While unions have been strong in their advocacy that rideshare drivers should be treated as employees, generally taxi drivers have never been treated as such. Most taxi drivers are bailees.⁷⁹⁷ Under a contract of bailment, the taxi operator (owner) provides the driver a taxi to drive and earn fares.⁷⁹⁸ The driver must then transfer a percentage of the earnings back to the taxi owner.⁷⁹⁹ Taxi drivers are neither employees nor independent contractors and are not entitled to award rates or paid leave.

787. Uber, Uber Blog, [An update on COVID-19 financial assistance](#) [website].

788. Ola, [Driver Support Package for COVID-19](#) [website].

789. Didi Australia, [COVID 19: \\$10M USD Driver-Partner Relief fund](#) [website]; Didi Australia, [COVID -19 Support Driver Hub](#) [website].

790. Ride Share Drivers Association of Australia, Submission 64, p. 2.

791. Ride Share Drivers Association of Australia, Submission 64, p. 2.

792. Deloitte Access Economics, [Economic effects of ridesharing in Australia](#) [website], p. 1.

793. Deloitte Access Economics, [Economic effects of ridesharing in Australia](#) [website], p. 7.

794. A consumer benefit is defined as the difference between the amount a consumer paid for a service and, the amount, given the quality of the service, that the consumer would have been prepared to pay.

795. Confidential Submitter, Submission 56, p. 5; See also Ride Share Drivers Association of Australia, Submission 64, p. 2.

796. Confidential Submitter, Submission 56, p. 5. See also Deloitte Access Economics, [Economic effects of ridesharing in Australia](#) [website], p. 5 (considering the benefits of rideshare and Uber X in particular).

797. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 7.

798. Johnstone et al., *Beyond Employment*. 73.

799. Johnstone et al., p. 73. In Victoria, bailment contracts, known as Driver Agreements, are regulated. A driver must be able to retain at least 55 per cent of gross fares and costs related to maintenance of the vehicle must be reimbursed to drivers. Drivers who have worked at least three days a week over a 12-month period are entitled to four weeks unpaid leave. See Commercial Passenger Vehicles Victoria, Drivers: [Driver Agreement](#) [website], 2018.

- 681 RSDAA suggests that rapid expansion of the rideshare industry saw driver revenues in the taxi industry collapse.⁸⁰⁰ CPVAA suggests that the commercial passenger vehicle market has not grown to match the number of commercial passenger vehicles.⁸⁰¹ The result is significantly reduced income for drivers in all categories; taxis, traditional hire cars and rideshare.⁸⁰²
- 682 However, Uber cites research that, at least across 2018, use of taxis remained stable.⁸⁰³ The company is however silent on changes to the taxi market in the years rideshare was growing fastest.
- 683 In the period 2014–2016, after licence costs were reduced, the number of taxi licences in Victoria increased significantly.⁸⁰⁴ Since 2017, the number of taxi (unbooked) commercial passenger vehicle registrations has declined slightly from 10,480 to 10,013 at January 2020.⁸⁰⁵ If taxi vehicle numbers in any way reflect the health of the taxi industry, it has not changed significantly in recent years.
- 684 The pay structures of taxi drivers and rideshare workers differ, making them hard to compare. The commissions or fees taken from revenue are very different,⁸⁰⁶ as are operating costs.⁸⁰⁷ Base fares may be lower in rideshare⁸⁰⁸ and taxis and rideshare vehicles may have different utilisation rates. The Australian Taxi Industry Association suggested that some taxi drivers left Uber to drive taxis because the pay is better.⁸⁰⁹ Yet they still drive rideshare on weekends to take advantage of surge pricing and better remuneration.⁸¹⁰

5.7.8 The role of regulators

- 685 The status of rideshare drivers has been the subject of active debate amongst experts and it is one of the few sectors where there has been formal consideration of the status of platform workers by regulators and tribunals.
- 686 There have been three cases in Australia where the work status of a rideshare driver was contested in tribunals.⁸¹¹ In each case, it was held that workers are independent contractors. The FWO investigated the status of Uber drivers and decided, ‘The weight of evidence from [its] investigation established that the relationship between Uber Australia and the drivers is not an employment relationship’. As a consequence, it would ‘not take compliance action’.
- 687 To date, tribunals in Australia and some courts overseas have formed the view that rideshare platforms operate transportation businesses and enter into contracts for services with drivers for the performance of transportation work.⁸¹²

800. Ride Share Drivers Association of Australia, Submission 64, p. 25.

801. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 8.

802. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 8.

803. Uber, Submission 79, p. 16.

804. See Victorian State Government: [Taxi Services Commission Annual Report 2017–18](#), p. 25; Australian Taxi Industry Association, [State and Territory Taxi Statistics as at December 2014](#) [website].

805. See Victorian State Government: [Taxi Services Commission Annual Report 2017–18](#), p. 25, and; Commercial Passenger Vehicles Victoria, [Commercial Passenger Vehicle Industry Statistics – Statistics end January 2020](#).

806. Taxi operators are entitled to take 45 per cent of revenue from the taxi driver. See Commercial Passenger Vehicles Victoria, Drivers: [Driver Agreement](#) [website]. The commission taken by rideshare platforms is much lower. Uber’s commission is reportedly 25 per cent (GST exclusive) (submissions differ on this rate), Rideshare Driver, Workers’ Roundtable Discussion, 29 July 2019; Shebah’s commission is 15 per cent, Georgia McEncroe, Shebah, Platform Business Roundtable Discussion, 22 February 2019; Didi’s commission is between 0 and 19 per cent, depending on what tier the driver is allocated to. A driver who has high acceptance rates, high completion rates and high trip numbers will be allocated a higher tier, Didi, Legal, [Driver Agreement](#) [website], Schedule 6 – Program Fee Schedule.

807. Taxi drivers are not liable for car finance, maintenance and repairs, fuel, equipment, comprehensive insurance, workers’ compensation insurance, state government fees and levies. Rideshare drivers meet these costs, Ride Share Drivers Association of Australia, Submission 64, p. 6; Commercial Passengers Vehicles Victoria, Drivers: [Driver Agreement](#) [website].

808. Deloitte, [Economic effects of ridesharing in Australia](#), p. 1.

809. Blair Davies, Australian Taxi Industry Association, Small Business Roundtable Discussion, 12 July 2019.

810. Blair Davies, Australian Taxi Industry Association, 12 July 2019.

811. *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807.

812. *Gupta v Portier Pacific Pty Ltd*; *Uber Australia Pty Ltd t/a Uber Eats* [2020] FWC 1698; *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Uber BV v Aslam* [2018] EWCA Civ 2748; *O’Connor and others v Uber Technologies, Inc.*, 82 F. Supp. 3d, 1133 (N.D. Cal. 2015).

- 688 In Victoria, commercial passenger vehicles are regulated by CPVV. Drivers must apply for accreditation⁸¹³ and register their vehicles.⁸¹⁴ Driver accreditation involves a check of driving, medical and criminal history.⁸¹⁵
- 689 Vehicle owners must maintain their vehicle in a serviceable and safe condition at all times and, undertake an annual roadworthy inspection.⁸¹⁶ Drivers and vehicle owners must also report notifiable incidents, including death or serious injury of any person or any incident attended by emergency services.⁸¹⁷
- 690 Booking service providers must maintain a register of safety risks and implement systems to manage driver fatigue; drug and alcohol testing; and driver behaviour, competency and medical fitness.⁸¹⁸ They must also notify CPVV of notifiable incidents and manage a complaints' handling process.⁸¹⁹
- 691 An Industry Code of Practice (Parts 1 and 2) has been made by CPVV for all industry participants.⁸²⁰ The Code establishes health and safety principles and sets out health and safety duties; including consultation with drivers about health and safety matters. The code provides guidance to meet the safety standards prescribed by the *Commercial Passenger Vehicle Industry Act 2017* (Vic).

813. Commercial Passenger Vehicles Victoria, [Drivers, Applying for driver accreditation](#) [website].

814. Commercial Passenger Vehicles Victoria, [Vehicle Owners, Register a vehicle to carry commercial passengers](#) [website].

815. Commercial Passenger Vehicles Victoria, [Vehicle Owners, Register a vehicle to carry commercial passengers](#) [website].

816. Commercial Passenger Vehicles Victoria, [Vehicle Owners, Commercial passenger vehicle registration conditions](#) [website].

817. Commercial Passenger Vehicles Victoria, [Drivers, Accredited driver responsibilities](#) [website].

818. Commercial Passenger Vehicles Victoria, [Booking Service Providers: Provider responsibilities](#) [website].

819. Commercial Passenger Vehicles Victoria, [Booking Service Providers: Provider responsibilities](#) [website].

820. Commercial Passenger Vehicles Victoria, [Booking Service Providers: Industry code of practice](#) [website].

Chapter 6 | Platforms – how work laws apply

6.1 INTRODUCTION

692 The Inquiry's TOR require it to examine the extent and nature of the on-demand economy and its impact on the labour market including:

- the legal or work status of persons working for or with businesses using on-line platforms [TOR 1]
- the application of workplace laws and instruments to those persons, including accident compensation, payroll or similar taxes, superannuation and health and safety laws [TOR 2]
- whether contracting or other arrangements are being used to avoid the operation of workplace laws and other statutory obligations [TOR 3]
- the effectiveness of the enforcement of those laws [TOR 4].

693 The TOR direct the Inquiry to a broad range of policy areas: including intersections between workplace or industrial matters, workers' compensation, health and safety, taxation, competition, national disability services, small business, labour hire, commercial passenger vehicles, transport accident compensation and more. This diverse subject matter has implications for platform workers in Victoria.

694 Through submissions, meetings and consultations, the Inquiry received extensive information on the legal or work status of people who work for, or with, on-demand business platforms. Businesses, unions, workers, industry associations, academics and not for profit organisations also provided large amounts of material regarding whether workplace laws and instruments apply (or should apply) to on-demand workers.

695 The Inquiry's TOR also require consideration of the utility of Victorian regulatory intervention, in the absence of a national approach to regulating on-demand work. This chapter considers each of these TOR in turn.⁸²¹

6.2 TERMS OF REFERENCE 1 – LEGAL OR WORK STATUS OF PLATFORM WORKERS

6.2.1 Work status and minimum standards

696 The FW Act, provides a safety net of 10 National Employment Standards (covering hours of work, forms of leave, notice of termination and redundancy and other universally applying entitlements),⁸²² operating in conjunction with modern awards which set out detailed terms and conditions of employment that apply on an industry or occupational basis.⁸²³

697 This safety net cannot be undercut by any other arrangement. It provides minimum wages and regulated hours of work, with job security and rights of representation. Employee 'on-demand' workers and casual employees are entitled to many of these benefits, though they are not entitled to ongoing work. This was starkly reinforced by the COVID-19 pandemic. It is casual workers who were first to lose work when governments ordered businesses to limit or shut down their operations. Unless they were regular casuals, they were also not entitled to the JobKeeper wage subsidy payment.

821. Inquiry Terms of Reference, B. VII and B. VIII.

822. See *Fair Work Act 2009* (Cth), Part 2-2; Fair Work Ombudsman, 2019, [National Employment Standards](#) [website].

823. Johnstone and Stewart, 'Swimming against the tide?', p. 64.

- 698 Workers who are not employees, are not entitled to the majority of protections provided by the FW Act.⁸²⁴ They are also not entitled to protections provided by awards; including classification based wage rates, additional payments (penalties) for work outside of standard hours or on public holidays, overtime for additional hours, dispute resolution procedures, consultation procedures and minimum engagement periods.⁸²⁵
- 699 Other important protections and obligations, such as health and safety, workers' compensation, superannuation and discrimination are set out in other Commonwealth and state laws. These laws also draw on 'work status' to determine obligations; first and foremost applying to 'employees'.

6.2.2 'Evolving' work status

- 700 Work status in these frameworks draws on common law concepts of 'employment', distinguishing this relationship from commercial arrangements.
- 701 The FW Act refers to, without setting out, the features of an 'employment relationship', leaving us to draw on longstanding legal constructs to work out what it means.
- 702 Other frameworks also rely on the common law, but sometimes define terms and generally, slightly expanding beyond the accepted meaning of 'employment', extending, often in a modified way, to some non-employee workers.⁸²⁶ This is achieved within each framework differently, through various formulations and tests that operate in different ways.⁸²⁷
- 703 The approach to determining the application of these laws generally starts with assessing whether an employment relationship exists.
- 704 'Employment' is the basic building block that determines how workers, and those who engage them, must interact with various regulatory frameworks.⁸²⁸ In practical terms, their status also influences where workers may obtain help and advice should they wish to raise a concern or pursue a complaint about their conditions, entitlements or obligations.
- 705 A person's 'work status' is pivotal. Work status determines a range of entitlements, protections and obligations with very different outcomes for each category.⁸²⁹ Non-employment workers are provided fewer guaranteed protections than employees.⁸³⁰

824. Victoria initially referred its industrial relations matters to the Commonwealth in 1996. The most recent referral was via the *Fair Work (Commonwealth Powers) Act 2009* (Vic). When the WorkChoices reforms were introduced, the aim was to introduce a unitary national system to cover almost all employers and remove the states' capacity to regulate employment matters. WorkChoices reforms were based primarily on the use of the corporations power in section 51(xx) of the Australian Constitution, rather than the conciliation and arbitration power in s51(xxxv) that was historically used to support Australia's industrial relations laws. However, in the case of Victoria, having referred its industrial relations powers to the Commonwealth in 1996, all employers were already treated as national system employers and covered by WorkChoices legislation, subject to some limitations regarding the Commonwealth's powers as stated in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 and other cases. Under the (then) national system, only employers (outside of Victoria and the territories) that were unincorporated (sole traders, partnerships, state government departments and incorporated entities that did not have sufficient trading or financial activities to be constitutional corporations) were not covered by the national system. The use of the corporations power was novel and one of the most significant changes introduced by the WorkChoices reforms. When the WorkChoices legislation was repealed, and with the introduction of the Fair Work Legislation in 2009, all other states except for Western Australia referred most of their industrial relations matters to the Commonwealth, subject to some specified exceptions (including in relation to the public sector and local government). In the case of WA, the national system only covers employers who are constitutional corporations and not sole traders, partnerships, other unincorporated entities and non-trading corporations are not covered by the national system but instead are covered by the State system unless they register an agreement in the national system; Stewart et al., *Creighton & Stewart's Labour Law*, p. 70; A. Stewart, 'Work Choices in overview: Big Bang or Slow Burn?', *Economic and Labour Relations Review*, vol. 16, no. 2, 2006; pp. 26-27; Fair Work Ombudsman, *Fair Work System*, [web site]; Prof Shae McCrystal and Prof Andrew Stewart, Submission 47, p. 4; Westjustice, Submission 92, p. 23.

825. See for example, *Road Transport and Distribution Award 2010*, Cl. 9, 9A, 10, 13, 14, 15, 18, 22, 27, 28.

826. Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 6; For example, the *Superannuation Guarantee (Administration) Act 1992* (Cth); *Occupational Health and Safety Act 2004* (Vic); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Accident Compensation Act 1985* (Vic). See discussion below of the application and scope of the *Independent Contractors Act 2006* (Cth) and specific laws which provide a more expansive definition of worker and cover certain independent contractors. See further Stewart et al., *Creighton & Stewart's Labour Law*, p. 196; Stewart and Stanford, 'Regulating work in the gig economy', p. 18; J. Stanford, 'The resurgence of gig work: Historical and theoretical perspectives', *The Economic and Labour Relations Review*, vol. 28, No. 3, 2017, p. 314.

827. Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 6. See further and discussed below: *Superannuation Guarantee (Administration) Act 1992* (Cth); *Occupational Health and Safety Act 2004* (Vic); *Workplace Injury Rehabilitation and Compensation Act*; *Accident Compensation Act 1985* (Vic).

828. Minter, 'Negotiating labour standards in the gig economy', p. 439; Johnstone et al., *Beyond Employment*, p. 58.

829. Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 3; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] 228 FCR 346 (Quest South Perth) at [173].

830. Johnstone et al., *Beyond Employment*, p. 189; Roles and Stewart, 'The reach of labour regulation', p. 259.

6.2.3 The origins of labour regulation and ‘work status’

- 706 The approach of using ‘work status’ to decide how work laws apply, is longstanding and based on principles arising from common law in the century before last. While the nature of work and what we want from it has evolved greatly over time, even in the last decade, the legal constructs that underpin modern work arrangements remain rooted in these long established principles, developed in a vastly different social and economic climate.
- 707 For much of the 18th and 19th centuries, master and servant laws primarily regulated work.⁸³¹ These laws created a subservient relationship, where the master had control over almost every element of a servant’s life,⁸³² with workers subordinate to an employer’s will.⁸³³ The concept of ‘employment’ evolved from this relationship, with the employer’s control over the employee the key defining characteristic of the relationship. There was a corresponding duty on the employer to engage the servant at all times, including when there was little work to do.⁸³⁴
- 708 There is a key distinction between employees – persons under the control of another and dependent on that other for income, and contractors – persons independently supplying services. The fundamental legal constructs that underpin labour regulation originate from this centuries old master and servant law.⁸³⁵ This is when the distinction between employees and ‘independent contractors’ arose.
- 709 The employment relationship is a ‘contract of service’ i.e. labour, while a non-employee is engaged under a ‘contract for services’.

6.2.4 The ‘wages–work bargain’

- 710 Employment arrangements have been based on the employer paying wages to the employee for making themselves available to work. This relationship is understood as the ‘wages–work bargain’.⁸³⁶ The employer can direct the employee to work and the employee must be ready, willing and able to work as directed.⁸³⁷
- 711 If a contract was one of employment, the employer typically assumed the risks and liabilities associated with work done under the contract and, in return, commanded control over their workers.
- 712 In Australia, an employment arrangement ‘is commonly understood as involving no liability for wages or salary unless earned by service ... service is something broader than work – it is said that the consideration for wages is a readiness and willingness to work, if and when called upon’.⁸³⁸ A mutuality of obligation must exist between the parties for a contract to exist.⁸³⁹ The presence of control and the obligation to work, as well as the totality of the relationship, are factors that determine the legal status of a worker.⁸⁴⁰ The courts have also emphasised the need to look at the system that operated and the work practices.⁸⁴¹ This mutual or inter-relationship is understood as the ‘wages–work bargain’.

831. Johnstone et al., *Beyond Employment*, p. 10.

832. Stewart et al., *Creighton & Stewart’s Labour Law*, p. 45.

833. Johnstone et al., *Beyond Employment*, p. 10.

834. Stewart et al., *Creighton & Stewart’s Labour Law*, p. 45.

835. Stewart et al., *Creighton & Stewart’s Labour Law*, pp. 45 and 521.

836. Employment arrangements are typically based on an exchange of wages for work, under a contract of service: for time based work, a per hour wage rate is paid for the number of hours worked; a piece rate may be paid for the completion of a task or piece of work; payment may be based on an annual salary for an amount that usually does not vary based on the hours worked by an employee: Johnstone, et al., *Beyond Employment*, p. 415.

837. *Automatic Fire Sprinklers v Watson* [1946] 72 CLR 435 at 449; Stewart et al., *Creighton & Stewart’s Labour Law*, p. 435; Johnstone et al., *Beyond Employment*, p. 52.

838. *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] CLR 435 at 465; *Forstaff v Chief Commissioner of State Revenue* [2004] NSWSC 573; *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Gupta v Portier Pacific Pty Ltd*; *Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 at [80].

839. *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] CLR 435 at 465; *Forstaff v Chief Commissioner of State Revenue* [2004] NSWSC 573; See also Johnstone, et al., p. 415.

840. *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] 160 CLR.

841. *Hollis v Vabu* [2001] HCA 44, [24], [52], [44].

- 713 This means that even if there is no work to be done, the employer must pay the worker, or lawfully bring the employment relationship to an end (that is, terminate employment). To not do so amounts to a breach of the employment contract and a breach of laws relating to payment of wages in the FW Act. There are only very limited exceptions to this rule – some of which have been relied upon by employers to respond to COVID-19 government interventions, such as standing down a workforce without pay, for example, due to a stoppage in work or a breakdown in machinery.
- 714 When considering platform work arrangements, the FWC has fairly consistently said that the wages–work bargain is essential to establishing an *employment relationship*, and this factor has been material in the consideration of platforms’ arrangements thus far.⁸⁴²
- 715 Independent contractors on the other hand were persons independently providing services, operating autonomously, carrying the risk and the reward of applying their skills. Independent contractors are self-directed in their work and exercise a high degree of control over how it is done, generally being paid for producing a particular outcome.

6.2.5 ‘Choosing’ work status in the modern labour market

Snapshot

- ▶ Independent, self-employed workers are a critical part of the labour market.
- ▶ The distinction between self-employed workers and employees is today commonly described as follows: contractors run their own business and sell their services to others, while employees work in someone else’s business.
- ▶ The work status of some workers is ‘borderline’: they are not clearly ‘employees’ or ‘independent contractors’.
- ▶ Parties may badge the relationship as a non-employment relationship, but its real status depends on how the work is done and how the parties interact.
- ▶ This status can also change over time.

- 716 Self-employed workers are an important part of Australia’s labour market and many parties pressed the importance of maintaining the distinction between employees and ‘independent contractors’.
- 717 As the SEA puts it, ‘Employees work for an employer. Independent contractors do not work for an employer ... They are independent owner-operators or owner-managers ... the independent workforce exhibits a significant degree of either ownership or control over the assets, time, technologies and talents it uses when working’.⁸⁴³
- 718 The VCCI emphasised to the Inquiry that independent contracting arrangements delivered ‘flexibility, efficiency and productivity that adds value to the parties, the economy and society as a whole’ and the importance of ‘entrepreneurship, risk taking, investment and choice which underpin contracts for services’.⁸⁴⁴

842. *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807.

843. Self-Employed Australia, Submission 67, p. 6 and 7.

844. Victorian Chamber of Commerce and Industry, Submission 83, p. 5.

- 719 The modern regulatory framework recognises and embeds the dichotomy in work laws.⁸⁴⁵
- 720 In many cases, parties make informed and deliberate choices about the nature of their work arrangements. As the Ai Group says, ‘the vast majority of independent contractors have absolutely no desire to be employees.’⁸⁴⁶ And in most cases, there is no question as to the nature of the contract and which set of rules apply.
- 721 But in some cases, it is *not* clear.
- 722 ‘Work status’ can be indistinct – modern labour market work arrangements may have both non-employment and employment characteristics. This is a longstanding regulatory challenge, and much of the feedback heard by the Inquiry went to challenges that arise from the uncertainty of the current test and inadequacies around resolving that uncertainty latent in the system. Indistinct or ‘borderline’ work status is common in platform work.
- 723 Questions and problems may arise where there is a lack of clarity about the real nature of the relationship or a misalignment between the way the relationship has been described and the way in which the parties are working.
- 724 Parties may badge the relationship as a non-employment relationship, but its real status depends on how the work is done and how the parties interact. This can change over time. A contract can begin as a clear, non-employment relationship but evolve into an employment relationship.
- 725 The question of a person’s ‘work status’ is rarely the subject of formal or regulatory scrutiny at the outset. Generally, the parties establish a relationship and work on the basis that things are as described and as treated by the parties and presume this to be correct.
- 726 The issue is not usually considered in a close and detailed way unless someone challenges the prevailing presumption. This may be one of the parties or a regulator seeking to apply legal frameworks.
- 727 The concept of ‘the employment relationship’ has been applied and refined by courts and tribunals over the years in a ‘post-breach’ scenario – such as when a dispute arises within an existing, potentially longstanding relationship. The courts consider and apply legal tests that have developed in the common law.
- 728 While preserving individual choice to choose ‘work status’, the regulatory framework recognises that the extensive entitlements and protections that apply to ‘employees’ and not those who are self-employed, may provide an incentive to a party who would carry the costs of complying with these rules, to avoid them – structuring the arrangement as an ‘independent contracting’ arrangement.
- 729 To guard against this ‘moral hazard’, many laws contain anti-avoidance mechanisms (such as prohibiting ‘sham contracting’, in the case of the FW Act). Another approach used, is to extend the operation of the laws beyond the strict common law definition to capture ‘employment like’ arrangements. These measures recognise the ‘borderline’ nature of some arrangements. Anti-avoidance measures can overcome the dynamic where the decision about work status may be more heavily influenced, or even solely determined, by the party procuring the services.

845. *Independent Contractors Act 2006* (Cth), Self-Employed Australia, Submission 67, p. 6; Housing Industry Association, Submission 35, p. 9; Institute of Public Affairs, Submission 36, p. 7; Australian Industry Group, Submission 1, pp. 4, 23 and 26; Australian Chamber of Commerce and Industry, Submission 10, pp. 5 and 6.

846. Australian Industry Group, Submission 1, p. 36.

6.2.6 What are the factors to determine the work status test?

Snapshot

- ▶ The definition of ‘employee’ is not set out in most work laws.
- ▶ Employment arrangements are identified using an established, but not always clearly set out, work status ‘test’ made up of multi-factor legal indicia, developed by courts.

- 730 Notwithstanding the significance of being an employee, key elements determining a person’s work status are not set out in the employment statutes. Instead, the legislation invokes terminology that references and applies the constructs already described – to ‘an employee’ or ‘a person in a contract of service’ – a reference to the ‘common law’ contract underpinning the relationship.⁸⁴⁷ Constructs, underpinned by a range of factors and developed over time by courts applying common law ‘tests’, are applied to particular cases.
- 731 Employment arrangements are distinguished from independent contracting arrangements by applying these multi-factor legal indicia developed by the courts over time. The test has evolved from one that focused primarily on ‘direct control’ of the worker – a remnant from the origins of the test from ‘master and servant’ times, to an approach that weighs up all the features of the relationship:
- the right or legal authority to exercise control over the worker (not its actual exercise) and the extent or ability to delegate work to others⁸⁴⁸
 - whether the worker is integrated into the organisation hiring their service⁸⁴⁹
 - the substance of the relationship, not just the terms of the contract⁸⁵⁰
 - who provides and maintains tools and equipment⁸⁵¹
 - if there is an opportunity to earn a profit or risk incurring a loss⁸⁵²
 - if payment is for completion of tasks, or wages in exchange for time worked⁸⁵³
 - if the person is working in an employer’s business or carrying on their own business.⁸⁵⁴
- 732 There are no consistent rules about the weight that should be given to the different indicia.
- 733 The question as to status is generally being considered because a dispute has arisen about the application of laws which use ‘work status’ to determine entitlements.
- 734 Courts will often first look to the terms of the contract when construing the character of the contractual arrangement. Courts will also consider the economic reality and the system and work practices in place to consider the totality of the relationship between the parties. Courts balance all the indicia to determine the question⁸⁵⁵ considering all the relevant circumstances.⁸⁵⁶

847. Stewart et al., *Creighton & Stewart’s Labour Law*, p. 196.

848. *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21; *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] 160 CLR 16; *Zuijs v Wirth Bros* [1955] 93 CLR 561; Stewart, et al. *Creighton & Stewart’s Labour Law*, p. 205; Stewart and McCrystal, ‘Labour Regulation and the Great Divide’, p. 6.

849. *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] 160 CLR 16.

850. *ACE Insurance v Trifunovski* [2013] 209 FCR 146; *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation* (No.3) [2011] 214 FCR 82.

851. *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21, p. 40.

852. *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21, p. 40.

853. *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21, p. 40; Stewart, et al., *Creighton & Stewart’s Labour Law*, p. 206.

854. *On Call Interpreters v Commissioner of Taxation*; Seeobiter comments by a plurality in *Hollis v Vabu*; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45.

855. Stewart and McCrystal, ‘Labour Regulation and the Great Divide’, p. 6.

856. Johnstone, et al., *Beyond Employment*, p. 52; Stewart et al., *Creighton & Stewart’s Labour Law*, p. 195; Stewart and McCrystal, ‘Labour Regulation and the Great Divide’, p. 6.

- 735 Recent decisions of the FWC have concluded that it is necessary to look beyond the terms of agreements and to the practical relationship between the parties, to determine whether an employment relationship exists.⁸⁵⁷
- 736 Stewart and McCrystal have identified three different approaches of courts and tribunals when applying the multifactorial test:
1. a formalistic approach that places greater weight on the terms of a contract and the parties' autonomy to decide the nature of the contractual arrangement
 2. the economic reality approach which places greater weight on the practical nature of the work relationship or economic reality and the system and work practices in place when examining the totality of the relationship
 3. entrepreneurship – the person is carrying on a business of his or her own.⁸⁵⁸
- 737 Stewart and McCrystal, discussing the application of the multi-factor test in Australia, suggested that the 'plurality'⁸⁵⁹ in *Hollis v Vabu* formed a view that distinguishing an employee from a non-employee, required an assessment of whether a person served an employer's business or was carrying on their own.⁸⁶⁰
- 738 The focus on 'entrepreneurial' factors has emerged in decisions of the Federal Court of Australia and the Full Bench of the FWC when considering the application of the FW Act.⁸⁶¹ They were also applied by the Federal Court of Australia in a case involving superannuation obligations – *On Call Interpreters and Translators Agency Pty Ltd v the Commissioner of Taxation (No 3)*⁸⁶² (*On Call Interpreters v Commissioner of Taxation*). His Honour, Justice Bromberg said, where a worker did not carry the risk of financial loss or possess the opportunity to make a profit, this pointed to an employment relationship. The Court looked beyond the words in the contract to the totality and real substance of the relationship – the parties' roles, functions and work practices, in considering the 'totality of the relationship'. Justice Bromberg described the approach as an intuitive test. The Court proposed that the central questions should be:
- Viewed as a 'practical matter':*
- (i) *is the person performing the work as an entrepreneur who owns and operates a business; and*
 - (ii) *in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?*
- If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.*⁸⁶³
- 739 This approach was applied by a Full Court of the Federal Court of Australia (Full Federal Court) in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*.⁸⁶⁴ In that case, the Full Federal Court found that sham contracting had occurred, meaning that employment relationships had been 'disguised' as independent contracting arrangements. The Court said that it is necessary to consider if someone is operating a business and then consider the hallmarks of the business. The Full Federal Court concluded housekeepers working for Quest serviced apartments did not possess any of the true characteristics of a business.⁸⁶⁵
- 740 This entrepreneurship approach has been adopted in some subsequent cases,⁸⁶⁶ but questioned in others.⁸⁶⁷ Its application is yet to be authoritatively determined by the High Court.⁸⁶⁸

857. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* [2019] FWC 5008 referring to UK and US authorities on this point and see also *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698; *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807.

858. Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 7 (A worker will not tend to be viewed as an independent contractor unless they are an entrepreneur who owns and carries on their own business).

859. Considered by some to be the largest number of presiding Judges with the same view on a point.

860. Stewart and McCrystal, 'Labour Regulation and the Great Divide,' p. 8.

861. *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWA 8307; *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

862. *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366.

863. *On Call Interpreters and Translators Agency Pty Ltd v the Commissioner of Taxation (No 3)* [2011] FCA 366 [208].

6.2.7 How does the work status test apply to platform arrangements?

Snapshot

- ▶ Most platforms do not employ workers but arrange work under commercial arrangements.
- ▶ Platforms determine the form of the arrangement which may not be aligned with the legal/economic reality.
- ▶ Some platform workers' arrangements are 'borderline' or finely balanced: they have features of employment and non-employment relationships.

- 741 The majority of platforms purport to engage workers under non-employment arrangements. While a few platforms engage workers as employees, they are the exception.⁸⁶⁹
- 742 The question of the 'true status' of platform workers has drawn a multitude of opinions from commentators, experts, unions, and businesses. Some consider that the status of these workers remains unsettled.⁸⁷⁰ The arrangements often feature some of the 'employment' indicia with the platform or, potentially, an end user. But elements that suggest otherwise are generally also present. The formal, written arrangement will generally represent the relationship with the platform as being something other than an employment relationship.
- 743 With over one hundred platforms operating in Australia across a range of sectors and with a myriad of arrangements, and a test made up of several different components that is applied to a particular relationship and a point in time, it is not feasible that there would be a single answer to the 'work status' question.
- 744 The TOR for the Inquiry did not require the Inquiry to determine the arrangements or the legal status of platform businesses or workers. This is a function of the courts that must consider the question based on each individual arrangement.
- 745 Thus far, the work status of a platform worker has not been considered by an Australian court. The FWC has examined the question in relation to rideshare and food delivery platforms. The tribunal has found that platform workers' arrangements often have some aspects that indicate an employment relationship, but other factors which do not.⁸⁷¹
- 746 As discussed previously in this report, a court determination is then confined to the particular platform and potentially, only the workers whose contracts are considered.

864. *Fair Work Ombudsman v Quest South Perth Holdings Ltd* [2015] FCAFC 37 (per North and Bromberg JJ) Quest Serviced Apartments sought to re-engage employees (providing housekeeping services to Quest Serviced Apartments), as independent contractors, via a triangular contracting arrangement with Contracting Solutions Pty Ltd. The decision was appealed in the High Court. The High Court did not consider the application of the entrepreneurship test on appeal but confirmed that the sham contracting provisions in s357 of the *Fair Work Act 2009* (Cth) applied when a business contracted with a third party (labour hire firm) and that third party entered into contracts for services with two housekeepers.

865. *Fair Work Ombudsman v Quest South Perth Holdings Ltd*; J. Murray, 'A Subtle Judicial Conversation About How to Define the Employee: Recent Cases on 'Working in the Business of Another''; Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 8.

866. See for example, *Fenwick v World of Maths* [2012] FMCA 131; *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034.

867. See for example, *Tattsbet Ltd v Morrow* [2015] 233 FCR 46; *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296.

868. Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 8.

869. Sidekicker, Submission 71, p. 5; Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019; Tom Amos, Sidekicker, Individual Consultation, 24 June 2019; Mr Ben Eatwell, Weploy, Platform Business Roundtable Discussion, 22 February 2019.

870. For example, Prof Shae McCrystal and Prof Andrew Stewart, Submission 47, p. 2; Dr Tom Barrett, Dr Caleb Goods and Dr Alex Veen, Submission 14, p. 3; WEstjustice, Submission 92, pp. 18 and 29.

871. *Gupta v Portier Pacific Pty Ltd*; *Uber Australia Pty Ltd t/a Uber Eats* [2020] FWC 1698; *Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610; *Pallage v Raiser Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Raiser Pacific* [2019] FWC 4807; *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

6.2.8 A myriad of arrangements, services and parties

- 747 The Inquiry heard about and considered different formal arrangements. The prevailing theme was one of complexity and uncertainty, as well as constant change.
- 748 It is evident to the Inquiry that platforms are very deliberate in choosing their contractual arrangements. The simplicity with which end users can procure goods and services via our devices is contrasted with the complicated array of structures in place to support platforms' systems.
- 749 In some cases, there are distinct contracts with several parties. There might be three parties (platform, worker and client) or even four (platform, worker, restaurant and client). Amongst crowd-work platforms it may not be clear whether the worker is engaged by the client or the platform (or has a contract with both), regardless of the nature of the relationship. Most crowd-work platforms tend to regard the workers registered with them as non-employees.⁸⁷²
- 750 Mr Fung, CEO of Airtasker, emphasised that this platform operates more along the lines of a digital community noticeboard for self-employed people. As such, the contract for services is directly between the worker and the end user.⁸⁷³
- 751 Other platform businesses have contract terms which state that workers who operate as independent contractors are engaged by the end user client. This might be a restaurant, a passenger, or someone who uses a worker to complete a job or service in their home.⁸⁷⁴
- 752 The services agreements of some platforms contain terms that establish non-employment type characteristics. For instance, clauses that limit the use of branding, confirm that the worker must supply all tools and equipment⁸⁷⁵ or state that they can decide the best way to perform the service, perhaps by selecting their delivery route.⁸⁷⁶ There may be clauses saying workers are not obliged to perform work but can work for competitors.⁸⁷⁷
- 753 Some platforms' services agreements characterise their own business and services in a way that appears to minimise the risk of falling within various regulatory frameworks. For example, rideshare platforms sometimes frame the arrangements as connecting independent drivers with people seeking transportation services, via lead generation software applications.⁸⁷⁸ Their services contracts commonly state that the business subject to the agreement does not provide transport services in Australia.
- 754 Several rideshare platform agreements also contain clauses that aim to demonstrate there is no contract for services between worker and platform, nor of employment. It is evident that in Australia, and in the UK and US, as far as platforms self-describe themselves as merely connecting drivers with clients via lead generation software, in reality (to date), this has no material impact on the actual nature of the contract, or whether or not there is a services contract between the platform and driver.⁸⁷⁹

872. Tim Fung Airtasker, Platform Business Roundtable Discussion, 22 February 2019; Airtasker, [How do I get a payment invoice?](#) [website], 2019; Peter Scutt, Mable, Care Sector Round Table, 19 July 2019; Australian Council of Trade Unions, Submission 11, p. 2; Prof Shae McCrystal and Prof Andrew Stewart, Submission 47, p. 4.

873. Tim Fung, Airtasker, 22 February 2019.

874. Portier Pacific Pty Ltd, Uber Portier B.V. [Services Agreement](#), preamble, 2017; See also, Didi Mobility (Australia) Pty Ltd, [Driver Agreement](#) [website], Cls. 1.1 and 1.3; Airtasker, [How do I get a payment invoice?](#) [website], 2019; Jonathan Hunter, Expert360, Platform Business Roundtable Discussion, 22 February 2019; Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

875. Menulog Pty Ltd, [Courier Agreement](#) [website], Cl. 3.3, 2018; Deliveroo Australia Pty Ltd, [Supplier Agreement](#) [website], Cl. 1; Raiser Pacific Pty Ltd, Uber B.V. [Services Agreement](#), Cl. 2.5.1, 2017.

876. Menulog Pty Ltd (2018), [Courier Agreement](#) [website], Cl. 3.3, 2018; Deliveroo Australia Pty Ltd, [Supplier Agreement](#) [website], Cl. 1; Raiser Pacific Pty Ltd, Uber B.V. [Services Agreement](#), Cl. 2.5.1, 2017.

877. Menulog Pty Ltd, [Courier Agreement](#) [website], Cl. 4.3, 2, 2018; Deliveroo Australia Pty Ltd, [Supplier Agreement](#) [website], Cl. 9, 2; Portier Pacific Pty Ltd, Uber Portier B.V., [Services Agreement](#), Cl. 2.3, 2017.

878. *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 [5]; *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 at [14]; Rasier Pacific Pty Ltd, Uber B.V., [Services Agreement](#), preamble, 2017. See also, Didi Mobility (Australia) Pty Ltd, [Driver Agreement](#) [website], Cls. 1.1 and 1.3.

879. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698; *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807.

755 As noted elsewhere in this report, the economic reality as well as the form of the arrangements must be considered in determining work status. In considering these arrangements, the FWC recently found that the ostensible ‘form’ of the arrangements did not overcome the fact that the platform worker was providing services (in this case food delivery services) for the platform, and not other parties (in this case, the restaurant).⁸⁸⁰ This decision noted the challenge of applying the work status test in this sort of case noting:

*The application of [the multifactorial common law test] in borderline cases such as the one before us is not without difficulty, since it requires the making of an evaluative judgement involving the weighing of various relevant considerations and, as such, may not produce any single clear answer.*⁸⁸¹

756 The form of platforms’ arrangements is determined by the platforms and, while they may be borderline and may not consistently indicate the ‘substance’ of the relationship, they are the basis on which the parties operate, unless and until successfully challenged.

6.2.9 Control and flexibility in platform work

Snapshot

- ▶ Some platforms’ arrangements are highly controlling about what the work is and how it is performed, while others are not.
- ▶ Most platforms do not require workers to perform work at any particular time, or at all, meaning a key aspect of the traditional work status test, the ‘work-wages’ bargain, is absent, and making it less likely that the worker would be an ‘employee’ under the current test.

757 The right to exercise control over a worker, rather than the actual exercise of control over a worker, is a key element of the employment test. So too, is the ability to delegate work to others. Capacity to delegate is a factor suggesting an independent contracting, rather than employment, relationship because it indicates the worker controls how to deliver the outcome, rather than an employer directing how the work is to be done.⁸⁸²

758 Some platforms are highly controlling, fixing prices and allocating work – normally core components of business. This is more often the case where the work is homogenous – for example, rideshare and food delivery. There is little capacity for parties, other than the platform, to determine the terms of the contract.

759 The services agreements of several platforms, including Menulog and Deliveroo, contain express rights to delegate. This was seen to result in workers having greater control.⁸⁸³ Some platforms told the Inquiry that any requirement to engage workers as employees would inhibit the control (and flexibility) on-demand workers want.⁸⁸⁴ However, while some platforms allow workers to delegate work without qualification, others do not.⁸⁸⁵

880. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 at [45].

881. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 at [55].

882. *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; Stewart et al., *Creighton & Stewart’s Labour Law*, pp. 205 and 207; Stewart and McCrystal, ‘Labour Regulation and the Great Divide’, p. 6, (foreshadowed earlier in the report).

883. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne; Menulog, Submission 50, p. 11; Self-Employed Australia, Submission 67, p. 6.

884. Ann Tan, Ola, Platform Business Roundtable Discussion, 22 February 2019; Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019; Maggie Lloyd and Lucas Groeneveld, Uber, Individual Consultation, 19 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

885. Uber does not permit delegation. It has submitted variously in Fair Work Commission proceedings that the Victorian Government regulations prevented the delegation of work. Although the Fair Work Commission noted that the submission of Uber does not address the question of whether rides assigned through the Partner App could be delegated to other people who hold the requisite Government license: *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579, at [41]. See further *Raiser Pacific Pty Ltd, Uber B.V. Services Agreement*, Cl. 4, 2017.

- 760 During consultations, one platform emphasised that workers can work for other platforms and delegate tasks. According to Deliveroo, 40 per cent of drivers had delegated deliveries in the past.⁸⁸⁶ In this case, the Deliveroo rider is responsible for paying the delegate and risks their relationship with Deliveroo if the delegate fails to deliver the food.
- 761 Deliveroo, Menulog, Uber and Uber Eats' agreements all state that they do not oblige workers to perform work, nor restrict them from working for competitors.⁸⁸⁷ Rideshare and food delivery platforms emphasised the right of workers to work for a competitor, even at the same time.⁸⁸⁸ Indeed, Uber made this point when addressing the engagement of its workers, saying the benefits of independent contracting are two sided; even if multi-platforming may be contrary to its commercial interest.⁸⁸⁹ It is suggested that such entrepreneurial behaviour maximises earnings⁸⁹⁰ and is crucial to maintaining the value of on-demand services for workers and purchasers.⁸⁹¹
- 762 Some participants (including unions and workers) suggested, in stark contrast to submissions by many platforms, that non-employees are subjected to a large amount of control over who accesses work – and therefore what income is earned.⁸⁹² HACSU submitted that control is exercised by some platforms by conducting extensive pre-screening and approval checks prior to workers' registration.⁸⁹³ The NUW also advised the Inquiry that many on-demand platforms operate like labour hire firms, supplying workers to people and businesses who need their services.⁸⁹⁴ Importantly, many labour hire firms engage workers as casual employees.⁸⁹⁵ It is evident that some platforms exert much control over who can access work and how. This determines the quantum of workers' earnings.
- 763 Other platforms are agnostic as to the nature of the services or how they are delivered, and the price set by the parties. This is more common with crowd-work systems. Such systems may still require workers to meet certain standards of service or conduct but are generally less prescriptive about the way in which work is performed.
- 764 The other critical element is the presence or otherwise of the wages–work bargain. This has been found to be wanting in some cases so far,⁸⁹⁶ because platform workers are generally not required to make themselves available to work at any particular time, or indeed, at all.
- 765 Generally, platforms' positions are that workers are not under any obligation to perform even a minimum amount of work.⁸⁹⁷ Workers can juggle other commitments, because they need not work unless it suits them.⁸⁹⁸ The flexibility of platform work is seen as one of its major attractions.⁸⁹⁹ It is also seen as a key determinant of work status.

886. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

887. Menulog Pty Ltd, [Courier Agreement](#) [website], 2020, Cl. 2.4, 2.5, Deliveroo Australia Pty Ltd, [Supplier Agreement](#), Cl. 9, 2; Raiser Pacific Pty Ltd (2017), Uber BV [Services Agreement](#), Cl 4; Portier Pacific Pty Ltd (2017), Uber Portier B.V. [Services Agreement](#), Cl 2.3; Deliveroo, Submission 28, p. 3; Menulog, Submission 50, p. 11.

888. Deliveroo, Submission 28, p. 4; Uber, Submission 79, p. 29; Georgia McEncroe, Shebah, Platform Business Roundtable Discussion, 22 February 2019; Confidential Submission, Submission 56, p. 7.

889. Uber, Submission 7, p. 29.

890. Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019.

891. Confidential Submission, Submission 56, p. 2.

892. National Union of Workers, Submission 54, p. 3; Health and Community Services Union, Submission 34, p. 5; Samantha (worker), Submission 65, p. 7; Luigi, Workers' Online Conversation, Department of Premier and Cabinet, 19 August 2019; Unions NSW, Submission 80, p. 7.

893. Health and Community Services Union, Submission 34, p. 5.

894. National Union of Workers, Submission 54, p. 3.

895. National Union of Workers, Submission 54, p. 2.

896. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWC 1698; *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807.

897. Deliveroo, Submission 28, p. 3; Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019; Simon Smith and Ann Tan, Ola, Individual Consultation, 3 July 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne; Uber, Submission 29, p. 8; Maggie Lloyd, Uber, Individual Consultation, 19 July 2019; George McEncroe, Shebah, Platform Business Roundtable Discussion, 22 February 2019.

898. George McEncroe, Shebah, Platform Business Roundtable Discussion, 22 February 2019; Uber, Submission 79, p. 5; Deliveroo, Submission 28, p. 5; Shebah, Submission 68, p. 3.

899. McDonald et al, *Digital Platform Work in Australia*, p. 9; AlphaBeta, Strategy and Economics, [Flexibility and fairness](#), p. 5; Uber, Submission 79, p. 29, Uber notes that 'it respects the genuine two-sided flexibility that comes with independent work – embracing flexibility even where it may not be commercially viable.'

- 766 Platform systems that allocate work for ‘periods of time’⁹⁰⁰ may begin to resemble ‘rostering’, a feature of employment, and might suggest the existence of a ‘wages–work’ bargain.
- 767 Menulog enables its couriers to nominate for work on a delivery run. Menulog contends that the workers may log off at any time without penalty.⁹⁰¹ This means that, although effectively ‘rostered on’, they’re under no obligation to work.
- 768 Deliveroo’s ‘self-service booking tool’ allocates riders based on predictions of demand.⁹⁰² This is a focus of submissions in a current case involving Deliveroo. The applicant is arguing that he is an employee, in part because a certain level of performance and shifts are necessary to maintain a high ranking on the platform.⁹⁰³ Riders who book and work a lot of shifts at times when demand is high are rewarded with priority access to those shifts.⁹⁰⁴
- 769 While platform workers may work ‘when they want’, work may only be available at certain times. It is the ‘client’ who determines the demand, as much as the worker may choose when to log on.
- 770 The RSDU suggested that full-time rideshare drivers who rely upon platforms for their income, are not entirely free to determine when they work because they must work when demand is high, which are mainly rush hours.⁹⁰⁵ A survey commissioned by Uber concluded that driver-partners earned more money per hour if they worked on the weekends (especially during the evenings) and in November and December.⁹⁰⁶
- 771 Similarly, Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen (see Chapter 5) noted that for food delivery riders, lunch and dinner – particularly on weekends – were the highest earning periods and so the imperative to earn (especially given the work was paid in ‘piece rates’) offset work flexibility.⁹⁰⁷ The ASU also noted that jobs may need to be carried out at very specific times of the day and that ‘high competition between workers may require workers to take on long hours at unsociable times to ensure sufficient earnings, an issue which may especially impact service work which involves relationship building and maintenance as is the case in the care industry.’⁹⁰⁸ Other participants in other industries also stated that the availability of work varies seasonally or that workers must be waiting online for work to become available to obtain it.⁹⁰⁹
- 772 It also appears that, even if rideshare and food delivery workers are not generally penalised for not accepting a job, they may be influenced by the perception that they will be. In the VTHC survey, food delivery drivers reported receiving fewer jobs for being unavailable, or having their accounts deactivated as a result of not accepting jobs.⁹¹⁰ A VTHC organiser also referred to the lack of clarity about the algorithms for some of the platforms regarding whether “they’re going to face some kind of punishment or drop down in the ratings.”⁹¹¹ The National Survey found that 22.8 per cent of participants stated that their main platform penalised them for declining work, while 21.2 per cent said they did not know.⁹¹²

900. Menulog enables its couriers to nominate to work on a delivery run, the company states that they may log off at any time without any penalty (Menulog, Submission 50, p. 11); Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019; For further detail on the Self Service Booking Tool, see also Deliveroo, [Work in more zones with the booking tool](#) [website].

901. Menulog, Submission 50, p. 8.

902. Deliveroo, Submission 28, p. 4.

903. ‘Deliveroo Worker Pursuing Sham Contracting Case’, *Workplace Express*, 19 July 2019.

904. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019; For further detail on the Self Service Booking Tool, see also Deliveroo, [Work in more zones with the booking tool](#) [website].

905. Ride Share Drivers United, Submission 63, pp. 2-3.

906. AlphaBeta, Strategy and Economics, [Flexibility and fairness](#), p. 19.

907. Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen, Submission 14, p. 4 (The researchers are from Edith Cowan University, the University of Western Australia and the University of Sydney respectively. They drew upon their own original research on food-delivery work in the on-demand economy in their submission to the Inquiry).

908. Australian Services Union, Submission 13, p. 13.

909. Catherine Cardinet, Submission 22, p. 1; Anonymous Worker 03, Submission 7, p. 4; National Tertiary Education Union, Submission 51, p. 3.

910. Victorian Trades Hall Council Supplementary Submission 89, p. 39.

911. Allan MacGill, Victorian Trades Hall Council, Union and Worker Roundtable Discussion, 7 June 2019.

912. McDonald et al., *Digital Platform Work in Australia*, p. 47.

- 773 Deliveroo, on the other hand, submitted that the company rewards riders who ride during peak periods with priority access to the ‘self-service booking system’ and that there is no impact for rejecting work. However, workers who cancel bookings at late notice may be suspended from the platform, while those who do not, for example, work regularly, may lose priority status.⁹¹³ Menulog submitted that couriers can elect not to log in for any nominated delivery run, decline a delivery opportunity proposed to them in any given delivery run, or check out of any nominated delivery run at any time without consequence.⁹¹⁴ Uber told the Inquiry in relation to their drivers, that there is no requirement to accept jobs. However, in extreme cases where the driver rejects many jobs, they may be suspended.⁹¹⁵
- 774 While the ‘reality’ for workers is they may feel compelled or incentivised to work at particular times, the lack of any formal requirement to work or complete a particular shift may amount to a ‘deal breaker’ in any attempt to extend employment conditions to platform workers under the current test. It is this key characteristic that sets a self-employed platform worker apart from a casual employee.
- 775 The ‘self-determined’ nature of the timing of platform work distinguishes it from casual employment. While both are ‘on-demand’ and subject to need, in the latter case, someone else – an employer – decides when work is required to be done and generally defines a set period or shift a casual employee may accept (or reject). An employee is contractually bound to fulfil the promise they have made. In the case of platform workers, they decide when to work and for how long.

6.2.10 Self-employed entrepreneurs?

- 776 Self-employed workers are, by virtue of this status, considered to be running their own business, as opposed to working in another’s enterprise. This means their rights, obligations and remedies are governed by commercial laws rather than labour laws. The nature of the remedies available to small businesses are outlined later in this report.
- 777 Platforms suggested to the Inquiry, that self-employment is a hallmark of their systems.⁹¹⁶ Platforms variously describe their workers as ‘entrepreneurs’, ‘partners’, ‘taskers’ or ‘freelancers’. The flexibility with which workers may choose when, where and for how long to work is at the core of this element.⁹¹⁷
- 778 Entrepreneurship imports attributes such as risk taking, investment and the exercise of discretion to facilitate innovation; something which should be supported.⁹¹⁸
- 779 The National Survey confirmed that the key motivations for working in the on-demand sector include factors relating to ‘working for myself and being my own boss’.⁹¹⁹
- 780 Workers, the Inquiry was told, willingly accept the absence of minimum rates, leave entitlements and other protections, in a trade-off for being their own boss. One on-demand platform said that ‘industrious entrepreneurs’ are attracted to the opportunity to build a business or to earn supplementary income.⁹²⁰ Uber suggested that:

*the flexibility Uber offers is proving an attractive option for many ... entrepreneurs ... partners tell us they value the freedom of being their own boss and choosing if, when and where they drive or deliver ...*⁹²¹

913. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019; Menulog, Submission 50, p. 8.

914. Menulog, Submission 50, pp. 8-10.

915. Lucas Groeneveld, Uber, Individual Consultation, 19 July 2019.

916. Uber, Submission 79, p. 4; Victorian Chamber of Commerce and Industry, Submission 83, p. 5; Direct Selling Australia, Submission 29, p. 3; Australian Chamber of Commerce and Industry, Submission 10, p. 13; Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2020; Robert van Stokrom, DFP Recruitment, Platform Business Roundtable Discussion, 22 February 2019; Confidential, Submission 56, p. 3; Law Institute of Victoria, Submission 39, p. 3.

917. Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019; Deliveroo, Submission 28, p. 1; Menulog, Submission 50, p. 11; McDonald et al., *Digital Platform Work in Australia*, p. 59; AlphaBeta, Strategy and Economics, [Flexibility and fairness](#), p. 19.

918. Australian Chamber of Commerce and Industry, Submission 10, p. 13; See, Samantha (worker), Submission 65, p. 5.

919. McDonald et al., *Digital Platform Work in Australia*, p. 59.

920. Confidential, Submission 56, p. 7.

921. Uber, Submission 79, p. 5.

- 781 Workers can maximise their earnings by having a relationship with more than one platform and working for them simultaneously.⁹²² One platform operating in the caring sector, told the Inquiry that it engages its workers as independent contractors and they are able to earn an income from multiple sources.⁹²³ However, a worker seeking to earn income from multiple sources may indicate something other than entrepreneurship. In a labour market that is unfavourable to some types of workers, particularly the low skilled, and where there is underemployment and high youth unemployment, people working more than one job may suggest necessity rather than choice.
- 782 In some cases, the degree of control exercised by platforms, particularly those determining prices and allocating work, does not seem to align with the characterisation of their workers as ‘entrepreneurs’.
- 783 A submission from a worker to the Inquiry noted that the narrative around on-demand work is one of entrepreneurial on-demand workers ‘living the dream of self-determined lives’. The person thought reality was more about workers who barely make a living wage and have fewer benefits and fewer rights than those employed under awards or enterprise agreements.⁹²⁴

6.2.11 Work status and ‘entrepreneurship’ – contemporary consideration by FWC Full Bench

- 784 In the most recent and significant consideration of the work status of a platform worker, in April 2020, the Full Bench found an Uber Eats driver was not an employee, even though she was not conducting a business in her own right.
- 785 The Full Bench majority said, “There was no aspect of the work which would permit it to be characterised as the carrying on of an independent business or enterprise”.
- 786 Even so, the Full Bench found:
- ... we do not consider that Ms Gupta’s relationship with Portier Pacific bore a number of the usual and essential hallmarks of an employment relationship, namely a requirement to perform work at particular times or in particular circumstances, exclusivity when work is being performed, and presentation to the public as serving in the business. For these reasons we conclude she was not an employee of Portier Pacific ...*
- 787 In commenting on the ‘tension’ between these two conclusions, the FWC went on to propose that:
- It may be that the difficulty is answered by the proposition that Ms Gupta had the capacity to develop her own independent delivery business as a result of her legal and practical right to seek and accept other types of work while performing work for Uber Eats, but chose not to.*⁹²⁵
- 788 This illustrates how finely balanced a proposition work status can be. The common law work status test in the ‘real’ world is not maintaining a clear distinction between an independent, autonomous worker operating their ‘own’ business and an employee working as part of another’s enterprise. Some platforms’ arrangements are blurring the distinctions.
- 789 The decision has already been criticised by some commentators. Leading RMIT employment and labour law academic, Professor Anthony Forsyth, said:
- The FWC majority finding that an Uber delivery driver could not bring an unfair dismissal claim as she was an independent contractor highlights a need for legislative intervention to recognise that many gig workers are employees.*⁹²⁶

922. Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019.

923. Peter Scutt, Mable, Care Sector Roundtable Discussion, 19 July 2019.

924. Samantha (worker), Submission 65, p. 5.

925. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 at [55], [68], [70] – [72].

926. A Forsyth, *The Uber Eats’ Decision: Australia’s FWC Full Bench misses the chance to see through the gig economy’s sophistry*, Labour Law Down Under, 2020 [website]; A. Patty and N. Bonyhady, ‘Uber scores major victory in argument driver was not an “employee”’, *The Sydney Morning Herald*, 21 April 2020 (see comments of Prof. Andrew Stewart).

6.3 TERMS OF REFERENCE 2 – APPLICATION OF WORK LAWS

Snapshot

- ▶ The primary source of employment entitlements, the FW Act, maintains a clear division between employees and self-employed independent contractors – employees are extended core conditions and protections while self-employed workers are not.
- ▶ Superannuation, tax, health and safety, and workers' compensation apply to employment relationships, but also extend entitlements and protections to some non-employees.
- ▶ These 'extensions' are designed to protect workers, irrespective of their 'strict' work status.
- ▶ While the extensions enlarge the cohort of workers who benefit from protections, their differential operation and complexity cause confusion for non-employee workers – including platform workers – about their rights.

- 790 This report has thus far focused primarily on the application of 'core' work arrangements – and those laws which extend entitlements and protections to workers in relation to their remuneration, leave and security of employment. These benefits are contained in the FW Act and apply primarily to employees. Independent contractors are singled out for some protections – generally associated with protecting their choice to work as an independent contractor without interference.
- 791 The Federal Workplace Relations framework has structurally reinforced the delineation by expressing the intention that 'independent contractors' arrangements should be covered by 'the rules of common law and equity' and should not be covered by 'employment like' laws.⁹²⁷
- 792 The TOR ask the Inquiry to consider the application of 'work laws and instruments' including health and safety, accident compensation, tax and superannuation laws.
- 793 This part considers the issues for platform workers under these laws. Some of these laws are federal (superannuation, income tax) and others are state laws (health and safety, accident insurance, payroll tax).
- 794 Each of these frameworks applies based on the basic 'building block' of 'work status', operating in the first instance with respect to 'employers' and 'employees'. However, each of these sets of rules also extends, often in a modified form, to some classes of non-employee workers. Unlike the FW Act, other frameworks have not maintained the strict common law position.
- 795 Each of the frameworks extends to non-employee workers in different ways, to achieve different policy outcomes. Approaches adopted include 'deeming' some (but not all) non-employee workers to be employees or using an extended definition that catches a broader range of worker. It is not uncommon for frameworks to draw in non-employee workers who earn a significant proportion of their income from a single 'contract' or to specifically identify categories of workers who are covered.

927. The *Explanatory Memorandum* of the Independent Contractors Bill states that the purpose of the Bill is to establish a national services contract review scheme, for the first time. This is to enable applications to be made to the Court for the review of services contracts on the ground that they are unfair or harsh. This scheme would offer efficient and easily attainable access to reasonable remedies for parties with contracts which are found to be harsh or unfair. The principal objects of the *Independent Contractors Act 2006* (Cth) are to: protect the freedom of independent contractors to enter into services contracts; recognise independent contracting as a legitimate form of work arrangement that is primarily commercial; prevent interference with the terms of genuine independent contracting arrangements. The Act also inhibits state governments from legislating for 'employment-like' entitlements, subject to certain exceptions.

6.3.1 Health, safety and accident compensation laws and platform work

Snapshot

- ▶ The diverse nature of platform work means there is a wide range of health and safety risks for platform workers. Some platform workers are spending significant time 'on the road' and/or entering or working in an end user's home.
- ▶ There is uncertainty about the responsibility for health and safety for non-employee platform workers.
- ▶ The Inquiry notes the diversity of platform arrangements, and while it is challenging to know how the occupational health and safety laws will apply to platform workers, we consider that the model WHS laws require close attention.
- ▶ The Inquiry considers that the Victorian Government resolve the current ambiguity around the application of existing health and safety laws and ensure that platform workers' health and safety is appropriately protected. The model WHS laws should be considered in this context.
- ▶ Greater clarity, consistency and simplicity in approach for 'work status' across different regulatory frameworks would reduce uncertainty. The Inquiry is cognisant that each regulatory framework has distinct policy imperatives. These factors should all be considered and balanced as part of a broader review of 'work status' across the statute books.

- 796 Australia has comprehensive laws setting out occupational health and safety (OHS) obligations for businesses, providing for safe workplaces.
- 797 Traditionally, these laws have been established by state governments. In Victoria, the rules are set out in the Victorian OHS Act. Model national work health and safety (WHS) laws have been enacted by most states, but Victoria has maintained its own laws. The Victorian Government indicated in 2015, that since Victoria's OHS Act is largely consistent, it would not adopt the model WHS laws.⁹²⁸
- 798 The Victorian OHS Act provides a broad framework directed at improving standards to reduce work-related illness and injury and one of its objects is to eliminate risks to, and secure the health, safety and welfare of, employees and other persons at work.⁹²⁹
- 799 In addition to preventing and managing health and safety risks, state laws have also historically required employers to take out insurance to provide compensation for workers injured at work.
- 800 In Victoria, the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (WIRC Act) creates the WorkCover scheme that provides for compensation and rehabilitation of work based injuries. Generally, Victorian employers who pay more than \$7,500 in total remuneration in a financial year, must be registered for WorkCover insurance and pay premiums which fund the WorkCover insurance scheme.⁹³⁰
- 801 WorkSafe Victoria (WorkSafe) is the agency responsible for administering both Victoria's OHS laws and the WorkCover scheme.
- 802 Both frameworks provide for obligations and protections with respect to employees. They also, in different ways, extend certain obligations and protections beyond common law employees to other workers.

928. Western Australia did not adopt them either; B. Creighton and P. Rozen, *Health and Safety Law in Victoria*, 4th edition, Sydney, the Federation Press, 2017, pp. 31 and 34; Stewart et. al., *Creighton & Stewart's Labour Law*, p. 548; [OHS Alert](#), 30 March 2015 [website].

929. See *Occupational Health and Safety Act 2004* (Vic) s2.

930. See further, WorkSafe's website: <https://www.worksafe.vic.gov.au/do-i-need-register-workcover-insurance> (If you have a company that employs you, but you work entirely for the company's one business client, then you could be a deemed worker of the other entity. In that case, you would not need to register if you are a company and you do all the work for the company's one and only business client).

- 803 Platform workers who are employees are clearly captured by these frameworks. However, there is some complexity and uncertainty about whether, and how, they apply to non-employee workers. The convoluted, and in some cases, novel nature of platforms' arrangements with workers adds to the degree of difficulty in navigating these frameworks.
- 804 The Inquiry heard conflicting stories about the approach adopted by workers and platforms about health, safety and accident insurance. Much of the Inquiry's information was about the experience of rideshare and food delivery workers, whose work inherently involves risks arising from road transport, including on bikes, which present increased risks to workers.
- 805 While many workers earn income through spending time 'on the road' the ambiguity about work status for platform workers and the application of these frameworks, presents additional public policy concerns about whether Victoria's laws provide sufficient certainty and appropriate protections for this cohort.

6.3.2 Application of health and safety laws to platform workers

- 806 The OHS Act's primary duty requires that employers must provide and maintain a safe working environment for employees, which is defined as, persons engaged under a contract of employment.⁹³¹ The Act extends the operation of this duty by providing in the relevant section that 'employees' includes 'independent contractors engaged by the employer', in relation to matters over which the business has control.⁹³²
- 807 These duties are absolute, although they are qualified by what measures are reasonably practicable to manage a risk or hazard.⁹³³
- 808 There are a range of duties to manage risks and hazards, report incidents and consult with employees about health and safety matters.
- 809 The nature of platforms' arrangements may, in some cases, mean that it is unclear if a worker is 'engaged' as an independent contractor by the platform, rather than by the end user. There is judicial consideration of multi-party contract relationships, but not directly in the context of a platform worker.⁹³⁴
- 810 The Act also provides that employers must ensure that persons other than employees are not exposed to risks to their health and safety arising from the conduct of the employer's business or undertaking. This provision extends obligations to third parties such as visitors, customers and outsourced providers who might be impacted by the business. It extends the obligation to self-employed workers who might not be captured under the extended operation of the employer's duties to independent contractors it has engaged.
- 811 Between these provisions, platform workers who are employees and those who are not, are extended protections in relation to their health and safety. Both employees and self-employed workers also have duties with respect to others' safety.⁹³⁵ Self-employed persons have parallel duties – they must ensure, so far as is reasonably practicable, that persons are not exposed to health and safety risks arising from conduct of the self-employed person's undertaking (while on the road, making a delivery or providing support to someone in their home).⁹³⁶

931. Contracts of training are also covered (*Occupational Health and Safety Act 2004* (Vic) s5 (though these were not a focus of the Inquiry).

932. Section 21(3) (a) and (b) *Occupational Health and Safety Act 2004* (Vic). Such as persons who are independent contractors and any of the employees engaged by them, and self-employed persons.

933. *Occupational Health and Safety Act 2004* (Vic), Part 3; *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14 at [8]; Stewart et al., *Creighton & Stewart's Labour Law*, p. 553.

934. In *R v ACR Roofing Pty Ltd* ((2004) 11 VR 187), it was said that the scope of 21(3) of the *Occupational Health and Safety Act 2004* (Vic) should not be limited to contractors with a direct contract between the business and the worker doing the work (that is, privity of contract is not necessary). It covers any contractor (or sub-contractor) who is engaged in relation to matters over which the employer has control. The term 'engaged' includes securing or obtaining services, whether or not there was direct payment.

935. *Occupational Health and Safety Act 2004* (Vic) s23. Section 5 provides that 'For the purposes of this Act 'employer' is limited to a 'person' who employs one or more other persons under contracts of employment or contracts of training'. See *Occupational Health and Safety Act 2004* (Vic) s5.

936. *Occupational Health and Safety Act 2004* (Vic) s24.

- 812 WorkSafe confirmed that platform businesses do have duties to workers, whether employment or independent contracting arrangements are used. Duties are also owed by clients, customers and procurers of services who engage workers, but vary depending on the nature of the arrangement between the parties – a central question is whether the worker is directly engaged as an employee or an independent contractor?⁹³⁷
- 813 Once this question is answered, secondary questions arise about the extent of the duties that the platform must fulfil. The OHS Act would impose obligations on a platform business to ensure, so far as is reasonably practicable, that the workplace is safe and without risk to health in relation to matters over which the platform business has management or control.⁹³⁸
- 814 The diversity and extent of platform work limits general statements here, save for the need to consider the particular facts. Platform workers' autonomy and flexibility with respect to where and when they work, mean the question of 'control' or 'the workplace' would vary greatly. Locations of work would include Victoria's roads, end users' homes or the worker's own home.

6.3.3 Practical concerns about health and safety for platform workers

- 815 The Inquiry heard a number of issues and concerns about health and safety for platform workers.
- 816 The National Survey found that 47 per cent of current platform workers considered their health and safety conditions adequate, while 10.8 per cent did not.⁹³⁹
- 817 Key issues and concerns (raised in information provided to the Inquiry) related to those working on the roads and about those entering peoples' homes. Businesses that employ workers – both platforms and those directly employing workers who engage in the same activities as non-employee platform workers, raised issues about health and safety.
- 818 Sidekicker, an employer of on-demand workers, told the Inquiry it requires businesses to submit documentation and information relating to their OHS Act compliance prior to hiring workers. Sidekicker conducts site visits and workers can rate businesses and submit incident reports through the Sidekicker app.⁹⁴⁰

6.3.4 'On the road' – safety for rideshare and food delivery

- 819 The Inquiry received submissions about safety issues for drivers and passengers of rideshare vehicles and for other road users. Information provided about the personal safety of drivers and passengers in rideshare vehicles, not taxis, was also provided to the Inquiry.
- 820 Taxis that provide unbooked services (hailed or from a rank) are required to have a security camera, but rideshare vehicles are not. The RSDAA stated that, to a degree, technology has removed the need for some security measures that taxi drivers generally complied with. In contrast, CPVAA argued, 'An authentic video recording is the only way to ensure that both drivers and passengers are protected, by providing the necessary and irrefutable evidence to support and pursue convictions'.⁹⁴¹
- 821 Several submitters considered rideshare to be safer than taxis for passengers and drivers because of user rating and route tracking systems⁹⁴² and, as both driver and passenger are known to the rideshare platform.⁹⁴³

937. Email sent to the Inquiry from WorkSafe Victoria in response to a request by the Inquiry, 27 June 2019. See also in particular *Occupational Health and Safety Act 2004* (Vic) ss20, 21, 23–26.

938. *Occupational Health and Safety Act 2004* (Vic) ss21, 23–26.

939. A significant 22.5 per cent neither agreed nor disagreed with the proposition that the health and safety conditions are adequate, while a further 15.7 per cent did not think this was at all applicable: McDonald et al., *Digital Platform Work in Australia*, p. 52.

940. Tom Amos, Sidekicker, Individual Consultation, 24 June 2019; Sidekicker, Submission 71, p. 8.

941. Commercial Passenger Vehicle Association of Australia, Submission 24, p. 6.

942. Law Institute of Victoria, Submission 39, p. 4.

943. Ride Share Drivers Association of Australia, Submission 64, p. 4.

- 822 Rideshare platforms told the Inquiry they have brought in safety features including the ability for drivers to share their geographical location, support teams and emergency assistance buttons for drivers in distress.⁹⁴⁴
- 823 Uber referred to surveys suggesting it has helped reduce drink driving. However, other submitters said, while commercial passenger vehicle (CPV) operators must have a zero blood alcohol reading, the lack of permanent livery on vehicles makes this hard to enforce.⁹⁴⁵ Yet, all CPVs are required to display at least one form of identification when in service, and any signage must be placed so it can't be removed by a person in the driver's seat.
- 824 Uber also referred to its fatigue management policy whereby drivers and delivery partners automatically go offline for eight straight hours after a total of 12 hours online.⁹⁴⁶ However, it is unclear how this addresses fatigue management if drivers are working on multiple platforms or doing other work outside Uber.⁹⁴⁷ CPVV have told the Inquiry that these issues impacting on driver fatigue are not new.⁹⁴⁸
- 825 Given the different OHS obligations across Australia, Ola told the Inquiry that it takes the most onerous OHS obligation from across the jurisdictions, determines the highest standard and applies that nationwide.⁹⁴⁹ Ola advised the Inquiry that it was the first rideshare platform to introduce a 'safety button' in the app for customers and workers.
- 826 Despite these measures, there remain concerns about the safety risks posed by platforms.⁹⁵⁰ The TWU's submission on the outcomes of its rideshare driver survey illustrate this point. When the TWU and the Rideshare Drivers' Cooperative surveyed 1,153 rideshare drivers in 2018, there were 969 reports of harassment and/or assault.⁹⁵¹ Unsurprisingly, the RSDAA is concerned that behavioural problems with rideshare passengers are becoming more prevalent and the applicable rules do not deal with physical security.⁹⁵²
- 827 When some of these matters were canvassed with the regulator (representatives from CPVV), it advised that during consultation on the regulatory impact statement for the current governing legislation and regulations, Victoria Police did not request the installation of security cameras in all commercial passenger vehicles and CPVV has received no subsequent formal requests from Victoria Police.⁹⁵³ Further, a representative from CPVV also noted that because there is no cash transaction when rideshare vehicles are booked, there is no argument about fares and so less risk to the driver. There are also no examples of vehicle theft.⁹⁵⁴
- 828 Working long hours is said by some, to be common in food delivery. The VTHC submitted that the fact some riders reported working upwards of 80 hours per week in the 2018 On-Demand Riders Survey, raises safety and fatigue concerns for them and other road-users.⁹⁵⁵ The TWU also told the Inquiry that, during their 2018 survey of 259 food delivery riders in Sydney and Melbourne, 46 per cent said they, or someone they knew, had been injured on the job.⁹⁵⁶
- 829 The Inquiry heard from food delivery riders in the On-Demand Workers Conversation that they tend to be busy when there is bad weather even though it's dangerous to ride, because consumers do not want to leave their homes.⁹⁵⁷ Like some other submitters, the Amy Gillett Foundation identified the issue of riders taking unnecessary risks to maximise deliveries and payments.⁹⁵⁸

944. Confidential Submission, Submission 56, pp. 10-11; Uber, Submission 79, pp. 12-13.

945. Uber, Submission 79, p. 17; Commercial Passenger Vehicle Association of Australia, Submission 24, p. 5; Rodney Barton MP, Submission 15, p. 1.

946. Uber, Submission 79, p. 12.

947. Brendan O'Sullivan, Shebah, Platform Business Roundtable Discussion, 22 February 2019.

948. Email to Inquiry, Commercial Passenger Vehicles Victoria, 15 May 2020.

949. Simon Smith and Ann Tan, Ola, Individual Consultation, 3 July 2019.

950. Leanne (consumer), Submission 40, pp. 1-2; Rodney Barton MP, Submission 15, p. 1; Becca (consumer), Submission 16, p. 1.

951. Transport Workers' Union of Australia, Submission 78, pp. 6-7.

952. Ride Share Drivers Association of Australia, Submission 64, p. 4.

953. Commercial Passenger Vehicles Victoria, 29 August 2019, Individual Consultation, Department of Premier and Cabinet, 1 Spring St, Melbourne.

954. Commercial Passenger Vehicles Victoria, 29 August 2019.

955. Victorian Trades Hall Council, Submission 88, p. 5.

956. Transport Workers' Union of Australia, Submission 78, p. 5.

957. 'DRI' and 'Rider', On-Demand Workers' Online Conversation, 19 August 2019.

958. For example, Susan (consumer), Submission 76, p. 3; Amy Gillett Foundation, Submission 3, p. 2; Marin-Guzman, '[Deliveroo seeks driver safety advice](#)', *Australian Financial Review*, 15 October 2019, p. 8 (noting comments by the Transport Workers' Union on this issue).

CASE STUDY

DELIVEROO

Deliveroo's contracts with its delivery workers provide that parties share responsibility for compliance with applicable occupational or work health and safety laws, as may be relevant.⁹⁵⁹ This is true under Victoria's OHS Act but Deliveroo cannot avoid obligations that otherwise apply to it.⁹⁶⁰

Deliveroo has duties to ensure that workplaces under its management and control are safe, and to maintain safe systems of work.⁹⁶¹

Deliveroo's capacity to ensure that a rider is safe on the road will be affected by matters within its control, although, it will need to implement reasonable work-related driving safety measures (see WorkSafe's guidelines).⁹⁶²

In 2017, the Amy Gillett Foundation conducted a review of Deliveroo's onboarding practices. It commended Deliveroo for its existing safety measures and proactiveness in seeking to further improve its safe cycling practices, but also recommended things Deliveroo could do to improve consistency and increase safety.⁹⁶³

Deliveroo has taken proactive steps in relation to health and safety matters. In response to fairly recent extreme heat and bushfire smoke, Deliveroo said no rider was obliged to work and could take themselves off the app if they wished to.⁹⁶⁴

Delivery riders have been provided with advice during the COVID-19 crisis about hygiene and protection, with 'leave at door' (no contact) policies being implemented to minimise contact, and isolation compensation is being provided.⁹⁶⁵

Deliveroo recently appointed 10 riders to a Rider Advisory Panel set up to manage the health and safety concerns of its riders, including by focusing on improving safety for its network of more than 8,000 riders across Australia.⁹⁶⁶ Deliveroo stated, 'This is Australia's first rider-run panel established by a food delivery platform'.⁹⁶⁷ The TWU reportedly said the panel is a 'smokescreen' and workers who had spoken out about safety concerns were left off it.⁹⁶⁸

The TWU recently called on SafeWork NSW to investigate Deliveroo over its alleged refusal to allow workers to elect OHS representatives and for discriminating against a TWU member involved in negotiations. The TWU suggests that the health and safety concerns of Deliveroo workers would be best dealt with by small geographic groups. Deliveroo says a single work group best suits their business. With workers operating across NSW, it maintains there are no issues that warrant a specific work group and that relevant state legislation does not readily apply to the flexible nature of the work relationship between Deliveroo and its riders.⁹⁶⁹

959. Deliveroo Australia Pty Ltd, *Supplier Agreement*, Cl. 3.1, 3.2.

960. See *Occupational Health and Safety Act 2004* (Vic), s21.

961. *Occupational Health and Safety Act 2004* (Vic), s20. The duty in section 21 is to be construed and applied having regard to section 20 of the *Occupational Health and Safety: Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14 at [8].

962. Transport Accident Commission and WorkSafe, *A handbook for workplaces – Guide to safe work related driving*, edn. 1, November 2008.

963. Amy Gillett Foundation, Submission 3, pp. 2–3.

964. E. Koehn, 'No rider obliged to work: Delivery start-ups monitor smoke conditions' [website] *Sydney Morning Herald*, 15 January 2020.

965. P. Smith, 'Low-paid gig economy workers on the coronavirus front line', *Australian Financial Review*, 10 March 2020, p. 23; Uber will provide drivers and riders with the equivalent of two weeks' pay if drivers have to self-isolate, A. Brown, 'Uber to suspend accounts for coronavirus affected drivers', *Canberra Times* [website], 12 March 2020; Menulog will implement contactless delivery, Menulog, *Menulog online ordering, pick up and delivery services*; Uber will implement contactless delivery provide financial assistance for up to 14 days for drivers diagnosed with COVID-19 or placed in quarantine by a public health authority who are required to self-isolate, Jodie Auster, Uber, *Supporting Restaurants across Australia and New Zealand amid the COVID-19 Epidemic* [website], 17 March 2020; Deliveroo will refund up to \$10 on hand sanitiser and provide financial support for drivers for up to 14 days if placed in quarantine or diagnosed with COVID-19, Deliveroo, *COVID-19 Guidance* [website], 24 March 2020.

966. Deliveroo's media release states that 10 riders were selected from 130 applications but provides no detail about the selection process: Media release titled 'Deliveroo elevates safety with new Rider Advisory Panel' attached to an email to the Inquiry from Deliveroo dated 15 October 2019; Marin-Guzman, 'Deliveroo sets up gig economy's first rider advisory panel' [website], *Australian Financial Review*, 15 October 2019.

6.3.5 Submissions for potential reform of health and safety for platform work

- 830 Several submitters recommended that the Victorian government address any doubt, ensuring workplace health and safety laws require on-demand businesses to take responsibility for the safety of their workers.⁹⁷⁰ Professor David Peetz noted in his submission to the Inquiry that, 'There is considerable international evidence that workplace health and safety outcomes are poorer for contractors than for employees'.⁹⁷¹
- 831 Some submissions asserted that the model WHS laws offers superior coverage that would resolve these issues and urged Victoria to adopt the model WHS laws.⁹⁷² Both Ai Group and the Australian Institute of Employment Rights (AIER) said that, if the current Inquiry identifies shortcomings in the OHS Act, consideration should be given to adopting the model WHS laws.⁹⁷³
- 832 Unlike the OHS Act, the national laws are said to require businesses to 'actively manage' the work of expert contractors, to ensure the health and safety of all workers and others. Some have therefore suggested that more effort is required to manage contractors than under the OHS Act in Victoria.⁹⁷⁴

6.3.6 Platforms and insurance

Snapshot

- ▶ There is uncertainty about accident and injury insurance, including the operation of WorkCover, for non-employee platform workers in Victoria.
- ▶ Some platforms provide insurance for workplace accidents and injuries but it is not always clear or obvious which work based activities are covered and these schemes may involve additional fees for the worker.
- ▶ Platform workers who work 'on the road' may be eligible for (Transport Accident Commission (TAC) benefits, as would any Victorian who is in an accident involving a vehicle. It is not ideal that rideshare or food delivery workers in particular may be reliant on a default (transport accident) as opposed to worker designed scheme.
- ▶ It is evident that on-demand workers may be eligible under a patchwork of schemes.
- ▶ The outcome is that platform workers are often uncertain about insurance and may have inferior or inadequate insurance for work based injuries.
- ▶ The Inquiry considers that the Victorian Government resolve any ambiguity around the operation of WorkCover for non-employee workers and ensure that platform workers receive appropriate protections.
- ▶ Greater clarity, consistency and simplicity in approach for 'work status' across different regulatory frameworks would reduce uncertainty. The Inquiry is cognisant that each regulatory framework has distinct policy imperatives. These factors should all be considered and balanced as part of a broader review of 'work status' across the statute books.

967. Media release titled *Deliveroo elevates safety with new Rider Advisory Panel* attached to a Deliveroo email to the Inquiry dated 15 October 2019. Deliveroo's media release states that 10 riders were selected from 130 applications but provides no detail about the selection process.

968. D. Marin-Guzman, '[Deliveroo sets up gig economy's first rider advisory panel](#)'.

969. 'TWU seeks SafeWork intervention at Deliveroo', *Workplace Express*, 27 February 2020.

970. WEstjustice, Submission 92, p. 13; Australian Council of Trade Unions, Submission 1, p. 15; Victorian Trades Hall Council, Submission 88, p. 4; Australian Institute of Employment Rights, Submission 12, p. 4; Dr Tom Barratt, Dr Caleb Goods, and Dr Alex Veen, Submission 14, p. 5; JobWatch, Submission 37, p. 8; Richard McEncroe, Submission 48, p. 4; National Union of Workers, Submission 54, p. 3; Susan (consumer), Submission 76, p. 1; Australian Institute Centre for the Future of Work, Submission 9, p. 26; Unions NSW, Submission 80, p. 3; Victorian Council of Social Service, Submission 84, p. 6.

971. M. Quinlan, 'The effects of non-standard employment on worker Health and Safety', *Conditions of Work and Employment Series*, ILO Geneva, cited in Prof David Peetz, Submission 58, p. 5.

972. Australian Industry Group, Submission 1, p. 42; Australian Institute of Employment Rights, Submission 12, p. 8; JobWatch, Submission 37, p. 8.

973. Australian Industry Group, Submission 1, p. 42; Australian Institute of Employment Rights, Submission 12, p. 8.

974. Stewart et. al., *Creighton & Stewart's Labour Law*, p. 554.

- 833 Nearly half of respondents to the National Survey who were currently doing platform work (45.5 per cent) reported that their main platform does not cover them for any type of work-related insurance (for example, work-related injuries or professional indemnity). A similar and comparable proportion (39.7 per cent) said their main platform requires them to take out their own insurance. Over 20 per cent of current platform workers do not know if their platform provides them with insurance or requires them to take out their own.⁹⁷⁵
- 834 There was a great deal of confusion about the options for, and application of, current accident insurance schemes for different types of platform worker. Workers who spoke with the Inquiry expressed confusion and uncertainty about the extent of coverage for work related accidents, particularly traffic accidents.⁹⁷⁶
- 835 There was also confusion about the application of, and responsibility for, workers' compensation.

6.3.7 WorkCover and platform workers

- 836 Victoria's statutory workers' compensation scheme, WorkCover, enables 'a worker' to make a claim for compensation for a workplace injury. Claims can cover lost income, compensation for permanent impairment, medical treatment (surgery or physiotherapist services), rehabilitation and/or disability support services (including for people who need this at home). The primary definition of 'worker' in the Act is a person who performs work (or agrees to perform work) for the employer 'at the employer's direction, instruction or request, whether under a contract of employment (whether express, implied, oral or in writing) or otherwise'.⁹⁷⁷ An 'employer', in turn, is defined with respect to various types of relationships with the worker.⁹⁷⁸ The reference to 'direction, instruction or request' imports similar concepts to the common law work status test.
- 837 The Act also extends beyond this core definition to other persons 'deemed' to be so covered. These extensions apply to certain specified workers despite them working under non-employment arrangements.⁹⁷⁹ Cohorts captured via this mechanism include taxi drivers working under bailment,⁹⁸⁰ and individual owner drivers working primarily for one principal hirer providing transport services.⁹⁸¹
- 838 'Deemed' workers also include certain contractors who provide services where the individual performs at least 80 per cent of the overall contract work, where they are paid mainly for the supply of labour, and payment from the hirer represents at least 80 per cent of the individual's gross income, for services of the same kind, for a 12-month test period.⁹⁸²
- 839 Some challenges arise in relying on these 'deemed worker' mechanisms to capture non-employee platform workers.
- 840 The Inquiry was informed that a delivery driver working for a food delivery platform sustained multiple injuries when struck by another vehicle. Following an investigation of the claim, it was rejected on the basis that the individual was not a worker under the Act. This decision, the Inquiry was told, was based on information provided by the platform that the worker was an independent contractor not working under a contract of employment.⁹⁸³
- 841 There are several reasons self-employed platform workers may not qualify under this test.
- 842 Firstly, given the secondary nature of platform income for most workers, it is not clear that most non-employee platform workers meet the requirements around the extent to which their gross income arises from one contract over a 12-month period.⁹⁸⁴

975. McDonald et al., *Digital Platform Work in Australia*, p. 6.

976. Deliveroo worker, Union and Worker Roundtable Discussion, 7 June 2019; Former Foodora and current Figure Eight worker, Union and Worker Roundtable Discussion, 7 June 2019. Two other food delivery workers (a Deliveroo worker and an Uber worker), expressed concern about the cost of coverage when insurers realise they are using their vehicle for commercial purposes, Workers' Roundtable Discussion, 29 July 2019.

977. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), s3.

978. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), s3.

979. WorkSafe, [Contractors and workers guideline](#) [website], last updated 6 December 2019.

980. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), Schedule 1, Cl. 7.

981. Under schedule 1 clause 8 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).

982. Each financial year (1 July to 30 June) or 12-month period is called a 'relevant period'; WorkSafe, [Contractors and workers guideline](#) [website], last updated 6 December 2019; WorkSafe, Individual Consultation, 19 June 2019, Department of Premier and Cabinet, Melbourne; WorkSafe, Information Briefing, 27 June 2019 (by email).

983. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), Schedule 1, Cl. 9; WorkSafe, Individual Consultation, 16 October 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne; WorkSafe, Brief, 05 November 2019 (by email).

984. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), Schedule 1, Cl. 9.

- 843 Secondly, if the services provided by a platform worker who is an independent contractor, are construed as being performed for the benefit of third parties (the end user, not the platform), the worker is unlikely to meet the test's requirements to be covered by compulsory insurance.⁹⁸⁵
- 844 Thirdly, in the case of rideshare drivers, they may not be captured under the taxi/bailee owner driver or general contractor deeming provisions. Rideshare drivers generally use their own vehicles and generally obtain multiple sources of income and therefore it is unlikely they would be captured under these provisions.
- 845 The Inquiry was informed about a case involving a rideshare driver who had an acute anxiety-stress reaction after being assaulted by an intoxicated passenger. The driver made a WorkCover insurance claim. The claim was investigated, then rejected on the basis that the individual was neither a worker, nor a deemed worker under the Act. The decision was based on information provided by the platform that the individual had not entered into a contract of bailment when driving for the platform.⁹⁸⁶
- 846 However, despite these instances, the Inquiry was informed by WorkSafe that some platform businesses do pay premiums for WorkCover insurance, and many claims made by platform workers had been accepted. The Inquiry was informed, as at November 2019, that 58 WorkCover insurance claims by on-demand workers were accepted – out of a total of 66 claims accepted and made by the broader category of platform workers and other staff working for platforms – such as administrative staff.⁹⁸⁷
- 847 Some examples of successful claims made by on-demand workers include:
- A claim was accepted for a platform food delivery driver who sustained an injury delivering food. The worker ceased work and, following surgery to repair their arm, returned to full pre-injury duties after seven months off.
 - A claim was accepted for another delivery driver performing work for a platform. The worker injured their hand and knee when another driver changed lanes without indicating. The worker required three weeks off and returned to full pre-injury duties.
- 848 At the time of meeting with the Inquiry, Deliveroo informed the Inquiry that it paid Workcover premiums and worked with Workcover in relation to claims.⁹⁸⁸ However, given that some claims had been rejected recently and no coverage provided when riders delegate tasks, Deliveroo was no-longer confident that Workcover suited its business model.⁹⁸⁹ It said alternatives were being considered.
- 849 Sidekicker also told the Inquiry it paid WorkCover premiums.⁹⁹⁰
- 850 Platform workers who are not (or may not) be able to make claims under WorkCover may be left with no compensation if they acquire a work based injury. This is an especially concerning prospect for rideshare and food delivery workers.
- 851 Several participants informed the Inquiry that, while on-demand workers may be afforded some protection under the WIRC Act, its application is not always evident or clear.⁹⁹¹ The examples of delivery and rideshare drivers above where claims were not accepted, tend to support this perspective. Several participants were critical of the ambiguity associated with the potential obligations of on-demand platform businesses to provide workers' compensation.

985. Each financial year (1 July to 30 June) or 12-month period is called a 'relevant period'; WorkSafe, [Contractors and workers guideline](#) [website], last updated 6 December 2019; WorkSafe, Individual Consultation, 19 June 2019; WorkSafe, Information Brief, 27 June 2019 (by email).

986. WorkSafe, Individual Consultation, 16 October 2019; WorkSafe, Information Brief, 5 November 2019 (by email).

987. WorkSafe, Individual Consultation, 16 October 2019; WorkSafe, Information Brief, 5 November 2019 (by email).

988. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

989. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

990. Sidekicker notes that its workers are covered by WorkCover: Sidekicker, Submission 71, p. 8; Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019.

991. See for example, Australian Institute of Employment Rights, Submission 12, p. 8; JobWatch, Submission 37, p. 8. In a report released by the McKell Institute it concluded that contractors miss out on basic workplace entitlements such as leave and superannuation, and not adequately covered by workers' compensation: N. Biddle and E. Cavanough, [Opportunities in Change: Responding to the Future of Work](#) [website], The McKell Institute, November 2019, p. 12.

- 852 When reviewing the coverage of the *Workers' Compensation and Rehabilitation Act 2003* (Qld), Professor David Peetz recommended that the applicable definitions in the Queensland Act be amended to apply to 'any person engaged via an agency to perform work under a contract (other than a contract of service) for another person'. Professor Peetz said:
- ... intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income received by the intermediaries or agencies. That premium would be based on risk experience in that industry for that type of firm.*
- 853 He recommended that Victoria consider taking a similar approach to ensure that on-demand workers are also covered by the WIRC Act.
- 854 The AIER recommended that the WIRC Act apply to on-demand workers.⁹⁹² Others wanted the deeming provisions clarified to make it apply. VCCI proposed that the provision of personal accident insurance to platform workers by WorkSafe Victoria, either directly or via platforms, be considered as an option for reform. They wanted this done on a commercial basis and with no impact on the premiums of current employers or the financial viability of the scheme.⁹⁹³
- 855 There were a range of other potential sources of compensation for these workers, including the statutory 'default' coverage for traffic accidents provided for by the TAC and insurance provided by platforms or workers themselves.

6.3.8 Platforms' approach to insurance

- 856 Some platforms provide accident or workers insurance⁹⁹⁴ or make it clear that workers should obtain their own for a range of work-related events.⁹⁹⁵ Platform workers may find themselves in a variety of 'workplaces' doing different types of work and each workplace may raise different injury risks.⁹⁹⁶
- 857 Platforms' approaches to insurance have evolved over time, maturing as the businesses have grown and workers and their representatives have sought additional protection. While acknowledging that some platforms have 'leant in' to this space, the nature and extent of coverage is not uniform and some suggest it is not as comprehensive as WorkCover would be.⁹⁹⁷
- 858 Understandably there were distinctions depending on the nature of the work and the platform model. A strong theme related to road transport where there are inherent risks for workers.
- 859 Insurance coverage is somewhat patchy for platform workers when they are in between jobs or tasks. For instance, a rider might be insured at the point when they accept a trip, and for a short period of time after the task is completed.

992. Australian Institute of Employment Rights, Submission 12, p. 9.

993. Victorian Chamber of Commerce and Industry, Submission 83, p. 6.

994. See for example, Airtasker, Airtasker Help: [How does third party liability insurance on Airtasker work for Taskers?](#) [website]; Tim Fung, Airtasker, Platform Business Roundtable Discussion, 22 February 2019. Sidekicker notes that its workers are covered by WorkCover, Sidekicker, Submission 71, p. 8. Other platforms also provide insurance: Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019; Mable, [Support Worker safeguards](#) [website]; Uber, Submission 79, p. 13.

995. Menulog indicated that it does not provide insurance for workers. It informs workers that they must have at least third party liability insurance, Lisa Brown, Menulog, Individual Consultation, 16 August 2019; Menulog, [Deliver with Menulog: Questions](#) [website]; Didi also advises its workers that they must have a vehicle insurance certificate, either comprehensive or third party, Didi, [Drive with Didi: Driver Requirements](#) [website].

996. Some submitters pointed to an increased risk from on-demand work: Australia Institute Centre for Future Work, Submission 9, p. 26 (suggests that there is a variety of on-demand work, much of which is dangerous); WEstjustice, Submission 92, p. 6 (suggests that on-demand work is frequently unsafe, and workers rarely receive access to Workcover when injured); Victorian Trades Hall Council, Submission 88, p. 13); Transport Workers Union, Submission 78, p. 2 (vulnerable on-demand transport workers at risk of injury or death); Unions NSW, Submission 80 p. 11, (Airtasker now provides information about hazards and risks associated with certain tasks).

997. Unions NSW, Submission 80, p. 7; Prof David Peetz, Submission 58, p. 1.

- 860 Uber told the Inquiry it has partnered with Chubb to provide market leading personal injury insurance, free of charge.⁹⁹⁸ Uber's insurance coverage commences when the driver accepts a trip and ends 15 minutes after it concludes.⁹⁹⁹ Food delivery partners are covered in the same way.¹⁰⁰⁰ The insurance provides accidental death and permanent total disablement benefits up to \$400,000 while other benefits vary according to the injury.¹⁰⁰¹ For temporary total disablement, Uber's insurance provides \$150 per day for up to 30 days.¹⁰⁰² A one-off lump sum of \$1,500 is also available for inconvenience associated with being temporarily unable to work.¹⁰⁰³ Uber said 90 per cent of claims made against this policy have been accepted, although it did not provide information on total numbers.¹⁰⁰⁴ To be eligible for coverage, Uber drivers must maintain their own compulsory third party (CTP) and third-party property damage insurance.¹⁰⁰⁵
- 861 One platform believed that compensation under the insurance it provides at no cost, may be, in respect of serious or major injuries, even better than what would be available under workers' compensation if its workers were engaged as employees.¹⁰⁰⁶
- 862 For other platforms, it is less clear that there is insurance, or it is unavailable. Shebah said it informs drivers they must have public liability insurance but added little more on the subject.¹⁰⁰⁷ Menulog, by contrast, said couriers must obtain their own insurance.¹⁰⁰⁸
- 863 During consultations held by the Inquiry, Deliveroo indicated that workers were responsible for providing their own insurance. The Inquiry understands that the company also allocated funds to the provision of accident insurance.¹⁰⁰⁹
- 864 Didi indicated that it provides insurance to drivers in China but not yet in Australia.¹⁰¹⁰ Although its partners must provide their own insurance, Menulog informed the Inquiry that it only partners with workers who use cars, motorbikes or scooters.¹⁰¹¹
- 865 There are other platforms operating in food delivery and rideshare which did not provide information to the Inquiry.¹⁰¹² Unless these platforms make information publicly available, it is difficult to know what they offer. The level of protection available to a worker may depend on which platform they happened to have been logged into when they accepted a task.
- 866 Airtasker informed the Inquiry that it provides insurance cover to workers. This covers the worker if they cause damage to a client's property or injure a client, in the course of their work.¹⁰¹³ An excess is payable by the worker if a claim is made.¹⁰¹⁴
- 867 Unions NSW informed the Inquiry that, following the agreement between it and Airtasker, workers using Airtasker's platform would be offered the personal accident cover.¹⁰¹⁵ The insurance would provide a lump sum payment to lessen the financial burden of injuries. It would not cover specific medical costs or provide ongoing income protection.¹⁰¹⁶ Airtasker's website provides information about an income protection policy available at cost to the worker.¹⁰¹⁷ Airtasker's website also advises workers that if personal injury arises whilst performing activities that are not excluded under the third-party liability policy, they should contact Airtasker.

998. Uber, Submission 79, p. 13.

999. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019.

1000. [Uber Personal Accident, Group Policy Wording](#), Chubb Insurance Australia Limited, 2018, p. 10.

1001. [Uber Personal Accident, Group Policy Wording](#), Chubb Insurance Australia Limited, 2018, p. 10.

1002. [Uber Personal Accident, Group Policy Wording](#), Chubb Insurance Australia Limited, 2018, p. 12.

1003. [Uber Personal Accident, Group Policy Wording](#), Chubb Insurance Australia Limited, 2018, p. 13.

1004. Maggie Lloyd, Uber, Individual Consultation, 19 July 2019.

1005. Uber, [Every trip is insured](#) [website] 2019.

1006. Confidential Submitter, Submission 56, p. 12.

1007. Shebah, Submission 68, p. 2.

1008. Lisa Brown, Menulog, Individual Consultation, 16 August 2019.

1009. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

1010. 'Didi, Individual Consultation following Platform Business Roundtable Discussion, 22 February 2019'.

1011. Lisa Brown, Menulog, Individual Consultation, 16 August 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

1012. For example, Door Dash and Easi in food delivery and Didi and Bolt in rideshare.

1013. Tim Fung, Airtasker, Individual Consultation, 3 July 2019; See also, Airtasker, [Airtasker Help, How does third party liability insurance on Airtasker work for Taskers](#) [website].

1014. Airtasker, [Airtasker Help, How does third party liability insurance on Airtasker work for Taskers](#) [website].

1015. Unions NSW, Submission 80, p. 10.

1016. Unions NSW, Submission 80, p. 10.

1017. Airtasker, Airtasker Help, [What is Roobyx income protection insurance and how does it work with Airtasker?](#), 2019 [website].

- 868 Workers performing a shift arranged through the Supp platform are covered for third party property damage or personal injury claims made by businesses.¹⁰¹⁸ As with Airtasker, an excess fee (\$1,000) is payable if a business makes a claim against Supp and Supp make a claim against the policy.¹⁰¹⁹ There is some discretion in the Supp policy as to whether the worker or Supp will pay the excess.¹⁰²⁰
- 869 Beyond third party insurance, Supp suggests that workers should make their own inquiries as to whether other insurance, including personal injury, is required.¹⁰²¹ If a worker is engaged as an employee,¹⁰²² they would be eligible for compensation through the workers' compensation scheme. Other insurances would also be provided by the hospitality business.
- 870 Sidekicker and Hireup both provide insurance cover for workers.¹⁰²³
- 871 Mable arranges personal accident insurance on behalf of independent contractors registered with their platform.¹⁰²⁴ The cost of this insurance is taken from service fees that workers pay.¹⁰²⁵ According to Mable, the insurance, through Zurich Australia Insurance, provides professional indemnity, public liability and good personal accident cover.¹⁰²⁶

6.3.9 Transport accident compensation – a suitable safety net?

- 872 Those working on the roads who are not covered by WorkCover or have insufficient alternative coverage, may be entitled to compensation from the TAC.
- 873 The TAC provides compensation for, or on behalf of, any person who is injured or dies as a result of a serious transport accident in Victoria, involving a vehicle.¹⁰²⁷ A claim can also be made if a person who resides in Victoria was injured or died in an interstate accident involving a Victorian registered vehicle, or if they were in a Victorian registered vehicle.
- 874 The policy intention behind the WIRC and TAC frameworks is that injuries shown to have arisen 'out of or in the course of employment' where work was a significant contributing factor to that injury, would be covered by WIRC. Other claims are covered by the TAC as the safety net for any person injured as a result of a transport accident.
- 875 Practically, if an injury occurs during the course of work, a worker may lodge a claim under the WIRC Act. They are encouraged to do this in the first instance. If a claim is rejected by WorkSafe, a claimant may pursue a claim with the TAC.¹⁰²⁸
- 876 Typically, the TAC and WorkSafe work together behind the scenes to determine which scheme will apply to a particular claimant.¹⁰²⁹ The TAC will often initially accept a claim while both agencies resolve coverage. The TAC facilitates discussion to ensure that any identified insurance 'gaps' are covered and to work cooperatively with other insurers so claims are directed to the best support. Doubling up on payments through more than one insurer must be avoided.¹⁰³⁰ The TAC will not pay compensation to a person who is entitled to workers' compensation.¹⁰³¹

1018. Supp, [Terms and Conditions](#) [website], Cl. 4. 'Insurance'.

1019. Supp, [Insurance](#) [website].

1020. Supp, [Terms and Conditions](#) [website], Cl. 4. 'Insurance'.

1021. Supp, [Terms and Conditions](#) [website], Cl. 4. 'Insurance'.

1022. Supp, [FAQ's](#) [website].

1023. Sidekicker notes that its workers are covered by WorkCover: Sidekicker, Submission 71, p. 8; Harriet Dwyer, Hireup, Care Sector Roundtable, 19 July 2019.

1024. Mable, [Support Worker safeguards](#) [website].

1025. Peter Scutt, Mable, Care Sector Roundtable, 19 July 2019.

1026. Mable, [Support Worker safeguards](#) [website]; Peter Scutt, Mable, 19 July 2019.

1027. Transport Accident Commission, [Compensation](#) [website].

1028. Transport Accident Commission, [Work Related Compensation Policy](#) [website].

1029. If a claimant is not covered by either the Transport Accident Commission or WorkSafe, it is understood that the person would be covered by the National Injury Insurance Scheme. The National Injury Insurance Scheme (NIIS) was proposed as a premium-funded mechanism to ensure all accidents for catastrophic injuries are insured (and therefore outside the scope of the NDIS). There are four streams to the proposed NIIS: motor vehicle accidents, work accidents, medical accidents and general accidents. The NIIS was expected to be completed at the same time that the NDIS reached full roll out (July 2019), with the expectation that all catastrophic injuries from accidents would be outside the scope of the NDIS. The web page of the Department of Prime Minister and Cabinet for the COAG [Regulation Impact Statement Updates](#) [webpage], states that in March 2017 the States and Territories agreed to implement a NIIS: 'Under their Heads of Agreement, New South Wales and Victoria are taken to already meet or exceed the minimum benchmarks and as such do not require any changes to their local schemes, and will not be required to contribute additional funding to the NDIS for motor vehicle injuries.' Victoria meets the minimum benchmarks for catastrophic injuries covered under the NIIS (burns requirements are met through the regulations).

- 877 While it is not intended to operate with respect to work, the TAC does provide a ‘default’ safety net for some non-employee on-demand workers, such as rideshare and food delivery workers and those operating in the transport sector. This may be seen as a transfer of risk and cost, that employers should cover, to the community at large.
- 878 The TAC provides income and other forms of compensation and may also provide treatment or support services. If a person earning an income is injured in a transport accident and suffers either a total or partial loss of earnings as a result of (or materially contributed to) by the accident, that person may be entitled to benefits. These can include weekly payments to compensate them for the loss of income (up to three years).¹⁰³²
- 879 Self-employed platform workers may be entitled to compensation under this scheme. To be covered by the TAC scheme, injuries arising from a transport accident must involve a motor vehicle. This includes a car, bus, tram, train or motorcycle. This would likely extend to rideshare arrangements but may not capture food delivery workers using bicycles: bicycles are not ‘vehicles’ for the purpose of the scheme.
- 880 One confidential submitter to the Inquiry noted that bicycle riders may not be compensated unless a motor vehicle is involved in the accident.¹⁰³³ The TAC confirmed that, as bicycles are not registered, cyclists do not pay a TAC charge. TAC compensation is, therefore, only available to cyclists if a vehicle is involved in their accident.¹⁰³⁴
- 881 Cyclists who have an accident involving another vehicle (including a stationary vehicle) are covered. Other scenarios, like falling off the bike or running into a pedestrian are not.¹⁰³⁵
- 882 Some participants submitted that the *Transport Accident Act (1986)* (TA Act) ought to be reviewed so companies operating in the on-demand economy bear responsibility and costs for insuring their workers in case they are injured in a work-related transport accident.¹⁰³⁶

6.3.10 Taxation

Snapshot

- ▶ The Inquiry notes that the current approach to work status in Commonwealth tax laws may create uncertainty for some workers.
- ▶ Greater clarity, consistency and simplicity in approach to ‘work status’ across different regulatory frameworks, would reduce uncertainty. The Inquiry is cognisant that each regulatory framework has distinct policy imperatives. These factors should all be considered and balanced as part of a broader review of ‘work status’ across the statute books.

- 883 As do other employment related laws, tax laws apply based on ‘work status’. Employees are treated differently from autonomous small business workers, meaning that the obligations for both the worker and the person who receives the services, require consideration of the ‘work status’ question. Once status is determined, the application of workplace laws and instruments to those persons can, in theory, be confirmed. In practice, as can be seen from information gathered and provided to the Inquiry, this equation is not so simple.

1030. Transport Accident Commission, Individual Consultation, 8 October 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

1031. *Transport Accident Act 1986* (Vic), s38A.

1032. *Transport Accident Act 1986* (Vic), s3(2), Part 3–Div 2, 3.

1033. Confidential Submission, Submission 84, p.10. See also Transport Accident Commission, [Who Can Make a TAC Claim?](#) [website], Transport Accident Commission. However, incidents (that is, accidents) directly caused by the driving of a vehicle include: pedal cyclists colliding with open or opening motor vehicle doors; pedal cyclists colliding with a motor vehicle while the cyclist is traveling to or from his or her place of employment; an out of control vehicle, [Transport accidents and accidents arising out of the use of vehicles – What is a transport accident for common law purposes?](#) [website].

1034. Transport Accident Commission, Individual Consultation, 8 October 2019, Department of Premier and Cabinet, Melbourne, 1 Spring St, Melbourne; Transport Accident Commission, [Compensation](#) [website].

1035. Transport Accident Commission, [Compensation](#) [website]; Transport Accident Commission, 8 October 2019.

1036. National Union of Workers, Submission 54, p. 3; Victorian Trades Hall Council, Melbourne; Australian Council of Trade Unions, Submission 11, p. 5.

6.3.10.1 Income tax and GST

- 884 Income tax is payable by all workers under the *Income Tax Assessment Act 1997* (Cth) (ITA Act). The way it is paid and the responsibilities around remitting it, depend on the status of the worker. The basic ‘building block’ used to determine that status is, once again, an employment relationship. This means that tax obligations for both worker and platform require determination of whether an employment relationship exists.
- 885 Independent contractors manage their own tax obligations while employers withhold income tax from employees’ wages. The range of income tax deductions available to the worker also, in part, depends on whether they are operating a personal services business or working as an employee.¹⁰³⁷
- 886 Workers operating as independent contractors may have obligations to remit Goods and Services Tax (GST).¹⁰³⁸ Ordinarily, a business needn’t remit GST prior to meeting an income threshold of \$75,000. Rideshare drivers (like taxi drivers) must report and pay GST on all income (even if they earn less than \$75,000 per year) using a Business Activity Statement (BAS).¹⁰³⁹

6.3.10.2 Tests applied to determine status under Commonwealth tax laws

- 887 As the ATO’s website provides, ‘Being an employee is different from being a contractor. If you’re a contractor, you’re self-employed and you’re running your own business. If you’re an employee, you’re working in another person’s business’.
- 888 In the case of employees, their employer must withhold and remit tax on their behalf.¹⁰⁴⁰ Employers must also withhold and remit tax on behalf of contractors who do not have an Australian Business Number (ABN) or who are engaged through a voluntary agreement.¹⁰⁴¹ Self-employed contractors who provide an ABN need to remit tax themselves, including income tax and potentially GST. They also need to obtain and submit a BAS.¹⁰⁴²
- 889 The other key implication of worker status relates to superannuation obligations. These are dealt with in more detail below.
- 890 The ITA Act does not define ‘employee’ so the common law multi-factor indicia is applied to determine whether a worker is an employee and if a business is liable to withhold pay as you go (PAYG) tax on their behalf.¹⁰⁴³

6.3.10.2.1 Assistance available in relation to Commonwealth tax status

- 891 The ATO can provide a private ruling to a platform worker concerning their status for the purpose of Commonwealth tax laws.
- 892 If a platform business is unsure of the status of its workforce, for tax purposes, it can apply for a class ruling.¹⁰⁴⁴ A class ruling is a type of public ruling that would apply to a class of workers.¹⁰⁴⁵
- 893 Both private and public rulings are legally binding.¹⁰⁴⁶ However, a private ruling would only bind the ATO in respect of the individual who relies on it.¹⁰⁴⁷ A platform business is not obliged to treat a worker as an employee, even if the worker has obtained a private ruling to say they are an employee. Based on such a ruling, the ATO may not require the worker to remit GST or complete a BAS, but the ruling would not mean the platform must make super contributions or withhold PAYG tax for them.¹⁰⁴⁸

1037. For example, a worker who is operating a services business is able to claim a tax deduction for the declining value of a motor vehicle and for insurance premiums paid in respect of that vehicle if the vehicle is used in operating the business, see Australian Government, [Business tax deductions](#) [website].

1038. *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

1039. Australian Government, Australian Taxation Office, [Ride-sourcing](#) [website].

1040. Australian Government, Australian Taxation Office, [PAYG withholding](#) [website].

1041. Australian Government, Australian Taxation Office, [PAYG withholding](#) [website].

1042. Australian Government: Australian Taxation Office, [Reporting and paying tax](#) [website].

1043. The Australian Taxation Office website provides the indicia applied to determining the status of a worker, these include ability to delegate work, how the worker is paid, whether the worker brings substantial plant or equipment, who is accountable for errors in the work, who has control over the work, whether the worker is seen to emanate from the business, see Australian Government: Australian Tax Office, [Employee or contractor – what’s the difference?](#) [website], these indicia are similar to those outlined by Lawler VP, O’Callaghan SDP and McKenna C in *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWA 8307, [4].

1044. Australian Government, Australian Tax Office, [Class rulings](#) [website].

1045. Australian Government, Australian Tax Office, [Class rulings](#) [website].

1046. Australian Government, Australian Tax Office, [How our advice and guidance protects you](#) [website].

1047. Australian Government, Australian Taxation Office, [Can you rely on a private ruling?](#) [website].

1048. In this circumstance the worker could accrue a significant tax debt in the amount the business has failed to withhold.

- 894 The ATO investigates tax avoidance. An on-demand worker who has obtained a ruling suggesting they should receive superannuation and otherwise be treated as an employee for tax purposes could, if they continue to be treated as an independent contractor, raise a complaint with the ATO.¹⁰⁴⁹
- 895 When followed reasonably and in good faith, public and private rulings protect the individual or business from certain tax consequences,¹⁰⁵⁰ if the ATO later determines they paid less tax than required by law.¹⁰⁵¹ The ATO may also provide administrative advice. When this advice is relied upon, it protects an individual or business from paying any tax shortfall. There are however some exceptions as to when the advice is binding.¹⁰⁵² These include when:
- there have been legislative changes since the advice was provided
 - a tribunal or court decision has affected interpretation of the law
 - the commercial circumstances on which the advice was based have changed.
- 6.3.10.2 Commonwealth tax obligations: supporting compliance and other issues**
- 896 The ATO estimates that, of all tax revenue due from the small business sector in Australia, approximately 12.5 per cent or \$11.1 billion goes unpaid.¹⁰⁵³
- 897 The ATO formed the view that Foodora had wrongly treated its workers as independent contractors, prior to that business ceasing to operate. See Foodora case study below. It was reported that the outcome of this was that \$2.1 million in unpaid tax was not properly remitted to the ATO.¹⁰⁵⁴
- 898 It is not clear what approach the ATO has adopted with other platforms.
- 899 Commenting on the outcome of the Foodora case, the VTHC raised the impact of tax status uncertainty on on-demand workers. The VTHC suggested work must be done to make tax obligations attached to business models in the on-demand economy clear, because ‘the ramifications for workers directly and for federal and state tax revenue are too big to ignore’.¹⁰⁵⁵
- 900 Concerns have also been raised about on-demand workers paying less tax than they should and the perception that backpackers return to their home country without paying tax.¹⁰⁵⁶ It was asked whether on-demand workers, whose average income is not high, are putting money aside to remit to the government as taxation later.
- 901 To help ensure that independent contractors in the on-demand economy meet their tax obligations, the Black Economy Taskforce recommended a reporting regime for platform businesses.¹⁰⁵⁷ The Commonwealth Government responded by agreeing that greater transparency of payments made through sharing economy websites is needed.¹⁰⁵⁸
- 902 Treasury since released a consultation paper on how a reporting regime could be implemented.¹⁰⁵⁹ The paper suggests that, as the on-demand economy expands, there is an increasing risk that participants selling goods and services via platforms may not be paying the right amount of tax.¹⁰⁶⁰

1049. Australian Government, Australian Tax Office, [Report unpaid super contributions from my employer](#) [website]; Australian Government, Australian Tax Office, [The fight against tax crime: What you can do](#) [website].

1050. Such as, having to pay a tax shortfall, interest on a shortfall, and protection from any penalty for making false or misleading statements.

1051. Australian Government: Australian Tax Office, [How our advice and guidance protects you](#) [website].

1052. Australian Government: Australian Tax Office, [How our advice and guidance protects you](#) [website].

1053. Australian Government, Australian Tax Office, [Small business income tax gap](#) [website].

1054. N. Zhou, ‘Foodora Australia admits riders owed \$5 million were ‘more likely than not employees’ [website], *The Guardian*, 10 November 2018; D. Marin-Guzman, ‘Tax Office investigating Foodora before exit over millions in unpaid taxes’, *Australian Financial Review*, August 28, 2018.

1055. VTHC Supplementary Submission, Submission 56, p. 13.

1056. Randstad, Submission 61, p. 2; Australia Institute Centre for Future Work, Submission 9, p. 27; Marketing4Restaurants, Submission 44, p. 6.

1057. Australian Government, The Treasury, [Black Economy Taskforce Final Report – October 2017](#), p. 136.

1058. Australian Government, The Treasury, [Tackling the black economy: Government Response to the Black Economy Taskforce Final Report](#), p. 18.

1059. Australian Government, The Treasury, [Tackling the black economy: A sharing economy reporting regime – A consultation paper in response to the Black Economy Taskforce Final Report, January 2019](#), cited in Michael Andrew AO – Chair Black Economy Advisory Board, Submission 3, Appendix A, p. 2.

1060. Australian Government, The Treasury, [Tackling the black economy: A sharing economy reporting regime](#), p. 2.

- 903 Previously the ATO has used its information gathering powers to enter into data collection arrangements with some platforms. This enabled the ATO ‘to undertake preventative activities that help drivers understand and comply with their obligations.’¹⁰⁶¹ The Taskforce suggested that failure to pay the right amount of tax may be due to both lack of awareness and deliberate under reporting.¹⁰⁶² It suggested that lack of awareness may stem from a lack of familiarity with operating as an independent contractor and that education initiatives were needed, supported by a reporting mechanism.¹⁰⁶³ The paper proposed two options:
- a requirement for sharing platforms to report payments made to users of their platform, or
 - the ATO seeking similar details through financial institutions.¹⁰⁶⁴
- 904 The reporting regime would make it easier for workers in the on-demand economy to meet their taxation obligations, by providing information for prefilling their tax-returns.¹⁰⁶⁵ The final Taskforce report contemplated tax literacy and suggested that platform businesses be encouraged to highlight tax obligations for workers.¹⁰⁶⁶ It also noted that, in the US and Spain, there are systems in place requiring platforms to collect and remit workers’ tax.¹⁰⁶⁷ The Taskforce did not recommend this approach unless there was sustained non-compliance.
- 905 Consistent with the issues raised by the Black Economy Taskforce, the Inquiry received submissions about the complexity independent contractors face in complying with their taxation (and other) obligations. One participant (Certica) informed the Inquiry that they work with on-demand workers across a multitude of platforms, helping with back office functions, like managing tax, superannuation remittances and insurance coverage.¹⁰⁶⁸
- 906 Workers informed the inquiry that they are unsure of their tax obligations. One worker said the ATO was unable to offer advice. He went on to express concern that if he overpaid and later went overseas, he would not get a refund.¹⁰⁶⁹ Another considered the situation where a driver, who operated for only a few days, got audited.¹⁰⁷⁰ A different worker said it was unfair that they must remit GST on every dollar while, for other businesses, the obligation only kicks in after the first \$75,000 of business income.¹⁰⁷¹
- 907 Platform businesses have implemented mechanisms to support workers in meeting their tax obligations. The Commonwealth Government’s consultation paper in response to the Taskforce noted initiatives by platforms to support compliance and indicated:
- Platforms, advisers and overseas jurisdictions have praised the quality of ATO guidance, which is considered the benchmark in terms of guidance provided by tax authorities on the sharing economy worldwide.*¹⁰⁷²
- 908 One platform business told the Inquiry it collects payments on behalf of drivers and shares data with the ATO according to a data matching protocol.¹⁰⁷³ Uber informed the Inquiry that it has partnered with Airtax, Quickbooks and H&R Block to offer ‘discounted services’ to help workers meet their tax obligations.¹⁰⁷⁴ An Uber driver confirmed this during consultation, saying the first BAS assistance from Airtax is free.¹⁰⁷⁵

1061. Australian Government, The Treasury, [Tackling the black economy: A sharing economy reporting regime](#), p. 2.

1062. Australian Government, The Treasury, [Tackling the black economy: A sharing economy reporting regime](#), p. 2.

1063. Australian Government, The Treasury, [Tackling the black economy: A sharing economy reporting regime](#), p. 2.

1064. Michael Andrew, AO, Chair of the Black Economy Taskforce, Submission 4, Attachment A, p. 2.

1065. Michael Andrew, AO, Chair of the Black Economy Taskforce, Submission 4, Attachment A, p. 2.

1066. Australian Government, The Treasury, [Black Economy Taskforce Final Report – October 2017](#), p. 137.

1067. Australian Government, The Treasury, [Black Economy Taskforce Final Report – October 2017](#), p. 140. The Ride Share Drivers Association of Australia also noted that some Taxi agreements permit the operator to deduct money and remit taxes on behalf of the driver, See Ride Share Drivers Association of Australia, Submission 64, p. 11.

1068. Don (worker), Submission 30, p. 4; Jonathan Hunter, Expert360 and Stephanie Bird, Certica, Platform Business Roundtable, 22 February 2019.

1069. Worker, Uber, Workers’ Roundtable Discussion, 29 July 2019.

1070. Worker, Rideshare, Workers’ Roundtable Discussion, 29 July 2019.

1071. Worker, Rideshare, Workers’ Roundtable Discussion, 29 July 2019.

1072. Australian Government, The Treasury, [Tackling the black economy: A sharing economy reporting regime](#), p. 10.

1073. Confidential Submission, Submission 56, p. 13.

1074. Uber, Submission 79, p. 24.

1075. Worker, Uber, Workers’ Roundtable Discussion, 29 July 2019.

- 909 Airtasker also mentioned that it had partnered with H&R Block to help workers access information about tax obligations. However, Airtasker does not require that workers use the service and suggests that compliance is a matter for them.¹⁰⁷⁶
- 910 A clause in Menulog's courier terms and conditions encourages workers to register for GST. It allows workers who have done so to 'recover' an additional amount, as part of payments they receive.¹⁰⁷⁷ It appears that Menulog passes onto registered workers the GST amount that reflects GST paid by the customer. It is not clear whether this is paid to workers who have not registered.
- 911 The emphasis of the information in this sub-section is on ensuring workers meet obligations. It does not approach issues related to the classification of workers or tax avoidance by on-demand platform businesses. The Australia Institute raised concern that the focus of the ATO is directed solely at workers 'who are already experiencing low and precarious incomes, and great financial and safety risks' and not at digital platform businesses as well.¹⁰⁷⁸

6.3.10.3 Payroll tax

- 912 In Victoria, businesses may be liable to pay payroll tax as set out in the *Payroll Tax Act 2007 (Vic)* (PT Act). The PT Act requires that tax be paid by employers paying wages. The term 'employer' is defined in the Act as a person who pays wages. Employment status is again the foundation 'building block' of the statutory regime.
- 913 However, once again, the scope of the laws captures the engagement of non-employee workers through extended definitions. For example, 'wages' includes payments to some contractors and the Act provides that certain persons are 'taken to be' employees and employers.
- 914 Payroll tax applies if a business pays wages in Victoria and its Australian wage bill exceeds a monthly threshold of \$54,166.¹⁰⁷⁹ Except for regional employers, payroll tax is 4.85 per cent of the value of wages paid by business.
- 915 In the on-demand economy, taxation has two dimensions:
1. whether the obligations of platforms are to be assessed on the basis that workers are employees or independent contractors, and
 2. if, as independent contractors, workers are meeting their tax obligations.

6.3.10.3.1 Tests applied under the Payroll Tax Act

- 916 The question of liability for payroll tax requires consideration of the status of workers. Whether the platform is liable, depends on whether the worker is an employee or independent contractor, and in the latter case, whether, under the PT Act, they are to be treated as an employee.
- 917 Businesses self-assess their payroll tax liability following appraisal of their business model.¹⁰⁸⁰ The State Revenue Office (SRO) may investigate if it appears a business, when assessing its wages bill, has incorrectly applied exemptions or has not correctly classified or grouped workers under its business.¹⁰⁸¹ A ruling by a court, tribunal or other agency about the status of workers, may assist the SRO in determining investigation priorities.¹⁰⁸² In determining employment status, the SRO informed the Inquiry that it will initially inquire into the nature of a relationship, by applying the common law multi-factorial legal test.¹⁰⁸³

1076. Tim Fung, Airtasker, Individual Consultation, 3 July 2019. See also Airtasker, Airtasker Help, [Insurance & Tax](#) [website]; H&R Block Tax Accountants, [Income Tax Guide for Airtaskers](#) [website].

1077. Menulog, [Courier Agreement](#), Cls. 7 and 8.

1078. Australia Institute Centre for Future Work, Submission 9, p. 28.

1079. State Revenue Office Victoria, [Payroll Tax](#) [website].

1080. Department of Treasury and Finance, Victoria, Individual Consultation, 24 June 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

1081. Department of Treasury and Finance, Victoria, 24 June 2019.

1082. Department of Treasury and Finance, Victoria, 24 June 2019.

1083. Department of Treasury and Finance, Victoria, 24 June 2019.

918 However, the Act extends the obligations around payroll tax by providing that businesses are ‘taken to be employers’ when they engage independent contractors under ‘relevant contracts’, which are defined to include certain arrangements for the supply of services.

919 All contracts for service are considered relevant contracts unless an exemption applies.¹⁰⁸⁴ Effectively this means that, unless an independent contractor fits within an exception, they are treated the same as an employee for the purpose of payroll tax.

6.3.10.3.2 Payroll tax obligations – issues raised

920 The Victorian Department of Treasury and Finance (DTF), noted that less than 20 per cent of employers (after exceptions and the like) are paying payroll tax. The Inquiry was informed that when an on-demand business does not pay, it could still be compliant with its obligations. Any advantage it receives may not be illegitimate.¹⁰⁸⁵

921 Although the extended definition under the PT Act captures work performed by workers who are not employees at common-law, the work contracted under some on-demand platforms may still not be caught.¹⁰⁸⁶

922 DTF added that, amongst factors that could contribute to an uneven playing field, payroll tax of about four per cent of wages, may not be the source of any competitive edge that platform businesses, who engage workers as independent contractors, have over businesses engaging employees.¹⁰⁸⁷

923 The Australia Institute however submitted that by adopting business models that avoid payroll tax, on-demand businesses effectively receive a subsidy to the value of 4.85 per cent on their wages.¹⁰⁸⁸ Sidekicker said payroll tax is a significant cost to business and impacts on profits (with the amount of payroll tax payable comparable to the amount of profit generated).

924 Participants at a restaurant and catering roundtable noted that restaurant profit margins are a low 2–4 per cent of revenue¹⁰⁸⁹ and suggested restaurants may be tempted to engage workers through on-demand platforms to avoid payroll tax and other obligations.¹⁰⁹⁰

925 The SRO indicated that investigations regarding payroll tax compliance are undertaken if they are a priority. Factors that may be considered when determining whether an investigation ought to be conducted include:

- whether the potential for lost revenue justifies the cost of compliance
- whether the matter will have precedential value
- whether the impact of the lost revenue is likely to be ongoing or long term.¹⁰⁹¹

926 In any investigation, the outcome will turn on facts.¹⁰⁹² That being so, the SRO also told the Inquiry that it would be useful to have a determination about the status of a worker when considering the application of the PT Act to a business.¹⁰⁹³

1084. *Payroll Tax Act 2007 (Vic)*, s34.

1085. Department of Treasury and Finance, Individual Consultation, 24 June 2019.

1086. Maurice Blackburn Lawyers, Submission 46, p. 5.

1087. Department of Treasury and Finance, Individual Consultation, 24 June 2019.

1088. Australia Institute Centre for Future Work, Submission 9, p. 27

1089. Mark Jenson, Red Lantern, Restaurant and Catering Roundtable Discussion, 16 July 2019; Wes Lambert Restaurant and Catering Industry Association, Restaurant and Catering Roundtable Discussion, 16 July 2019.

1090. Restaurant and Catering Business Owner, Restaurant and Catering Roundtable Discussion, 16 July 2019.

1091. Department of Treasury and Finance, Victoria, Individual Consultation, 24 June 2019.

1092. Department of Treasury and Finance, Victoria, 24 June 2019.

1093. Department of Treasury and Finance, Victoria, Individual Consultation, 3 March 2020.

6.3.11 Superannuation

Snapshot

- ▶ Most platform workers are unlikely to be paid superannuation.
- ▶ It is likely that, even where a platform worker is engaged as an employee, they may earn a low income – under the \$450 a month from a particular platform required for an employer to make superannuation contributions.
- ▶ Low income workers are unlikely to make their own contributions to superannuation.
- ▶ The use of non-employment models by platforms is likely to negatively impact on the superannuation balances of some workers, which may affect the position of workers in their retirement.

927 Australia's superannuation system's objective is to 'provide income in retirement to substitute or supplement the age pension'. *The Commonwealth Superannuation Guarantee (Administration) Act 1992* (Cth) (SG Act) establishes the basic level of superannuation that employers must pay for employees from their wages. The mandatory superannuation guarantee system requires that they pay at the prescribed level – currently 9.5 per cent of an employee's ordinary time earnings – set to rise in stages, to 12 per cent from the year commencing on or after 1 July 2025.¹⁰⁹⁴

928 The importance of preserving funds for retirement has been long emphasised. Until very recently, suggestions that workers have access to their superannuation ahead of retirement have generally met resistance, particularly from unions. However, in the wake of the extraordinary labour market disruption caused by the response to COVID-19, workers have been provided with special access to their superannuation to assist them to manage costs while unable to work.

6.3.11.1 Application of superannuation law

929 Again, the 'building block' for entitlement and obligations is the existence of an employment relationship.

930 Under the SG Act, an employee and an employer are defined as having their ordinary, common law meaning. In this sense, the approach is consistent with the FW Act, however, eligibility for superannuation is extended to some non-employee workers.¹⁰⁹⁵ Superannuation is payable by a business when a person is working wholly or principally for their labour. For the purposes of the SG Act, the contractor is an employee of the other party to the relevant contract.¹⁰⁹⁶ The other party must contribute a percentage of earnings to that worker's super or pension fund.¹⁰⁹⁷ It is a question of fact to determine the nature of the contractual relationship.

931 Employees are entitled to be paid SG contributions by their employers, subject to some limited exceptions, including when earnings are less than \$450 a month.¹⁰⁹⁸

932 Typically, businesses are not required to remit superannuation on behalf of self-employed persons (sole traders or partnership arrangement) or independent contractors. These individuals may create a superannuation fund and make contributions for themselves.¹⁰⁹⁹

1094. Table 1, s19(2) of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

1095. *Superannuation Guarantee (Administration) Act 1992* (Cth), s12.

1096. *Superannuation Guarantee (Administration) Act 1992* (Cth), s12(3).

1097. *Superannuation Guarantee (Administration) Act 1992* (Cth), s12(3); See also Superannuation Guarantee Ruling of 2005.

1098. All employees are entitled to super unless they earn less than \$450 per calendar month; or are aged under 18 years of age and do not work more than 30 hours a week; or perform work of a domestic or private nature for not more than 30 hours a week for a non-business employer: Australian Securities Investments Commission, MoneySmart, [Super contributions](#) [website].

1099. Australian Government, Australian Tax Office, [Super – Self-employed](#) [website].

- 933 Case law considering the application of SG Act provisions to independent contractors has produced mixed outcomes.¹¹⁰⁰ A contract for services principally to produce a result (for instance, professional services) or a contract that permits delegation (even if delegation did not occur) has been found to fall outside of the extension relating to persons working wholly or principally for their labour in the SG Act.¹¹⁰¹ More recently, provisions extending superannuation have been more expansively interpreted. Workers engaged under a contract for services (independent contractors) who are paid for their time, not a result, might be covered.¹¹⁰²
- 934 On this reasoning, a platform based carer who is paid for the time it takes her to perform a task, is quite likely to be working wholly or principally for her labour. She may fall within the scope of the provisions extending to super, and therefore be entitled to it. A professional sourcing work via a platform, who is being paid for the time it takes her to perform a job, rather than the result, might also fall within the extension.
- 935 It will not always be clear whether a worker falls within the provisions extending superannuation to workers working wholly or principally for their labour.¹¹⁰³ One of the most significant recent decisions about work status arose over a dispute about the requirement to pay superannuation.
- 936 *On Call Interpreters and Translators Agency v Commissioner of Taxation* (No.3) considered this question with respect to telephone interpreters working for the business On Call. The business had obtained a ruling from the ATO in 1990 to the effect that an employer-employee relationship did not exist. On Call consequently treated most of its workers as independent contractors and did not make superannuation contributions to its workers under the SG Act.¹¹⁰⁴ However, the Commissioner of Taxation subsequently determined that the workers were employees and should have been paid superannuation. On Call sought to appeal the Commissioner's later decision.
- 937 While noting that On Call was focused on establishing that its workers were not employees,¹¹⁰⁵ when applying the multi-factor test to determine the legal status of a worker, Justice Bromberg determined that the workers were employees irrespective of which test was applied, that is, both within the extended meaning of the SG Act, and at common law.¹¹⁰⁶
- 938 This judicial decision reached a different conclusion to that reached by the ATO in 1990, although it is understood that different information was available at different times to the different decision makers. This case illustrates that, until the legal status of a worker is judicially determined, such matters lack a degree of certainty.
- 939 That said, the Inquiry is also aware that business models will evolve over time. For instance, a business may be set up in a particular way, but later modified to cater for how it operates in practice and over time, and in light of any applicable legislation.¹¹⁰⁷ This presents some obvious challenges for regulators when applying the law, as a business' arrangements may change after an assessment has been made about the status of its workers.
- 940 Where services contracts between platforms and workers permit delegation of performance under the contract, workers will not be entitled to super. Services contracts that calculate a 'fare' based on components (including a base fare, time and distance allocation, booking fee) are less likely to pay workers for time spent, but more for producing a result. These may not attract superannuation contributions either.

1100. *Neale v Atlas Products (Vic) Pty Ltd* [1955] 94 CLR 419; *World Book (Australia) Pty Ltd v Commissioner for Taxation* [1992] 27 NSWLR 377; *Vabu v Commissioner for Taxation* [1996] 81 IR 150.

1101. *Neale v Atlas Products (Vic) Pty Ltd* [1955] 94 CLR 419; *Vabu v Commissioner for Taxation* [1996] 81 IR 150; *World Book (Australia) Pty Ltd v Commissioner for Taxation* [1992] 27 NSWLR 377.

1102. See *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [1996] 81 IR 150; Stewart et al., *Creighton and Stewart's Labour Law*, p. 198.

1103. *On Call Interpreters and Translators Agency v Commissioner of Taxation* (No.3), [2011] FCA 366, [34].

1104. *On Call Interpreters and Translators Agency v Commissioner of Taxation* (No.3), [2011] FCA 366, [34].

1105. *On Call Interpreters and Translators Agency v Commissioner of Taxation* (No.3), [2011] FCA 366, [315].

1106. *On Call Interpreters and Translators Agency v Commissioner of Taxation* (No.3), [2011] FCA 366, [6].

1107. Sidekicker, for instance, informed the Inquiry that it initially serviced individual customers and clients that were not businesses, but evolved to now only supplying labour to businesses.

6.3.11.2 Application of superannuation law to platform workers

- 941 It is unclear whether most non-employee platform workers might be eligible for superannuation.
- 942 Several participants submitted that on-demand workers who are self-employed or independent contractors do not typically receive superannuation contributions on their earnings.¹¹⁰⁸ Other participants said they might be paid superannuation contributions, depending on the amount they earned.¹¹⁰⁹
- 943 Sidekicker informed the Inquiry that its workers who are employees, are paid superannuation contributions.¹¹¹⁰ Weploy does the same.¹¹¹¹
- 944 Generally, non-employee platforms indicated they did not pay superannuation, though some were open to doing so.
- 945 Ola indicated that, when the company is more established, it would consider making superannuation contributions on behalf of workers.¹¹¹²
- 946 Several platforms, including Deliveroo and Uber, said they would be prepared to support a scheme that covered, among other things, superannuation,¹¹¹³ but had concerns this might jeopardise their business model.
- 947 Uber submitted that:
- everyone should have the ability to protect themselves and their loved ones when they're injured at work, get sick, or when it's time to retire. ... There is more to do as a society to support independent workers ... However, in many countries including Australia, existing employment law means platforms like Uber are constrained in providing additional support to those who use the App to find work. This is because offering benefits and training to our partners could compromise the self-employed status of the individual.*¹¹¹⁴
- 948 Deliveroo advised that paying superannuation could increase the risk that its workers would be reclassified as employees.¹¹¹⁵ Some industry participants and platform businesses recommended that the law be modified so businesses can provide additional benefits to independent contractors without fear of reclassification.¹¹¹⁶ They believed their workers were correctly identified as independent contractors, but thought they should be able to provide additional protections or benefits for them.
- 949 There is nothing inherent in on-demand work to prevent platforms or clients from paying superannuation or providing workers with other entitlements.¹¹¹⁷

6.3.11.3 Enforcement if eligible for superannuation

- 950 WEstjustice submitted that a situation where on-demand workers, including those engaged as independent contractors, do not get super to which they are otherwise entitled, is a problem.¹¹¹⁸ Platform workers who believe they are eligible for superannuation and have not been paid could lodge an online inquiry with the ATO if they feel superannuation contributions they're entitled to, are not being paid.

1108. Confidential Submission, Submission 84; Self-Employed Australia, Submission 67, p. 7. See also Australian Services Union, Submission 13, p. 8; Adam Portelli, Media Entertainment and Arts Alliance, Union and Worker Roundtable Discussion, 7 June 2019, Victorian Trades Hall Council, Melbourne; Australian Council of Trade Unions, Submission 11, p. 5; Dr Fiona Macdonald, Care Sector Roundtable Discussion, 19 July 2019; Simon Bailey, Chefs on the Run, Restaurant and Catering Roundtable Discussion, 19 July 2019.

1109. See for example comments by Karen Lupton, Salmat, IT and Telecommunications Roundtable Discussion, 28 February 2019, Australian Industry Group, 441 St Kilda Road, Melbourne.

1110. Sidekicker, Submission 71, p. 8.

1111. Ben Eatwell, Weploy, Platform Business Roundtable Discussion, 22 February 2019.

1112. Simon Smith, Ola, Individual Consultation, 3 July 2019.

1113. Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019.

1114. Uber, Submission 79, p. 5; See also Uber Newsroom, [Building a portable benefits system for today's world](#) [website], 23 January 2018.

1115. Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

1116. See for example, Deliveroo, Submission 28, pp. 7 and 8; Uber, Submission 79, p. 22.

1117. Australia Institute of Employment Rights, Submission 12, p. 10.

1118. WEstjustice, Submission 92, p. 24.

- 951 The ATO may investigate alleged non-compliance with superannuation guarantee obligations and issue a default assessment for the employer to pay a superannuation guarantee charge.¹¹¹⁹ The ATO needs relevant evidence to follow up the enquiry, like copies of invoices issued to an employer by an independent contractor.¹¹²⁰ The ATO will only investigate a claim relating to a particular period once the employer's date for lodging superannuation has passed.¹¹²¹
- 952 A worker may also be able to seek FWO's assistance in pursuing unpaid superannuation as part of a claim for unpaid wages and conditions if an applicable award or enterprise agreement includes an extra term about superannuation.¹¹²²
- 953 WEStjustice noted that it is the ATO that determines whether to recover unpaid super.¹¹²³ There is no capacity for an individual worker (unless they are an employee covered by an applicable award or enterprise agreement with an extra term about superannuation) to do so. As a consequence, the vast majority of on-demand workers who are non-employees will have no private right to claim unpaid superannuation contributions.

6.3.11.4 Submissions/evidence

- 954 The vast majority of platforms do not pay superannuation to workers. If a non-employee platform worker does not fall within the extension in the SG Act, they will only accrue superannuation benefits if they make voluntary contributions. Some submitters said platforms are shifting risks and costs to the community by failing to provide entitlements like superannuation.¹¹²⁴
- 955 Other participants suggested that superannuation guarantee laws ought to be amended to better accommodate non-employee workers.¹¹²⁵ This might also be achieved by enabling workers to pursue unpaid superannuation claims themselves. In a recent submission by the Victorian Government to the Commonwealth Government's Retirement Income Review, Victoria encouraged the Commonwealth to consider amending the SG Act and/or the *Independent Contractors Act 2006* (Cth) (IC Act), to better support payment of superannuation contributions for independent contractors, gig workers and self-employed workers.¹¹²⁶
- 956 According to the ACCI and VCCI, the risk-taking behaviour underpinning entrepreneurship involves making choices about investment vehicles, including whether to invest in superannuation.¹¹²⁷ They do nevertheless acknowledge that not all on-demand workers know how to run a business. ACCI and VCCI suggest advice and support be provided to on-demand workers to help them account for expenses like tax and superannuation and when negotiating prices or deciding whether to accept a job.¹¹²⁸

1119. The superannuation guarantee charge consists of the amount of superannuation not contributed (the 'shortfall'); an interest component (currently 10 per cent per year) and an administrative fee of \$20 per employee per quarter. Australian Government, Australian National Audit Office, *Auditor-General Report No.39 2014–15: Promoting Compliance with Superannuation Guarantee Obligations* [website].

1120. Australian Government, Australian Taxation Office, *Other ways to claim your unpaid super* [website].

1121. Australian Government, Australian Taxation Office, *Report unpaid super contributions from my employer* [website].

1122. An employee, his or her representative union or the Fair Work Ombudsman can lodge an application for orders in relation to contraventions of civil remedy provisions under s.539 *Fair Work Act 2009* (Cth), including a failure by an employer to pay an employee an amount that is payable in relation to the performance of work: s.323 *FW Act*. See for example awards that include extra superannuation terms: clause 32, *Building and Construction General On-Site Award 2010*; clause 28, *Hospitality Industry (General) Award 2010*. See also WEStjustice, Submission 92, p. 39.

1123. WEStjustice, Submission 92, p. 39.

1124. For example, Mr Richard McEncroe, Submission 48, pp. 3-6.

1125. See Professionals Australia, Submission 60, p. 5; Unions NSW, Submission 80, p. 6.

1126. Victorian Government Submission to the Commonwealth Government's Retirement Income Review (6 February 2020), p. 33.

1127. Victorian Chamber of Commerce and Industry, Submission 83, p. 5; Australian Chamber of Commerce and Industry, Submission 10, p. 13.

1128. Victorian Chamber of Commerce and Industry, Submission 83, p. 5.

- 957 Uber emphasised that independent contractors are free to allocate funds from their enterprise in the way that best suits their business.¹¹²⁹ However, it proposes in-app integrations, that may allow workers to make contributions directly through the app, to help them save for retirement.¹¹³⁰ Uber recognised however, that workers may access income from multiple sources.¹¹³¹ It says it would work with government to create a framework that streamlines administration for contributions from multiple sources and targets concessional contributions.¹¹³² Shebah, also operating in the rideshare industry, told the Inquiry they provide new drivers with a free 30 minute financial consultation, including how to set up superannuation contributions.¹¹³³
- 958 SEA argued that any assumption independent contractors are vulnerable is false and it is misleading to suggest they have lower retirement incomes.¹¹³⁴
- 959 The ASFA, referred to by SEA, also discusses diversity within the independent contractor sample. There are those who have invested significant capital and own a business of great value.¹¹³⁵ Then there are others who end up with a business comprising little more than a utility truck.¹¹³⁶ The inference of ASFA is that amongst employees, compulsory superannuation contributions prevent the same degree of diversity in retirement outcomes and ensure that, within income brackets, the difference between employees who have done badly and those who have done well is not as wide.
- 960 Independent contractors indeed possess freedom to determine investment strategies, but as with many rights, enjoyment of this freedom is a function of context. Writing of the 'context', for many platform workers, Recruitment Consulting and Staffing Association of Australia considered that, compared to standard labour hire practices, platform workers 'are left to their own devices', to cope with negotiating terms or pay and conditions and meeting health, safety and superannuation obligations.¹¹³⁷
- 961 Other submitters said wage levels in the on-demand economy would make it difficult for independent contractors to save. The RSDAA confirmed estimates of rideshare wages provided by the Australia Institute and remarked that superannuation must be deducted from net earnings of about \$12.88 per hour in Victoria.¹¹³⁸ The MEAA submitted that independent contracting arrangements allow employers to ignore industry or award rates. Without casual loadings and a requirement to pay superannuation, a \$30 per hour headline figure might be below the Live Performance Award minimum. Employers covered by that award are obliged to pay super for workers.¹¹³⁹
- 962 Dr Fiona Macdonald advised that, in the care sector, less experienced workers take direction on wage setting from the market. According to her, they do not have great knowledge of their rights and, once platform costs and superannuation are accounted for, are not being paid the equivalent of award wages.¹¹⁴⁰ On-demand worker Samantha, submitted that the work is usually paid at a level close to the award minimum. According to her, there really isn't any surplus to cover superannuation contributions.¹¹⁴¹ For some workers, wages in the on-demand economy are set at levels that make it difficult to set aside money for retirement.
- 963 Supp advised that, on its platform, employers in hospitality advertise an ordinary rate comparable to the award.¹¹⁴² An example advertisement on Supp's site, provided to the Inquiry by a worker, included a rate equivalent to that of casual employees in the host business. However, when discussing the example, the worker confirmed that superannuation would not be provided on top of that rate and Supp would also deduct its commission.¹¹⁴³

1129. Uber, Submission 79, p. 23.

1130. Uber, Submission 79, p. 23.

1131. Uber, Submission 79, p. 23.

1132. Uber, Submission 79, p. 23.

1133. Shebah, Submission 68, p. 2.

1134. Self-Employed Australia, Submission 67, p. 7.

1135. Self-Employed Australia, Submission 67, p. 7.

1136. R. Clare and A. Craston, *Super and the Self-Employed*, ASFA Research and Resource Centre, May 2016, p. 8.

1137. Recruitment Consulting and Staffing Association of Australia, Submission 62, p. 5.

1138. Ride Share Drivers Association of Australia, Submission 64, p. 6.

1139. Media Entertainment and Arts Alliance, Submission 49, p. 8.

1140. Dr Fiona Macdonald, RMIT University, Care Sector Roundtable Discussion, 19 July 2019.

1141. Samantha (Worker), Submission 65, p. 7.

1142. Jordan Murray, Supp, Restaurant and Catering Roundtable Discussion, 16 July 2019.

1143. Worker, Supp, Workers' Roundtable Discussion, 29 July 2019.

- 964 As noted, section 27(2) of the SG Act does not require superannuation benefits to be paid by businesses or hirers if a worker earns less than \$450 per month. Submissions by unions and workers recommended this minimum be removed as it disadvantages on-demand workers whose platform incomes are often supplementary to other sources, infrequent or intermittent.¹¹⁴⁴
- 965 Many workers distribute working hours across multiple platforms, especially those in ridesharing and food delivery.¹¹⁴⁵ Others use platform work to supplement income. Payments received from any one work-on-demand platform may therefore fail to reach the \$450 threshold. Several submitters were concerned about this.¹¹⁴⁶
- 966 Payments received through crowd-work are often also unlikely to reach the \$450 threshold. A platform worker is often engaged to do short, discrete tasks for a variety of end user clients and unlikely to reach the threshold with any one user. Even those who are employed via one platform would struggle.¹¹⁴⁷ One worker indicated that, because of the threshold, she has never received superannuation for on-demand work, even in respect of a platform that employs her.¹¹⁴⁸
- 967 The stated policy rationale for the \$450 threshold – to minimise the administrative burden on employers of paying small amounts of superannuation – no longer appears so compelling.¹¹⁴⁹ Businesses or hirers can now make superannuation contributions comparatively easily via the ATO’s SuperStream electronic transaction system, introduced in 2015. Modern payroll systems also help minimise compliance and administrative hassle. To further assist, for some small employers with under 20 employees or annual turnover of less than \$10 million, the ATO offers a free Small Business Superannuation Clearing House.¹¹⁵⁰
- 968 The Victorian Government, in its submission to the Commonwealth Government’s Retirement Income Review, recommended abolishing the \$450 monthly earnings threshold.¹¹⁵¹

1144. Victorian Trades Hall Council, Submission 88, p. 4; Catherine Cardinet, Submission 22, 5; Emma (worker), Submission 31, pp. 5 and 6; Health and Community Services Union, Submission 34, p. 7; Media Entertainment and Arts Alliance, Submission 49, p. 13; Professionals Australia, Submission 60, p. 5; Unions NSW, Submission 80, p. 6.

1145. In both rideshare and food delivery new entrants have recently entered the Australian market. Each of these competes to attract workers, who as competition increases may divide their work time across a greater number of platforms. Shebah suggested to the Inquiry that some drivers may now be on as many as 15 rideshare platforms, see Georgia McEncroe, Shebah, Platform Business Roundtable Discussion, 22 February 2019.

1146. Emma (Worker), Submission 31, p. 5; Anonymous Worker 03, Submission 7, p. 5; WEstjustice, Submission 92, p. 39.

1147. End users using the Supp platform may employ workers on a casual basis for single shifts, see Supp, [FAQ’s](#) [website].

1148. Anonymous Worker 03, Submission 7, p. 5.

1149. Australian Government, Department of Prime Minister and Cabinet, [Government response to A husband is not a Retirement Plan: Achieving Economic Security for Women in Retirement](#), (Senate Economics Reference Committee Report) [website], 16 August 2018, p. 16.

1150. Australian Government, Australian Taxation, [Small Business Superannuation Clearing House](#) [website].

1151. Victorian Government Submission to the Commonwealth Government’s Retirement Income Review (6 February 2020), p. 33.

6.4 TERMS OF REFERENCE 3 – ARE PLATFORMS USING CONTRACTING ARRANGEMENTS TO AVOID THE APPLICATION OF WORK LAWS?

Snapshot

- ▶ Platforms have been deliberate in framing their arrangements with workers.
- ▶ This enables platforms to avoid the operation of close and detailed labour regulation while other businesses are carrying the costs of complying with those requirements.
- ▶ Non-employee platforms claim employment arrangements are incompatible with their models.
- ▶ Non-employee platforms craft, or closely manage, their arrangements to avoid an employment relationship and actively manage ‘reclassification’ risk.
- ▶ The Inquiry observes that some existing platform models would struggle to accommodate aspects of employment regulation that would otherwise apply to their workers.
- ▶ The Inquiry considers that the award system can and has evolved, and could do so to better accommodate platform work.

6.4.1 Platforms’ intentions

- 969 As traversed over the course of this report, it is not contested that most platforms have chosen non-employment arrangements to underpin their models. This part of the TOR goes to the question of whether the motive for this is to ‘avoid’ obligations in work laws. There is nothing unlawful about adopting genuine independent contracting arrangements on a large scale. This approach is not unique to platforms – some non-platform businesses also choose to organise workers in this way.
- 970 Platforms are unapologetic that they have chosen to operate outside the employment regulatory framework.
- 971 Platforms have been very deliberate about the basis and nature of their contractual arrangements with workers and customers. They can be complex and often provide the framework for, or prescribe, arrangements between workers and customers.
- 972 As noted in this report, particularly in Chapter 5, the contractual arrangements offered to non-employee platform workers are commonly done so on a ‘take it or leave it’ basis. The nature of the arrangements reflects the platforms’ choices, not the workers’, and the imperatives for the platforms to efficiently manage the systems they design and deploy. Platforms using non-employment arrangements assert that elements of their models are incongruous with an employment relationship. Many submitted that workers valued the unprecedented flexibility offered to them, over employment arrangements.¹¹⁵²
- 973 Platforms claim to be inhibited from extending more beneficial arrangements to workers by the risk that the relationship might then be characterised as employment, making their model untenable. The arrangements they have put in place are designed to mitigate this ‘reclassification risk’.

1152. Joanne Woo and Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019; Maggie Lloyd and Lucas Groeneveld, Uber, Individual Consultation, 19 July 2019; Simon Smith and Ann Tan, Ola, Individual Consultation, 3 July 2019; Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019; Ann Tan and Aaron Wolf, Ola, Platform Business Roundtable Discussion, 22 February 2019.

- 974 Several businesses (including Deliveroo and Uber) and some industry participants recommended that the law be modified so businesses can provide additional protections and benefits to non-employees without them later being classified as employees.¹¹⁵³ They said that while workers are not employees, they should still be able to provide additional protections or benefits.¹¹⁵⁴
- 975 To illustrate this point, Ola informed the Inquiry that engaging workers as employees, would require exclusive service for minimum periods and the company would then control and dictate work time. They, and several other platforms, submitted that this is not what on-demand workers want.¹¹⁵⁵
- 976 The position that platform work is not compatible with employment regulation is supported by some elements of ‘common law’ employment and the current regulation (largely sourced in the detailed regulation contained in modern awards). The key elements are:
- the self-determined nature of the work – workers choose when to work
 - payment for outcomes versus by time
 - requirements to work for a minimum period (minimum shift provisions in modern awards)
 - exclusivity – the common law principle of exclusive ‘service’ to one ‘employer’.

6.4.2 Self-determined work

- 977 A core component of this position is that platform workers choose when to work. There is no ‘rostering’ by the platforms. This self-determined way of working means the fundamental underpinning of an employment relationship: the work–wages bargain, is not present.
- 978 This is the critical differentiator between a self-employed on-demand worker and an employee on-demand worker – a casual employee who may be required from time to time and employed from shift to shift.
- 979 Uber’s research indicates that 80 per cent of its driver partners would be unlikely to work for them if fixed shifts were required, as they value flexibility over many other work conditions.¹¹⁵⁶ Uber submitted that this is why it uses independent (contracting) working arrangements.¹¹⁵⁷
- 980 The Inquiry notes that while this feature is part of the ‘work status’ test, it is not incongruous to awards and workplace laws that work is carried out as, and when, workers choose. Many workers are not ‘rostered’ for particular hours. Employees may work flexibly and often with minimal supervision. Many employees are able to choose to carry out work from home, in the evening or early in the morning, to fit around their lives and family. Employers’ flexible work policies facilitate this and such policies are encouraged. The challenges required in working under the COVID-19 shut-down have demonstrated that many businesses can operate more flexibly and this is likely to have fundamental and long term implications for the arrangement of work into the future.
- 981 While many awards operate based on rules setting out things like standard hours and rostered work, they could operate differently. An award might recognise that workers can choose when they work and establish standards around remuneration that would apply to that work.
- 982 There is, in the Inquiry’s view, scope for labour regulation to adapt to formally allowing for this way of working.

1153. Deliveroo, Submission 28, pp. 1 and 6; Victorian Chamber of Commerce and Industry, Submission 83, p. 6; Uber, Submission 79, p. 21; Joanne Woo and Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

1154. Uber, Submission 79, p. 22; Deliveroo, Submission 28, p. 6; Simon Smith and Ann Tan, Ola, Individual Consultation, 3 July 2019.

1155. Ann Tan, Ola, Platform Business Roundtable, 22 February 2019; Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019; See also for example, Maggie Lloyd and Lucas Groeneveld, Uber, Individual Consultation, 19 July 2019.

1156. Deliveroo, Submission 28, p. 5; Maggie Lloyd, Uber, Individual Consultation, 19 July 2019. Research conducted by Alphabeta on behalf of Uber also found that 55% of workers would not continue to drive for Uber if fixed rostering was implemented.

1157. Uber, Submission 79, p. 4.

6.4.3 Payment by outcome vs by the hour

- 983 As has already been observed, most platform work is remunerated based on the achievement of an outcome. Australia's workplace relations system is underpinned by hourly rates of pay. The hourly rate is derived from an award, an agreement or the federal minimum wage.
- 984 Award rates provide the minimum pay rate for most workers, having been set with reference to several factors: worker age, status (casual, full-time, apprentice, trainee) and the nature of the duties. Additional payments are made in recognition of overtime or work outside 'standard' hours.
- 985 Platforms assert that outcome-based pay is integral to their systems. They cite challenges in deriving an hourly rate for workers who combine work and non-related tasks, may be working for multiple organisations and even working across more than one platform simultaneously.
- 986 While employees are generally entitled to be paid hourly rates for time worked, the system does enable payment by outcome. Some awards provide for the setting of wages based on outcomes in the form of piece rates and commissions. Piece rates pay employees based on output for the number of items or products made, picked or packed for example. Piece rates apply instead of an hourly or weekly pay rate or are used in combination.¹¹⁵⁸ These arrangements are longstanding in sectors like agriculture.
- 987 Piece rates have been retained in modern awards and operate subject to protections. There must be a written piece rate agreement and the 'rate' must be set with reference to the relevant hourly rates – at a level that ensures competent workers can earn at least the equivalent of the minimum wage on an hourly basis.¹¹⁵⁹ There have been challenges in interpreting and enforcing this requirement.¹¹⁶⁰ But as fixtures in the award system, piece rates illustrate that outcome-based remuneration can be accommodated within employment regulation.
- 988 The Inquiry notes that awards could accommodate outcome-based remuneration for platform workers and set standards for setting such rates. Noting that workers choose when they work, the application of additional payments for work outside of 'standard' hours may not be seen as essential. This is a matter that could be considered by the FWC.

6.4.4 Minimum shift requirements

- 989 Most awards contain minimum shift requirements.¹¹⁶¹ That is, an employee may not be rostered for less than a minimum term, generally between two and four hours. Higher rates of pay or allowances may also be payable for 'split shifts' or where there is an insufficient break between shifts.
- 990 These rules were designed to protect workers from being required or called in to work for very short periods of time or not receiving appropriate rest between work periods. Where this is imposed on employees, it can cause them disproportionate costs and inconvenience relative to the value of wages earned.
- 991 Of the awards that may be applicable to platform workers, one of the shortest minimum engagement periods is two hours.¹¹⁶² For home care workers, it is one hour.¹¹⁶³ Platforms tie the preferences of workers for short and irregular working hours to flexibility, which they say demonstrates workers' desire for, and underpins platforms' commitment to, independent contracting arrangements.

1158. Fair Work Ombudsman, [Piece rates and commission payments](#) [website]. See for example the [Horticulture Award 2010](#) [website].

1159. See for example the [Horticulture Award 2010](#) [website]; Fair Work Ombudsman, [Piece rates and commission payments](#) [website].

1160. The Fair Work Ombudsman recently sought special leave of the High Court of Australia to appeal a decision of the Full Federal Court in *Fair Work Ombudsman v Hu* [2019] FCAFC 133. The Fair Work Ombudsman wanted the High Court to consider how compensation for an employee who was paid an inadequate pieceworker rate ought to be calculated. For instance, if the piece work rate was inadequate, the Fair Work Ombudsman wanted to confirm if those workers are entitled by default to be paid the hourly rates under the applicable *Horticulture Award 2010* (Fair Work Ombudsman, Fair Work Ombudsman Files, special leave application in Marland Mushrooms case, 19 September 2019, Media Release; 'FWO seeks to take piece work case to High Court', *Workplace Express*, 25 September 2019). However, the High Court denied the special leave application.

1161. See for example *Road Transport and Distribution Award 2010* – 4 hours minimum; *Restaurant Industry Award 2010* – 2 hours minimum; *Hospitality Industry (General) Award 2010* – 2 hours minimum; and *Fast Food Award 2010* – 3 hours minimum; Clause 10, *Social, Community, Home Care and Disability Services Industry Award 2010* – one hour minimum for home care workers. Some platforms have said it is not always clear which award should apply to workers, especially in the on-demand food delivery sector.

1162. See for example *Road Transport and Distribution Award 2010* – 4 hours minimum; *Restaurant Industry Award 2010* – 2 hours minimum; *Hospitality Industry (General) Award 2010* – 2 hours minimum; and *Fast Food Award 2010* – 3 hours minimum; *Social, Community, Home Care and Disability Services Industry Award 2010* (Some platforms have said it is not always clear which award should apply to workers, especially in the on-demand food delivery sector).

1163. Clause 10, *Social, Community, Home Care and Disability Services Industry Award 2010*.

- 992 It was submitted that minimum shifts are incompatible with platform work arrangements.¹¹⁶⁴ The Inquiry was provided credible information that workers often engage with platform work for short and non-consecutive periods of time.¹¹⁶⁵
- 993 A rideshare worker may log onto the platform to pick up a customer or two on the way home from work and then log off again.
- 994 Deliveroo stated that almost half its rider sessions are less than two hours.¹¹⁶⁶ It said workers prefer short shifts, a preference alleged to be possible only under independent contracting arrangements. If remuneration was tied to workers being required for a specific period of time, platforms suggest valued flexibility would be limited.
- 995 Businesses using an employment model for food delivery, such as the pizza delivery company Domino's, have sought to reduce minimum shift lengths, firstly through a proposed enterprise agreement and then via the award review process. This suggests the company may find it hard to accommodate the minimum shift lengths in awards.¹¹⁶⁷ However, Domino's says it can.
- 996 Other types of platform work may be more time critical – for example, providing caring or support to care recipients in their own home, or picking up a shift for an event or in a restaurant.
- 997 However, platform workers retain choice about when and where to work – which jobs to accept. While practically, they may feel compelled to work during a busy period or for longer periods to earn sufficient income, the self-determined nature of the system means that workers, not platforms, are making the decision about when and for how long they work.
- 998 The Inquiry notes that while minimum shifts commonly feature in awards, they are not required by the FW Act and the FWC. They may be less relevant in the case where a worker is not being 'rostered' by the employer and therefore choosing when to work. These requirements could be modified in existing, or new, awards taking into account the distinct features of platform work.

6.4.5 Working for multiple businesses or platforms

- 999 Platforms assert that workers being able to work for several platforms or businesses, including simultaneously, is a critical component of their systems.
- 1000 Employees under the common law are under an implied duty to faithfully serve their employer. This is understood to mean that they typically could not operate a business which competes with their employer's business, but may be able to work for another competing business if they do so outside the hours dedicated to their primary job. It is also not uncommon for employers to include exclusive service clauses in contracts (subject to being otherwise compliant with restraint of trade limitations).¹¹⁶⁸
- 1001 This feature is a remnant of the master and servant origins of employment. It continues to be important for some employers, but is equally something that need not be present in an employment arrangement and is not imposed by labour market regulation. Many employees also work multiple casual or part-time roles or do a combination of employment and on-demand work. In the case of platforms, the notion of exclusive service appears to be incompatible with a worker simultaneously sourcing work from several platforms.
- 1002 While principles around exclusivity operate for employees at common law, there is nothing in employment regulation that inhibits a self-employed worker having several jobs.

1164. Deliveroo, Submission 28, p. 5; Uber, Submission 29, p. 4; George McEncroe, Shebah, Platform Business Roundtable Discussion, 22 February 2019; Ann Tan, Ola, Platform Business Roundtable Discussion, 22 February 2019.

1165. The results of the National Survey tend to confirm this, with almost half of current platform workers, 47.2 per cent, spend less than five hours per week working or offering services via on-demand business platforms) (McDonald et al., *Digital Platform Work in Australia*, p. 56). Deliveroo told the Inquiry that based on its research, its riders work about 15 hours per week on average: Deliveroo, Submission 28, p. 4. And the report commissioned by Uber suggested that almost half of its driver partners spend a maximum of 10 hours per week on the Uber app (AlphaBeta Strategy and Economics, *Flexibility and fairness*, p. 16).

1166. Deliveroo, Submission 28, p. 5.

1167. Nick Knight, Domino's, Individual Consultation, 28 May 2019.

1168. Stewart et al., *Creighton & Stewart's Labour Law*, p. 506 – 507; *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312; *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275.

6.4.6 Employment-based platforms

- 1003 The argument of ‘incompatibility’ with employment positions is challenged by the fact that some on-demand businesses (Sidekicker, hospitality; Hire-up, care sector; Weploy, clerical and admin) engage workers as casual employees.¹¹⁶⁹ Occasionally, at the request of clients, platforms such as Expert360 will also engage professional services workers as employees.¹¹⁷⁰
- 1004 Sidekicker informed the Inquiry that it engages workers, typically as casuals, in accordance with the applicable award, such as the *Hospitality Industry (General) Award 2010*.¹¹⁷¹ Necessary penalty rates are automatically applied via Sidekicker’s platform. Business clients are provided with a full breakdown of costs, including the hourly rate, superannuation obligations, payroll tax, insurance and the platform’s service fee.¹¹⁷² Sidekicker noted that its model complies with the existing employment framework, objectively applied via its digital platform.¹¹⁷³ Sidekicker also submitted that if a business is paying a labour hire firm for a worker to perform hourly work, the worker should be engaged as the labour hire firm’s employee.¹¹⁷⁴
- 1005 Both Weploy and Hireup also told the Inquiry that workers taken on as employees are paid according to the relevant award, matching their skill and experience with the complexity of tasks to be performed.¹¹⁷⁵ On-boarding processes involve checking for award matches and uploading qualifications into the app.¹¹⁷⁶ Where appropriate, police and working with children and vulnerable person checks are also completed.¹¹⁷⁷ The platforms provide all insurances, pay work cover premiums and administer payroll services.¹¹⁷⁸
- 1006 These examples suggest that employment is not inherently incompatible with an on-demand business model. Even some food delivery workers are employees of a restaurant.¹¹⁷⁹ Some participants believe that a business’ decision about how to engage a worker is a matter of choice, not a necessity. The Inquiry was told, for example, that a worker who gained exam and assignment marking work via a platform was engaged as an employee, even though the platform initially intended to engage her as an independent contractor. NTEU intervention was required.¹¹⁸⁰
- 1007 Platforms engaging workers as employees are remunerating them in accordance with statutorily set standards and industry or occupation standards overseen by the independent tribunal, the FWC. Platforms using non-employment arrangements are not required to remunerate in accordance with these or any other standards, although some do recommend or refer to relevant minimum rates.
- 1008 This arguably creates an uneven playing field, where businesses carrying out similar activities under employment arrangements incur the compliance and direct costs of regulated pay rates and complex rules, while those using non-employee arrangements do not.
- 1009 The differences between traditional and on-demand business models has led submitters from a range of sectors, including transport, hospitality and caring services, to challenge whether there is a level playing field for businesses competing with platforms that engage workers.¹¹⁸¹ These submitters protest that platform businesses are not subject to the same regulations and need not meet the same minimum standards others must comply with. In so doing, platforms avoid significant costs and complexity and arguably obtain an unfair and potentially unlawful competitive advantage.

1169. Sidekicker, Submission 71, p. 5; Tom Amos, Sidekicker, Individual Consultation, 24 June 2019; Ben Eatwell Weploy, Platform Business Roundtable Discussion, 22 February 2019; Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019.

1170. Jonathan Hunter, Expert360, Platform Business Roundtable Discussion, 22 February 2019.

1171. Tom Amos, Sidekicker, Individual Consultation, 24 June 2019.

1172. Sidekicker, Submission 71, p. 6; Tom Amos, Sidekicker, 24 June 2019.

1173. Sidekicker, Submission 71, p. 3.

1174. Sidekicker, Submission 71, p. 3.

1175. Sidekicker, Submission 71, p. 6; Harriet Dwyer, Hireup, Care Sector Roundtable Discussion, 19 July 2019.

1176. Sidekicker, Submission 71, p. 6; Harriet Dwyer, Hireup, 19 July 2019.

1177. Sidekicker, Submission 71, p. 6; Harriet Dwyer, Hireup, 19 July 2019.

1178. Sidekicker, Submission 71, p. 8; Harriet Dwyer, Hireup, 19 July 2019.

1179. Nick Knight, Domino’s, Individual Consultation, 28 May 2019.

1180. Anonymous Worker 3, Submission 7, p. 2.

1181. For example Transport Workers’ Union of Australia, Submission 78, p. 15; Randstad, Submission 61, p. 2; Samantha, worker, Submission 65, p. 8; Lonely Pets Club, Submission 42, p. 2; Transport Matters Party, Submission 77, p. 1; Professionals Australia, Submission 60, p. 9; Marketing for Restaurants, Submission 44, p. 9; Australia Institute Centre for Future Work, Submission 9, pp. 26, 27; Maurice Blackburn Lawyers, Submission 46, p. 8; Recruitment, Consulting and Staffing Association of Australia, Submission 62, p. 8.

- 1010 Several submissions focused on the use of independent contracting arrangements to avoid obligations to obtain an unfair advantage. Maurice Blackburn Lawyers for example, suggests that some businesses have engaged in sham contracting and deliberate attempts to misclassify workers for these reasons.¹¹⁸² Professionals Australia suggests that workers must be protected from businesses seeking to divert risk by misclassifying workers, otherwise any chance of a level playing field for those businesses who do comply will be destroyed.¹¹⁸³
- 1011 Some platform businesses may be able to exploit the uncertainty in relation to the application of the common-law test and the coverage of extended statutory definitions.¹¹⁸⁴ Maurice Blackburn Lawyers suggests that, it is this behaviour which provides the unfair competitive advantage over businesses who 'do not use such tactics'.¹¹⁸⁵
- 1012 Of course, if these arrangements are lawful, they might on another view involve fair business practice. The SRO for example, has suggested that the arrangements of many on-demand platforms comply with laws it administers and the advantages obtained by platforms may therefore be considered legitimate.¹¹⁸⁶

6.4.7 Could labour regulation accommodate platform arranged work?

- 1013 Many of the elements that platforms characterise as fundamental to their models can, and are, able to be accommodated within an employment like framework. On-demand work, in many ways, resembles casual work arrangements, where employees are not required to accept shifts or work particular hours, may work for multiple businesses and so forth.¹¹⁸⁷ The key distinction is that for platform mediated work, the worker, not an employer, decides when work is done.
- 1014 The current system could accommodate the features of platform work if there were an appetite to explore how it might be adjusted so it was fit-for-purpose for this way of working. There is no indication that platforms have sought to work with the FWC to either seek to modify, or create, awards to accommodate this way of working.
- 1015 The FWC has shown itself capable of adapting to changing circumstances – it varied the operation of awards at lightning speed in response to the impact of COVID-19 interventions, to facilitate greater flexibility for employers facing unprecedented and sudden disruption.
- 1016 The Inquiry considers that should platforms wish to, they could ask the FWC to vary the award system to create fit-for-purpose protections for employee platform models.

6.4.8 Reclassification risk – deterring better conditions for platform workers?

- 1017 Platforms advocated that the current 'work status' test and their desire to manage 'reclassification risk' produced disincentives from extending benefits to workers, particularly in relation to insurance and superannuation. Some platforms expressed a desire to enhance benefits for workers, but were cautious about so doing as it may compromise the self-employed status of the individual worker and thereby the viability of their models (see submissions from platforms on providing additional benefits to workers noted elsewhere in the report).
- 1018 It was reported, for example, that platforms may be risking their non-employment-based models by providing protective equipment to rideshare and food delivery workers to improve their safety during the COVID-19 pandemic.¹¹⁸⁸
- 1019 The work status test in this sense could be creating a perverse outcome where businesses which desire to improve the position of workers are deterred from so doing. This is arguably because of the broader consequences to their systems, if their workforce was to take on too many of the characteristics of employment.

1182. Maurice Blackburn Lawyers, Submission 46, p. 6.

1183. Professionals Australia, Submission 60, p. 2.

1184. Maurice Blackburn Lawyers, Submission 46, pp. 5 and 7; See also Stewart and Stanford, 'Regulating work in the gig economy', p. 428; Prof Shae McCrystal and Prof Andrew Stewart, Submission 47, p. 4.

1185. Maurice Blackburn Lawyers, Submission 46, p. 3.

1186. Victorian Government, Department of Treasury and Finance, Individual Consultation, 24 June 2019. The Department also noted that payroll tax amounts to about a four per cent increase on the cost of wages. They suggest that, of all considerations, this is unlikely to be the 'wedge' that determines the outcome of competition between traditional businesses and platforms. However, the Australia Institute notes that the increase is closer to 4.85 per cent, whilst restaurant owners told the Inquiry their margins can be as low as two to four percent. See also Australia Institute Centre for Future Work, Submission 9, p. 27; Mark Jenson, Red Lantern, Restaurant and Catering Roundtable Discussion, 16 July 2019.

1187. 'Foodora ruling unlikely to disrupt disrupters: Academic', *Workplace Express* [website], 2018.

1188. N. Bonyhady, 'Safety measures may put gig economy contractor status at risk' [website], *Sydney Morning Herald*, 4 May 2020.

- 1020 Platforms submitted that the law is out of date and does not reflect how many workers choose to work today – flexibly and autonomously.¹¹⁸⁹ Deliveroo further submitted that the legal concepts of ‘employee’ and ‘independent contractor’ developed before platforms existed.
- 1021 Further, these businesses submitted that, rather than forcing them to change their business models to provide workers with greater security, the law needed to catch up.¹¹⁹⁰
- 1022 Uber told the Inquiry that in many countries, such as Australia, employment law constrains platforms that may wish to provide additional support to workers.¹¹⁹¹ Uber referred to its global standard that ‘at a basic level, everyone should have the ability to protect themselves and their loved ones when they’re injured at work, get sick, or when it’s time to retire’ and indicated that it wishes to work with other stakeholders to build a portable benefits system, including in relation to retirement benefits (see discussion above).¹¹⁹²
- 1023 As noted, many on-demand businesses do provide personal and accident insurance to workers.¹¹⁹³ However, they expressed concern that offering these, put them at risk of a court concluding that a worker is an employee.¹¹⁹⁴
- 1024 Due to the perceived threat of reclassification, some platforms contended that they are unable to provide additional benefits to self-employed workers.¹¹⁹⁵ A representative of Deliveroo stated:
- ... what we really want is to end that trade-off between flexibility and security. Right now in terms of the legislation; if we do offer our riders security, some form of security like sick pay, they then could potentially be classified as employees which would then jeopardise their ability of being self-employed contractors, and that is what they’ve told us that they want.*¹¹⁹⁶
- 1025 Deliveroo and some other platforms believe workers who opt to work in the on-demand economy should be provided with the flexibility and control they desire, as well as greater security at work. To end the trade-off between flexibility and security, Deliveroo suggests that law reform be considered so workers can accrue benefits on the basis of work performed (for example, the number of deliveries completed or the value of fees earned), rather than basing it on their ordinary hours of work.¹¹⁹⁷
- 1026 Ola also suggested that any loss of flexibility for workers would negatively impact its capacity to recruit workers, as drivers want flexibility.¹¹⁹⁸
- 1027 Several platforms also suggested that they would be prepared to provide superannuation,¹¹⁹⁹ but worried that if they did so, their business model may be jeopardised. Deliveroo was one such company.¹²⁰⁰
- 1028 It is sometimes proposed that indicia, such as lack of paid leave, workers’ compensation, superannuation or non-deduction of PAYG tax, may be relevant in determining whether a worker is an employee or independent contractor. However, leading legal academics suggest these factors ought to be given little weight. Whether those benefits ought to be provided is dependent on whether, initially, there is an employment relationship. Not the other way around.¹²⁰¹

1189. Uber, Submission 79, p. 5.

1190. Deliveroo, Submission 28, p. 7; Victorian Chamber of Commerce and Industry, Submission 83, p. 6.

1191. Uber, Submission 79, p. 5.

1192. Uber, Submission 79, p. 5; Confidential Submission, Submission 43, p. 14.

1193. Airtasker, Airtasker Help, [How does third party liability insurance on Airtasker work for Taskers?](#) [website]; Sidekicker notes that its workers are covered by WorkCover, Sidekicker, Submission 71, p. 8; Harriet Dwyer, Hireup, Care Sector Roundtable, 19 July 2019; Mable, [Support Worker safeguards](#) [website].

1194. Uber, Submission 79, p. 22; Jodi Ingham and Joanne Woo, Deliveroo, 17 July 2019, Individual Consultation.

1195. Deliveroo, Submission 28, pp. 4–5; Uber Submission 79, p. 26.

1196. Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019.

1197. Joanne Woo, Deliveroo, Platform Business Roundtable Discussion, 22 February 2019; Deliveroo, Submission 28, p. 6.

1198. Simon Smith and Ann Tan, Ola, Individual Consultation, 3 July 2019.

1199. For example Simon Smith and Ann Tan, Ola, Individual Consultation, 3 July 2019.

1200. Joanne Woo, Deliveroo, Individual Consultation, 17 July 2019.

1201. Stewart, et al., *Creighton & Stewart’s Labour Law*, p. 206; See *Ace Insurance v Trifunovski* [2013] 209 FCR 146; and *Re Porter* [1989] 34 IR 179 at 185.

6.4.8.1 Improving standards

- 1029 The Inquiry notes that many platforms have expressed a desire to improve the position of their workforces. The Inquiry considers that governments could work with platforms to establish principles based benchmarks or standards to ensure fairness for platform workers who are not employees. The goodwill expressed and demonstrated by many platforms in this regard has informed the Inquiry's recommendations (see Chapter 7).
- 1030 In spite of 'reclassification risk', some platforms have been prepared to enhance workers' positions. Some crowd-work platforms that facilitate arrangements where the worker must agree a price with the consumer, reference employment standards in their frameworks. The Airtasker and Unions NSW arrangement (referred to in Chapter 5 of this report) is the most formalised example of this.¹²⁰²
- 1031 Guidance' or 'minimum payments' may nudge the consumer to consider the employment rates but there is no imperative for them to act on this advice. The fact that some platform workers are covered by voluntary agreements seeking to establish above statutory minimum rates,¹²⁰³ may suggest that the employment framework is not incompatible with on-demand work.
- 1032 Work on-demand platforms on the other hand, are setting prices for workers which need not, and do not, appear to be benchmarked to minimum employee rates.
- 1033 Several submitters were supportive of ACTU recommendations to create minimum standards and rates for on-demand workers that are not less than those in an applicable modern award.¹²⁰⁴ The TWU reported that contracts used by several on-demand platform businesses have changed over time, including by transitioning from hourly to piece rates.¹²⁰⁵ Participants told the Inquiry there has been a gradual undermining of awards and industrial arrangements.¹²⁰⁶
- 1034 One potential benchmark brought to the attention of the Inquiry was the Five Pillars of Fair Work (Labour Standards in the Platform Economy) developed by Fair Work.¹²⁰⁷ The principles call for fair standards relating to:
1. Pay – workers should earn a decent income after accounting for work-related costs
 2. Conditions – such as proactive measures to protect and promote health and safety
 3. Contracts – transparent terms and conditions, in an accessible form
 4. Management – fair processes for workers to be heard, to appeal and understand decisions affecting them
 5. Representation – the right to collectively organise and opportunities to negotiate.
- 1035 It was suggested that these standards be used as benchmarks for regulators to evaluate platforms against.¹²⁰⁸ The standards would encourage platform businesses to be transparent about the nature of the work arrangements they offer and ultimately create fairer jobs.

1202. Unions NSW, Submission 80, p. 10.

1203. Unions NSW, Submission 80, p. 10.

1204. Health and Community Services Union, Submission 34, p. 7; Victorian Trades Hall Council, Submission 88, p. 4; Australian Council of Trade Unions, Submission 1, pp. 5-6; Law Institute of Victoria, Submission 39, p. 13.

1205. Transport Workers' Union of Australia, Submission 78, p. 4.

1206. Adam Portelli, Media Entertainment and Arts Alliance, Union and Worker Roundtable Discussion, 7 June 2019.

1207. FairWork, *The five pillars of Fairwork: Labour standards in the platform economy* (2019), Oxford, UK, Capetown, South Africa, Bangalore, India. The five FairWork principles were developed at workshops that brought together workers, platforms, trade unionists, and policymakers at the International Labour Organization and United Nations Conference on Trade and Development in Geneva, as well as in India (Bangalore and Ahmedabad) and South Africa (Cape Town and Johannesburg).

1208. FairWork, *The five pillars of Fairwork*. The five FairWork principles were developed at workshops that brought together workers, platforms, trade unionists, and policymakers at the International Labour Organization and United Nations Conference on Trade and Development in Geneva, as well as in India (Bangalore and Ahmedabad) and South Africa (Cape Town and Johannesburg).

6.5 TERMS OF REFERENCE 4 – THE EFFECTIVENESS OF THE ENFORCEMENT OF WORK LAWS

Snapshot

- ▶ The work status test is inherently complex to apply in ‘borderline’ cases.
- ▶ Work status is only tested in a ‘post-breach’ scenario – that is, when someone asserts a person has been misclassified for the purpose of particular rules. Work status cannot easily be resolved from the outset of the relationship.
- ▶ Workers experience inconsistent and qualified advice from regulators about their ‘true’ work status, resulting in uncertainty around entitlements, protections and obligations under employment, health and safety and tax laws.
- ▶ Formally resolving status is costly and complex so it’s not a real option for low-leveraged workers, including many platform workers.
- ▶ Borderline work status is not being effectively resolved or enforced in the current system.
- ▶ As a result, parties operate under their nominal or ‘presumed’ status.
- ▶ A more proactive, interventionist approach from regulators could address some, but not all, of these issues.

- 1036 The work status test creates a binary outcome for workers, with very different treatments by the regulatory framework for employees as opposed to self-employed, self-directed workers.
- 1037 However, the dichotomy is not clear-cut for all workers. The modern labour market features arrangements that are indistinct, that is, where applying the indicia does not produce a conclusive answer. Many platform arrangements fall into this category.
- 1038 Where the outcome is inconclusive, without some form of regulatory assistance or intervention, a worker has little choice but to accept their ‘presumed’ work status. If a worker is presumed to be an independent contractor but is really an employee, they will not have received the entitlements, protections and benefits accorded to them under work laws.
- 1039 Resolving the question of work status is therefore critical to enable certainty for workers, business and regulators.
- 1040 This part examines how the question may be resolved under the current framework and assesses the effectiveness of the enforcement of current laws and remedies. It considers the options and remedies for employee platform workers and non-platform workers to resolve uncertainty and enforce their respective rights.
- 1041 The Inquiry heard compelling evidence from a range of sources that the current system is falling short when it comes to resolving this question. This can present a challenge not just for platforms, but any other parties operating under ‘non-employee’ arrangements.
- 1042 Elements which cause this are:
- the inherent complexity and uncertainty of the work status test
 - a lack of effective assistance and advice, or ‘helpful’ help navigating these issues
 - inaccessible resolution pathways
 - lack of effective support in enforcing or resolving work status.
- 1043 Given the presumed and, in all likelihood, true work status of some platform workers is that they are not employees, the Inquiry has also considered the adequacy of the options available to them as self-employed autonomous small businesses.

- 1044 Challenges in applying the test and resolving work status – the variations as to how different statutes have incorporated but modified the ‘common law employment’ test, a lack of clarity about where to go for help and advice, and regulatory inaction – have all contributed to circumstances, that at best, create a regulatory quagmire, especially for low-leveraged workers. At worst, it is a framework ripe for exploitation by those who have access to lawyers and advisers to structure their arrangements and minimise their compliance costs.
- 1045 There is also a recognition that the dichotomy creates an incentive to deliberately structure arrangements to avoid employment regulation.¹²⁰⁹ It may be that it is this concern which sits behind the decisions of parliaments to legislate to extend certain benefits or obligations beyond the employment relationship under the common law, in a range of different frameworks.

6.5.1 Inherent uncertainty of ‘work status’ in borderline cases

- 1046 The work status test has been criticised for being uncertain and difficult to apply for many of the diverse range of workers in purported non-employment arrangements. The requirement to weigh up so many distinct aspects of the arrangements and the totality of the relationship can result in different, but valid, opinions about work status.¹²¹⁰ In the most recent and authoritative tribunal consideration of platform worker status, the Full Bench of the Commission noted, ‘The application of this test in borderline cases is not without difficulty, since it requires the making of an evaluative judgement involving the weighing of various relevant considerations and, as such, may not produce any single clear answer.’¹²¹¹
- 1047 One of the key difficulties with the multi-factor legal test is that courts may apply it to similar facts, but arrive at very different conclusions.¹²¹² Melbourne University academic, Dr Tess Hardy, in assessing the general applicability of the Foodora decision (see below), noted that, even when you have a similar set of facts, judges or commissioners may place different weight on the different indicia and arrive at different outcomes.¹²¹³ Further, Dr Hardy noted that some indicia may be features of both casual employment relationships and independent contracting arrangements. For example, non-exclusive service and a right to refuse work may be features of both casual employment and independent contracting arrangements.¹²¹⁴
- 1048 According to some Inquiry participants, the common law multi-factorial legal indicia of employment were developed to deal with more traditional methods of work. For example, the Law Institute of Victoria questioned whether the test was suited to assess the platform economy.¹²¹⁵

1209. See above discussion of sham contracting.

1210. Menulog, Submission 50, p. 13; Uber, Submission 79, p. 22; Sidekicker, Submission 71, p. 9; Housing Industry Association, Submission 35, p. 9; Unions NSW, Submission 80, p. 8; Jonathan Hunter, Expert360, Platform Business Roundtable Discussion, 22 February 2019; Self-Employed Australia, Submission 67, p. 6; Michael Andrew, Chair Black Economy Advisory Board, Submission 4, p. 3.

1211. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 at [55].

1212. Roles and Stewart, ‘The reach of labour regulation’, p. 267 (see for example *Vabu v Federal Commissioner of Taxation* (1996) 33 ATR 537 and *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 – where the opposite conclusions were reached with respect to the same company and the same bicycle couriers. In the former case the couriers drove or rode motor-cycles whereas in the latter case the couriers used bicycles.

1213. ‘[Foodora ruling unlikely to disrupt disrupters: Academic](#)’, 20 November 2018, *Workplace Express* [website].

1214. ‘[Foodora ruling unlikely to disrupt disrupters: Academic](#)’.

1215. Law Institute of Victoria, Submission 39, p. 10; Menulog, Submission 50, p. 13; Uber, Submission 79, p. 22; Sidekicker, Submission 71, p. 9; Housing Industry Association, Submission 35, p. 9; Unions NSW, Submission 80, p. 8; Jonathan Hunter, Expert360, Platform Business Roundtable Discussion, 22 February 2019; Self-Employed Australia, Submission 67, p. 6; Michael Andrew, Chair Black Economy Advisory Board, Submission 4, p. 3.

- 1049 Decisions by the FWC that have considered the work status of platform workers have also posed the question of whether the existing multifactorial test is fit-for-purpose in this context. In *Kaseris*, considering Uber's rideshare model, Deputy President Gostencnik stated that:

The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new 'gig' or 'sharing' economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition.

Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.¹²¹⁶

- 1050 In *Klooger v Foodora*, considering Foodora's food-delivery platform, Commissioner Cambridge noted:

The determination that the applicant was properly, an employee of Foodora and not a contractor has been made having regard for the conventional and well established approach described as the application of the multifactorial tests. In my view, there may be a need to expand and modify the orthodox contemplation for the determination of the characterisation of contracts of employment vis-à-vis, independent contractor, as the changing nature of work is impacted by new technologies.¹²¹⁷

- 1051 Cases that have applied the multi-factor legal indicia turn on the facts before the court or tribunal. That particular arrangement and relationship is examined. Consequently, decisions may offer little guidance regarding on-demand work arrangements more generally.¹²¹⁸ Even submissions supportive of maintaining the dichotomy, acknowledged the complexity and ambiguity. SEA's submission noted that while the test is both 'important' and 'powerful', it is also neither unambiguous nor simple:

The point is that the distinction between employee and independent contractor is an important and powerful distinction but it is not an unambiguous one nor a simple one. Nor can it be legislated away with an all-purpose rule. The distinction as it applies in practice has been contested periodically in courts for at least a century or more. It will continue to be contested.¹²¹⁹

- 1052 The Housing Industry Association said:

Where state and federal governments have sought to legislate to codify independent contractors and deem some to be employees, that invariably added complexity, confusion and cost to business operations, particularly for small businesses ... There is no reason why the common law tests cannot be applied to 'on-demand' workers.¹²²⁰

- 1053 The purity of work status has been compromised over time by exceptions and extensions across a range of statutory frameworks including those outlined earlier in this chapter, that have granted employment like entitlements to cohorts of non-employed workers.¹²²¹

1216. *Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610 at [66].

1217. *Klooger v Foodora* [2018] FWC 6836 at [103].

1218. Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen, Submission 14, p. 3. These submitters noted that these decisions are unlikely to be generalisable across platforms.

1219. Self-Employed Australia, Submission 67, p. 6; Housing Industry Association, Submission 35, p. 9.

1220. Housing Industry Association, Submission 35, p. 6.

1221. See for example, legislation that extends rights to a broader category of worker discussed above: *Superannuation Guarantee (Administration) Act 1992* (Cth); *Occupational Health and Safety Act 2004* (Vic); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Accident Compensation Act 1985* (Vic). Other legislation that extends rights to non-employee workers: *Owner Drivers and Forestry Contractors Act 2005* (Vic); *Long Service Benefits Portability Act 2018* (Vic); *Industrial Relations Act 1986* (NSW) (applies to contracts of bailments and contracts of carriages).

- 1054 This further complicates the situation for parties who must navigate different, convoluted ‘definitions’ in different laws overseen by several different agencies. It can mean that a worker is considered to be covered by one statutory framework as an ‘employee’ but not another.
- 1055 For example, a person may be advised they are not an employee for the purpose of the FW Act, but they are to be treated as an employee by the tax system.¹²²²
- 1056 The situation for wages and super may not be the same. The ATO is responsible for super given its obligations under the SG Act (discussed above). Since the SG Act’s test extends the common law definition, some workers may be entitled to superannuation but not to have their wages enforced under the FW Act.
- 1057 Many participants were particularly critical of this aspect of the Australian regulatory framework. The concern was that it creates much uncertainty for workers and businesses when the employment status of a worker or group of workers may be differently assessed by a court, tribunal or regulator.¹²²³
- 1058 Many Inquiry participants called for greater clarity across different frameworks. They asserted that consistency, transparency, accessibility and speedy resolution of a person’s status was required, either through changes to the law or changes to the way regulators advise and support people, particularly workers and small businesses.¹²²⁴

6.5.2 Lack of ‘helpful’ help

- 1059 In attempting to resolve the question of status, workers go to a range of places for help and advice. The Inquiry heard this often means bouncing between different parts of government in search of certainty or clarity about their rights.
- 1060 The FWO is responsible for advising workers about their entitlements under the FW Act, which includes whether a worker is, or is not, an employee. It is also responsible for assisting workers to seek remedies under the workplace relations framework if they have been wrongly classified, and potentially taking action over this (see further information below).
- 1061 The FWO provides information and assistance to workers to help them apply the indicia to their relationship.
- 1062 However, the Inquiry heard that the FWO is often not able to give presumed non-employee workers clear advice about their status, leaving them to seek their own. This may not be practical for those earning a low income, or for whom this work activity is only a small proportion of their income.

1222. The Australian Small Business and Family Enterprise Ombudsman told the Inquiry of one example of an Australian start up, that was liaising with both Fair Work Ombudsman and the Australian Taxation Office. At first the company was given an informal view by the ATO that its workers obtaining work via the platform were contractors, but then after a formal review, the company was told that the workers were employees. The matter is nearing resolution after the company has been engaging with regulators for almost two years: Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, Individual Consultation, 10 July 2019.

1223. Menulog, Submission 50, p. 13; Uber, Submission 79, p. 22; Sidekicker, Submission 71, p. 9; Housing Industry Association, Submission 35, p. 9; Unions NSW, Submission 80, p. 8.

1224. Menulog, Submission 50, p. 13; Uber, Submission 79, p. 22; Sidekicker, Submission 71, p. 9; Housing Industry Association, Submission 35, p. 9; Unions NSW, Submission 80, p. 8; Jonathan Hunter, Expert360, Platform Business Roundtable Discussion, 22 February 2019; Unions NSW, Submission 80, p. 8; Professor Shae McCrystal and Professor Andrew Stewart, Submission 47, p. 3 (note that there is a need to tackle inconsistent and unpredictable application of judicial tests of employment status); Victorian Transport Association, Submission 90, p. 9 (suggests defining on-demand workers to ensure they are covered by legislation that offers protections); Professor David Peetz, Submission 58, p. 12 (calls for statutory definition of a worker); Victorian Trades Hall Council, Submission 89, p. 7; Shop Distributive and Allied Employees Association, Submission 69, p. 15; Kate Carnell Australian Small Business and Family Enterprise Ombudsman, Individual Consultation, 10 July 2019; Elisha Radwanowski, Australian Convenience and Petroleum Marketers Association, Small Business Roundtable Discussion, 12 July 2019; Robert Blanche, Bayside Group and Nicole O’Sullivan, Tandem, IT and Telecommunications Roundtable Discussion, 28 February 2019.

- 1063 The FWO advised the Inquiry that platform on-demand workers represent a very small proportion of its requests for assistance.¹²²⁵ Its 'find help' page for independent contractors was viewed almost 84,000 times in 2018 and 2019 and its fact sheet on independent contractors and employees was downloaded 97,647 times. Advice can also be sought from FWO's fair work infoline, small business helpline and online MyAccount service. In the past five financial years, FWO has completed 883 disputes relating to alleged sham contracting or misclassification across several industries and business structures.¹²²⁶ FWO said it has been interested in the platform workforce as it intersects with other priority areas for FWO, such as:
- **fast food, restaurants and cafes:** several of Australia's more well-known businesses service this sector
 - **supply chain risks:** any business that procures labour from a third, including via an on-demand business, is exposed to legal and reputational risk if that third does not comply with their obligations under workplace law
 - **sham contracting:** the FWO's interactions with workers and businesses to date have predominantly related to ensuring proper classification of workers, as either employees or contractors, depending on the circumstances of engagement
 - **vulnerable workers:** the FWO finds that certain cohorts of workers, such as young and migrant workers, can be vulnerable to exploitation. A range of factors contribute to their vulnerability, including that they are often not aware of their workplace rights and do not feel able to question their employers about their workplace rights and entitlements.¹²²⁷
- 1064 While agencies work together to some degree and strive for consistency, this does not translate into the reality experienced by many on-demand workers. Few seek remedies from these entities, and regulators are not especially focused on this cohort.
- 1065 It is often an inherent feature of bureaucracies that each regulatory framework is administered by a separate agency. Efforts to 'join up' and ensure there are 'no wrong doors' across agencies, particularly for vulnerable members of the community are applauded, but often struggle to be successful because of the naturally siloed way in which agencies operate.
- 1066 It was noted that in spite of good efforts to 'join up' around information and support, unnecessary complexity and uncertainty was caused because Commonwealth regulators, such as the ATO, FWO, and other bodies, apply tests differently.
- 1067 At a roundtable consultation, the Council of Small Business Organisations Australia (COSBOA) expressed dissatisfaction about the operation of tax tests. They argued that where the choice is made freely, the parties' choice of arrangement should be paramount.¹²²⁸ Some businesses were concerned that a claim could be pursued in the FWC, even though the ATO had previously considered the issue using a different test.¹²²⁹ The tax law test used by the ATO is based on the common law multi-factor test and is similar to the test applied by the FWO, but different conclusions are reached by these regulators.
- 1068 Many participants said it creates real uncertainty when the employment status of a worker or group of workers may be differently assessed by a court, tribunal or regulator.¹²³⁰

1225. Letter sent by email to the Inquiry from Sandra Parker, Fair Work Ombudsman, dated 11 October 2019, p. 2.

1226. Letter sent by email to the Inquiry from Sandra Parker, Fair Work Ombudsman, dated 11 October 2019, p. 2.

1227. Fair Work Ombudsman, Submission 32, p. 2.

1228. Peter Strong, Council of Small Business Organisations Australia, Small Business Roundtable Discussion, 12 July 2019, Department of Premier and Cabinet, 121 Exhibition St, Melbourne.

1229. Dominic Schipano, Australian Digital and Telecommunications Industry Association, 12 July 2020.

1230. Menulog, Submission 50, p. 13; Uber, Submission 79, p. 22; Sidekicker, Submission 71, p. 9; Housing Industry Association, Submission 35, p. 9; Unions NSW, Submission 80, p. 8.

6.5.3 Inaccessible resolution pathways

- 1069 The inherent uncertainty of the test could be mitigated if there was a fast, easy way to get the question finally resolved. But this is not the case. Final resolution requires formal action. The system is not geared to determining the question of status from the outset, but only where a person alleges a breach of the law – ‘post breach’.¹²³¹
- 1070 The options for seeking formal resolution involve formally challenging the presumed status, either in a court or a tribunal, by making a claim for entitlements or remedies available by virtue of being an employee (for example, unpaid wages, unfair dismissal) or alleging sham contracting.
- 1071 While the FWC is not a court, its decisions are enforceable in a court and are considered to be persuasive precedents, though a court is not bound to follow them. In either case, complex legal and factual matters must be argued, and unrepresented or unsupported parties are likely to find this challenging if the platform contests their claim.
- 1072 As noted earlier there have been no court decisions in Australia about platform workers, though there has been consideration of work status by the FWC.
- 1073 The categorisation of work arrangements is not something definitively and quickly determined before the parties have begun to work under them. It is not attractive or realistic to seek a formal ruling prior to commencing business and most workers do not have the time or money to challenge their arrangements in a court or tribunal. There is no simple way to obtain an ‘endorsement’ or otherwise of the arrangement.
- 1074 WEstjustice drew such ‘access to justice’ concerns to the Inquiry’s attention. It stated that, to receive compensation for underpayment of earnings, a claim must be made in the Federal Circuit Court or Federal Court of Australia.¹²³² A claimant must establish that they were an employee and know the appropriate award classification, the rate of pay and the extent of any underpayment.¹²³³ Even with a reasonably strong case, the court may find that the worker is not an employee.¹²³⁴ WEstjustice said workers may obtain a better outcome if they pursue a claim as an independent contractor.¹²³⁵
- 1075 Maurice Blackburn Lawyers submitted that on-demand workers are at a distinct disadvantage in accessing workplace rights given:
- Unions are not well engaged with the workforce, platform businesses have significantly more resources, there is fear of reprisal and the worker may have limited understanding of how and where to get information.*¹²³⁶
- 1076 The law firm also suggested that some platforms are attempting to exploit the uncertainty created by the multi-factor legal indicia test, to avoid employment obligations.¹²³⁷
- 1077 There are palpable obstacles for individual workers seeking to challenge their presumed work status. Cost and complexity are strong disincentives particularly for low-leveraged workers who may not be earning significant income via the platform.
- 1078 The cost-benefit analysis of challenging their presumed work status is unlikely to stack up for most individual workers.

6.5.4 Failure to quickly resolve/enforce work status

- 1079 Given the challenges for individual workers, the capacity for intervention by regulators or other third parties to seek clarity of arrangements is an important factor. There is clear public interest in resolving this question, especially if platforms are deploying ‘systems’ which wrongly treat significant numbers of workers as self-employed.
- 1080 The FWO is the agency with the function of taking such action.

1231. Michael Kaine, Transport Workers’ Union of Australia, Individual Consultation, 18 October 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

1232. WEstjustice, Submission 93, p. 24.

1233. WEstjustice, Submission 93, p. 24.

1234. WEstjustice, Submission 93, p. 24.

1235. WEstjustice, Submission 93, p. 24.

1236. Maurice Blackburn Lawyers, Submission 46, p. 7.

1237. Maurice Blackburn Lawyers, Submission 46, p. 7.

- 1081 If the FWO forms a view that the law has been misapplied, it considers whether there has been a genuine mistake or misunderstanding and assists the parties with education and support to rectify the situation, including securing backpay.
- 1082 The FWO advised that in more serious cases, it will take action, including formal investigations and initiating court action in appropriate cases.
- 1083 The FWO refers to its action against Foodora alleging sham contracting which did not proceed to court due to the platform ceasing operations and being placed in administration. Foodora conceded following the action, that its workers should have been treated as employees (see Foodora case study below).
- 1084 The Inquiry notes that the FWO investigated Uber's arrangements, to assess whether drivers were engaged as employees or contractors. The FWO concluded that, on the weight of evidence, there was no employment relationship between Uber Australia and its drivers. It said, at a minimum, there must be an obligation for a worker to perform work when an employer demands.¹²³⁸
- 1085 The FWO concluded that the ten Uber drivers who were the subjects of its review, were not employees, including because they were not subject to any formal or operational obligation to perform work, and as these drivers had control over whether, when and for how long they decided to perform work.
- 1086 The FWO's decision is effectively an administrative one – it is not required to, and nor did it, produce any detailed reasons for its decision, rather, a short statement that there was insufficient evidence to conclude that the relationship between Uber and the drivers was an employment relationship. The FWO subsequently reinforced to the Inquiry that a key element of its decision was that the drivers were not subject to any formal or operational obligation to perform work, on any given day or week.¹²³⁹
- 1087 The FWO's decision has no formal status at law in the way a court decision would have. Having considered some evidence and decided not to test the law in a court, it sent a powerful signal to the market about the prospects of a test case based on the evidence before it.
- 1088 The FWO's reasoning is consistent and arguably validated with the FWC's subsequent majority Full Bench consideration of Uber Eats' arrangements – both concluding that the workers were not employees.
- 1089 A handful of matters brought to tribunals by rideshare and food delivery platform workers, have argued that their status was incorrectly classified and they should be provided with employment entitlements.¹²⁴⁰ These matters were pursued as unfair dismissal claims.¹²⁴¹ With one exception (*Klooger v Foodora Australia Pty Ltd*),¹²⁴² they were unsuccessful.¹²⁴³
- 1090 In *Klooger v Foodora*,¹²⁴⁴ probably the best known case, a successful unfair dismissal claim was brought by food delivery rider, Josh Klooger. The FWC found that Mr Klooger, when working for (then) food delivery company Foodora, should have been engaged as an employee and not an independent contractor.

1238. Letter sent by email to the Inquiry from Sandra Parker, Fair Work Ombudsman, dated 11 October 2019, p. 2; Fair Work Ombudsman, [Uber Australia investigation finalised](#) [website], Media Release, 7 June 2019; 'Uber's Contractor Model Given FWO tick', *Workplace Express*, 7 June 2019.

1239. Letter sent by email to the Inquiry from Sandra Parker, Fair Work Ombudsman, dated 11 October 2019, p. 2; Fair Work Ombudsman, [Uber Australia investigation finalised](#) [website], Media Release, 7 June 2019; 'Uber's Contractor Model Given FWO tick', *Workplace Express*, 7 June 2019.

1240. *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific* [2019] FWC 4807.

1241. *Suliman v Rasier Pacific* [2019] FWC 4807, [39] Bissett C; *Kaseris v Rasier Pacific V.O.F* [2017] FWC, [66] Gostencnik DP. In each of *Kaiseris v Raiser Pacific* and *Suliman v Rasier Pacific* decision makers weighed indicia and found some favoured an employment relationship whilst others were characteristic of genuine independent contracting. However, the absence of a 'work-wages bargain' proved significant in determining that workers were independent contractors. In *Suliman*, Commissioner Bissett used the concept to draw a distinction between casual employment and independent contracting. A casual employee who agrees to a shift agrees to work across a certain period for an agreed payment. Having commenced a shift, the casual employee must complete the agreed hours. By contrast, once an Uber driver has logged onto the Uber application, they are free to log off at any time. See also recent FWO administrative decision. When assessing whether the engagement of Uber drivers complies with Commonwealth workplace laws, the Fair Work Ombudsman's investigation concluded that the 'weight of evidence' showed no employment relationship existed. 'Uber's Contractor Model Given FWO tick', *Workplace Express*, 7 June 2019.

1242. *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

1243. *Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610; *Pallage v Raiser Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific* [2019] FWC 4807; *Gupta v Portier Pacific Pty Ltd*; *Uber Australia Pty Ltd t/a Uber Eats* [2020] FWC 1698.

1244. *Klooger v Foodora* [2018] FWC 6836.

- 1091 Workers who have pursued FWC cases against Uber or Uber Eats, have not been successful.¹²⁴⁵ In *Kaseris, Pallage, Suliman and Gupta*, the workers were found to not be employees after the traditional multifactorial legal test was applied. A critical element of the finding in *Kaseris, Pallage and Suliman* was that there was no work–wages bargain because drivers were not obliged to perform work, when logged on to the app and ‘at work’, and did not face any consequences if they refused requests to work. In *Kaseris, Pallage and Suliman* the FWC concluded that the work–wages bargain is essential to the employment relationship.¹²⁴⁶
- 1092 Another key factor was the degree of control the drivers exercised over their own work.¹²⁴⁷ They could choose their hours and the number of trips they conducted while logged on and refuse trips without consequence.¹²⁴⁸ Consequently, the workers were unable to access the FWC’s unfair dismissal jurisdiction.
- 1093 The Gupta decision was appealed with the support of the TWU (unsuccessfully).¹²⁴⁹ The decision of the Full Bench was the first time an appellate body has considered the legal status of an on-demand worker. It was consistent with the FWO’s finding (in relation to several Uber drivers) that workers were not employees.¹²⁵⁰ That being so, only a court can ultimately resolve whether an on-demand worker is a contractor or an employee.
- 1094 There is one current matter, again involving a food delivery platform, before the Federal Circuit Court where the applicant is asserting he is an employee and entitled to be paid under an award.¹²⁵¹
- 1095 Mr Jeremy Rhind is pursuing a sham contracting case against Deliveroo. Supported by the TWU, Mr Rhind is claiming that Deliveroo misrepresented his employment as an independent contracting arrangement, in breach of the FW Act’s sham contracting provisions.¹²⁵² Mr Rhind is arguing that he ought to have been engaged as a casual employee, applying the multifactorial legal indicia used to distinguish between employees and contractors.¹²⁵³
- 1096 The Federal Circuit Court’s decision regarding Mr Rhind’s claim will, if made, be the first Australian court decision to consider the legal status of an on-demand food delivery worker. A ruling by a court is the only authoritative way to resolve whether an on-demand worker is a contractor or an employee.

1245. *Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610; *Pallage v Raiser Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Raiser Pacific; Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

1246. *Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610; *Pallage v Raiser Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Raiser Pacific; Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

1247. *Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610; *Pallage v Raiser Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Raiser Pacific; Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

1248. *Kaseris v Raiser Pacific V.O.F* [2017] FWC 6610; *Pallage v Raiser Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Raiser Pacific; Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

1249. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

1250. *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

1251. *Rhind v Deliveroo Australia Pty Ltd & Anor* (CAG38/2019).

1252. *Fair Work Act 2009* (Cth) s.357; ‘Our Contracts do not contain work–wages bargain: Deliveroo’, *Workplace Express*, 21 January 2020.

1253. ‘Our contracts do not contain work–wages bargain: Deliveroo’, *Workplace Express*, 21 January 2020; ‘Deliveroo Worker Pursuing Sham Contracting Case’, *Workplace Express*, 19 July 2019; Mr Rhind further claims that Deliveroo paid him \$368 for a total of 35 hours and 10 minutes of work between August 2017 and June 2018 and he is seeking \$2,340 in unpaid wages, entitlements, superannuation, compensation and damages. Mr Rhind alleges that he received \$8.55 per delivery, amounting to a rate of only \$10.46 an hour, which is much lower than the minimum wage (\$19.49 per hour). Mr Rhind claims Deliveroo paid him, exercised significant control over his work, required that he wear the company’s uniform, use branded equipment and make deliveries in a set geographical location for a shift that he elected to work via the Deliveroo app. It is further contended by Mr Rhind that Deliveroo assessed his performance based on weighted factors such as punctuality and whether he presented for work, to determine who would get priority offers to work certain shifts. Penalties were also applied for a failure to undertake delivery work. It is Mr Rhind’s contention that the practical consequences of the batching system introduced by Deliveroo created an obligation to perform work. Mr Rhind suggests that the batching system meant he would have to perform a certain number of deliveries per shift, reach a minimum number of shifts per week and work several Friday, Saturday or Sunday nights to maintain a high ranking. Further, Mr Rhind contends that he worked exclusively for Deliveroo, and that it would be difficult to work for more than one platform at the same time and that he did not delegate or subcontract his work to another contractor. Deliveroo are defending all of the claims made by Mr Rhind. Deliveroo contends that under the supply agreement with it, and also in practice, Mr Rhind was under no obligation to work or perform any services, and it was entirely his choice to decide if, when and how much he wanted to work. He was not subject to the direction of Deliveroo. The company also stated that Mr Rhind could in reality provide services to other companies if he wanted to, as he was only logged on for 28 hours over a ten-month period, and only delivered 40 orders. In agreeing to work for Deliveroo, the company submitted that Mr Rhind represented that he was a self-employed independent contractor in business on his own account. Notably, while it is Deliveroo’s submission that Mr Rhind is a contractor and so would not be covered by an Award, it is Deliveroo’s view that if any award did apply to him, it would be the Fast Food Industry Award, not the Road Transport and Distribution Award as claimed by Mr Rhind.

- 1097 The VTHC submitted that it is not uncommon for it to take a worker up to eight months to find out whether they are an employee when pursuing a matter in the FWC.¹²⁵⁴ As an example, in *Klooger v Foodora*,¹²⁵⁵ Mr Klooger's unfair dismissal application commenced on 14 March 2018 and the decision was only reached on 16 November 2018.¹²⁵⁶
- 1098 Similarly, FWO's sham contracting action against Foodora was filed in June 2018. Given the eventual fate of that matter, it appears significant Commonwealth resources were invested over some time, without a court ever having the opportunity to consider the substance of the case.
- 1099 The FWO's administrative decision regarding Uber drivers involved a similarly lengthy timeframe. The investigation commenced in 2017 and concluded the drivers were not employees, only in late 2019.¹²⁵⁷

6.5.5 The problems for regulators

- 1100 The process of investigation of platforms appears reactive and slow – platforms have been in operation for extensive periods before being scrutinised.
- 1101 There are several factors behind why regulators may take a long time to take action to confirm the status of workers. The Inquiry notes that these cases are complex and resource intensive. They are not without risk for a regulator that must justify taxpayer-funded court action in relation to public interest, prospect of success, and competing priorities.
- 1102 Reported non-compliance with respect to employee workers in Australia is rightly a priority of the FWO, especially when it involves deliberate and blatant exploitation of vulnerable workers.
- 1103 Any actions challenging the presumed status of platform workers will be strongly contested and expensive. This endangers the success of such a challenge, and the prospect of success is a primary criterion for taking action in the first place. Additionally, the fact that any outcome will only ever apply to those workers directly involved in the action limits the 'system impact'.
- 1104 Given the leverage that the platforms enjoy in determining their arrangements, a successful case would likely see them adjust their arrangements to preserve the non-employment status underpinning their models. In this context, the cost, resources and competing priorities limit the motivation for regulators to get involved.
- 1105 Workers and businesses need greater certainty than our current framework is delivering. Uncertainty can be fatal to enforcement. The appetite to resource investigation or legal action wanes as the costs and complexity rises, especially where a regulator has numerous competing priorities and insufficient resources.
- 1106 However, it is in the public interest to examine the legitimacy (or illegitimacy) of arrangements, to provide workers with certainty about their entitlements and to give businesses a level playing field.

1254. Victorian Trades Hall Council, Submission 88, p. 11.

1255. *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

1256. *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

1257. Uber's Contractor Model Given FWO tick', *Workplace Express*, 7 June 2019.

CASE STUDY

FOODORA – NO QUICK OR EFFECTIVE RESOLUTION

Overview

Mr Josh Klooger had worked for Foodora. The ATO and the FWO pursued the company on the basis that its food delivery riders were employees and not independent contractors.

The Foodora case study illustrates the many challenges that individuals and regulatory agencies can encounter when trying to enforce the law in an on-demand environment. The proceedings were costly and lengthy and not all workers are able to pursue similar claims.

How did Foodora operate?

Foodora was founded in Germany and began operating in Australia in 2015.¹²⁵⁸ It ran an internet-based platform through which customers could order food from local restaurants. Once an order was submitted, Foodora would match a rider with the restaurant and they would deliver food to the customer.

Foodora arranged the work performed by its couriers via mobile phone internet applications.¹²⁵⁹ Workers would log into the Foodora app at predetermined times and sign up to available shifts distributed across geographical locations.¹²⁶⁰ At some time before they arrived at their location, the courier would collect and attach a Foodora branded insulated box to their bicycle, for carrying food.¹²⁶¹

Once at the location, another app was used to distribute delivery tasks. Via this app, Foodora would send workers notification of a food order and the location of the restaurant to collect it from.¹²⁶² From the restaurant, the worker would access the app and confirm collection.¹²⁶³ When the worker confirmed, Foodora provided the delivery address.¹²⁶⁴ The worker then took the food to the customer.

On its website, Foodora advertised to the public that food from restaurants would be delivered to them by 'our' drivers and 'our riders'.¹²⁶⁵

Foodora had a 'batching' system to allocate shifts.¹²⁶⁶ The workforce was divided into six batches and workers were allocated to a batch based on performance – Batch 1, the best performing and Batch 6 the lowest. When 'shifts' were released, workers got access based on this 'batch' ranking.

Electronic message communication between riders/drivers and Foodora was a key part of managing logistics. An electronic messaging chat group was initially established with What's App.¹²⁶⁷ It was used to communicate and resolve delivery issues, including the need to swap shifts.

When the What's App chat group reached its participant limit, Foodora workers began to communicate via another chat room, hosted via the Telegram app.¹²⁶⁸ This was set up by Josh Klooger, who also maintained administrative control rights.

Foodora closes operations as FWO and ATO take action

The arrangements between Foodora and its delivery workers had been of concern to regulators from the start. Following an earlier investigation, in June 2018, the FWO initiated proceedings, asserting that Foodora's workers were employees rather than independent contractors. The FWO alleged that Foodora breached sham contracting laws by misrepresenting to workers that they were independent contractors rather than employees. Having investigated the circumstances of three workers, the FWO claimed that the workers were paid less than the applicable minimum wage rates, casual loadings and penalty rates for night, weekend and public holiday work.¹²⁶⁹ The FWO further alleged that each of the workers was underpaid \$1,640 across a four-week period. In addition, no superannuation was paid.

CASE
STUDY

FOODORA – NO QUICK OR EFFECTIVE RESOLUTION (CONT)

On 2 August 2018, Foodora understood that an ATO investigation was being conducted of its business.¹²⁷⁰ Foodora had engaged its workers as independent contractors but the ATO was concerned that tax should be paid on the basis that its workers were actually employees.

On 2 August 2018, Foodora announced that it would close its Australian operations by 20 August 2018.¹²⁷¹ It entered voluntary administration on 17 August 2018.¹²⁷²

On about 28 August 2018, the ATO determined that Foodora's workers were, for tax purposes, employees.¹²⁷³ The ATO decision did not however mean that Foodora's workers were employees for the purposes of other workplace laws.

The company's administrators indicated shortly thereafter that the company had underpaid employees approximately \$5.25 million and owed the ATO about \$2.1 million.¹²⁷⁴ About \$550,000 was also owed to Revenue NSW. Creditors and Foodora's German parent company agreed to settle claims by Deed of Company Arrangement for \$3 million, which ended the administration.¹²⁷⁵

Once Foodora entered administration, the FWO proceedings could not continue without the consent of the administrators. FWO did not seek consent. On 21 June 2019, the FWO confirmed that it would discontinue its proceedings against Foodora, deeming it unlikely they would result in additional payments being made for workers or financial penalties being imposed on the company.¹²⁷⁶

Mr Klooger's unfair dismissal application against Foodora

Mr Klooger commenced work as a food delivery bicycle courier with Foodora in March 2016. Mr Klooger had signed a service agreement with Foodora called an Independent Contractor Agreement. The contract said Josh was to be paid \$14 per hour when on-shift and \$5 per delivery.¹²⁷⁷

Mr Klooger allowed a delivery rider, whose own access had been suspended because he did not have work rights, to access shifts through the Foodora app using his log in details.¹²⁷⁸

Mr Klooger later gave his log in details to other riders. Mr Klooger paid sub-contractors according to his own contract with Foodora, but subtracted a percentage for tax and his involvement. Mr Klooger was contactable by phone whenever a sub-contractor was working, in case there were problems with a delivery.

Mr Klooger's contract with Foodora indicated that he needed to seek Foodora's express consent prior to entering into any sub-contracting arrangements. However, when Foodora management found out about the sub-contracting, it took no steps to prevent it, instead commending Mr Klooger for his entrepreneurial spirit.¹²⁷⁹

Employees engaged after Mr Klooger were on different contracts. Over time Foodora reduced riders' hourly rates and commissions. In July 2016, the hourly rate for new riders was reduced to \$13 and the per delivery payment to \$3.¹²⁸⁰ Toward the end of 2016, Foodora removed the hourly rate completely and fixed a flat rate of \$10 per delivery.

In early 2018, Mr Klooger made a series of public complaints about the rates paid to new Foodora delivery riders.¹²⁸¹

In February 2018, Foodora wrote to Mr Klooger raising concerns about his administrative control of the chat room. It was used by Foodora workers and Foodora wanted control over it.¹²⁸² In March 2018, Foodora sent Mr Klooger a second email saying he had failed to comply and that they would no longer engage his services.¹²⁸³

Mr Klooger filed an unfair dismissal application with the FWC. Foodora responded by stating that the FWC did not have jurisdiction to hear Mr Klooger's unfair dismissal claim because he was an independent contractor, not an employee.

Commissioner Cambridge decided Mr Klooger was an employee.¹²⁸⁴ He held that Mr Klooger was unfairly dismissed. He said Mr Klooger was really dismissed for agitating about the terms and conditions Foodora imposed on delivery drivers. This was not a valid reason.

Deciding whether workers are employees or independent contractors

In each of the ATO, FWO and Klooger unfair dismissal actions, the relevant decision maker had to apply the 'multifactorial test' to decide whether the worker was an employee or contractor. Its application in these types of cases has been confirmed by the High Court. No single factor is determinative and a different weight may be attributed to each factor. A case turns on its facts and the arrangements in place between the worker and the platform business.

The reasons for the ATO determination are not on the public record and the FWO action was discontinued. However, the reasons provided by Commissioner Cambridge in deciding Mr Klooger's unfair dismissal application demonstrate the application of the multifactorial test to the facts.¹²⁸⁵

The service agreement between Mr Klooger and Foodora contained language to the effect that he was an independent contractor.¹²⁸⁶ It also referred to matters typically present in employment contracts, including dress codes that required Mr Klooger to present himself as a part of Foodora's business, rostering arrangements, and an obligation to comply with Foodora's policies.

The Commissioner noted that Foodora appeared to go to some lengths to define the relationship as one of principal and contractor.¹²⁸⁷ However, he was of the view that the matters noted above, tended to point to a contract of employment between the parties.

The Commissioner also placed a degree of significance on the batching system used by Foodora.¹²⁸⁸ Under the batching system the Commissioner found that as a 'practical reality', workers could not pick and choose when or where to work or how fast or how slow. Further, the system for allocating workers was found to have the same outcome as rostering practices commonly used to allocate casual workers to available shifts. This, along with contractual terms that provided a unilateral right for Foodora to suspend or dismiss Mr Klooger, suggested a level of control exerted by Foodora consistent with an employment relationship.

Other indicia were also considered.¹²⁸⁹ In summary, extra considerations pointing to an employment relationship included that Mr Klooger:

- (a) had not invested significant capital
- (b) did not have a separate place of work
- (c) did not obtain good will
- (d) did not cover business expenses
- (e) was presented to the public as part of the Foodora business
- (f) was remunerated regularly, albeit via automatically generated invoices.

It was also found that, although a Foodora worker could perform work for other platforms, this was not dissimilar to an employee who holds a second job.

In Mr Klooger's case, Foodora drew significant attention to his sub-contracting arrangements and the fact that they permitted it.¹²⁹⁰ They argued that permission to subcontract performance of tasks was inconsistent with a contract of service.

Commissioner Cambridge found that, given it required approval by written consent, the right to sub-contract under the service agreement was not unfettered. On the basis that Mr Klooger had not sought approval to sub-contract and that Foodora had not provided written consent, the Commissioner concluded that Foodora management should not have permitted the sub-contracting arrangement.

This conclusion was strengthened by the finding that one of the sub-contractors was working illegally and had previously been 'de-activated' by Foodora. According to the Commissioner, it followed that Foodora could not rely on the fact that they allowed Mr Klooger to sub-contract to support the position that Mr Klooger was not an employee.¹²⁹¹

Some factors did point to a relationship between an independent contractor and principal. However, on balance, the indicia pointed to an employment relationship.

6.5.6 Adequacy of remedies

- 1107 Relevant to assessing the effectiveness of enforcement, is whether the remedies available for platform workers are ‘fit-for-purpose’. This includes both the machinery designed to address uncertainty around ‘work status’, such as sham contracting and also the remedies and support available to ‘non-employee’ workers.
- 1108 There are pathways for ‘small businesses’ or ‘independent contractors’ to seek support and remedies in relation to their arrangements.
- 1109 It is important to consider their application to platform workers, firstly because it is likely that some platform workers’ true work status is what it is presented to be: that is, they are not employees under the existing ‘work status’ tests. It is evident to the Inquiry that, while these options are theoretically available to platform workers, they are not regularly accessed by them.
- 1110 Secondly, with the challenges to resolving work status, for some workers, the better course of action may be to seek the support and remedies available based on their ‘presumed status’, even if it is not their true status. This might be the pragmatic approach, particularly if a worker does not have the means to challenge their status and/or the alternative pathway may resolve their immediate issue. For example, via dispute resolution services on offer to small businesses.

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1258. S. Thomsen, [Foodora is quitting Australia in less than 3 weeks](#) [website], *Business Insider Australia*, 2 August 2018; Media Release, [Appointment of Administrator—Foodora Australia Pty Ltd](#) [website], Worrells, Solvency and Forensic Accountants, 20 August 2018.
1259. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [8] Cambridge C.
1260. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [8] Cambridge C.
1261. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [9] Cambridge C.
1262. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [10] Cambridge C.
1263. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [10] Cambridge C.
1264. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [10] Cambridge C.
1265. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [90] Cambridge C.
1266. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [19] Cambridge C.
1267. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [21] Cambridge C.
1268. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [22] Cambridge C.
1269. Australian Government, Fair Work Ombudsman, [Fair Work Ombudsman commences legal action against Foodora](#) [website], 12 June 2018.
1270. Marin-Guzman, [‘Tax Office Investigating Foodora’](#).
1271. Marin-Guzman, [‘Tax Office Investigating Foodora’](#).
1272. Australian Securities and Investment Commission, Published Notices, [Combined Notice of Appointment and First Meeting of Creditors of Company under Administration](#) [website], 21 August 2018; The Inquiry notes with interest that Foodora has very recently announced that it would stop operating in Canada on 11 May 2020, and filed for bankruptcy claiming that it is \$4.7 million in debt, after the Ontario Labour Relations Board ruled that Foodora workers were employees for the purposes of the Canadian Labour Relations Act and protected by the provinces bargaining laws, D. Doorey, [Thoughts on Foodora’s Canadian Exit: Have Labour Laws Been Violated?](#), Labour Law Down Under Blog, 1 May 2020.
1273. D. Chao, [Foodora fallout: ATO comes after failed food delivery company for unpaid taxes](#) [website], *ABC News*, 28 August 2018.
1274. A. Patty, [Foodora offers to pay less than half amount claimed by creditors](#) [website], *Sydney Morning Herald*, 8 November 2018.
1275. Approximately \$2.6 million was paid to priority creditors, including delivery riders, [Foodora riders: employee entitlement underpayment](#) [website], Worrells, Solvency and Forensic Accountants, 2 September 2019.
1276. Australian Government: Fair Work Ombudsman, [FWO discontinues legal action against Foodora](#) [website], 21 June 2019.
1277. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [23] Cambridge C.
1278. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [14] Cambridge C.
1279. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [16] Cambridge C.
1280. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [23] Cambridge C.
1281. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [24] Cambridge C.
1282. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [25] Cambridge C.
1283. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [26] Cambridge C.
1284. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.
1285. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.
1286. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 [71], Cambridge C.
1287. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 [70], Cambridge C.
1288. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 [73], [74], Cambridge C.
1289. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [75–100], Cambridge C.
1290. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, [79–87], Cambridge C.
1291. *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

6.5.7 Resolving employment status – sham contract remedies

Snapshot

- ▶ **The enforcement of existing sham contracting provisions is not providing sufficient deterrence against misuse of independent contracting arrangements.**
- ▶ **Sham contracting provisions should be amended along the lines recommended by previous independent inquiries.**
- ▶ **In addition, the sham contracting provisions should take into account the extent to which work status is a genuine choice on the part of the worker.**

- 1111 The FW Act recognises that the dichotomy between employee and independent contractors may incentivise those bearing the costs of employment regulation to circumvent it by deliberately disguising the arrangement as an independent contracting arrangement.
- 1112 These businesses would operate with lower labour costs and avoid other statutory obligations like having to comply with award wages, PAYG tax obligations, payroll tax and superannuation contributions.¹²⁹²
- 1113 This is possible because it is up to the parties to frame their relationship, and in some cases, one party will have greater leverage and effectively re-badge it however they prefer.
- 1114 The work status test requires a consideration of the true character of the relationship. However, the reality is that formal, independent consideration of this rarely occurs. If a contract is labelled as an ‘independent contracting arrangement’ parties will generally operate on this basis, even if it is a ‘borderline’ case. To address this ‘moral hazard’ the FW Act prohibits ‘sham contracting’ arrangements from deliberately misrepresenting employee workers as independent contractors.¹²⁹³ Sham contracting is available where the ‘true’ status of the worker is, based on an application of the ‘work status’ indicia, found to be an employee but the employer either knowingly or recklessly treated the worker as an independent contractor.
- 1115 These provisions are designed both to protect workers and to prevent a business obtaining an unfair economic benefit over competitors. If platform workers are wrongly characterised as independent contractors, the sham contracting provisions may apply.
- 1116 The remedy targets deliberate conduct. If a worker has been mischaracterised as an independent contractor but the employer can demonstrate they did not do so knowingly or recklessly, they will not be found to have engaged in sham contracting.
- 1117 This remedy could assist presumed non-employee platform workers, if they are able to demonstrate their true work status is that of employee.
- 1118 The sham contracting provisions have been reviewed and found to have hurdles that are very challenging to meet.

1292. Australian Government, The Treasury, [Improving Black Economy Enforcement and Offences](#), Consultation Paper [website], 22 November 2018, pp. 3 and 14.

1293. The Black Economy Taskforce recommended that the Government implement the Productivity Commission’s earlier recommended changes to the sham contracting provisions of the *Fair Work Act 2009*, Australian Government, The Treasury, [Black Economy Taskforce Final Report – October 2017](#), p. 236.

- 1119 The Productivity Commission and the Commonwealth Government's Black Economy Taskforce¹²⁹⁴ both recommended reform to reduce the degree of intention that must be proven.¹²⁹⁵
- 1120 The Commonwealth Government agreed in principle to increase the penalties for breaches of the sham contracting provisions in the FW Act, but stopped short of agreeing to lower the intent threshold for establishing the offence.¹²⁹⁶
- 1121 In September 2019, the Commonwealth Minister for Industrial Relations, the Hon Christian Porter MP, released a discussion paper inviting submissions from stakeholders on how to reduce non-compliance with workplace laws. It explored things such as higher penalties for sham contracting and whether the 'reckless' threshold for prosecuting employers is suitable.¹²⁹⁷ Consistent with the evidence provided to this Inquiry, many submissions by unions and other worker representatives supported further amendments to the recklessness test,¹²⁹⁸ while a lot of industry representatives were opposed to any modifications.¹²⁹⁹
- 1122 There were conflicting views during the Inquiry as to whether existing sham contracting laws are an effective remedy for platform workers.
- 1123 ACCI said they were not aware of any concrete evidence about a groundswell of 'sham' arrangements designed to exploit or avoid workplace obligations, or anything to justify revisiting the regulatory framework in this area, including in relation to the 'on-demand' economy.¹³⁰⁰ ACCI and VCCI noted that the FWO already actively pursues sham contracting contraventions. Each was of the view that current sham contracting laws are fit-for-purpose.¹³⁰¹ They did not support change.¹³⁰² The Commonwealth Government recently allocated \$9.2 million to the FWO to establish a dedicated unit focusing on sham contracting arrangements.¹³⁰³

1294. Chair Black Economy Advisory Board, Submission 4, Attachment A.; Australian Government, The Treasury, *Improving Black Economy Enforcement and Offences*, Consultation Paper [website], 22 November 2018, pp. 3 and 14. The Chair of the Commonwealth Government's Black Economy Taskforce (Michael Andrew) noted in his submission to the Inquiry that sham contracting arrangements have become increasingly common in Australia. The Taskforce recommended that the sham contracting provisions in the *Fair Work Act 2009* (Cth) should be strengthened (in line with previous recommendations of the Productivity Commission) (Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report*, May 2018, p. 26).

1295. Chair Black Economy Advisory Board, Submission 4, Attachment A.; Australian Government, The Treasury, *Black Economy Taskforce Final Report – October 2017*, p. 237; Productivity Commission, *Workplace Relations Framework: Productivity Commission Inquiry Report*, Volume 2, No. 76., 30 November 2015, p. 47; Australian Government, The Treasury, *Improving Black Economy Enforcement and Offences*, Consultation Paper [website], 22 November 2018, pp. 3 and 14. The Productivity Commission previously reviewed the Fair Work Act's sham contracting provisions in 2015 and concluded that the requirement to prove that an employer was reckless, as to whether or not it was an employment contract was too high a bar. The Productivity Commission recommended that the test should be lowered to whether an employer 'reasonably should have known' whether it was an employment contract.

1296. Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report*, May 2018, p. 26. The Commonwealth Government, in response to the recommendations of the Taskforce, agreed in principle to increase the penalties for breaches of the sham contracting provisions in the FW Act, but stopped short of agreeing to lower the intent threshold to establish the offence. In September 2019, the Commonwealth Minister for Industrial relations, the Hon Christian Porter MP, released a discussion paper inviting submissions from stakeholders on how to strengthen non-compliance with workplace laws, including with higher penalties for sham contracting or whether the 'reckless' threshold for prosecuting employers is suitable (see Australian Government, Attorney-General's Department, *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance* [website], 2019).

1297. Australian Government, Attorney-General's Department, *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance* [website], 2019.

1298. Australian Council of Trade Unions; Australian Manufacturing Workers' Union; CFMMEU; Australian Nursing and Midwifery Foundation; AUSVEG; Legal Aid NSW; Maurice Blackburn Lawyers; Migrant Workers Centre; Queensland Government and WEstjustice Community Legal Centre.

1299. Australian Chamber of Commerce and Industry; Australian Business Industrial and the NSW Business Chamber; Australian Industry Group; Business Council of Australia; Housing Industry Association; National Retail Association; Australasian Association of Convenience Stores and Australian Fresh Produce Alliance.

1300. Australian Chamber of Commerce and Industry, Submission 10, p. 6.

1301. Australian Chamber of Commerce and Industry, Submission 10, p. 6; Victorian Chamber of Commerce and Industry, Submission 83, p. 6.

1302. Australian Chamber of Commerce and Industry, Submission 10, p. 6; Australian Industry Group, Submission 1, p. 30; Victorian Chamber of Commerce and Industry, Submission 83, p. 6.

1303. Australian Government, *Tackling the black economy: Government Response to the Black Economy Taskforce Final Report*, May 2018, p. 26; Letter sent by email to the Inquiry from Chris Moraitis, Secretary, Attorney-General's Department, dated 13 November 2019, p. 3.

- 1124 Several other participants however, contended that the Inquiry ought to respond to fairly wide-spread concerns about the misclassification of workers as independent contractors and the use of sham contracting arrangements.¹³⁰⁴ The ACTU and VTHC supported further reforms to strengthen protections under the FW Act.¹³⁰⁵ The ACTU referred to the recent example of Foodora which exited Australia after it was prosecuted for sham contracting arrangements, to support its case.¹³⁰⁶ Professionals Australia submitted that a comprehensive regulatory response is needed so there are clear obligations on platform businesses and so workers disguised under sham contracting arrangements are protected under Commonwealth laws.¹³⁰⁷
- 1125 To effectively eliminate sham contracting, several other participants submitted that workers ought to be presumed to be employees, unless it can be shown that they are running their own business.¹³⁰⁸ The Inquiry agrees with previous independent inquiries that the sham contracting provisions should be amended to ensure they more effectively deter parties misusing independent contracting arrangements. The amendments recommended and under consideration by the Commonwealth are well thought through and should be progressed.
- 1126 However, as previously noted, the arrangements of platform workers are diverse and many contain features of both employee and independent contracting workers.
- 1127 There have not been any successful sham contracting actions taken against a platform. Leading legal scholars, such as Professors McCrystal and Stewart, have said that workers who agree to perform discreet one-off jobs or project tasks of short duration such as ‘micro tasks’, are unlikely to qualify as employees, ‘even on the broadest possible view’.¹³⁰⁹
- 1128 Many platforms’ systems create arrangements that have features of both employment and non-employee work.
- 1129 It may be challenging to demonstrate deliberate conduct, seeking to disguise or mislead, in relation to these arrangements. Even with changes to the law mooted by the Commonwealth.
- 1130 Independent contracting is a good choice for many workers who wish to operate in an autonomous manner and ‘be their own’ boss. But it should be a genuine choice. Given the unilateral nature of the ‘work status’ decision in some cases, the Inquiry considers that the question of leverage or bargaining power and genuine choice should be an element of the sham contracting remedy. The Inquiry notes that the IC Act requires the relative bargaining positions of the parties to be considered when determining whether a contract is unfair. This element would be appropriately imported into whether or not a contract is genuine or a sham.

6.5.8 Small business support and remedies

Snapshot

- ▶ Advice and support services from small business support agencies are not targeted to platform workers and are not being regularly accessed by such workers.

- 1131 If a worker is not an employee, they are able to access support as a self-employed small business. The framework in place to support this group is overseen by Small Business Commissioners or, in the case of the Commonwealth, the ASBFEO. The ACCC also plays an important role supporting small businesses, with mechanisms in Competition and Consumer Law designed to protect small businesses who may have minimal leverage or bargaining power when dealing with much larger businesses.

1304. Communication Workers Union Postal and Telecommunications Branch of Victoria Division of the CEPU, Submission 25, p. 4; Chair Black Economy Advisory Board, Submission 4, Attachment A.

1305. Australian Council of Trade Unions, Submission 11, p. 12; Victorian Trades Hall Council, Submission 88, p. 4.

1306. Australian Council of Trade Unions, Submission 11, p. 6; Thomas Costa, Unions NSW, Care Sector Roundtable Discussion, 19 July 2019.

1307. Professionals Australia, Submission 60, p. 9.

1308. Prof Shae McCrystal and Prof Andrew Stewart, Submission 47, p. 3; WEstjustice, Submission 92, p. 11; Maurice Blackburn Lawyers, Submission 46, p. 11.

1309. Australian Council of Trade Unions, Submission 11, p. 2; Prof Shae McCrystal and Prof Andrew Stewart, Submission 47, p. 4.

- 1132 The help and remedies offered by the Victorian Small Business Commission (VSBC)/ASBFEO focus on advice and dispute resolution, which operate on a voluntary basis though with some incentives to the parties to cooperate, and good success rates in resolving disputes (see further information below – Small business advice and dispute resolution).
- 1133 More formal ‘unfair contracts’ remedies provide an avenue for small businesses to challenge their contractual arrangements. These pathways recognise that small businesses may encounter unfair practices when transacting with larger businesses because they have relatively less bargaining power.¹³¹⁰ As a result, remedies have evolved to enable small businesses to seek relief from unconscionable and unfair practices, including unfair contracts.
- 1134 As noted above, a key concern raised by submitters, was that many platforms offer access to work under ‘take it or leave it’ contracts that retain a high degree of discretion, including to change the terms of workers’ arrangements. One worker told the Inquiry that amendments to contracts were made via the relevant platform’s app, without prior warning and in circumstances where the worker could not obtain further work unless the terms were accepted.¹³¹¹ The Inquiry heard that while some platform workers have sought help from the ACCC, the ASBFEO and the VSBC, the numbers are low and outcomes variable.

6.5.9 Small business advice and dispute resolution

6.5.9.1 Commonwealth

- 1135 The Federal Government provides a range of support and help to small businesses. For example, the ATO prioritises, and offers tools and assistance to support, them.¹³¹² The ACCC has a longstanding Small Business Commissioner.¹³¹³
- 1136 The key Commonwealth agency responsible for supporting, and advocating on behalf of, small business is the ASBFEO, established under the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth) (ASBFEO Act).¹³¹⁴ It offers dispute resolution services with a view to avoiding court; small business advocacy by conducting inquiries and research; and works with other arms of government, contributing to inquiries and promoting good business practices. During its own inquiries, the ASBFEO can compel people to produce information.¹³¹⁵
- 1137 Under the ASBFEO Act, a small business is one with less than 100 employees and annual revenue under \$5m.¹³¹⁶ A business is broadly defined as including any enterprise, activity, project, undertaking or arrangement.¹³¹⁷ An on-demand worker, who is an independent contractor, will likely be characterised as a small business for the purpose of the Act. The ASBFEO is to work cooperatively with other Commonwealth, state and territory agencies and transfer requests to them if they could more conveniently deal with a dispute.¹³¹⁸
- 1138 Part 4 of the Act governs ASBFEO assistance to small businesses or family enterprises. The ASBFEO can provide assistance in relation to any action taken by a platform business that the on-demand small business has a sufficient interest in.¹³¹⁹ This could include a decision to exclude a worker from a platform, to prioritise other workers for jobs, to alter remuneration policies, to limit locations where a worker may work, and more.¹³²⁰ Actions include conduct addressed by the CC Act.¹³²¹

1310. The *Explanatory Memorandum* of the Independent Contractors Bill states that the purpose of the Bill is to establish a national services contract review scheme, for the first time. This is to enable applications to be made to the Court for the review of services contracts on the ground that they are unfair or harsh. This scheme would offer efficient and easily attainable access to reasonable remedies for parties with contracts which are found to be harsh or unfair, see [Independent Contractors Bill 2006](#) [website].

1311. Worker, Workers’ Roundtable Discussion, 29 July 2019.

1312. Australian Taxation Office, [Small Business Information](#) [website].

1313. Australian Competition and Consumer Commission, [Small business](#) [website].

1314. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), s13.

1315. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), ss 37, 38.

1316. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), s5(1).

1317. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), s5(2).

1318. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth) ss16, 69, 70, 79.

1319. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), s67, 68.

1320. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), s7.

1321. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), s7. This includes dispute about unfair contract terms.

- 1139 ASBFEO does not have powers to conduct dispute resolution but can assist by making recommendations about how a matter could be managed. It can compel parties to produce documents to help it decide.¹³²² When assistance is sought, ASBFEO can recommend that parties participate in alternative dispute resolution (ADR) and recommend a provider¹³²³ drawn from a list published by ASBFEO. ASBFEO does not have the power to require attendance at ADR but can publicise the fact that a party has withdrawn or failed to take part.¹³²⁴ Possible publicity often encourages ADR participation.¹³²⁵
- 1140 The ASBFEO told the Inquiry that the areas of greatest concern to her office involved small businesses using platforms. One of the key issues is that small businesses have no real choice about whether they use a platform. If a platform provides greater access to markets and all competitors are using it, there is no real alternative. The ability to decide is compounded by the fact that there is an imbalance in bargaining power, with the result that small businesses are forced to accept contract terms as presented. The ASBFEO considers that small businesses are not seeking to access the ASBFEO jurisdiction primarily because of this power imbalance and as they harbour grave concerns that complaining may lead to a lack of access to the platform.¹³²⁶ The ASBFEO said that, while non-employees may be able to access the IC Act or ACCC unfair contract terms jurisdiction, the “law does not work where there is an imbalance of power”.¹³²⁷

6.5.10 Victorian small business support and remedies

6.5.10.1 Dispute resolution – general

- 1141 There are a range of sources of support and remedies available for small businesses in Victoria. The VSBC is established under the *Small Business Commission Act 2017* (Vic), to support small businesses through information, advice and dispute resolution. Self-employed on-demand workers can make use of these.
- 1142 The VSBC has broad powers to facilitate and encourage the fair treatment of small businesses in their commercial dealings with other businesses.¹³²⁸ This may involve assisting with the resolution of disputes about terms in business-to-business contracts, including by advising small businesses about their rights and obligations, providing pre-mediation assistance and offering low-cost mediation.
- 1143 The VSBC seeks to promote informed decision making by small businesses to minimise disputes; investigate complaints regarding unfair market practices and mediate those disputes; monitor emerging trends that may adversely impact small businesses; advocate on behalf of small businesses to other bodies; and investigate compliance with industry codes.¹³²⁹
- 1144 The VSBC assists in resolving disputes between businesses, business and government, retail leasing and franchises, taxi drivers and operators, hire car and rideshare operators and owner drivers. It also provides information to small business about their rights and responsibilities, to help avoid disputes escalating. On-demand workers who are a small business, may lodge an application for dispute resolution with the VSBC.¹³³⁰
- 1145 As a general rule, the VSBC cannot enforce compliance with laws but can act as an impartial dispute moderator. It can now arbitrate certain disputes under the *Owner Drivers and Forestry Contractors Act 2005* (Vic) (ODFC Act) (see discussion following).¹³³¹

1322. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), s75.

1323. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), ss 71(2)(a), 71(2)(b), 73.

1324. *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth), s74.

1325. Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, Individual Consultation, 10 July 2019.

1326. Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, 10 July 2019.

1327. Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, 10 July 2019.

1328. *Small Business Commission Act 2017*, s5(2); Victorian Small Business Commission, Submission 87, p. 1.

1329. Victorian Small Business Commission, Submission 87, p. 1; See *Small Business Commission Act 2017* (Vic).

1330. Victorian Small Business Commission, Submission 87, p. 2; Judy O’Connell, Victorian Small Business Commission, Individual Consultation, 5 August 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

1331. *Owner Drivers and Forestry Contractors Act 2005* (Vic), s54.

- 1146 To access the VSBC’s mediation services each party to the dispute is charged \$195.¹³³² Eighty-two per cent of cases are resolved, with parties signing a binding agreement.¹³³³ Mediation is voluntary, but only about 10 per cent of parties indicate they will not participate.¹³³⁴ The VSBC told the Inquiry that it can reveal a company’s refusal to participate in dispute resolution processes, in its annual report. This potential for adverse publicity is usually sufficient to encourage participation.¹³³⁵ If the VSBC does not successfully resolve a matter, small businesses can take it to the Victorian Civil and Administrative Tribunal (VCAT) or the Courts. Some disputes (such as those involving owner drivers, forestry contractors and their hirers, or tenants and landlords) must be dealt with by the VSBC before proceeding to VCAT. Those involving drivers and operators must go firstly to CPVV and, if not resolved, to the VSBC. General business disputes do not need to be first referred to the VSBC.¹³³⁶
- 1147 The VSBC received just over 1,800 requests for dispute resolution assistance in 2018–2019¹³³⁷ and only four applications in the past two years involved on-demand platform businesses.¹³³⁸ The VSBC said this suggests low awareness of its services among on-demand businesses. Each of the four applications involved a decision to deny a worker access to the relevant platform. None proceeded to mediation; either because the matter was resolved earlier or the applicants decided not to pursue it.¹³³⁹
- 1148 In one case, the applicant complained that they were blocked from an online platform and was seeking monetary compensation. The platform business was contacted to respond. The business informed the VSBC that the applicant had been temporarily suspended because they breached the terms of the agreement and abused staff. The respondent provided details of the abusive language and advised that the applicant had since been reinstated. The response was relayed to the applicant, who did not pursue their monetary claim with the VSBC.¹³⁴⁰
- 1149 In two separate but similar matters, the applicants claimed that a temporary lapse in performance, or some bad reviews, resulted in the closure of their account with the respective platform business. The VSBC informed the Inquiry that these small business operators found it challenging to continue to generate earnings from this source of income, as there were few relevant platforms operating in Australia.¹³⁴¹

6.5.11 VSBC oversight of owner drivers

- 1150 Hirers of owner drivers and freight-brokers have obligations under the ODFC Act.¹³⁴² Owner drivers are small businesses that own one to three vehicles to transport goods, where the owner of the business operates one of the vehicles.¹³⁴³ The ODFC Act currently covers similarly defined contractors engaged via freight-brokers.¹³⁴⁴

1332. Judy O’Connell, Victorian Small Business Commission, Individual Consultation, 5 August 2019.

1333. Judy O’Connell, Victorian Small Business Commission, 5 August 2019.

1334. Judy O’Connell, Victorian Small Business Commission, 5 August 2019.

1335. Judy O’Connell, Victorian Small Business Commission, 5 August 2019.

1336. Victorian Small Business Commission, Victorian Civil and Administrative Tribunal and the Courts, see the [Victorian Small Business Commission](#) [website].

1337. Victorian Small Business Commission, *Annual Report 2019*, p. 12.

1338. Victorian Small Business Commission, Letter sent by email to the Inquiry from Victorian Small Business Commission, 3 September 2019; Victorian Small Business Commission, Submission 87, p. 2.

1339. Victorian Small Business Commission, Submission 87, p. 2; Judy O’Connell, Victorian Small Business Commission, Individual Consultation, 5 August 2019; Letter sent by email to the Inquiry from Victorian Small Business Commission, 3 September 2019.

1340. Letter sent by email to the Inquiry from Victorian Small Business Commission, 3 September 2019.

1341. Victorian Small Business Commission, Submission 87, p. 2.

1342. *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, s.3: defines a hirer to mean ‘a person who engages a contractor under one or more regulated contracts’.

1343. *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, s.4.

1344. A contractor includes an owner driver, which in turn is defined to include ‘a natural person who carries on a business of transporting goods in one or more vehicles supplied by him or her and operated by him or her (whether solely or with the use of additional or relief operators)’ (s 4(1)(a)). A regulated contract includes an owner driver contract, which is defined as ‘a contract made in the course of business by an owner driver with another person for the transport of goods by the owner driver’ (s 4(2)).

- 1151 The ODFC Act can apply in circumstances where drivers are engaged to transport goods. The Act states that a person who engages an owner driver (including ‘drivers’ of bicycles and cars) under a contract for the transport of goods by the owner driver, is a hirer.¹³⁴⁵ Goods include ‘freight and material’.¹³⁴⁶ A freight-broker is defined in the ODFC Act.¹³⁴⁷ This framework may apply to on-demand workers who deliver ‘goods’, including food deliverers and couriers.
- 1152 The obligations on hirers are more extensive than on freight-brokers. Hirers’ obligations include complying with the Code of Practice for owner drivers and forestry contractors, not engaging in unconscionable conduct, and providing written contracts and notice of termination in certain circumstances.
- 1153 The obligations under the ODFC Act of freight-brokers, include to provide information booklets and applicable rates and cost schedules to drivers engaged for at least 30 days in any three month period. Hirers must do this too.¹³⁴⁸
- 1154 Under the ODFC Act, an owner driver may pursue a dispute against a hirer under, or in relation to, the ODFC Act, the Code of Practice or an owner driver contract.¹³⁴⁹ The dispute may be the subject of alternative dispute resolution or arbitration in the VSBC, or arbitration at VCAT.¹³⁵⁰ A freight-broker may be joined as a party to the dispute.¹³⁵¹ The ACTU submitted that the obligations in relation to freight-brokers have limited effect.¹³⁵²
- 1155 A platform may be either a hirer or a freight-broker. Whether a platform business is a hirer or freight-broker depends on the specific arrangements that apply between it and the small business sourcing work via its platform.
- 1156 In 2017–2018 there were 20 disputes under the ODFC Act, and in 2018–2019 there were 23 disputes brought to the VSBC.¹³⁵³ The VSBC told the Inquiry that these mostly concerned termination of the contract without notice or reasons.¹³⁵⁴
- 1157 Recent amendments to the ODFC Act enable the VSBC to arbitrate a dispute in certain circumstances.¹³⁵⁵ This may assist on-demand workers, including those in the food-delivery industry. However, given the recent introduction of the amendments, it is too early to assess the impact of the changes for on-demand businesses.

6.5.12 Unfair contracts remedies

Snapshot

- ▶ Existing unfair contracts remedies (in the Independent Contractor’s Act and Australian Consumer Law, ACL) are confusing in their operation and interaction with respect to platform workers.
- ▶ It is not clear that there is appropriately targeted support for platform workers to access these remedies.
- ▶ Unfair contracts remedies would offer very confined and limited relief and are not sufficient to ensure fairness in work arrangements with platform workers.

1345. *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, s3.

1346. *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, s3.

1347. *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, s3.

1348. *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, ss10 and 16.

1349. *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, ss33 and s41(1).

1350. *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, Part 5, Div 2.3.

1351. *Owner Drivers and Forestry Contractors Act 2005 (Vic)*, s43.

1352. Victorian Trades Hall Council, Supplementary Submission 89, p. 5 (attaching correspondence from the Australian Council of Trade Unions).

1353. Victorian Small Business Commission, *Annual Report 2019*, p. 12.

1354. Judy O’Connell, Victorian Small Business Commission, Individual Consultation, 5 August 2019.

1355. See *Owner Drivers and Forestry Contractors Amendment Act 2019 (Vic)*.

1158 There are two distinct remedies available for ‘unfair contracts’ which could provide outcomes for non-employee platform workers; one which is available for independent contractors and another available for small businesses. While these two remedies have some common elements, they sit in very different statutory frameworks: one is in the IC Act and sits alongside the FW Act, and the other sits in competition and consumer protection laws (ACL). There is also a degree of uncertainty about how it is intended that these remedies intersect.

6.5.12.1 Independent Contractors Act

1159 The IC Act was enacted in 2006 to support the policy of the (then) Commonwealth Government that genuine independent contracting relationships ought to be governed by commercial rather than industrial law.¹³⁵⁶ The principal objects of the IC Act are to:

- protect the freedom of independent contractors to enter into services contracts
- recognise independent contracting as a legitimate form of work arrangement that is primarily commercial
- prevent interference with the terms of genuine independent contracting arrangements.

1160 The Act inhibits state governments from legislating for ‘employment like’ entitlements, subject to certain exceptions.¹³⁵⁷ It also creates a remedy for ‘unfair contracts’ for independent contractors.

1161 The IC Act deals with contracts for services. A contract for service is defined as one:

- to which an independent contractor is a party, and
- that relates to the performance of work by that contractor, and
- where one party to the contract is a constitutional corporation.¹³⁵⁸

1162 Non-employee platform workers may be able to apply for a review of a contract for services on the ground that it is unfair or harsh (Part 3, IC Act).¹³⁵⁹ The terms ‘unfair’ or ‘harsh’ have their common law meaning.¹³⁶⁰

1163 An application to review a contract must be made to the Federal Court or Federal Circuit Court. The court will conduct a review of the services contract and may order that all or part of it, be set aside or varied. The court might consider the relative strength of each party’s bargaining position and whether the remuneration provided for is less than that what an employee would receive for the same work.

1164 There is no penalty for having incorporated an unfair term.

1165 Parties must generally pay their own costs, unless a claim was vexatious.¹³⁶¹

1356. Minister for Employment and Workplace Relations, *Commonwealth Parliamentary Debates, House of Representatives*, 22 June 2006. p. 5.

1357. The *Independent Contractors Act 2006* (Cth) also provides that certain state or territory laws may not deem a party to a services contract to be an employee or treat them as such or affect workplace rights, entitlements, obligations and liabilities of a party to a services contract (such as, remuneration; most leave entitlements and other benefits; hours of work; enforcing or terminating employment contracts; dispute resolution, collective bargaining and industrial action). The operation of the *Independent Contractors Act 2006* (Cth) is also subject to a range of exceptions. Section 8(2) of the IC Act outlines what are not considered workplace relations matters. These include superannuation, workers’ compensation, work, health and safety laws, child labour, consumer protection and taxation, and long service leave (to an extent).

1358. *Independent Contractors Act 2006* (Cth), s5.

1359. *Independent Contractors Act 2006* (Cth), s12(1), Part 3. A proceeding must be instituted during the life of the services contract, or in 12 months of its expiry (subject to the court’s discretion to extend that limitation period in exceptional circumstances).

1360. Explanatory Memorandum of the Independent Contractors Bill 2006 (Cth), p. 38.

1361. *Independent Contractors Act 2006* (Cth), s17.

- 1166 The Inquiry was informed by the Commonwealth Attorney-General's Department that since July 2014 there have been 16 claims filed under the IC Act.¹³⁶² Eleven were withdrawn after the applicant lodged a notice of discontinuance, two were dismissed, two were dismissed by consent and one was underway. While the Commonwealth does provide some information on the work status of independent contractors via FWO, the ATO and the www.business.gov.au website,¹³⁶³ it is not clear whether substantial Commonwealth resources are allocated to help applicants bring claims under the IC Act.¹³⁶⁴ The type of information generally provided is 'guidance' on worker status and information required to run a business, such as understanding tax, contracts and other obligations.¹³⁶⁵
- 1167 The Inquiry is not aware of any platform worker seeking to bring a claim using this remedy. The avenue does not appear to have been highly utilised or well supported. With only 16 matters being filed in court under the IC Act since 2014, comes the suggestion that this little used jurisdiction has produced few positive outcomes.¹³⁶⁶ By comparison, many claims were pursued at the FWC:
- 70,976 unfair dismissal applications between 1 July 2014 and 30 June 2019
 - 23,479 general protection claims filed between 1 July 2014 and 30 June 2019
 - 70 adverse action decisions made just in 2019.¹³⁶⁷
- 1168 It is not clear who is responsible for providing advice and support to independent contractors about their right to seek a remedy or how to do it. Repeated approaches to the FWO and Commonwealth Attorney-General's Department did not reveal any clear or concerted government support in this regard.¹³⁶⁸
- 1169 The Inquiry put questions to the Commonwealth Attorney-General's Department about the nature and extent of support available to people seeking to access the unfair contracts jurisdiction under the IC Act, including resources. Their response referred to the FWO's role in providing advice about workplace laws.
- 1170 When asked about the resources allocated to supporting the administration of the IC Act, the same department told the Inquiry there are practical limits to the information available to share with the Inquiry; one being the fact that it is held across multiple agencies.¹³⁶⁹
- 1171 The FWO advised the Inquiry that 'taking into account the provisions of both the IC Act and the FW Act, FWO does not consider that our agency's statutory functions include advising on or enforcing the unfair contract provisions in the IC Act'.¹³⁷⁰ The ACCC is responsible for administering the ACL and the Director of Consumer Affairs, Victoria for the mirror state laws.
- 1172 There may be questions about how the definition of contract for services operates with respect to platform workers' arrangements. Their 'work' or 'services' are generally presented as being commissioned by an end user, not the platform, and the arrangements can be complex, making characterising them for the purpose of this remedy, challenging.

1362. *Independent Contractors Act 2006* (Cth), s17.

1363. See also for example: Australian Government, Business, [Contractor rights & protections](#) [website]. (refers to protections at work, unfair contracts, sham contracting, and work health and safety laws).

1364. Letter sent by email to the Inquiry from Chris Moraitis, Secretary, Attorney-General's Department, 13 November 2019, p. 2. These claims were commenced under s.12 of the *Independent Contractors Act 2006* (Cth).

1365. Letter sent by email to the Inquiry from Chris Moraitis, Secretary, Attorney-General's Department, 13 November 2019, p. 2. These claims were commenced under s.12 of the *Independent Contractors Act 2006* (Cth).

1366. See also letter sent by email to the Inquiry from Chris Moraitis, Secretary, Attorney-General's Department, 13 November 2019, p. 3. Only in three of the 16 cases under the *Independent Contractors Act 2006* (Cth) were the contracts found to be unfair or positive outcomes obtained for the claimants (*Keldote Pty Ltd & Ors v Riteway Transport Pty Ltd* [2007] FMCA 1701; *Informax International Pty Ltd v Clarius Group Ltd* (No 2) [2011] FCA 934; *JY Smile Centre Pty Ltd & Anor v Idameneo* (No 123) Pty Ltd [2013] FCCA 336).

1367. This figure is based on the number of published cases with adverse action claims.

1368. Letter emailed to the Inquiry from Chris Moraitis, Secretary, Attorney-General's Department, 13 November 2019, p. 3; Letter sent by email to the Inquiry from Sandra Parker PSM, Fair Work Ombudsman, 11 October 2019, p. 1.

1369. Letter sent by email to the Inquiry from Chris Moraitis, Secretary, Attorney-General's Department, 13 November 2019, p. 2. These claims were commenced under s.12 of the *Independent Contractors Act 2006* (Cth).

1370. Letter sent by email to the Inquiry from Sandra Parker PSM, Fair Work Ombudsman, 11 October 2019, p. 1.

1173 Some submitters recommended amendments to the IC Act.¹³⁷¹ JobWatch suggested that the unfair or harsh contracts provisions in the IC Act be strengthened. It submitted that the unconscionability of a contract for services should be a reason to request review by a court. JobWatch also said the remedies available for unfair or harsh contracts should be improved.¹³⁷² JobWatch recommended that provisions in Part 2 of the IC Act, such as those that prevent states or territories from conferring employment like benefits on contractors, be abolished. Similarly, the Law Institute of Victoria suggested that the IC Act be clarified.¹³⁷³

6.5.12.2 Consumer law

1174 The ACL protects small business from unfair terms in standard form contracts. These laws were most recently amended in 2016. The provisions were described to be directed to terms that are 'unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier'.¹³⁷⁴

1175 The ACL applies in Victoria, as do 'mirror' provisions in Victorian legislation.¹³⁷⁵

1176 Under the ACL, small businesses may seek a review of their contract if they meet certain criteria regarding the size and scale of the business.¹³⁷⁶ The provisions go to addressing 'significant imbalances' in contractual arrangements and target the situation where provisions are not reasonably necessary to protect the legitimate interests of the party seeking to rely on it.¹³⁷⁷

1177 A term of a 'small business contract'¹³⁷⁸ for the supply of services may be found to be void if the contract is a standard form contract and the term is 'unfair'.¹³⁷⁹

1178 Typically, a standard form contract is one that has been prepared by one party to the contract and the other party has little or no opportunity to negotiate the terms. Sometimes, it is offered on a 'take it or leave it' basis.¹³⁸⁰

1179 A court may declare a term in a standard form contract void (not valid), if it:

- causes a significant imbalance in the parties' rights and obligations under the contract
- is not reasonably necessary to protect the legitimate interests of the party that is advantaged by the term (that is, who seeks to rely on it)
- would cause detriment (financial or other) to a party if applied or relied on.¹³⁸¹

1180 A court is required to consider if the contract is transparent, and the contract as a whole.¹³⁸² The ACL contain a list of examples of unfair terms, but other terms not on the list may also be unfair.¹³⁸³ Terms that may be declared void include those that allow only one party to unilaterally vary the terms of the contract¹³⁸⁴ or vary the upfront price payable under the contract.¹³⁸⁵

1371. JobWatch, Submission 37, p. 8; Law Institute of Victoria, Submission 39, p. 13.

1372. JobWatch, Submission 37, p. 8.

1373. Law Institute of Victoria, Submission 39, p. 13.

1374. The Regulatory Impact Statement to the Explanatory Memorandum to the [Trade Practices Act Amendment \(Australian Consumer Law Bill\) \(No.2\) 2010](#) [website].

1375. *Competition and Consumer Act 2010* (Cth), s131C(1) and see also *Australian Consumer Law and Fair Trading Act 2012* ss7,8. Specifically, the *Competition and Consumer Act 2010* (Cth), s131C(4), expressly states that nothing in the Australian Consumer Law is taken to limit or restrict or otherwise affect any right or remedy a person would otherwise have had.

1376. The Australian Consumer Law applies to small business contracts. A small business contract is a contract for the supply of services where one party has fewer than 20 employees and the value of the contract is less than \$300,000 or \$1 million for multi-year contracts (a contract for more than 12 months) see *Competition and Consumer Act 2010* (Cth), Schedule 2, s23(4).

1377. *Competition and Consumer Act 2010* (Cth), Schedule 2, s24.

1378. A small business is one with less than 20 employees.

1379. *Competition and Consumer Act 2010* (Cth), Schedule 2, ss23(1),24, 27.

1380. *Competition and Consumer Act 2010* (Cth), Schedule 2, ss23(4), 27(2). The prescribed amount is \$300,000 or for a contract of more than 12 months, \$100,000,000.

1381. *Competition and Consumer Act 2010* (Cth), Schedule 2, s24.

1382. *Competition and Consumer Act 2010* (Cth), Schedule 2, s24(2). A term is transparent if the term is: (a) expressed in reasonably plain language; and (b) legible; and (c) presented clearly; and (d) readily available to any party affected by the term.

1383. *Competition and Consumer Act 2010* (Cth), Schedule 2, s25.

1384. *Competition and Consumer Act 2010* (Cth), Schedule 2, s25(d) and *Keldote Pty Ltd & Ors v Riteway Transport Pty Ltd* [2007] FMCA 1701. The court found that the contracts were unfair because they allowed Riteway to unilaterally require that the truck drivers provide was different to the one they had under the contract without financial compensation.

1385. *Competition and Consumer Act 2010* (Cth), Schedule 2, s25(f).

- 1181 The ACCC, the Victorian Director of Consumer Affairs, or a party to the contract, can apply to have a contract declared unfair by the courts.
- 1182 The ACCC has powers to investigate unfair contract terms.¹³⁸⁶ Following an investigation, it can apply to the court for a declaration that a term or terms are unfair.¹³⁸⁷ There are also dispute resolution schemes and industry ombudsmen (such as the ASBFEO) that can assist parties to a contract.¹³⁸⁸
- 1183 The ACCC receives thousands of contacts each year.¹³⁸⁹ It assesses which matters it will investigate based on its compliance and enforcement priorities.¹³⁹⁰
- 1184 The ACCC tends to take on high profile cases and focus on matters that might harm competitive processes or result in widespread consumer or small business detriment.¹³⁹¹ It aims to direct resources to where they will have the greatest overall benefit.
- 1185 The ACCC informed the Inquiry that investigations can be initiated following a complaint or a referral. A compromise can usually be reached before court processes commence, by modifying a term to remove or reduce unfairness to a level below the actionable standard.¹³⁹² The ACCC said most companies are cooperative, but there are some who want to continue benefiting from current arrangements and deliberately drag out the process.¹³⁹³
- 1186 The inclusion of unfair terms is not unlawful under the ACL. Rather than deterring parties through penalties, the approach is to amend the contract. This makes bringing a claim under the ACL framework an unsatisfactory option for many workers or their representatives.¹³⁹⁴ While compensation could be paid where loss or injury results from an unfair contract term, it is unlikely, unless the other party to the contract continues to use the same term in the same contract.¹³⁹⁵ The Federal Court and the Federal Circuit Court have jurisdiction where the remedy sought is \$750,000 or less.¹³⁹⁶
- 1187 The ACCC examined the terms of contracts between Uber Eats and restaurants.¹³⁹⁷ As a result, Uber Eats agreed to contract amendments so as to not penalise restaurants. Terms giving Uber Eats the right to give customer refunds and deduct it from restaurants, even when the problem with the meal may not have been their fault, were amended.¹³⁹⁸ Uber Eats also agreed to amend a term suggesting it did not provide logistics services, on the basis that it may be misleading.¹³⁹⁹ However, this change does not appear to have been incorporated into the amended Uber Eats' restaurant contract yet.¹⁴⁰⁰
- 1188 In speaking about the outcome, Rod Simms – ACCC Chair, observed that the unfair contracts remedies are deficient because there is no penalty for including unfair terms. The ACCC's strong position is that the remedies need to be more effective. Others share this view.¹⁴⁰¹
- 1189 The ASBFEO and the VSBC both suggested that there is fairly broad support for strengthening the standard form contracts provisions in the ACL.¹⁴⁰²

1386. *Competition and Consumer Act 2010* (Cth), ss155, 156.

1387. *Competition and Consumer Act 2010* (Cth), s250.

1388. Australian Competition and Consumer Commission, [Industry ombudsmen & dispute resolution](#) [website].

1389. Email from the Australian Competition and Consumer Commission, 23 September 2019.

1390. Australian Competition and Consumer Commission, Individual Consultation by teleconference, 20 August 2019, Department of Premier and Cabinet, 1 Spring St, Melbourne.

1391. Australian Competition and Consumer Commission, 20 August 2019.

1392. Australian Competition and Consumer Commission, 20 August 2019.

1393. Australian Competition and Consumer Commission, 20 August 2019.

1394. 'Time for ACCC to step up on gig contracts: Stewart', *Workplace Express*, 14 February 2020.

1395. *Competition and Consumer Act 2010* (Cth), ss237(1), 238(1).

1396. *Competition and Consumer Act 2010* (Cth), ss86 and 86AA.

1397. Australian Competition and Consumer Commission, Media Release, [Uber Eats amends its contracts](#) [website], 17 July 2019.

1398. Australian Competition and Consumer Commission, Media Release, [Uber Eats amends its contracts](#) [website], 17 July 2019.

1399. Australian Competition and Consumer Commission, Media Release, [Uber Eats amends its contracts](#) [website], 17 July 2019.

1400. As at May 2020.

1401. Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, Individual Consultation, 10 July 2019; Judy O'Connell, Victorian Small Business Commissioner, Individual Consultation, 5 August 2019.

1402. Kate Carnell, Australian Small Business and Family Enterprise Ombudsman, Individual Consultation, 10 July 2019; Judy O'Connell, Victorian Small Business Commissioner, Individual Consultation, 5 August 2019.

- 1190 The unfair contract terms' regulatory regime was the subject of a recent review and the Commonwealth Government is holding public consultations with members of the community about policy options to address its operation.¹⁴⁰³ It is clear that the current ACL framework offers little disincentive. Companies can simply amend unfair contract terms and then, even though a claim against them may be successful, use the term again in other similar contracts.¹⁴⁰⁴
- 1191 In its submission to the Commonwealth Government's review of the unfair contract terms, the ACCC recommended that they be made illegal and civil penalty provisions adopted.¹⁴⁰⁵ It also said the remedy only affects the specific standard form contract in dispute.¹⁴⁰⁶ Consequently, a more expansive remedy is being considered so that similar contractual terms, in other contracts used by the offending party, are also deemed unfair.¹⁴⁰⁷
- 1192 Contract amendments appear to be a relevant remedy for on-demand workers. The 'unfairness' criteria appear to cover aspects of the conduct of some platforms.
- 1193 The RSDAA submitted that the ACCC's jurisdiction may be a good avenue for addressing shortcomings in contracts provided by on-demand platforms. It said typical services agreements contain penalty terms allowing drivers to be deactivated for any contract breach and provide for unlimited unilateral variation of the contract by the platform. There is usually no provision for any variation by the driver. RSDAA acknowledged, however, that this mechanism is not able to address the key concerns of rideshare drivers – their proper legal status and their rights at work.¹⁴⁰⁸
- 1194 In a recent paper prepared for the Association of Industrial Relations Academics in Australia and New Zealand (AIRAANZ) conference, Professor Andrew Stewart, Dr Penny Williams and Simon Guthrie outlined some findings from their study which reviewed 13 Australian platform contracts for potentially unfair terms. They concluded that many would be unfair within the meaning of the ACL. Notably, their research found that all but one of the 13 included a clause enabling one party to unilaterally vary the contract.¹⁴⁰⁹ The three study authors submitted that it is difficult to conceive of any circumstances in which that type of conduct would not be unfair or harsh, and ought not fall within the unfairness grounds in the IC Act.¹⁴¹⁰
- 1195 In 2018–2019, the ACCC received over 315,000 contacts in total. Of these, almost 13,000 were received via the ACCC's dedicated small business enquiry line and webform. However, ACCC data also shows that it has received very few contacts from on-demand workers and this may be because on-demand workers are more likely to report the issues they are experiencing to bodies other than the ACCC (for example, the FWC).¹⁴¹¹
- 1196 Scholars have suggested that the ACCC has shown no interest in reviewing workers' contracts.¹⁴¹² At the AIRAANZ conference, Professor Andrew Stewart said many on-demand workers would not be regarded as employees of a platform, including where the direct contractual relationship is between worker and end user client. Independent contractors, whose contractual relationships are commercial, are covered by the ACL unfair contract protections. Consequently, Professor Stewart thought it was time for the ACCC to consider reviewing their contracts. He also recently suggested that the ACCC expand its review of platforms' conduct to examine the arrangements between platforms and workers.¹⁴¹³

1403. The consultations were planned to be held in March 2020. See Australian Government, The Treasury, Consultation Hub, [Enhancements to Unfair Contract Terms Protections](#) [website].

1404. Australian Government, The Treasury, [Enhancements to Unfair Contract Terms Protections](#), Consultation Regulation Impact Statement, December 2019 [website], p. 13. Again if the court determines that the relevant clause in the contract is not valid (void), there is no satisfactory remedy available, unless the other party to the contract continues to use the same term in the same contract: 'Time for ACCC to step up on gig contracts: Stewart', *Workplace Express*, 14 February 2014.

1405. Australian Competition and Consumer Commission, [Review of Unfair Contract Term Protections for Small Business: ACCC Submission](#), 21 December 2018, p. 2.

1406. Australian Competition and Consumer Commission, Individual Consultation, 20 August 2019.

1407. Australian Government, The Treasury, [Enhancements to Unfair Contract Terms Protections](#), Consultation Regulation Impact Statement: December 2019' p. 23.

1408. Ride Share Drivers Association of Australia, Submission 64, p. 17.

1409. A. Stewart, P. Williams and S. Guthrie, 'Regulating the Fairness of Gig Economy Contracts' in *Association of Industrial Relations Academics of Australia and New Zealand, 2020 Annual Conference*; 'Time for ACCC to step up on gig contracts: Stewart', *Workplace Express*, 14 February 2014.

1410. *Independent Contractors Act 2006* (Cth), s9.

1411. Email from the Australian Competition and Consumer Commission, 23 September 2019.

1412. 'Time for ACCC to step up on gig contracts', *Workplace Express*, 14 February 2014.

1413. 'Time for ACCC to step up on gig contracts', *Workplace Express*, 14 February 2014.

1197 TWU National Secretary, Michael Kaine, in the wake of the ACCC's Uber Eats decision noted that the contracts Uber has with its workers are also "crying out for regulation", observing, "If restaurants can be protected over customer complaints and when disputes arise, then why not workers?"¹⁴¹⁴

6.5.12.3 Accessing these remedies

1198 There are some challenges for platform workers seeking to access these remedies. Firstly, there is a lack of clarity around responsibility and resources available to support self-employed workers getting advice about the remedy in the IC Act.

1199 Secondly, there is uncertainty about whether and how the definitions in that Act operate in relation to platform work.

1200 Thirdly, it is not clear how the two remedies might intersect. Some are of the view that the ACL is more likely to apply or offer a remedy than the IC Act.¹⁴¹⁵ The ACL provisions were legislated after the IC regime and it is not clear whether parties to a 'services contract' covered by the IC Act have a choice of remedy, or whether the IC Act is intended to be the sole recourse. These issues have not been the subject of determination by a court.

1201 The ACCC is highly visible in supporting small businesses, but platform workers do not see this agency as a natural 'go to' in seeking help.

1202 The Inquiry has found it challenging to navigate the legal and bureaucratic elements that impact on the interaction between these remedies and how they might apply to platform workers. It would be little wonder that workers would not see this territory as hospitable to them in seeking help and advice!

6.5.13 Unfair contracts jurisdiction under Victorian consumer laws

1203 In addition to these federal unfair contracts remedies, there are parallel remedies to the consumer laws available under Victorian law.

1204 VCAT may adjudicate 'consumer and trader disputes',¹⁴¹⁶ relating to claims between a purchaser and supplier about the supply of goods or services.¹⁴¹⁷ This can include a dispute between an on-demand worker and a business over supply of services by a supplier (independent contractor) to the purchaser (principal). VCAT's orders may include varying or voiding a term of a contract, rescinding a contract or rectifying a contract.¹⁴¹⁸ VCAT must consider a range of factors before making a determination. Trader to trader disputes can be brought for claims up to \$10,000 in value.¹⁴¹⁹

1205 A non-employment relationship between a business and an on-demand worker will likely be characterised as involving the supply of services by a supplier (contractor) to the purchaser (principal).

1206 Consumer Affairs Victoria told the Inquiry that, while there have been complaints involving platform businesses, to date none have warranted compliance activities.¹⁴²⁰

1207 Small businesses may be able to use the unfair contracts remedy via Victorian mirror laws in VCAT or state courts.¹⁴²¹ However, the question about the interaction between this jurisdiction and IC Act remedies arises here, particularly given the intention of the IC Act to exclude the operation of certain state laws.

1208 This provides another possible pathway to self-employed platform workers, but also creates yet more complexity and confusion about which options are available and appropriate.

1414. D. Chau, 'Uber Eats Taking advantage of deficient Australian Consumer Law', ABC News [website], 17 July 2019.

1415. Stewart et al., 'Regulating the Fairness of Gig Economy Contracts'; 'Time for ACCC to step up on gig contracts: Stewart', *Workplace Express*, 14 February 2014.

1416. *Australian Consumer Law and Fair Trading Act 2012* (Vic), s184(1).

1417. *Australian Consumer Law and Fair Trading Act 2012* (Vic), s182(1).

1418. *Australian Consumer Law and Fair Trading Act 2012* (Vic), s184(1).

1419. *Australian Consumer Law and Fair Trading Act 2012* (Vic), s185(1).

1420. Consumer Affairs Victoria, Individual Consultation, 17 December 2019.

1421. The Australian Consumer Law applies as Commonwealth law to constitutional corporations under Part XI of the CC Act. State and Territory courts have jurisdiction to deal with matters related to the Australian Consumer Law (Cth), such as, most civil claims pursued under the Australian Consumer Law. The Supreme Court, County Court or VCAT will exercise federal jurisdiction and may determine claims made under the Australian Consumer Law in Victoria that relate to the unfair contract terms protections. In Victoria, the Australian Consumer Law laws apply to persons or bodies with a connection in Victoria. To date, courts have accepted that a person or corporation could bring a claim under the Australian Consumer Law (Vic) or Australian Consumer Law (Cth).

6.5.14 Small business remedies – fit-for-purpose?

- 1209 There are a range of sources of support and help for small businesses which on-demand workers who are not engaged under employment arrangements, could avail themselves of.
- 1210 However, there is a great deal of uncertainty about the nature and application of these remedies. By and large, those agencies who might provide support and help to this cohort do not necessarily see on-demand workers as falling within their respective constituencies.
- 1211 It is not clear that these remedies are entirely fit-for-purpose as currently designed and administered, especially for low-leveraged on-demand workers.
- 1212 It is evident that the remedies available for unfair contract terms in relation to small businesses who are on-demand workers, ought to be more accessible and provide an effective and speedy resolution of a worker's concerns.
- 1213 In light of the overall number of requests for assistance and the very few matters brought by on-demand workers, it is evident that further support is required to help vulnerable on-demand small businesses to access this jurisdiction. This is particularly so given that it is a low-cost jurisdiction.
- 1214 The non-workplace remedies discussed above are focused on providing small businesses with support and assistance, but do not provide accessible, quick or always effective remedies for non-employee on-demand workers to contest unfair contract terms, or other unfair conduct or practices in particular.
- 1215 There is a compelling case for strengthening the remedies available to assist on-demand workers who have little negotiating or bargaining power vis a vis a business platform. Further support is needed to assist independent contractors to seek to review services contracts.
- 1216 It should be easy for on-demand workers to obtain help and assistance when needed. Victoria has no power to amend the definitions of employment versus non-employment in the FW Act.

6.6 COLLECTIVE BARGAINING FOR PLATFORM WORKERS

Snapshot

- ▶ Platform workers are impeded from acting collectively to improve their conditions or deal with disputes.
- ▶ Platform workers should be able to organise with platforms as a group about their work arrangements, should they choose to.

- 1217 Many workers, especially low-leveraged workers, are not well positioned to engage with platforms to resolve disputes or seek improved arrangements. The precarious nature of their arrangements inhibits their capacity, and there is nothing to compel platforms to engage on such matters. The concerns about unilateral decision making, particularly around access to the platform, are also powerful disincentives to workers advocating on their own behalf.
- 1218 Some leading academics like Stewart and Stanford,¹⁴²² suggest on-demand workers could improve their wages and conditions by organising collectively. This could address imbalances in bargaining power between workers and platforms and enable workers more influence over compensation and benefits.¹⁴²³

1422. Stewart and Stanford, 'Regulating work in the gig economy', p. 428.

1423. Stewart et al., *Creighton & Stewart's Labour Law*, p.10; Stewart and Stanford, p. 428; L. F. Katz and A. B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*, Working Paper No 22667, National Bureau of Economic Research, 2016; K. Stone, 'Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees with Employers', *Berkeley Journal of Employment and Labor Law*, vol. 27, no. 06-12, 2006, p. 283; O. Lobel, 'The Gig Economy and the Future of Employment and Labor Law', *University of San Francisco Law Review*, Forthcoming San Diego Legal Studies Paper No. 16-223, 2016, p. 66; S. McCrystal, 'Collective Bargaining Beyond the Boundaries of Employment: A Comparative Analysis', *Melbourne University Law Review* vol. 37, no. 3, 2014, pp. 662-663. Others note that geographically dispersed platform workers may be difficult to organise for bargaining, Directorate for Science, Technology and Innovation: Committee on Digital Economic Policy, *New forms of Work in the Digital Economy*, 2016, p.32 Organisation for Economic Cooperation and Development; Rawling, *Regulating Precarious Work in Australia*, p. 254.

- 1219 The FW Act provides for collective bargaining, agreement making and protected industrial action for employees, including platform employees.¹⁴²⁴
- 1220 This system is not available to non-employee workers. The AIER has advocated to enhance the framework for self-employed workers to bargain collectively.¹⁴²⁵
- 1221 Self-employed workers are ‘small businesses’ and as such they are inhibited in their capacity to take collective action if it is anti-competitive under Commonwealth competition laws.
- 1222 Non-employee workers can’t bargain collectively unless it is authorised by the ACCC. In deciding whether to allow such conduct, the ACCC considers whether public benefit outweighs any detriment of such conduct.
- 1223 These provisions are directed to commercial practices that would reduce competition between contractors colluding over the supply of labour.¹⁴²⁶ An authorisation or notification would provide workers with a defence to any proceedings brought under one or more of the provisions in Division 2 of Part IV of the CC Act.¹⁴²⁷
- 1224 Some scholars have suggested that improving working conditions increases costs and would be unlikely to be considered a ‘public benefit’ under these provisions in the CC Act.¹⁴²⁸
- 1225 The ACCC has conducted a public consultation, and is now considering submissions, on a proposed ‘class exemption’ to give certain businesses automatic protection to collectively bargain.¹⁴²⁹ The exemption would allow a business or independent contractor with aggregated turnover of less than \$10 million in the preceding financial year, to form or join a collective bargaining group to negotiate with suppliers or customers about the supply or acquisition of goods or services. The ACCC would need to be satisfied first that the actions would not substantially lessen competition and there would be a net public benefit.¹⁴³⁰ A ‘collective bargaining class exemption notice’ would need to be given to the ACCC and the target business.¹⁴³¹
- 1226 However, platforms would need to agree to engage with workers. Where collective bargaining was allowed, the process of negotiating agreements would remain voluntary and businesses could not engage in collective boycotts without separate ACCC approval. The ACCC advised the Inquiry that these changes, if enacted, would allow eligible businesses to realise the potential benefits of collective bargaining without delay or additional cost.¹⁴³² This may open up collective action to platform workers.
- 1227 In their submission to the ACCC regarding the potential class exemption, Dr Tess Hardy and Professor Shae McCrystal noted that, ‘there appears to be almost no circumstances when a collective boycott would be authorised in practice’. The authors suggest that ‘without the ability to propose or take collective action, non-employee workers will be presented with ‘take it or leave it’ standard form contract arrangements’.¹⁴³³
- 1228 Under the FW Act, protected industrial action is available to employee workers to provide leverage around bargaining, and employers are obliged to engage in ‘genuine bargaining’ overseen by the FWC. There would be no such requirements here. Platforms may not be sufficiently incentivised to agree to ‘bargain’ with their non-employee workforces.
- 1229 One example where a platform engaged positively with workers’ representatives about workers’ conditions was brought to the Inquiry’s attention.

1424. See *Fair Work Act 2009* (Cth), Division 2; See also S. McCrystal, ‘Is there a public benefit in improving the working conditions for independent contractors? Collective Bargaining and the *Trade Practices Act 1974* (Cth)’, *Federal Law Review*, 2009, vol. 37, p. 264.

1425. Australian Institute of Employment Rights, Submission 12, p. 10.

1426. McCrystal, ‘Is there a public benefit in improving the working conditions for independent contractors?’, p. 272.

1427. See *Competition and Consumer Act 2010* (Cth), Part IV, Division 2; McCrystal, p. 265; Stewart et al., *Creighton & Stewart’s Labour Law*, p. 966; Australian Institute of Employment Rights, Submission 12, p. 7.

1428. *Competition and Consumer Act 2010* (Cth), ss 88, 93AB.

1429. Australian Competition and Consumer Commission, [Collective bargaining class exemption](#) [website]; Australian Competition and Consumer Commission, Individual Consultation, 20 August 2019.

1430. *Competition and Consumer Act 2010* (Cth), s 95AA.

1431. Australian Competition and Consumer Commission, [Class Exemption for Collective Bargaining Guidance Note, Draft for consultation – June 2019](#). Note that the proposed class exemption does not allow trade unions to give notice on behalf of a collective bargaining group.

1432. Australian Competition and Consumer Commission, [Potential ACCC ‘class exemption’ for collective bargaining – discussion paper](#), 23 August 2018.

1433. T. Hardy and S. McCrystal, [Submission on Potential ACCC Class Exemption for Collective Bargaining](#), p. 7.

1230 Airtasker¹⁴³⁴ and Unions NSW negotiated an unenforceable agreement following a published Unions NSW report criticising how Airtasker engaged workers.¹⁴³⁵ Unions NSW submitted that, as of March 2017, under this agreement, Airtasker rates must now exceed comparable award rates. Additionally, Airtasker had stopped posting recommended pay rates below the minimum wage for casual employees and was notifying job posters of minimum award rates across the ten key work categories.¹⁴³⁶ According to Unions NSW, Airtasker also agreed to offer affordable cover, similar to workers' compensation insurance, and continue to work with Unions NSW to ensure best practice health and safety standards.¹⁴³⁷ Unions NSW submitted that:

*The agreement with Airtasker was an important step in acknowledging the importance of minimum wages and safety protections in the gig-economy. However, the agreement is not an enforceable instrument nor does it provide any safety net for workers in other areas of the gig economy. The agreement highlights the risks currently facing workers in the gig-economy and the failure of legislative tools to provide adequate protections.*¹⁴³⁸

1231 There are also practical issues with organising on-demand workers.¹⁴³⁹ The NTEU found that organising English language testing workers (who gain work on an employer provided platform that has many characteristics of on-demand platforms) was hard, as their casual status created fear for their future employment opportunities.¹⁴⁴⁰ The ASU expressed similar concerns and submitted that access to dispute resolution is unlikely because workers are not engaged under collective agreements or awards and said this was inadequate.¹⁴⁴¹ One participant in the online On-Demand Workers Conversation stated that, after Melbourne CBD riders started 'protests' against Deliveroo, the business hired additional workers to work for \$5. The protests ended.¹⁴⁴²

1232 The Business Council of Co-operatives and Mutuals (BCCM) and the Platform Cooperativism Consortium advocated for the use of cooperatively owned platforms to rebalance the relationship between on-demand workers and platforms.¹⁴⁴³ According to the BCCM, there are various cooperative models. One is like a union, seeking ACCC permission to bargain with a platform, another is a group of workers setting up a competing platform.¹⁴⁴⁴ The BCCM is seeking that the process of forming a cooperative be streamlined, that cooperatives be treated similarly to other business models and that their development be supported by the Victorian government.¹⁴⁴⁵

1233 SMart (a European cooperative of freelancers and self-employed workers) submitted that it had negotiated a 'commercial agreement' (overseas) with Deliveroo and another food delivery platform for a fixed hourly rate and minimum three hour shifts. However, this was terminated by Deliveroo according to Smart, due to the changed regulatory landscape and after it sought to improve the working conditions of platform workers.¹⁴⁴⁶

6.7 POSITIONS ON CHANGE TO 'WORK STATUS'

1234 With the range of complex and nuanced issues before this Inquiry about the operation of platforms and their contribution to, and impact on, workforce and labour market dynamics, it is not surprising that there were many different views about potential reform.

1235 At one end of the spectrum is strong defence of the status quo. At the other end, are calls for capturing platform workers in employment regulation. In the middle: suggestions for the creation of purpose built approaches for platform or borderline workers more generally and/or minor modifications to the work status test to clarify its operation and ensure it is not having an anomalous effect.

1434. Airtasker maintains that the workers on its platforms are not its employees.

1435. Unions NSW, Submission 80, p. 9.

1436. Minter, 'Negotiating labour standards in the gig economy' p. 449.

1437. Unions NSW, Submission 80, p. 10.

1438. Unions NSW, Submission 80, p. 10.

1439. For a review of techniques used by unions to organise on-demand workers see, H. Johnston, C. Land- Kazlauskas, 'Organising on-demand: Representation, voice, and collective bargaining in the gig economy', 2019, pp. 5-19, *Conditions of Work and Employment Series*, No. 94, International Labour Office, Geneva.

1440. National Tertiary Education Union, Submission 51, pp. 2 and 4.

1441. Australian Services Union, Submission 13, pp. 20 and 23.

1442. 'DRI', On-Demand Workers' Online Conversation, Department of Premier and Cabinet, 19 August 2019.

1443. Business Council of Co-operatives and Mutuals, Submission 20, pp. 6-7; Platform Cooperativism Consortium, Submission 59.

1444. Anthony Taylor, Business Council of Co-operatives and Mutuals, Small Business Roundtable Discussion, 12 July 2019.

1445. Anthony Taylor and Melina Morrison, Business Council of Co-operatives and Mutuals, Small Business Roundtable Discussion, 12 July 2019; Business Council of Co-operatives and Mutuals, Submission 20, pp. 6-7.

1446. SMart Production Associées, Submission 73, pp. 2-3.

- 1236 The diversity of the ideas matches the diversity of platform work and workers and reflects common positioning – business wishing to maintain flexibility and workers’ representatives wanting to extend protections and benefits.
- 1237 More universal were calls for greater clarity, better support and advice and, in the event of any change, a national approach. Many participants suggested the current mechanisms for determining coverage of work laws based on the longstanding ‘work status’ test was no longer working well.
- 1238 There was an acknowledgement, even amongst those supportive of maintaining the current approach to work status, that elements of the way in which the approach is playing out for workers and businesses are creating some uncertainty and anomalies.

6.7.1 Extend entitlements to platform workers

- 1239 Submissions for reform were based on the need to enhance protections for platform workers, irrespective of their underlying work status.¹⁴⁴⁷ A range of different mechanisms were suggested for achieving this: deeming workers to be employees, or creating new tests (for example, the ABC test) or creating a ‘new category’ of ‘worker’ who is extended a base level of protections but something short of all those that currently apply to ‘employees’.
- 1240 The final report of the Senate Select Committee on the Future of Work and Workers concluded that workplace laws have not kept pace with technological change. It recommended a regulatory response to broaden the definition of an employee so that on-demand workers are provided adequate protections under Australia’s workplace relations laws.¹⁴⁴⁸
- 1241 Many participants submitted that the minimum entitlements in the FW Act ought be extended to on-demand workers.¹⁴⁴⁹ They said on-demand workers should not be disadvantaged compared to workers in regularised employment.¹⁴⁵⁰ Unions NSW told the Inquiry that rights ought to accrue to on-demand contractors and this would assist in preventing their non-employment arrangements from being disguised as contracting.¹⁴⁵¹ JobWatch submitted that on-demand workers, also classified as vulnerable workers, require additional protections.¹⁴⁵²
- 1242 Several submitters remain concerned that on-demand workers lack standard employment protections and suffer work insecurity, lack workers’ compensation, earn below legal minimum wage rates, are not able to collectively bargain (as independent contractors), are unable to find sufficient work, have poor health and safety outcomes and are at increased risk of not receiving their wages and entitlements.¹⁴⁵³ These disadvantages are comparable to those of other non-standard workers.

1447. Australian Council of Trade Unions, Submission 1, pp. 5-6; Victorian Trades Hall Council, Submission 88, p.4; Richard McEncroe, Submission 48, p. 4; Media Entertainment and Arts Alliance, Submission 49, p.12; Professionals Australia, Submission 60, p.7; Randstad, Submission 61, p. 2; Shop, Distributive and Allied Employees’ Association – Victoria Branch, Submission 69, p.16; Silvy (Worker), Submission 72, p. 1. For example, Recruitment, Consulting and Staffing Association of Australia, seem to be suggesting that all lower skilled workers in dependent contracting relationships should be protected under the law: Submission 62, p.4; Kristen Sobeck, Submission 74, p. 1; Australia Institute Centre for Future of Work, Submission 9, p.24; Transport Workers’ Union of Australia, Submission 78, p. 15; Unions NSW, Submission 80, p. 3; Victorian Council of Social Service, Submission 84, p. 6.

1448. Senate Select Committee on the Future of Work and Workers, p. 91.

1449. Australian Council of Trade Unions, Submission 1, pp. 5-6; Victorian Trades Hall Council, Submission 88, p. 4; Richard McEncroe, Submission 48, p. 4; Media Entertainment and Arts Alliance, Submission 49, p. 12; Professionals Australia, Submission 60, p. 7; Randstad, Submission 61, p. 2; Shop, Distributive and Allied Employees’ Association–Victoria Branch, Submission 69, p. 16; Silvy (Worker), Submission 72, p. 1; For example, Recruitment, Consulting and Staffing Association of Australia seem to be suggesting that all lower skilled workers in dependent contracting relationships should be protected under the law: Submission 62, p. 4; Kristen Sobeck, Submission 74, p. 1; Australia Institute Centre for Future of Work, Submission 9, p. 24; Transport Workers’ Union of Australia, Submission 78, p. 15; Unions NSW, Submission 80, p. 3; Victorian Council of Social Service, Submission 84, p. 6.

1450. Maurice Blackburn Lawyers, Submission 46, p. 6; Unions NSW, Submission 80, p. 3.

1451. Unions NSW, Submission 80, p. 3.

1452. JobWatch, Submission 37, p. 3.

1453. Australian Council of Trade Unions, Submission 1, pp. 5-6; See also Transport Workers’ Union of Australia, Submission 78, p. 15.

- 1243 A significant view put by participants, was that even if on-demand workers are correctly classified as independent contractors, new industrial rules and minimum protections are needed (including higher minimum wage standards) to cover emerging forms of work and keep pace with changing work structures.¹⁴⁵⁴ The ACTU stated that the challenges posed by digital platforms must be addressed by changing the law regulating all work.¹⁴⁵⁵ It proposed that any changes should include:
- better mechanisms for workers to achieve secure jobs
 - fair wages and collective bargaining rights
 - access to industry wide bargaining
 - a statutory definition of casual employment
 - restoration of penalty rates
 - better enforcement of employee protections.¹⁴⁵⁶
- 1244 Several other participants strongly supported the ACTU's proposal, including the creation of minimum standards and rates for on-demand workers.¹⁴⁵⁷
- 1245 Professionals Australia noted that while digital disruption offers new challenges and opportunities, it is important that workers are provided with appropriate protections from employers trying to undermine minimum employment standards, avoid employment obligations and divert risk to workers by misclassifying them as independent contractors.¹⁴⁵⁸
- 1246 Maurice Blackburn Lawyers suggested that the law ought to establish a set of standard workplace rights and conditions for all workers. They might include rights to collective bargaining, minimum wages, workplace health and safety, minimum standards, workers' compensation and access to dispute resolution mechanisms.¹⁴⁵⁹
- 1247 Some submissions opposed proposals to confer additional rights on on-demand workers.¹⁴⁶⁰ They argued it would create a minefield of complexity and uncertainty and increase costs for businesses and consumers, while disrupting the work preferences and commercial arrangements of thousands of contractors.¹⁴⁶¹
- 1248 Professors Andrew Stewart and Shae McCrystal cogently argue that an intermediate worker category, with something less than the full range of employment rights and protections, should not be introduced. It would likely result in workers, otherwise categorised as employees, being reclassified into the new category.¹⁴⁶²

6.7.2 Preserve the dichotomy between employed and self-employed workers

- 1249 Many participants supported maintaining the dichotomy between genuine, self-employed-independent contractors and employees.¹⁴⁶³
- 1250 Business representatives in particular, were of the view that the common law test is appropriate and capable of evolving and regulating their arrangements.¹⁴⁶⁴

1454. Australian Council of Trade Unions, Submission 1, pp. 5-6; See also Transport Workers' Union of Australia, Submission 78, p. 15; JobWatch, Submission 37, p. 3; Victorian Trades Hall Council, Submission 89 (Supplementary Submission), pp. 7 and 8; Professionals Australia, Submission 60, p. 9; Maurice Blackburn Lawyers, Submission 46, p. 6.

1455. Australian Council of Trade Unions, Submission 1, pp. 5-6; See also Transport Workers' Union of Australia, Submission 78, p. 15.

1456. See also JobWatch, Submission 37, p. 3 (who make a similar point that some independent contractors who are vulnerable workers require additional protections).

1457. Australian Council of Trade Unions, Submission 1, pp. 5-6; Health and Community Services Union, Submission 34, p. 7; Victorian Trades Hall Council, Submission 88, p. 4; Law Institute of Victoria, Submission 39, p. 13; Victorian Trades Hall Council, Submission 89 (Supplementary Submission), pp. 7 and 8.

1458. Professionals Australia, Submission 60, p. 9.

1459. Maurice Blackburn Lawyers, Submission 46, p. 6.

1460. Australian Industry Group, Submission 1, p. 35; NatRoad, Submission 55, p. 12; Australian Institute of Employment Rights, Submission 12, p. 5; Prof Shae McCrystal and Prof Andrew Stewart, Submission 47, p. 3; Transport Workers' Union of Australia, Submission 78, p. 11.

1461. Australian Industry Group, Submission 1, p. 35; See also Direct Selling Australia, Submission 29, p. 11.

1462. Prof Shae McCrystal and Prof Andrew Stewart, Submission 47, p. 3; Australian Institute of Employment Rights, Submission 12, p. 5.

1463. Australian Industry Group, Submission 1, pp. 4-5; Australian Chamber of Commerce and Industry, Submission 10, p. 13; Victorian Chamber of Commerce and Industry, Submission 83, p. 2; Institute of Public Affairs, Submission 36, p. 11. Direct Selling Australia, Submission 29, paragraph 36; Housing Industry Association, Submission, p. 4.

1464. Australian Chamber of Commerce and Industry, Submission 10, p. 6; Victorian Chamber of Commerce and Industry, Submission 83, pp. 4-5 Self-Employed Australia, Submission 67, p. 6.

- 1251 Some industry participants strongly defended the importance of independent contracting and the need to preserve this dichotomy. Submissions from the business community were emphatic that it must be maintained.¹⁴⁶⁵ Ai Group, ACCI and Direct Selling Australia were of this view and did not agree with extending ‘employment like’ entitlements to self-employed workers. They note this distinction is a longstanding feature of labour and tax regulation. They argue that independent contracting arrangements have always been used by business and these arrangements are not designed to avoid workplace laws.¹⁴⁶⁶
- 1252 Ai Group, ACCI, VCCI and the Institute of Public Affairs all stated that prescriptive laws may constrain and limit innovation, to the detriment of the whole community, including workers.¹⁴⁶⁷ However, the overwhelming majority of participants felt that applying the legal tests was complex and lacked clarity.¹⁴⁶⁸
- 1253 In written submissions and consultations from unions, worker advocates, on-demand businesses and industry stakeholders, it was stated that needing to apply the multi-factorial legal indicia and legislative tests to determine whether individuals were employees or independent contractors, is hard.¹⁴⁶⁹ The current regulatory framework is seen as uncertain and unclear.
- 1254 Many participants were critical of this aspect of the Australian regulatory framework. They said much uncertainty is created when the employment status of a worker or group of workers can be assessed differently by a court, tribunal or regulator and the outcome may turn on different considerations and differences in the application of the legal tests.¹⁴⁷⁰
- 1255 Some suggested that ‘independent contractor’ could be defined to give greater clarity, while maintaining the dichotomy.¹⁴⁷¹
- 1256 Having initially strongly defended the status quo, the Ai Group revised its view about the operation of the law. Acknowledging that the current test was deterring businesses from enhancing protections and support for workers for fear of ‘reclassification’ of their workforces, Ai Group suggested modifications on the face of the statute to allow conferring benefits without compromising the underlying status of the worker.¹⁴⁷²
- 1257 Ai Group contended that it is in everyone’s interests for independent contractors to work in a safe environment, receive appropriate training, be covered by accident insurance, be consulted about workplace changes and be paid on time at a fair price. Ai Group proposed that section 12 of the FW Act be amended to:

***Independent contractor** is not confined to an individual and has the common law meaning, except that the provision of the following benefits by the person engaging the contractor shall not be taken into account in determining whether there is a contract of services:*

- (a) *safety systems and equipment*
- (b) *training*
- (c) *insurance*
- (d) *standard prices or payment terms*
- (e) *consultation processes.*¹⁴⁷³

1465. Australian Industry Group, Submission 1, pp. 4-5; Australian Chamber of Commerce and Industry, Submission 10, p. 13; Victorian Chamber of Commerce and Industry, Submission 83, p. 2; Institute of Public Affairs, Submission 36, p. 11. Direct Selling Australia, Submission 29, paragraph 36; Housing Industry Association, Submission, p. 4.

1466. Australian Industry Group, Submission 1, pp. 4 and 5; Australian Chamber of Commerce and Industry, Submission 10, p. 13; Victorian Chamber of Commerce and Industry, Submission 83, p. 2; Direct Selling Australia, Submission 29, paragraph 36.

1467. Australian Industry Group, Submission 1, pp. 4 and 5; Australian Chamber of Commerce and Industry, Submission 10, p. 13; Victorian Chamber of Commerce and Industry, Submission 83, p. 2; Institute of Public Affairs, Submission 36, p. 11.

1468. Menulog, Submission 50, p. 13; Uber, Submission 79, p. 22; Sidekicker, Submission 71, p. 9; Housing Industry Association, Submission 35, p.9; Unions NSW, Submission 80, p. 8; Jonathan Hunger, Expert360, Platform Business Roundtable Discussion, 22 February 2019; Self-Employed Australia, Submission 67, p. 6.

1469. Menulog, Submission 50, p. 13; Uber, Submission 79, p. 22; Sidekicker, Submission 71, p. 9; Housing Industry Association, Submission 35, p. 9; Unions NSW, Submission 80, p. 8; Jonathan Hunter, Expert360, 22 February 2019; Self-Employed Australia, Submission 67, p. 6.

1470. Menulog, Submission 50, p. 13; Uber, Submission 79, p. 22; Sidekicker, Submission 71, p. 9; Housing Industry Association, Submission 35, p. 9; Unions NSW, Submission 80, p. 8.

1471. Housing Industry Association, Submission 35, p.9; Australian Industry Group (Supplementary Submission), Submission 2, pp. 1-2.

1472. Australian Industry Group (Supplementary Submission), Submission 2, pp. 1-2.

1473. Australian Industry Group (Supplementary Submission), Submission 2, pp. 1-2.

1258 VCCI submitted that independent contracting offers the flexibility that supports the on-demand economy. They said, rather than forcing businesses to change their models to adapt to old regulatory frameworks, the law may need to catch up and allow greater benefits to be offered to independent contractors, without compromising their employment status.¹⁴⁷⁴

6.7.3 Platforms' positions

- 1259 Several businesses (including Deliveroo and Uber) and some industry participants recommended that the law be modified so businesses can provide additional protections and benefits to non-employees without them later being classified as employees.¹⁴⁷⁵ They said that while workers are not employees, they should still receive be able to provide additional protections or benefits.¹⁴⁷⁶
- 1260 These businesses also thought old regulatory frameworks should catch up with their business models. They want to offer greater benefits to non-employees without fear of reclassification.
- 1261 Menulog proposed that national uniformity was critical in any approach. They suggested for example that, in the absence of federal legislative change, any reform relevant to the on-demand economy and workforce ought to be considered by the Council of Australian Governments.¹⁴⁷⁷
- 1262 Deliveroo told the Inquiry that workers who opt for the on-demand economy should be provided with maximum flexibility and greater security. Deliveroo suggested the company should be able to offer sick leave and carer's leave while maintaining the flexibility needed to perform the work.¹⁴⁷⁸ The company suggested that, to end the trade-off between flexibility and security, law reform should be considered so workers can accrue benefits for work performed (like number of completed deliveries or value of fees earned), rather than hours of work. The provision of benefits to a self-employed contractor should not impact their employment status.¹⁴⁷⁹
- 1263 Both Uber and Deliveroo referred to France's 'social charter' model as an innovative framework to solve the flexibility-security conundrum.¹⁴⁸⁰ Each platform provider would list benefits, training and other conditions provided to independent workers, in a 'social charter'. The charter would be verified by government and not result in reclassification to an employment relationship.¹⁴⁸¹
- 1264 Deliveroo also told the Inquiry that a Commonwealth 'Future Work Act' is needed, harmonising state and territory legislation. The legislation would specify the responsibilities of platforms to independent contractors and define their flexibility (the right to set their own work patterns, no obligation to perform work or accept set hours, no penalty for working for multiple providers). The 'Future Work Act' could state that a company is able to directly provide benefits that are unrelated to the work the contractor performs.¹⁴⁸² Examples might include:
- accident and injury or third party liability insurance
 - income protection when temporarily unable to work because of an accident
 - sick pay
 - training
 - specialist training related to the contracted work
 - wider life skills
 - educational qualifications.

1474. Victorian Chamber of Commerce and Industry, Submission 83, p. 6.

1475. Deliveroo, Submission 28, pp. 1 and 6; Victorian Chamber of Commerce and Industry, Submission 83, p. 6; Uber, Submission 79, p. 21; Joanne Woo and Jodi Ingham, Deliveroo, Individual Consultation, 17 July 2019.

1476. Uber, Submission 79, p. 22; Deliveroo, Submission 28, p. 6; Simon Smith and Ann Tan, Ola, Individual Consultation, 3 July 2019.

1477. Menulog, Submission 50, p. 13.

1478. Deliveroo, Submission 28, p. 6.

1479. Deliveroo, Submission 28, p. 6.

1480. The Charter was first introduced into France's Assemblée Nationale as an amendment to a Bill dealing with vocational education and training and unemployment support. The proposed Amendment was invalidated by the French Constitutional Council. The Charter has not been introduced into the Assemblée. The Charter, if made, would have defined the rights and obligations of platforms and those of the workers with whom they engage: A. Sterescu, *The Taché Charter: A Modern Social Policy for the Gig Economy?* [website], Medium, 15 March 2020; See also [Assemblée Nationale](#) [website], 7 June 2018.

1481. Uber, Submission 28, p. 6.

1482. Deliveroo, Submission 28, p. 6.

6.8 FAIR WORK ACT – A NATIONAL SYSTEM THAT COVERS THE FIELD

- 1265 Victoria’s ability to legislate for on-demand workers is affected by the comprehensive national regulatory framework provided for by the FW Act and the IC Act.
- 1266 Since 2009, a national system of Commonwealth laws has been the primary source of terms, conditions, rights and responsibilities for employees and employers.¹⁴⁸³ These laws are underpinned by agreements with state governments, except in WA. Constitutionally, the laws are supported by the corporations power; formal referrals of power by state governments and a range of other heads of power. In Victoria this referral is provided currently by the *Fair Work (Commonwealth Powers) Act 2009* (Vic).
- 1267 The Commonwealth laws, including terms in modern awards or enterprise agreements, prevail over state laws to the extent of any inconsistency (with some exceptions where set out in the FW Act).¹⁴⁸⁴ The Commonwealth framework expresses an intention to exclude all state or territory industrial laws, unless they have been expressly identified as permissible (such as workers’ compensation, occupational health and safety and anti-discrimination laws).¹⁴⁸⁵ The national laws ‘cover the workplace relations field’ and invalidate state laws intruding into the field¹⁴⁸⁶ via section 109 of the Commonwealth Constitution.
- 1268 The FW Act and the IC Act¹⁴⁸⁷ respectively, primarily regulate employment and independent contracting arrangements. The IC Act’s primary purpose is to prevent states and territories introducing laws that grant or limit rights, entitlements, obligations or liabilities typically associated with employment relationships on independent contractors (see further discussion of the IC Act’s purposes below).¹⁴⁸⁸
- 1269 The intention is to provide for one national system, providing consistent regulation and enforcement across the country, with clear, expressly identified exceptions. Other relevant Commonwealth legislation such as competition and consumer protection laws as set out in the CC Act don’t exclude or limit the concurrent operation of any state law.¹⁴⁸⁹ Among other things, under the ACL, unfair contract terms can be challenged. State legislation can operate concurrently with ACL to the extent it’s consistent with Commonwealth law. This avoids triggering section 109 of the Commonwealth Constitution and rendering those state laws invalid.

6.8.1 Powers for Victoria in a federal framework

- 1270 Victoria may only pass laws that are not directly inconsistent with Commonwealth laws and do not intrude on the ‘field’ covered.
- 1271 The Inquiry has closely considered the constitutional limitations on Victoria in framing its recommendations. These constitutional limitations are a key reason it would be ideal for the Commonwealth to lead any regulatory changes arising out of the Inquiry.
- 1272 A national response is strongly preferred for the same reason that a national workplace relations system is preferred. That is, to maintain national consistency for employers and workers and to not add complexity or confusion about applying laws or regulatory responsibilities.

1483. A national system employer is defined as a constitutional corporation and other persons with respect to which the Commonwealth has power to make laws. A national system employee is a person who is employed or usually employed by a national system employer. All private sector and most public sector employers in Victoria are covered by the *Fair Work Act 2009* (Cth). See *Fair Work Act 2009* (Cth), ss13–14 and Part 1–3 Div 2, and *Fair Work (Commonwealth Powers) Act 2009* (Vic).

1484. *Fair Work Act 2009* (Cth), s29(1).

1485. Part 1–3 Division 2 of the *Fair Work Act 2009* (Cth) provides for the interaction of state and territory laws. Section 27 of the *Fair Work Act 2009* (Cth) carves out several non-excluded matters such as: superannuation; workers’ compensation; occupational health and safety; matters relating to outworkers; child labour; training arrangements, except in relation to some terms and conditions of employment; long service leave, except in relation to certain employees with *Fair Work Act 2009* (Cth) entitlements; leave for victims of crime; jury or emergency service duties; claims for enforcement of contracts of employment other than where excluded by s26(2)(e), and any other matters prescribed by the regulations: *Fair Work Act 2009* (Cth), s27(2). This qualification may however be overridden by regulation. *Fair Work Act 2009* (Cth), s26.

1486. *Explanatory Memorandum*, Fair Work Bill 2008 (Cth), paragraph 128.

1487. Most relevantly, see the *Fair Work Act 2009* (Cth), *Independent Contractors Act 2006* (Cth) and *Competition and Consumer Act 2010* (Cth).

1488. *Independent Contractors Act 2006* (Cth), Part 2, s7.

1489. *Competition and Consumer Act 2010* (Cth), s131C(1).

- 1273 The Inquiry requires consideration of options for Victoria and has framed alternative recommendations in the event that the Commonwealth is not inclined to implement its recommendations.
- 1274 The Inquiry has closely considered relevant Commonwealth legislation, like the FW Act and IC Act, limiting how much Victoria may regulate in framing its recommendations and is confident the approaches are viable. The detail of any Victorian regulation must be carefully framed in light of these limitations to ensure it is valid.

6.9 APPLICATION OF INTERNATIONAL LAW – INTERNATIONAL LABOUR ORGANIZATION OBLIGATIONS

- 1275 The Inquiry's TOR require it to have regard to certain matters, including applicable obligations under international law.¹⁴⁹⁰
- 1276 In Australia, international treaties are not legally binding immediately at the time they are ratified, but only when expressly given effect by the Commonwealth Parliament. Only then will there be an obligation, domestically, to ensure compliance with an international treaty or convention.¹⁴⁹¹
- 1277 Several International Labour Organization (ILO) conventions and recommendations concern matters considered by the Inquiry, but not all have been ratified and so do not have legal effect domestically.¹⁴⁹² For instance, the Domestic Workers Convention 2011 (C189)¹⁴⁹³ and the Home Work Convention 1996 (C177)¹⁴⁹⁴ cover matters traversed by the Inquiry.¹⁴⁹⁵ However, as these conventions have not been ratified by Australia, and not given effect in domestic legislation, they do not create obligations under international law.¹⁴⁹⁶
- 1278 Conventions that have been ratified by Australia and that are directed to regulating health and safety, freedom of association and the right to organise and engage in collective bargaining, are considered relevant to the Inquiry's TOR. Consideration of these conventions follows.

6.9.1 Freedom of association and collective bargaining

- 1279 Australia has ratified both the Freedom of Association and Protection of the Right to Organise Convention 1948 (C87) and the Right to Organise and Collective Bargaining Convention 1949 (C98).¹⁴⁹⁷

1490. Terms of Reference, B IV.

1491. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at [29], [32].

1492. Particular attention has been paid to International Labour Organization conventions and recommendations. The International Labour Organization is a specialised agency of the United Nations. It finalises conventions by tripartite negotiations between business, government and unions. Ratified International Labour Organization conventions set out internationally recognised labour standards, which inform the development of domestic law and policy and expectations.

1493. Opened for signature 16 June 2011, ILO C189 (entered into force 5 September 2013).

1494. Opened for signature 20 June 1996 (entered into force 22 April 2000).

1495. Some participants made submissions on these conventions: see Iain Campbell, Fiona McDonald, Sara Charlesworth, Submission 21, p.31; the Australian Services Union, Submission 13, p. 7.

1496. As the Terms of Reference (B IV) ask the Inquiry to consider Australia's obligations under international law, and these conventions place no obligation on Australia until they are ratified and given effect by the Commonwealth Parliament they are noted but do not have legal effect. The *Domestic Workers Convention* applies to employed workers who perform work in or for a household. The convention provides that domestic workers are to be informed of the terms and conditions of their employment. The *Home Work Convention* applies to outworkers more broadly. The convention provides that domestic workers are to be informed of the terms and conditions of their work. Article 4 of the *Home Work Convention* provides that national policy on home-work shall promote, as far as possible, equality of treatment between homeworkers and other wage earners, taking into account the special characteristics of home work, and where appropriate, conditions applicable to the same or a similar type of work carried out in an enterprise. As such, homeworkers are to be equally treated including in relation to: the right to establish or join organisations of their own choosing; protection against discrimination in employment and occupation; protection in the field of occupational safety and health; access to training. Part 6-4 of the *Fair Work Act 2009* (Cth) provides protection for outworkers in the textile and clothing industry.

1497. Opened for signature 9 July 1948 (entered into force 4 July 1950, ratified by Australia by Australia 28 February 1973); Opened for signature 1 July 1949 (entered into force 18 July 1951, ratified by Australia 28 February 1973). Conventions ratified by Australia can be found at: International Labour Organization, [Ratifications for Australia](#) [website], 2017.

- 1280 Under the Freedom of Association and Protection of the Right to Organise Convention 1948 (C87), respect for the principles of freedom of association, including the right of both employers and workers to form and join organisations of their choice, is to apply to all workers, ‘without distinction whatsoever’, including self-employed workers. The freedom of association principles in the convention are considered to be a fundamental human right, also recognised in the Constitution of the ILO, the Declaration of Fundamental Principles and Rights at Work of 1998, the Declaration on Social Justice for a Fair Globalisation of 2008 and in other decisions of the judicial bodies of the ILO. The protection of a right to take industrial action (including to stop work or engage in other related conduct, such as engaging in work bans or boycotts) is said to be guaranteed by Articles 3, 8 and 10 of that Convention, even though there is no explicit mention of a right to take any such action.¹⁴⁹⁸
- 1281 Collective bargaining too, is considered one of the fundamental rights recognised by the ILO and under international law in the Right to Organise and Collective Bargaining Convention 1949 (C98) and the Constitution of the ILO. It is reaffirmed in the Declaration of Fundamental Principles and Rights at Work of 1998 and forms a part of the principles in the Freedom of Association and Protection of the Right to Organise Convention 1948 (C87). The Convention has been interpreted as providing for participants or parties to determine the level at which bargaining ought to take place and those matters that may be the subject of bargaining. It is understood to support arbitration of matters if parties are unable to resolve disputes and this avenue is voluntarily supported by the parties, and to provide for parties to voluntarily engage in collective bargaining, but not require it.¹⁴⁹⁹
- 1282 On-demand workers, where they are employees, may access the collective bargaining framework in the FW Act.¹⁵⁰⁰ However, as most on-demand workers are not employees, they cannot access the bargaining framework under the FW Act.
- 1283 The ability of non-employee workers to collectively withhold their labour is circumscribed by the CC Act.¹⁵⁰¹ Any collective action taken by non-employees may fall foul of the statutory re-statement of some torts in the CC Act (namely, the restraint of trade, breach of contract, economic duress and economic torts or anti-competitive conduct provisions). Non-employee workers will not be able to bargain collectively unless an authorisation is granted by the ACCC, or a notification to engage in conduct has not been opposed by the ACCC – including when considering whether the public benefit outweighs any detriment as a result of the conduct.¹⁵⁰²
- 1284 Some scholars have suggested that seeking to improve working conditions will necessarily result in increased costs, which seems unlikely to constitute a ‘public benefit’ for the purposes of these provisions in the CC Act.¹⁵⁰³ These provisions are directed to commercial practices that would be anti-competitive in effect and reduce competition between the contractors supplying labour who are acting collusively.¹⁵⁰⁴ An authorisation or notification would provide workers with a defence to any proceedings that could be brought under one or more of the provisions in Division 2 of Part IV of the CC Act.¹⁵⁰⁵ One important means by which on-demand workers could seek to further and improve their economic interests, is significantly limited. Some scholars have said that the likelihood of the ACCC granting an authorisation where industrial action is being contemplated is not great.¹⁵⁰⁶

1498. Stewart et. al., *Creighton & Stewart's Labour Law*, p. 917; S. McCrystal, ‘Fair Work in the International Spotlight: The CEPU Complaint to the ILO’s Committee on Freedom of Association’, *Australian Journal of Labour Law*, 2011, vol. 24, p. 169.

1499. Stewart et. al, pp. 813 and 814.

1500. See S. McCrystal, ‘Is there a public benefit in improving working conditions for independent contractors?’, *Federal Law Review*, 2009, vol. 37, p. 264.

1501. Authorisations, notifications and clearances in respect of restrictive trade practices, see *Competition and Consumer Act 2010* (Cth) Part VII, Subdivision B; McCrystal, p. 264.

1502. See *Competition and Consumer Act 2010* (Cth) ss88, 93AB.

1503. McCrystal, ‘Is there a public benefit in improving working conditions for independent contractors?’, p. 272; and see *Competition and Consumer Act 2010* (Cth) ss88, 93AB.

1504. McCrystal, p. 272.

1505. See *Competition and Consumer Act 2010* (Cth) Div 2, Part IV; S. McCrystal, ‘Is there a public benefit in improving the working conditions for independent contractors?’, p.265; Stewart et.al., *Creighton & Stewart's Labour Law*, p. 966; Australian Institute of Employment Rights, Submission 12, p. 7.

1506. Stewart et al., p. 966.

- 1285 To address some of these limitations, the ACCC is considering submissions to introduce a ‘class exemption’ to give certain businesses automatic protection to collectively bargain.¹⁵⁰⁷ The ACCC noted that a class exemption would allow eligible businesses to realise the potential benefits of collective bargaining without delay or additional cost.¹⁵⁰⁸ What collective bargaining conduct may, in the end, be covered by any such class exemption is likely to be limited by the ACCC needing to be satisfied that, in all circumstances, the type of conduct specified in a class exemption is unlikely to substantially lessen competition, or will likely result in a net public benefit.¹⁵⁰⁹
- 1286 The AIER suggested that the framework to facilitate collective bargaining by self-employed workers ought to be improved. While non-employee workers may form and join associations, they are not, however, supported by any formal mechanism to bargain collectively.
- 1287 An earlier review of the anti-competitive provisions in the then *Trade Practices Act 1974* (Cth) (predecessor legislation to CC Act, Schedule 2), suggested that collective bargaining by small businesses may be needed to balance the bargaining power of much larger businesses.¹⁵¹⁰ Self-employed workers are not in the same bargaining position and are on a spectrum. Those workers who are dependent (economically) on contracts with one, or a very small number of, purchasers and who may have limited contract options, are more likely to benefit from bargaining collectively.¹⁵¹¹

6.9.2 Occupational health and safety

- 1288 In the preamble to its constitution, the ILO expresses a commitment to protect ‘the worker against sickness, disease and injury arising out of employment’.¹⁵¹² Many conventions and recommendations adopted by the ILO address directly or indirectly occupational health and safety considerations.¹⁵¹³
- 1289 Historically in Australia, whilst the Commonwealth had responsibility for ratifying international conventions, the states were responsible for implementing occupational health and safety laws.¹⁵¹⁴ As a result, the Commonwealth tended not to immediately ratify ILO occupational health and safety conventions. This was in part because, while there were broad similarities in occupational health and safety laws across the states, there were differences, prior to several States adopting the model WHS laws.¹⁵¹⁵ This prevented ratification of ILO standards on health and safety.¹⁵¹⁶
- 1290 In 2004, Australia ratified the Occupational Safety and Health Convention 1981 (C155).¹⁵¹⁷ At that time, it was only the second convention ratified by Australia that directly addressed occupational health and safety.¹⁵¹⁸

1507. Australian Competition and Consumer Commission, [Collective bargaining class exemption](#) [website]. Australian Competition and Consumer Commission, Individual Consultation, 20 August 2019.

1508. Australian Competition and Consumer Commission, [Potential ACCC ‘class exemption’ for collective bargaining – discussion paper](#), 23 August 2018.

1509. Div 3, Part VII, *Competition and Consumer Act 2010* (Cth), ss95AA.

1510. D. Dawson, J. Segal and C. Rendell, [Review of the Competition Provisions of the Trade Practices Act](#), Australian Competition Law [website], 2003; SeeMcCrystal, ‘Is there a public benefit in improving the working conditions for independent contractors?’, p. 265.

1511. McCrystal, p. 267.

1512. R. Johnstone, E. Bluff, A. Clayton, *Work Health & Safety Law and Policy*, 3rd edition, Thomson Reuters, 2012, p. 100.

1513. Johnstone, Bluff, and Clayton, p. 100.

1514. Creighton and Rozen, *Health and Safety Law in Victoria*, p. 15.

1515. The model *Work Health and Safety Act 2011* (Cth) has been adopted by the Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia and Tasmania; Creighton and Rozen, pp. 15-16.

1516. Creighton and Rozen, pp. 15-16.

1517. Opened for signature 22 June 1981, (entered into force 11 August 1983, ratified by Australia 26 March 2004); See also International Labour Organization, [Ratifications for Australia](#) [website].

1518. Creighton and Rozen, *Health and Safety Law in Victoria*, pp. 15-16. Australia had also ratified the Marking of Weight, (Packages Transported by Vessels) Convention 1929, opened for signature 21 June 1929 (entered into force 9 March 1932, ratified by Australia 9 March 1931 and has since in 2011 ratified Asbestos Convention 1986, opened for signature 24 June 1986 (entered into force 16 June 1989, ratified by Australia 10 August 2011); See also International Labour Organization, [Ratifications for Australia](#) [website].

- 1291 The Occupational Safety and Health Convention 1981 (C155)¹⁵¹⁹ and the Protocol to the Occupational Safety and Health Convention 2002 (Protocol No. 155)¹⁵²⁰ apply to all employees in all branches of economic activity (subject to exclusions being made and justified).¹⁵²¹ The Convention applies to on-demand workers who are employed.¹⁵²²
- 1292 The Occupational Safety and Health Convention 1981 (C155) places employers under a wide-ranging duty to ensure, so far as practicable, the health and safety of the workforce and extends to workplaces both under the direct and indirect control of employers.¹⁵²³ The convention also calls for arrangements under which workers and their representatives cooperate with their employer on occupational health and safety and in fulfillment of the employer's obligations.¹⁵²⁴ This extends to enabling workers or their representatives, in accordance with applicable laws, to inquire into and be consulted about health and safety.¹⁵²⁵
- 1293 In so far as the OHS Act and Occupational Health and Safety Regulations 2017 apply to employees and non-employee workers, it exceeds the standards provided in the Occupational Safety and Health Convention 1981 (C155).¹⁵²⁶ Duties and obligations under the OHS Act are owed by and towards, employers, employees, and self-employed persons and include duties to consult about health and safety matters.¹⁵²⁷

1519. Opened for signature 22 June 1981 (entered into force 11 August 1983, ratified by Australia 26 March 2004); See also International Labour Organization, [Ratifications for Australia](#) [website].

1520. Opened for signature 20 June 2002, (entered into force 9 February 2005, ratified by Australia 10 August 2011); See also International Labour Organization, [Ratifications for Australia](#) [website].

1521. Opened for signature 22 June 1981, Art 1 and Art 2 (entered into force 11 August 1983, ratified by Australia 26 March 2004).

1522. Art 3(a) states that the term 'branches of economic activity' covers those branches in which workers are employed, including the public service. See also [Report III \(Part IB\): General Survey concerning the Occupational Safety and Health Convention, 1981 \(No. 155\), the Occupational Safety and Health Recommendation, 1981 \(No. 164\), and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981](#), International Labour Conference, 98th Session, 2009, p. 12.

1523. Opened for signature 22 June 1981 Arts 16 and 3 (entered into force 11 August 1983, ratified by Australia 26 March 2004).

1524. Opened for signature 22 June 1981, Art 19 (entered into force 11 August 1983, ratified by Australia 26 March 2004).

1525. Opened for signature 22 June 1981, Art 19 (entered into force 11 August 1983, ratified by Australia 26 March 2004).

1526. Opened for signature 22 June 1981 (entered into force 11 August 1983, ratified by Australia 26 March 2004); See also International Labour Organization, [Ratifications for Australia](#) [website]. In so far as it addresses hazard identification, Victorian Law is also consistent with International Labour Organization, [R164 – Occupational Safety and Health Recommendation, 1981 \(No. 164\)](#) [website]. See also Occupational Health and Safety Regulations 2017 (Vic).

1527. Sent by email to the Inquiry from Worksafe Victoria, 5 November 2019.

FIGURE 6 : SUMMARY OF RECOMMENDATIONS



Chapter 7 | Inquiry recommendations

7.1 THE COMPELLING CASE FOR CHANGE

- 1294 The composition of Australia's labour market and its capacity to meet the needs of workers and businesses, is a critical element of our future economic success. The growth of digital platforms in Australia, using models that operate outside of labour market regulation, has put the spotlight on the need to balance agility and flexibility, with protections. It has intensified the imperative to ensure our labour market regulation meets the needs of our modern ways of working. There has been little deliberate, transparent consideration of these issues by Australian governments prior to this Inquiry, and limited research in the Australian context.
- 1295 The Inquiry has identified aspects of our current system which are not serving us well. There are six reasons to act now to revise our current system.

1. The inherent uncertainty of the work status test
2. The fragmented and limited nature of advice and support about work status
3. Inaccessible resolution pathways to determine work status
4. The emergence and conduct of platforms
5. High incidences of low-leveraged workers accessing work via platforms and working under 'borderline' work status
6. Inadequate protections for non-employee 'small business' platform workers

7.1.1 Work status – inherently uncertain

Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.¹⁵²⁸

1

The inherent uncertainty of the work status test

This, in the Inquiry's view, is the 'root cause' of the current system's failings. It, in turn, causes uncertainty about the application of work laws. This uncertainty is amplified, rather than assuaged, by the remaining aspects identified by the Inquiry.

- 1296 The dichotomy between 'employees' and self-employed 'independent contractors' has endured since the genesis of labour regulation. Work status has been the cornerstone of modern labour market regulation. It determines whether a worker is extended the comprehensive entitlements and protections of labour market regulation.
- 1297 The two types of worker may have been quite distinct in the master-servant era from which the 'work status' test emerged. But today, the distinction is not always obvious.

1528. *Kaseris v Raiser Pacific VO.F* [2017] FWC 6610 at [66].

- 1298 While many workers clearly sit within one or other category, some arrangements are ‘borderline’: they have features of both ‘employment’ and ‘self-employment’.
- 1299 This can be the case for lower skilled workers operating under non-employment arrangements. It is the reality for many platform workers.
- 1300 Resolving work status requires evaluative judgement to be brought to bear on the substance of the work arrangement. For ‘borderline’ workers, the test is inherently unclear and difficult to apply.

7.1.2 Resolving work status – inadequate and perplexing advice and inaccessible resolution pathways

2

The fragmented and limited nature of advice and support about work status

People seeking to resolve borderline work status encounter conflicting and caveated advice from regulators. They cannot act with certainty about their entitlements and experience confusion around obligations.

3

Inaccessible resolution pathways to determine work status

Existing arrangements put the determination of work status out of reach for individual workers and, also often, for businesses.

- 1301 The mechanisms for formally resolving work status are inaccessible and slow. The complexity and cost of court or tribunal action prevents most individual workers from testing their true work status. Regulators, grappling with the complex and costly processes, have been slow to intervene to address these issues.
- 1302 As a result, many platform workers operate under their ‘presumed’ non-employee status for the duration of the arrangement.
- 1303 The impact is enduring uncertainty about fundamental entitlements, protections and obligations for a significant cohort of workers. The Foodora case is an example that demonstrates this: some platform workers were deprived of entitlements as a result of their true status being unrecognised, until it was too late to fully claim what was owed.
- 1304 There are also significant consequences for businesses using employment-based models, which must comply with the complex and close requirements of employment regulation while competing in a market where platforms facilitating similar services are not.

7.1.3 Operation and conduct of platforms

4

The emergence and conduct of platforms

Platforms are enabling the organisation of ‘on-demand’ work in a way that is highly flexible and structurally distinct, largely under non-employment models of engagement.

- 1305 Platforms provide a diverse range of new and accessible opportunities to earn income. Such flexibility and autonomy is highly valued by workers.
- 1306 Platforms have taken the fullest advantage of their leverage in the relationship to frame the arrangements to maximise their agility, responsiveness and discretion, while minimising (or transferring) their risks.
- 1307 While platforms refer to workers as ‘partners’ or ‘entrepreneurs’ or ‘taskers’, their arrangements with the workers are not distinct to the individual workers but form part of a complex system which is designed and controlled by the platform.

- 1308 While some platforms have, over time, 'leaned in' to provide better support, conditions and consultation for workers, there is no requirement to do so. Some platforms have expressed concern about further extending benefits for fear of reclassification risk, which would threaten their current models.
- 1309 It is a perverse outcome that existing regulation is inhibiting businesses from choosing to improve conditions for workers.
- 1310 Large non-employee platform workforces present a significant development in the organisation of on-demand work, in our labour market.
- 1311 There are genuine questions about the 'true' work status of some of these workers.
- 1312 The finer academic points of the work status test and its multi-factorial indicators are not especially meaningful to these workers. In order to gain access to platform work they have little choice but to accept their 'presumed' non-employment status.
- 1313 It may be that on close and legally robust scrutiny, many platform workers' true work status is not 'employment' but, nevertheless, their characterisation as autonomous self-employed business people does not always ring true.

7.1.4 Low-leveraged workers

5

High incidences of low-leveraged workers accessing work via platforms and working under 'borderline' work status

These workers are presumed to not have entitlements, protections and obligations under work laws.

- 1314 Low-leveraged workers are prominent in platform work: these include workers who are low-skilled, more likely to be young and/or from a migrant background. They are operating in a labour market where there is high competition for fewer entry level jobs. Those alternative jobs are often in sectors that have been found to be chronically non-compliant.
- 1315 These are among the people who were most immediately impacted by the coronavirus (COVID-19) government interventions. Some are also more likely to be workers not eligible for the federal government's 'JobKeeper' payments, because they are irregular casual workers or visa workers.
- 1316 These workers are in a precarious position in the labour market, especially at times of heightened unemployment or under-employment. Platforms offer them valuable opportunities to earn income, but with minimal choice about their arrangements, and low income security.

7.1.5 Inadequate small business remedies for platform workers

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Inadequate protections for non-employee 'small business' platform workers

The remedies and supports available for platform workers who are 'presumed' not to be employees are designed for 'small businesses'. They provide inadequate protections for this cohort. Options to improve or challenge unfair contracts or seek help resolving disputes are not clear, adequate or accessible to this cohort.

- 1317 Low-leveraged workers (and many businesses) struggle to understand or access support for these remedies designed for small business. The bureaucratic arrangements that might support the workers are also not always clear or designed to be accessible to platform workers. The IC Act unfair contracts remedy appears to have no dedicated government support, with no agency clearly responsible to help workers access it. The ACCC has been highly effective at leveraging the minimalist unfair contracts remedy available to small businesses under the ACL. But the ACCC has been more inclined to apply this remedy to support restaurants than 'small business' platform workers.

7.2 PRINCIPLES FOR REGULATORY INTERVENTION

- 1318 Regulatory intervention must always be carefully considered and justified by failings in the current framework.
- 1319 Such failings are apparent in the current system. Mechanisms to determine work status, pivotal to the application of entitlements, protections and obligations for workers, are not accessible or effective.
- 1320 Businesses, regulators and workers alike have acknowledged challenges in resolving these questions and the harm caused by prevailing uncertainty for affected businesses and workers.
- 1321 Courts can adapt the law. However, in a decade of platform work, there has been no court consideration of platform work. A ‘court-based’ evolution of work status indicia via individual cases will not deliver timely and targeted adjustments that suit a fair, efficient modern labour market. The Inquiry considers the system’s failings will not be addressed without intervention.
- 1322 While the labour market has evolved quickly, driven by technology and the desire for agility and flexibility, the system has been slow to respond to emerging work arrangements.
- 1323 The current ‘work status test’ and the mechanisms for applying it are not serving today’s labour market well. The current system is not delivering real balance or fairness to the work arrangements of platform workers.
- 1324 Non-employee workers are entitled to genuine choice, certainty and fair conduct in their work arrangements. While protections in ‘employment’ regulation have been regularly revised and reformed by governments and considered by tribunals and courts, the rules on the non-employee side of the ledger have been neglected and are not suitable for low-leveraged workers.
- 1325 The Inquiry recommends balanced, measured government intervention executed in collaboration with stakeholders. The proposals are revisionist, not revolutionary. The approach continues to delineate between genuinely autonomous ‘self-employed’ workers running their own business and ‘employee’ workers.

7.3 SCOPE OF RECOMMENDATIONS – OUTSIDE OF PLATFORMS

- 1326 The recommendations propose revised tests, remedies and standards with the aim of improving certainty, choice and conduct for platform workers. They also recommend better, more joined up advice and support, and fast resolution of borderline work status.
- 1327 Complexity and uncertainty arising from the opaque nature of the ‘work status’ test is not confined to platform workers.
- 1328 This Inquiry has highlighted longstanding, lingering systemic irritants about ‘work status’ that impact on a broader range of workers and businesses.
- 1329 Platforms are not the first to deploy ‘borderline’ work arrangements. Workers, including low-leveraged workers, have worked under presumed non-employment arrangements in ‘traditional’ work scenarios for some time.
- 1330 The FWO has successfully taken action through sham contracting proceedings involving low-leveraged workers working outside of platforms (for example, in cleaning and retail), who similarly lacked choice and fairness under apparent non-employment arrangements.
- 1331 Platforms’ systemic, distinct and sometimes complex work arrangements have drawn our attention to a pre-existing problem in the system. This has posed the question of whether platforms have disadvantaged workers and competitors alike through their disruptive operating models.
- 1332 But that does not mean action should be limited to platform workers. Other low-leveraged workers and some businesses are encountering the same difficulties. To regulate specifically for platforms and platform workers risks leaving other low-leveraged workers without adequate remedies and further fragmenting support and options, exacerbating divisions and confusion about where to go for help.
- 1333 Some recommendations have therefore been cast broadly, to address the root cause of the problem – the inherent uncertainty of the work status test. The recommendations single out platform work as the priority, especially for advice and support, but do not exclude non-platform workers from the measures.

7.4 RECOMMENDATIONS AND APPROACH

7.4.1 The Commonwealth should lead

- 1334 The Commonwealth is responsible for Australia's national system of workplace laws. It was the universal view of those participating in the Inquiry that any change should be led nationally. Reforms confined to a single state risk creating yet more complexity and inconsistency and could impose an unnecessary regulatory burden on national businesses.
- 1335 The Commonwealth is therefore best placed to deliver genuine choice, fairness and certainty for workers and business. The Inquiry suggests it should grasp this opportunity to deliver the recommendations set out in this report and make balanced and fit-for-purpose revisions to the current system.

RECOMMENDATION 1

The Inquiry recommends that the Commonwealth Government, in collaboration with state governments and other key stakeholders, lead the delivery of the recommendations in this report regarding the national workplace system.

- 1336 The Inquiry has taken the liberty of setting out an approach the Commonwealth may wish to adopt.
- 1337 In the absence of Commonwealth leadership, the Victorian Government has several levers available to it to bring more certainty, fairness and choice for platform workers in Victoria.
- 1338 The Inquiry has closely considered the interaction between Commonwealth and state frameworks and related constitutional issues in framing these 'alternate' recommendations. There are limitations but Victoria can take administrative and legislative action to progress these principles within the state. The Inquiry recommends that Victoria should, in so doing, lead a collaborative and consultative process to achieve this with stakeholders and other willing states.

RECOMMENDATION 2

The Inquiry recommends that, if the Commonwealth does not act, Victoria, in consultation and collaboration with other states, should pursue administrative and legislative options to improve choice, fairness and certainty for platform workers that:

- ▶ are constitutionally available
- ▶ align with its broader priorities
- ▶ are appropriate in the current regulatory landscape, and
- ▶ meet the needs of the current and future workplace.

7.4.2 Consultation and collaboration

- 1339 The recommendations, while revisionist and not radical, are significant and would impact on workers and businesses as well as a number of current regulatory frameworks and jurisdictions.

RECOMMENDATION 3

The Inquiry recommends governments should, in implementing change, consult and collaborate with stakeholders; including platforms, employees, industry groups and unions.

7.4.3 Costs

- 1340 It is important the costs associated with any regulatory change are understood and considered. The community has benefited greatly from the innovation of platforms. In framing regulatory change, governments should consider the cost to business, especially for emerging businesses, so innovation is not stifled. This acknowledges that innovation and entrepreneurial activity should be encouraged.
- 1341 But the current systemic uncertainty around work status causes significant costs: for individuals, businesses and regulators. While the Inquiry has not quantified these, they can't be ignored when considering intervention.

RECOMMENDATION 4

The Inquiry recommends governments cost the changes and consider those costs alongside the transferred costs of the current systemic uncertainty around work status – the impacts on workers, businesses, the economy and community more broadly.

7.4.4 Ongoing data collection is needed

- 1342 Platform work is diverse and occurring across the labour market. There is no distinct 'platform economy' or 'on-demand' economy. Rather, platforms are a tool through which on-demand types of work may be accessed.
- 1343 Noting its diversity, and the challenges in getting meaningful data and information about platform work, the Inquiry suggests targeted research to understand and identify platform work trends. Ongoing surveys, like the Inquiry's National Survey, would ensure policy makers have better information about current and future platform work, to inform decisions.

RECOMMENDATION 5

The Inquiry recommends appropriate government funded surveys and evidence-based research to ensure policy makers are aware of critical developments in platform work.

7.5 RECOMMENDATIONS FOR SYSTEMS CHANGE – GENUINE CHOICE, FAIR CONDUCT, GREATER CERTAINTY

1344 The recommendations set out changes that together, would enhance certainty, choice and fairness for workers. The recommendations set out to achieve six key outcomes.



1. **Clarify and codify work status**
to reduce doubt about work status and, therefore, the application of entitlements, protections and obligations for workers and business, and align legislative definitions across the statute books.
2. **Streamline advice and support**
for workers whose work status is borderline.
3. **Provide fast-track resolution**
of work status so workers and business do not operate with prolonged doubt about the rules.
4. **Provide for fair conduct for platform workers**
who are not employees through establishing Fair Conduct and Accountability Standards that are principles based and developed through a consultative process with relevant stakeholders.
5. **Improve remedies for non-employee workers**
to address deficiencies and anomalies in the existing approach.
6. **Enhance enforcement**
to ensure compliance, including where sham contracting has occurred.

1345 These outcomes are expressed in simple terms. But, as the report shows, the regulatory landscape of work is complex and multi-jurisdictional.

1346 Achieving these outcomes requires action across a multitude of Commonwealth and state frameworks.

1347 The Inquiry has set out below a package of recommendations which together would achieve these outcomes. The recommendations are supported by 'roadmaps' setting out in detail how the Commonwealth might deliver the changes and how the Victorian Government should support them. The roadmaps also set out an alternative path for the Victorian Government to consider in the absence of Commonwealth action.

7.5.1 Clarify and codify work status in legislation



1. Clarify and codify work status

to reduce doubt about work status and, therefore, the application of entitlements, protections and obligations for workers and business, and align legislative definitions across the statute books.

- 1348 Work status is pivotal to determining entitlements, protections and obligations (including fair treatment, minimum standards, health, safety and insurance).
- 1349 Some workers' arrangements have features of both employment and self-employed arrangements, with the result that their work status is 'borderline' and the application of work laws uncertain.
- 1350 The current work status tests cause confusion and uncertainty for borderline workers, particularly low-leveraged workers presumed to not be employees by virtue of their formal arrangements. Where there is doubt, they 'fall out' of regulated entitlements, protections and obligations with no accessible means of resolving this doubt.
- 1351 The basis for the application of entitlements, protections and obligations should be clearer.
- 1352 Genuinely self-employed, autonomous business people should operate under commercial arrangements. Workers who operate as part of another's business or enterprise should be covered by protections and entitlements provided by labour regulation. This is consistent with recent court decisions such as *On Call and Quest*,¹⁵²⁹ which have considered the question of 'entrepreneurship' in applying the work status test.
- 1353 The Inquiry recommends that this approach be adopted and clearly set out in the legislation.
- 1354 In enshrining the 'entrepreneurship' approach, the current dichotomy between independent contractor and employee will be maintained with appropriate weight placed on the economic reality of the relationship and modern work arrangements.
- 1355 In making this recommendation, it is not the Inquiry's intention to interfere with existing labour hire arrangements – noting that these involve on-hire businesses placing employees 'in another's business' – or existing regulation of these entities.
- 1356 Where the party procuring the services has significantly more leverage in the arrangement, they may, in reality, unilaterally determine the terms of the work arrangement. In this scenario, workers are not given real choice about their arrangement and their resultant work status. This does not sit well with the concept of genuine independent contracting.
- 1357 In 'borderline' cases, the public interest supports extending, rather than limiting, worker entitlements and protections. The test should require the party seeking to rely on non-employee status to prove this to be the case, rather than a worker having to demonstrate they are an employee.
- 1358 The inclusion in the 'work status' test of factors that may be decided by the party procuring the services (for example, the provision of superannuation, accident insurance, training, tax treatment) creates a disincentive to parties from extending these benefits. These factors are more likely reflective of the position of the party rather than an indicator of the substance of the relationship and should not be considered as part of the work status test. In this context, they are better seen as entitlements flowing from an employment relationship, than indicia determining the relationship.

1529. *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (No 3) [2011] FCA 366; *Fair Work Ombudsman v Quest South Perth Holdings Ltd* [2015] FCAFC 37.

7.5.2 Align work status across the statute books

- 1359 The report refers to a number of concerns about the coverage of platform workers by other work laws: health and safety, workers' compensation, superannuation and tax laws. These concerns relate primarily to uncertainty around 'work status', which is the basis for the application of those laws.
- 1360 Each regulatory framework uses slightly different definitions of 'work' or 'employee' and may extend coverage of the frameworks beyond 'strict' employees in order to achieve different levels of protection and outcomes. Definitions need to be fit-for-purpose within those frameworks, but more conscious consideration of how they align across the statute books would address some of the existing uncertainty for workers' and business. This is especially the case for national businesses grappling with different state laws for their workforces.
- 1361 The Inquiry considers that more could be done to align approaches to work status across the statute books and, in so doing, ensure platform workers are appropriately covered. Greater clarity about 'work status' would be achieved by clarifying and codifying 'work status' under Recommendation 6 but each of these frameworks also warrants examination in its own right.
- 1362 The Inquiry notes that in relation to superannuation, there are some particular concerns about low income workers not being paid superannuation and not being in a position to make their own contributions. Compulsory superannuation is a key component of Australia's welfare and income policies. The strong presumption is that people have sufficient funds to support themselves in retirement and that the age pension serves as a safety net.
- 1363 There are longer term costs to individuals and the community if superannuation is not being paid for platform workers because of their work status. These costs have been reflected more broadly in commentary for and against the recent COVID-19 early release scheme, allowing withdrawal of superannuation.
- 1364 The Inquiry considers these issues ought to be closely considered. In particular, the current threshold of \$450 earnings a month from one employer for superannuation to be paid, may be having a direct impact for some platform workers and should be removed.

Clarify and codify the status of workers in legislation and align definitions across the statute books

RECOMMENDATION 6

The Inquiry recommends that the FW Act be amended to:

- (a) codify work status on the face of relevant legislation (rather than relying on indistinct common law tests)
- (b) clarify the work status test including by adopting the 'entrepreneurial worker' approach,¹⁵³⁰ so that those who work as part of another's enterprise or business are 'employees' and autonomous, 'self-employed' small business workers are covered by commercial laws.
- (c) provide that the:
 - (i) provision of safety protections and entitlements such as superannuation, training, occupational health and safety and worker consultation is not disincentivised because of the potential impact on work status
 - (ii) party asserting a worker is not an employee, bears the onus of proving work status, and
 - (iii) the relative bargaining positions of each party are expressly considered when determining work status.

1530. *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation* (No 3) [2011] FCA 366; *Fair Work Ombudsman v Quest South Perth Holdings Ltd* [2015] FCAFC 37.

Align work status across the statute books

RECOMMENDATION 7

The Inquiry recommends that governments review the approach to ‘work status’ across work laws (e.g. Independent Contractors Act, superannuation, workplace health and safety, tax) with the purpose of more closely aligning them, specifically, considering:

- (a) the need for clarity, consistency and simplicity
- (b) the policy imperatives of each regulatory framework
- (c) appropriate coverage for low-leveraged workers
- (d) the need to appropriately protect platform workers.

The Commonwealth should:

C1. Amend laws to:

- ▶ clarify and codify the work status test that applies under the FW and IC Acts
- ▶ apply the ‘entrepreneurial worker’ approach so that those who work as part of another’s enterprise or business are ‘employees’ and autonomous, ‘self-employed’ small business workers are covered by commercial laws
- ▶ ensure that the provision of safety protections and entitlements such as superannuation, training, health and safety and consultation is not disincentivised because of the potential impact on work status
- ▶ place the onus of proving a worker is not an employee on the party asserting this
- ▶ consider the relative bargaining positions of each party in determining work status.

C2. In cooperation with states, review and align as far as possible laws that extend entitlements, obligations and protections based on ‘work status’ (like superannuation, tax and workplace health and safety law), taking into account:

- ▶ the need for clarity, consistency and simplicity
- ▶ the policy imperatives of each regulatory framework
- ▶ appropriate coverage for low-leveraged workers
- ▶ the need to appropriately protect platform workers.

Victoria should:

V1. Encourage and work with the Commonwealth to amend the FW and IC Acts to clarify and codify the work status test.

V2. Review and align as far as possible state laws that extend entitlements, obligations and protections based on ‘work status’ (like payroll tax, workplace health and safety), taking into account:

- ▶ the need for clarity, consistency and simplicity,
- ▶ the policy imperatives of each regulatory framework,
- ▶ appropriate coverage for low-leveraged workers,
- ▶ the need to appropriately protect platform workers.

V3. Resolve the current ambiguity around the operation of existing health and safety and accident insurance laws to ensure that platform workers’ health and safety is appropriately protected and they may be appropriately compensated for work based injuries. The model WHS laws require close consideration in this context.

7.5.3 Streamlined advice and support



2. Streamline advice and support for workers whose work status is borderline.

- 1365 Pathways for seeking support and advice around work status are confusing and not always accessible to low-leveraged workers.
- 1366 The complex and inconsistent approach to work status across the statute books, paired with involvement of multiple agencies, further exacerbates uncertainty about the application of work laws.
- 1367 Governments can, and should, do better to streamline support and advice about work status and ensure this support is low cost and accessible to platform workers, using dispute resolution and other informal options.
- 1368 The Inquiry notes that these functions could be conferred on a suitable existing body operating in this space, for example, the FWO or the ASBFEO. But these agencies already have a range of responsibilities and priorities and may not be able to prioritise another complex area of work. In the Victorian context, the Inquiry notes that the Wage Inspectorate Victoria or Victorian Small Business Commissioner may be options to explore.
- 1369 A stand-alone Streamlined Support Agency focused purely on these issues may be more effective and more easily integrated with the fast-tracked resolution proposed in Recommendation 10. There would need to be appropriate administrative infrastructure to manage necessary interactions and referrals between agencies to ensure the Streamlined Support Agency achieves its purpose.

7.5.3.1 Industry and union role

- 1370 Industry organisations and unions help members navigate the complexity of work laws and are a first port of call for many businesses and workers. Their networks and visibility could be leveraged to help workers get good advice about their work status. Given the public interest in helping this group, governments could fund these organisations to provide tailored and intensive support to better understand and resolve work status.
- 1371 Governments should consider how industry organisations and unions might be leveraged and supported to help workers understand and resolve status questions.

RECOMMENDATION 8

The Inquiry recommends there be a clear primary source of advice and support to workers to help them understand and use dispute resolution or other informal options to resolve their work status.

RECOMMENDATION 9

The Inquiry recommends that a Streamlined Support Agency (whether stand alone or incorporated into the functions of an existing suitable body) should:

- (a) have dedicated and sufficient resources
- (b) be accessible to and prioritise platform workers, particularly low-leveraged workers
- (c) help resolve work status through advice and dispute resolution
- (d) help workers understand the entitlements, protections and obligations of their work status
- (e) where work status is borderline, escalate the question to Fast-tracked Resolution (see Recommendation 10) prioritising a determination.

The Commonwealth should:

C3. Collaborate and consult with state governments and stakeholders to establish and appropriately resource the Streamlined Support Agency for parties to resolve work status:

- ▶ the arrangements should strive to deliver consistent advice and appropriate support, especially for low-leveraged platform workers
- ▶ sufficient funding and clear direction to prioritise resolving work status would be essential to success.

C4. Consider how to leverage and support industry organisations and unions to help presumed self-employed workers understand and resolve work status questions.

Victoria should:

V4. Encourage the Commonwealth to establish and appropriately resource advice and support to parties seeking to resolve work status across all frameworks. Necessary complementary administrative arrangements should also be created to allow this.

V5. In the absence of Commonwealth action, collaborate with other states and stakeholders to establish and resource streamlined support for parties to resolve work status as set out in Recommendation 10:

- ▶ the arrangements should strive to deliver consistent advice and appropriate support, especially for low-leveraged platform workers
- ▶ the Streamlined Support Agency could liaise with other relevant state and federal regulators and agencies and attempt, as far as possible, to provide consistent and fast advice
- ▶ sufficient funding and clear direction to prioritise resolving work status would be essential to success.

V6. Consider how to leverage and support industry organisations and unions to help presumed self-employed workers understand and resolve questions about work status.

7.5.4 Fast-track resolution



3. Provide fast-track resolution

of work status so workers and business do not operate with prolonged doubt about the rules.

7.5.4.1 Access to resolution 'pre-breach' for workers

- 1372 There is systemic uncertainty about the true work status of some platform workers.
- 1373 Existing resolution mechanisms – formal action in courts or tribunals – are unacceptably slow, costly and inaccessible, especially for low-leveraged workers.
- 1374 Unresolved work status disadvantages workers and is potentially unfair and anti-competitive to businesses who use employment-based models.
- 1375 Recommendation 6 (to codify and clarify work status) should reduce the number of 'borderline' cases. But there will continue to be some situations where work status is uncertain.
- 1376 The Inquiry considers that there needs to be quicker and easier ways to finally resolve work status than court action taken by individual workers in a 'post-breach' situation.
- 1377 The system should enable parties to obtain certainty from the outset of the arrangement rather than 'post-breach'.
- 1378 The Inquiry recommends that workers or businesses should have access to a fast-tracked, and inexpensive determination of work status, so they can proceed with certainty. The process should be conducted with as few formalities and technicalities as possible, while allowing for quick resolution and proper consideration of matters. Importantly, the decision should stand and be complied with, unless it is reconsidered or overturned by a more authoritative tribunal.
- 1379 The question of which agency, court or tribunal might carry out this function depends on a range of factors, including whether it is implemented nationally or on a state basis. There are existing bodies on which this function could be conferred, or a purpose-built body could be created.
- 1380 Ideally, the process should be one which is supported by and coordinated with the Streamlined Support Agency's operations, whose role it will be to provide advice and support to workers about 'work status'. The Streamlined Support Agency can identify cases where a determination may be appropriate and assist parties to make that application. The Inquiry notes that, should the Commonwealth implement this recommendation, constitutional issues relating to which tribunals may make binding determinations will need to be carefully considered.

7.5.4.2 Proactive work status determinations for platforms

- 1381 Workers currently bear the costs and complexity for resolving borderline work status. Platforms are better positioned than workers to take action to demonstrate their models are lawful and resolve lingering doubt. Platforms should be encouraged to seek determinations to confirm the presumed non-employment work status (or otherwise). The work status determinations approach would minimise a platform's costs in so doing.
- 1382 Much of the doubt would be resolved if platforms were to initiate work status determinations for their systems. Platforms have demonstrated goodwill with respect to their engagement with this Inquiry and expressed a desire to eliminate uncertainty and provide greater fairness to workers. They could be encouraged to seek work status determinations.
- 1383 If platforms chose not to take such resolatory action, governments could consider whether platforms might be required to take such action.
- 1384 A requirement for proactive work status determination should not impose unreasonable requirements, particularly on emerging businesses. Such an obligation might reasonably be targeted at enterprises of an appropriate size, maturity and number of workers and should consider the costs for businesses, particularly small and emerging businesses. Criteria around revenue or size may be appropriate.
- 1385 Platforms should be given appropriate timeframes to apply and react to potential consequences and effect any changes.

Work status determinations

RECOMMENDATION 10

The Inquiry recommends that a fit-for-purpose body provides a mechanism for accessible, fast resolution of work status that:

- (a) produces authoritative and binding determinations for all parties
- (b) is available to all workers and businesses
- (c) is as informal as possible
- (d) is appropriately funded so as to provide access
- (e) has decision makers with appropriate expertise
- (f) allows for resolution from the outset of the work arrangement
- (g) allows groups of workers under similar arrangements to seek resolution
- (h) is inexpensive and helps fund applications and costs of low-leveraged workers
- (i) operates in a coordinated way with the Streamlined Support Agency, enabling seamless referrals and support.

RECOMMENDATION 11

The Inquiry recommends that governments encourage platform businesses with significant non-employee, on-demand workforces to seek a work status determination.

RECOMMENDATION 12

The Inquiry recommends that, if platforms do not voluntarily seek a proactive determination, governments consider requiring platforms to initiate a determination process, or governments could facilitate this.

- (a) Proactive work status determinations should be targeted at enterprises of an appropriate size, maturity and number of workers and consider the costs for businesses, particularly small and emerging businesses.
- (b) Platforms should be given appropriate timeframes to apply and react to potential consequences and effect any changes.

The Commonwealth should:

C5. Establish a low-cost, accessible mechanism for resolving work status which, as far as possible, operates in a coordinated way with the Streamlined Support Agency.

- ▶ Work status determinations could be made by an existing tribunal like the Federal Circuit Court of Australia.
- ▶ Decision makers must have appropriate expertise and funding and the capability to make fast decisions.

Victoria should:

V7. Encourage and work with the Commonwealth to establish a low-cost, accessible mechanism for resolving work status which, as far as possible, operates in a coordinated way with the Streamlined Support Agency, and create complementary arrangements to make this effective and efficient.

The Commonwealth should: (cont)

- ▶ Work status determinations should be accompanied by written reasons going over findings of fact and law and, in the absence of a formal challenge, constitute prima facie evidence of status.

C6. Encourage platforms with significant non-employment workforces to seek a work status determination. If there is little take-up of this, consider requiring businesses to seek a determination or government-initiated actions. Any such action should consider the impact on the business, particularly small and emerging businesses. Criteria such as business size, maturity, number of workers and the costs for businesses could be applied.

Victoria should: (cont)

V8. In the absence of Commonwealth action, collaborate with other states to set up state-based mechanisms to fast-track resolution of work status under the 'common law' test applied under the FW Act and specified Victorian laws.

- ▶ Work status determinations could be made by an existing tribunal like VCAT, the Magistrates' Court of Victoria or a purpose-built body.
- ▶ Work status determinations should be accompanied by written reasons going over findings of fact and law and, in the absence of a formal challenge, constitute prima facie evidence of status.
- ▶ Decision makers must have appropriate expertise and funding and the capability to make fast decisions.
- ▶ Encourage platforms to seek a determination.

7.5.5 Fair conduct for platform workers**4. Provide for fair conduct for platform workers**

who are not employees through establishing Fair Conduct and Accountability Standards that are principles based and developed through a consultative process with relevant stakeholders.

- 1386 Platforms with non-employee workforces don't have to meet minimum standards of conduct or work conditions. The systems that platforms have put in place can be opaque. Platforms generally retain the power to make unilateral changes that directly impact on a worker's capacity to earn income and access the platform.
- 1387 The small number of platforms that employ workers must comply with minimum statutory standards; including consultation and dispute resolution arising under the Fair Work framework. This is not the case for non-employee platform workers.
- 1388 Some non-employee platforms expressed to the Inquiry a desire to establish fair standards and have sought to do so for their own platforms. For example, they have consulted workers on aspects of their arrangements. This good conduct is to be applauded, but it is entirely within the 'gift' of the platforms.
- 1389 Some non-employment platforms have expressed a desire to improve their workforce's benefits but are concerned to avoid 'reclassification risk', that is, the risk that the presumed non-employee status of the workers may be compromised.

- 1390 There is an opportunity for platforms to engage in an industry-based approach to setting Fair Conduct Standards which would provide greater transparency and fairness for workers. Noting the number and diversity in platforms, with varying maturity and posture to workers, the Inquiry recommends a government-led approach in collaboration with industry, workers and their representatives and other stakeholders.
- 1391 The Fair Conduct and Accountability Standards could establish principles for:
- (a) genuine consultation about work status and arrangements
 - (b) consideration of parties' relative leverage
 - (c) fair conditions and pay
 - (d) fair and transparent independent dispute resolution
 - (e) worker representation, including ability to seek better work arrangements
 - (f) safety.
- 1392 Relevant businesses, workers, their representatives, and other stakeholders should be consulted about the substance and form of Fair Conduct and Accountability Standards and their application.

7.5.5.1 Application and scope of fair conduct standards

- 1393 The application of the Fair Conduct and Accountability Standards should be targeted at enterprises of an appropriate size, maturity and number of workers which consider the costs for businesses, particularly small and emerging businesses. Criteria around revenue or size may be appropriate.
- 1394 The process for establishing codes of conduct under the ACL would be a suitable reference point for developing the Fair Conduct and Accountability Standards. This approach includes the option to have principles or standards apply voluntarily and consideration of any further measures that might be necessary and appropriate.

Platforms should be transparent and fair

RECOMMENDATION 13

The Inquiry recommends that platforms should be transparent with workers, customers and regulators about their worker contracts. Arrangements should be fair and consider the nature of the work and the workers.

Fair conduct and accountability standards

RECOMMENDATION 14

The Inquiry recommends that governments lead a process to establish Fair Conduct and Accountability Standards or principles, to underpin arrangements established by platforms with non-employed on-demand workforces.

The Commonwealth should:

C7. Collaborate and consult with stakeholders, including state governments, platforms, industry and employee representatives, to lead the development of Fair Conduct and Accountability Standards for platforms organising significant non-employee, on-demand workforces.

- ▶ The process should be consultative and consider options for the substance of the standards and their scope/application, including whether they're voluntary or not.
- ▶ The process may be led by the body carrying out the Streamlined Support Agency functions.

Victoria should:

V9. Encourage and collaborate with the Commonwealth to lead the development of Fair Conduct and Accountability Standards for platforms organising significant, non-employee, on-demand workforces.

V10. In the absence of Commonwealth action, work with other states, businesses and stakeholders to develop principles-based Fair Conduct and Accountability Standards for platforms.

- ▶ The process should be consultative and consider options for the substance of the standards and their scope/application, including whether they're voluntary.
- ▶ The process may be led by the body carrying out the Streamlined Support Agency functions.
- ▶ In framing the standards and considering their application, Victoria would need to consider the constitutional limitations and intersection with, Commonwealth legislation.

7.5.5.2 Collective bargaining for non-employee platform workers

1395 Non-employee platform workers are inhibited from negotiating their work arrangements with platforms by Commonwealth competition laws. The Inquiry notes proposed changes to this framework by the ACCC to provide easier access to collective bargaining for small businesses. The Inquiry supports removing barriers to collective bargaining for non-employee platform workers. The Inquiry also supports such workers having choice of representation in bargaining.

Collective bargaining for platform workers

RECOMMENDATION 15

The Inquiry recommends Commonwealth competition laws remove barriers to collective bargaining for non-employee platform workers and ensure workers may access appropriate representation in dealing with platforms about their work arrangements.

The Commonwealth should:

C8. Ensure competition laws do not inhibit platform workers from collectively bargaining with platforms about their work arrangements and ensure platform workers may access representation in relation to their work arrangements.

Victoria should:

V11. Encourage and collaborate with the Commonwealth to ensure platform workers can collectively bargain with platforms about their work arrangements and ensure platform workers may access representation in relation to their work arrangements.

7.5.5.3 Modern awards for platform workers?

- 1396 Aspects of the current regulatory system (largely contained in modern awards) are complex and not easily integrated into platforms' models.
- 1397 While many platforms were emphatic that their models could not accommodate award conditions, some employ their workers.
- 1398 A truly 'modern' award system should be capable of adapting to new models of work, balancing the need for minimum standards with new agile work practices. Some award conditions have been designed based on presumptions that may not be true for platform work; for example, patterns and duration of work. Modern awards can, and do, accommodate outcomes-based payment systems and flexible work arrangements, as well as a range of patterns of work.
- 1399 If the award system can't adapt, people will operate 'outside' of the system, as many platforms have.
- 1400 The Inquiry notes that a modern award may be varied or a new modern award made, provided it meets the modern awards' objective. A variation can be made on application of an employer, employee or union or at the FWC's own initiative.
- 1401 The Inquiry notes the FWC takes a consultative and evidence-based approach to such applications. The FWC has been agile and responsive in changing awards to accommodate changes to work during the COVID-19 pandemic. It is well placed to consider the question of appropriate award coverage of platform workers.
- 1402 The Inquiry notes the Commonwealth's foreshadowed review into the complexity and impact of the award system. The Commonwealth may wish to consider the capacity of the modern award system to accommodate platform work as part of this exercise.

Platform modern award

RECOMMENDATION 16

The Inquiry recommends that the FWC work with relevant stakeholders, including platforms and representatives of workers and industry, about the application of modern awards to platform workers, with a view to ensuring fit-for-purpose, fair arrangements that are compatible with work enabled by technology.

7.5.6 Effective and improved remedies for non-employee workers



5. Improve remedies for non-employee workers

to address deficiencies and anomalies in the existing approach.

- 1403 Current remedies for self-employed workers to challenge the fairness of their arrangements are unduly limited and confusing to understand and access. There is little or no meaningful support for workers to take these actions.
- 1404 Of particular concern, is that the intersection between the unfair contracts remedies in the IC Act and consumer law is unclear and the bureaucratic infrastructure neither sufficient nor accessible to low-leveraged, self-employed workers.
- 1405 These pathways are not suitable to ensure fairness or transparency for platform workers. Self-employed platform workers should have access to fit-for-purpose remedies regarding fairness.

Remedies

RECOMMENDATION 17

The Inquiry recommends that governments clarify, enhance and streamline existing unfair contracts remedies so that they:

- (a) are accessible to low-leveraged workers
- (b) enable system-wide scrutiny of platforms' arrangements
- (c) introduce penalties and compensation to effectively deter unfair contracts
- (d) allow materially similar contracts to be considered together and orders made with respect to current and future arrangements.

RECOMMENDATION 18

The Inquiry recommends that the Streamlined Support Agency be responsible for and sufficiently resourced to provide effective support to self-employed platform workers and to prioritise actions against systemic deployment of unfair contracts involving these workers.

The Commonwealth should:

C9. In consultation and collaboration with states and stakeholders, review, enhance and clarify existing unfair contracts remedies to be fit-for-purpose in the modern labour market, including for low-leveraged self-employed workers.

- ▶ In doing this the Commonwealth should note the views of the ACCC and small business representatives about improving these remedies.
- ▶ The Commonwealth should ensure appropriate resources and priority for self-employed platform workers to access these remedies via the Streamlined Support Agency function (or alternatively an existing appropriate entity such as the ACCC or ASBFEO).

Victoria should:

V12. Encourage and collaborate with the Commonwealth to review, enhance and clarify existing unfair contracts remedies to be fit-for-purpose in the modern labour market, including for low-leveraged self-employed workers.

V13. Install complementary arrangements to ensure non-employee workers can access its unfair contracts remedies.

V14. In the absence of Commonwealth action, assist platform workers to access existing unfair contracts remedies. This should be done by the Streamlined Support Agency, or alternatively, be conferred on an appropriate existing entity.

7.5.7 Enhance enforcement of work laws, including where sham contracting has occurred



6. Enhance enforcement

to ensure compliance, including where sham contracting has occurred.

7.5.7.1 Resource and prioritise compliance with work laws

- 1406 There is extensive documented non-compliance with the FW Act. This affects the quality of jobs (especially entry-level/low-skilled jobs) and workers' real income. This limits workers' choices, especially in a market unfavourable to less skilled, low-leveraged workers.
- 1407 Overcoming systemic non-compliance with work laws requires significant investment of regulatory resources. Compliance with minimum employment standards is critical for ensuring a fair labour market for workers and businesses and to ensure that vulnerable workers are paid fairly.
- 1408 It is important that compliance with work laws is sufficiently resourced to ensure that there is a level playing field for workers and businesses throughout the labour market, and that the regulator has the capacity and resourcing to proactively intervene to address 'borderline' work status, especially when deployed on a systemic basis.

7.5.7.2 Sham contracting

- 1409 The sham contracting remedy has been found to be deficient. It is not effectively deterring parties characterising a relationship as independent contracting in order to avoid the operation of work laws.
- 1410 The sham contracting remedy should be enhanced as recommended by previous reviews (see for example, discussion of recommendations by the Black Economy Taskforce and Productivity Commission in Chapter 6), to lower the intent threshold that must be proven, and increase the penalties.
- 1411 The decision about work status may be more heavily influenced, or even solely determined, by the party procuring the services, particularly in the case of low-leveraged workers.
- 1412 The relative leverage of the parties impacts on the extent to which a choice is genuinely made. The Inquiry considers that the extent to which the parties exercise a genuine choice about their work status is relevant to whether the arrangement is a 'sham'. This factor should be considered in determining whether a business has engaged in sham contracting.
- 1413 The Inquiry notes that the IC Act requires the relative bargaining positions of the parties to be considered when determining whether a contract is unfair. This element would be appropriately imported into whether a contract is genuine or a sham.

Sham contracting

RECOMMENDATION 19

The Inquiry recommends strengthening provisions to counter sham contracting to:

- (a) reflect the recommendations of previous reviews including the Black Economy Taskforce and the Productivity Commission, to capture conduct where it would be reasonable to expect the employer knew, or should have known, the true character of the arrangement was 'employment', and apply appropriate penalties to this conduct
- (b) require a court to consider each party's relative bargaining position and how much genuine choice a worker has over their presumed work status.

RECOMMENDATION 20

The Inquiry recommends that regulators proactively intervene to resolve cases of 'borderline' work status, especially where it is occurring at a systemic level and impacts on low-leveraged workers, including by initiating test cases.

The Commonwealth should:

C10. In consultation and collaboration with the states improve the sham contracting remedy; directing relevant regulators to proactively intervene to take action, including test cases, to resolve 'borderline work status' where it is occurring at a systemic level and impacts on low-leveraged workers.

Victoria should:

V15. Encourage and work with the Commonwealth and other states to implement recommendations to counteract sham contracting.

Appendices

APPENDIX 1 – TERMS OF REFERENCE FOR THE INQUIRY

The TOR for the Inquiry are as follows:

To inquire into, consider and report to the Minister for Industrial Relations on:

- (a) The extent and nature of the on-demand economy in Victoria, for the purposes of considering its impact on both the Victorian labour market and Victorian economy more broadly, including but not limited to:
 - (i) the legal or work status of persons working for, or with, businesses using online platforms;
 - (ii) the application of workplace laws and instruments to those persons, including accident compensation, payroll or similar taxes, superannuation, and health and safety laws;
 - (iii) whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations; and,
 - (iv) the effectiveness of the enforcement of those laws.
- (b) In making recommendations, the Inquiry should have regard to matters including:
 - (i) the capacity of existing legal and regulatory frameworks to protect the rights of vulnerable workers;
 - (ii) the impact on the health and safety of third parties such as consumers and the general public, for example, road safety;
 - (iii) responsibility for insurance coverage and implications for State revenue;
 - (iv) the impacts of on-demand services on businesses operating in metropolitan, regional or rural settings;
 - (v) regulation in other Australian jurisdictions and in other countries, including how other jurisdictions regulate the on-demand workforce;
 - (vi) Australia's obligations under international law, including International Labour Organization Conventions;
 - (vii) the limitations of Victoria's legislative powers over industrial relations and related matters and the capacity to regulate these matters; and
 - (viii) the ability of any Victorian regulatory arrangements to operate effectively in the absence of a national approach.

APPENDIX 2 – INQUIRY MEDIA COVERAGE

3 July 2018

'Vic to boost gig economy worker rights', *SBSNews*

21 September 2018

'Uber Eats, Deliveroo among companies under review in Victorian workers rights inquiry', *ABC News Melbourne* (5.27pm)

22 September 2018

'New Inquiry to Investigate the Gig Economy', Victorian Government Media Release

'The Victorian Government is launching an investigation into the gig economy', *Business Insider Australia*

25 September 2018

'Victoria's gig economy inquiry', *InnovationAus*

5 February 2019

'Gig economy inquiry open for submissions', Trailer

'More time to have your say about the Gig Economy', Victorian Government Media Release

8 February 2019

Interview with Inquiry Chair, Natalie James, about the Inquiry on *ABC Radio Melbourne* on Mornings with Jon Faine (9.24am)

5 March 2019

'Deliveroo riders jump at faster pay plan', *The Australian*

7 May 2019

'Victorians have their say about the gig economy', Victorian Government Media Release

'Australia - Victoria gig economy inquiry receives nearly 100 submissions', *Staffing Industry Analysts*

'Dealing with a ghost - Victoria looks at laws to protect gig economy workers', *Sydney Morning Herald*

'Don't fence us in, Uber tells government inquiry', *Workplace Express*

'Gig economy inquiry update', Trailer

'Gig economy ripping off Victorian workers', *Nine News*

'Gig economy ripping off Victorian workers', *SBS*

'Gig economy ripping off Victorian workers', *The Canberra Times*

'Victorians Have Their Say About Gig Economy', *Mirage News*

Interview with Minister Tim Pallas about the Inquiry on *ABC Radio Melbourne* with Myf Warhurst (1.02pm)

Interview with Inquiry Chair, Natalie James, about the Inquiry on *ABC Radio Melbourne* on Afternoons with Richelle Hunt (2.02pm)

Report about the Inquiry on Drive with Rafael Epstein on *ABC Radio Melbourne* (5.02pm)

Interview with Minister Tim Pallas about the Inquiry on *3AW Melbourne* on Drive with Tom Elliott (5.10pm)

Interviews with Minister Tim Pallas; Inquiry Chair, Natalie James; and former Foodora worker, Josh Klooger on *Channel 10* (5.11pm)

Interviews with Minister Tim Pallas; Inquiry Chair, Natalie James; and former Foodora worker, Josh Klooger on *Nine News* (6.14pm)

Report about the Inquiry on *Seven News* (6.39pm)

Interviews with Minister Tim Pallas; Inquiry Chair, Natalie James, and former worker, Josh Klooger, Minister Tim Pallas and Inquiry Chair, Natalie James on *ABC1*

8 May 2019

'Gig economy ripping off Victorian workers', *Sunraysia Daily*

'Gig may be up for 'slavery' *Herald Sun*

'Uber on collision course with state government over workers' rights', *The Age*

'Victoria signals readiness to go it alone over gig workers', *Australian Financial Review*

'Uber drivers stage global protest over pay and conditions', *ABC News Melbourne*

Interview with Tony Sheldon about the Inquiry on Breakfast with John Burns and Ross Stevenson, on *3AW Melbourne* (06:32am)

Interview with Tony Sheldon about the Inquiry on Breakfast with John Burns and Ross Stevenson, on *3AW Melbourne* (07:32am)

Interview with Tony Sheldon about the Inquiry on Mornings with Neil Mitchell, on *3AW Melbourne* (9.02am)

15 May 2019

Interview with Inquiry Chair, Natalie James, about the Inquiry. Callers phone up with comments on their experience working in the Gig Economy on Mornings with Jon Faine, on *ABC Radio Melbourne* (10.04am)

20 May 2019

'Lure of 'flexible' gig economy', *The Age*

22 May 2019

'Is the gig economy fair?', *South Gippsland Sentinel Times*, Wonthaggi

11 June 2019

'Uber test for Christian Porter', *Australian Financial Review*

18 June 2019

'Revealing the true size of Australia's gig workforce', Victorian Government Media Release

'Gig economy 7pc of workforce as Australians supplement income', *Australian Financial Review*

'Seven per cent of working Australians have sourced jobs through online platforms', *The Age*

'Workers go digital in search of jobs: study', *Sydney Morning Herald*

'More workers using digital platforms', *The Australian*

'Gig workers unaware of their rate of pay: Survey', *Workplace Express*

'Flexibility welcome but not low pay: Vic Govt reviews gig economy', Thomson Reuters *Workforce*

'Workers turning on to digital platforms', *Australian Financial Review*

'A good gig for on the side', *Herald Sun*

'Australians flock to gig economy for work', *The Canberra Times*

'Australians flock to gig economy for work: study', *SBS News*

'Australians flock to gig economy for work: study', *Warrnambool Standard*

'Australians flock to gig economy for work: study', *Burnie Advocate*

'Australians flock to gig economy for work: study', *Launceston Examiner*

'Australians flock to gig economy for work: study', *Border Mail*, Albury-Wodonga

'Aussies flock to gig economy for work', *Sunraysia Daily*, Mildura

Interview with Inquiry Chair, Natalie James, about the Inquiry on Mornings with Jon Faine, on *ABC Radio Melbourne*

Interview with Inquiry Chair, Natalie James, about the Inquiry on Afternoons with Richelle Hunt, on *ABC Radio Melbourne*

Report about the Inquiry on *ABC Radio News Breakfast*

Report about the Inquiry on Mornings with Jon Faine, on *ABC Radio Melbourne*

Interviews with Inquiry Chair, Natalie James; Rich Phan, rideshare driver; and Michael Kaine, Transport Workers' Union about the Inquiry, *ABC News*, *The Business*

19 June 2019

'The so-called 'gig economy' changing the Australian Workforce', *SBS News*

19 September 2019

'Death to the online survey? Community engagement through online chat', Digital Government Victoria

8 November 2019

Protecting Workers in our Changing Jobs Market, Victorian Government Media Release, 8 November

9 December 2019

'Victorian gig economy inquiry delayed', InnovationAus

11 December 2019

Interview with Inquiry Chair, Natalie James, about the Inquiry, AM with Sabra Lane, on *ABC Radio Melbourne* (8.09am)

APPENDIX 3 – LIST OF SUBMISSIONS

1	Australian Industry Group	28	Deliveroo
2	Australian Industry Group (supplementary submission)	29	Direct Selling Australia
3	Amy Gillett Foundation	30	Don (worker)
4	Mr Michael Andrew AO – Chair, Black Economy Advisory Board	31	Emma (worker)
5	Anonymous Worker 01	32	Fair Work Ombudsman
6	Anonymous Worker 02	33	Foundation for Young Australians
7	Anonymous Worker 03	34	Health and Community Services Union
8	Anonymous Worker 04	35	Housing Industry Association
9	Australia Institute Centre for Future Work	36	Institute of Public Affairs
10	Australian Chamber of Commerce and Industry	37	JobWatch
11	Australian Council of Trade Unions	38	Dr Carmel Laragy
12	Australian Institute of Employment Rights	39	Law Institute of Victoria
13	Australian Services Union	40	Leanne (consumer)
14	Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen	41	Lifetime Trophies
15	Mr Rodney Barton MP	42	Lonely Pets Club
16	Becca (consumer)	43	CONFIDENTIAL
17	Mr Paul Benson	44	Marketing4Restaurants
18	Prof Alysia Blackham	45	Master Electricians Australia
19	Prof John Burgess and Prof Alex de Ruyter	46	Maurice Blackburn Lawyers
20	Business Council of Co-operatives and Mutuals	47	Professor Shae McCrystal and Professor Andrew Stewart
21	Iain Campbell, Sara Charlesworth and Fiona Macdonald	48	Mr Richard McEncroe
22	Ms Catherine Cardinet	49	Media, Entertainment and Arts Alliance
23	Centre for Business and Social Innovation, University of Technology Sydney	50	Menulog
24	Commercial Passenger Vehicle Association of Australia	51	National Tertiary Education Union
25	Communication Workers Union Postal and Telecommunications Branch of Victoria Division of the CEPU	52	National Tertiary Education Union supplementary submission
26	Communication Workers Union Victoria T&S Branch - Communications Workers Union P&T Branch	53	National Disability Services
27	Dr Helen Cripps, Dr Uma Jogulu, Dr Mehran Nejati and Professor Pi-Shan Seet	54	National Union of Workers
		55	NatRoad
		56	CONFIDENTIAL
		57	Orbit Legal Resourcing
		58	Professor David Peetz
		59	Platform Cooperativism Consortium
		60	Professionals Australia
		61	Randstad
		62	Recruitment, Consulting and Staffing Association of Australia
		63	Ride Share Drivers United

64	Ride Share Drivers Association of Australia	81	University of Queensland Research Network on Automation, Ethics & Society
65	Samantha (worker)	82	VicHealth
66	Assistant Professor Nathan Schneider	83	Victorian Chamber of Commerce and Industry
67	Self-Employed Australia	84	CONFIDENTIAL
68	Shebah	85	Victorian Farmers Federation
69	Shop, Distributive and Allied Employees Association – Victoria Branch	86	Victorian Local Learning and Employment Networks - Youth Affairs Council Victoria
70	Mr Ewan Short	87	Victorian Small Business Commission
71	Sidekicker	88	Victorian Trades Hall Council
72	Silvya (worker)	89	Victorian Trades Hall Council (supplementary submission)
73	SMart Productions Associées	90	Victorian Transport Association
74	Ms Kristen Sobeck	91	Watermark Search International
75	Stocksy United	92	WEstjustice
76	Susan (consumer)	93	Dr Raelene West
77	Transport Matters Party	94	Tandem
78	Transport Workers' Union of Australia		
79	Uber		
80	Unions NSW		

APPENDIX 4 – LIST OF CONSULTATION PARTICIPANTS

19 February 2019 – Melbourne

- Confidential individual consultation

22 February 2019 – Melbourne

- Didi
- Victorian Chamber of Commerce and Industry Roundtable 1
 - o Airtasker
 - o Certica
 - o Deliveroo
 - o Didi
 - o Entity Solutions
 - o Expert360
 - o Ola
 - o Shebah
 - o The Pharmacy Guild of Victoria
 - o Weploy
- Victorian Chamber of Commerce and Industry Roundtable 2
 - o 13cabs
 - o Crown Cabs / Slyyk
 - o DFP Recruitment
 - o Direct Selling Australia
 - o Geelong Taxi Network
 - o Recruitment, Consulting and Staffing Association of Australia

28 February 2019 – Melbourne

- Australian Industry Group Roundtable 1
 - o Bayside Group
 - o Energy Australia
 - o Ovato
 - o Salmat Limited
 - o Tandem
 - o The Real Media Collective

8 March 2019 – Melbourne

- Australian Industry Group Roundtable 2
 - o BOC
 - o Cummins
 - o Don Smallgoods
 - o Select Harvests
 - o UGL

14 March 2019 – Melbourne

- Australian Industry Group Roundtable 3
 - o Craveable Brands
 - o McDonalds
 - o Woolworths

18 March 2019 – Melbourne

- Closed industry consultation

27 March 2019 – Melbourne

- Australian Industry Group Roundtable 5
 - o Boral, Southern Region
 - o CPB Contractors
 - o Lendlease Engineering

5 April 2019 – Melbourne

- Youth Summit 2019

28 May 2019 – Melbourne

- Domino's Pizza

31 May 2019 – Melbourne

- Labour Hire Licensing Authority

7 June 2019 – Melbourne

- Victorian Trades Hall Council Union and Worker Roundtable
 - o Australian Services Union
 - o Media, Entertainment and Arts Alliance
 - o Victorian Trades Hall Council
- Workers from:
 - o Deliveroo
 - o Foodora
 - o Menulog
 - o Uber
 - o Uber Eats

Also a freelance technician

19 June 2019 – Melbourne

- WorkSafe Victoria, Legislation, Policy and Information Services

24 June 2019 – Melbourne

- Sidekicker
- Department of Treasury and Finance (Victoria) State Revenue

25 June 2019 – Melbourne

- Department of Treasury and Finance (Victoria) Procurement

28 June 2019 – Melbourne

- Department of Health and Human Services (NDIS Transition, Disability and NDIS Branch) (Victoria)

3 July 2019 – Melbourne

- Airtasker

3 July 2019 – Melbourne

- Ola

10 July 2019 – Melbourne

- Australian Small Business and Family Enterprise Ombudsman

12 July 2019 – Melbourne

- COSBOA (Small Business Organisations Australia) – Small Business Roundtable
 - o Australian Convenience and Petroleum Marketers Association
 - o Australian Digital and Telecommunications Industry Association Inc
 - o Australian Taxi Industry Association
 - o Business Council of Co-Operatives and Mutuals
 - o La Concierge Pty Ltd
 - o MGA Independent Retailers
 - o Small Business Victoria
 - o Thrive Refugee Enterprise
 - o Victorian Chamber of Commerce and Industry

16 July 2019 – Melbourne

- Tandem
- Restaurant and Catering Roundtable
 - o Australian Industry Group
 - o Deliveroo
 - o Going Gourmet
 - o Hospitality Staff on the Run and Chefs on the Run Australia
 - o Matteo’s Restaurant
 - o Mercer’s Restaurant
 - o Peter Rowland Catering
 - o Red Lantern Restaurant
 - o Restaurant and Catering Industry Association
 - o Sand Hill Road Group
 - o Supp
 - o Uber
 - o Uber Eats
 - o United Voice
 - o Vue Group

17 July 2019 – Melbourne

- Deliveroo

19 July 2019 – Melbourne

- Department of Health and Human Services (NDIS Transition, Disability and NDIS Branch (Victoria))
- Uber
- Care Sector Roundtable
 - o Australian Services Union
 - o Department of Health and Human Services (Victoria)
 - o Health and Community Services Union
 - o Hireup
 - o La Trobe University

- o Mable Technologies Pty Ltd
- o National Disability Services
- o RMIT University
- o Unions NSW

29 July 2019 – Melbourne

- Workers’ Roundtable
 - o Health and Community Services Union
 - o JobWatch
 - o SDA
 - o Victorian Trades Hall Council
- Workers from:
 - o Deliveroo
 - o Didi
 - o Expert360
 - o Ola
 - o Supp
 - o Uber
 - o Uber Eats
 - o Woolworths

2 August 2019 – Melbourne

- Victorian Council of Social Services

5 August 2019 – Melbourne

- Victorian Small Business Commissioner

16 August 2019 – Melbourne

- Menulog

19 August 2019 – Online

- Workers’ Forum

20 August 2019 – Melbourne

- Australian Competition and Consumer Commission

28 August 2019 – Melbourne

- National Disability Insurance Scheme

30 August 2019 – Melbourne

- Department of Transport (Victoria) and Commercial Passenger Vehicle Victoria

8 October 2019 – Melbourne

- Transport Accident Commission

16 October – Melbourne

- WorkSafe CEO
- Australian Taxation Office

18 October – Melbourne

- Transport Workers’ Union of Australia

16 December 2019 - Melbourne

- Consumer Affairs Victoria

3 March 2020 - Melbourne

- Department of Treasury and Finance (Victoria) State Revenue

APPENDIX 5 – KEY COMMONWEALTH GOVERNMENT CORRESPONDENCE

- 11 July 2019 – From ASBFEO attaching media release re. unfair contract terms
- 29 July 2019 – To Australian Competition and Consumer Commission requesting a meeting
- 29 July 2019 – To National Disability Insurance Scheme requesting a meeting
- 29 July 2019 – To Fair Work Ombudsman requesting a meeting
29 July 2019 – To Office of the Secretary of Commonwealth Attorney-General requesting a meeting
- 5 August 2019 – To Australian Taxation Office requesting a meeting
- 23 August 2019 – From Office of the Secretary of Commonwealth Attorney-General inviting Inquiry Chair to the next Senior Officials’ meeting of State and Territory Industrial Relations and Workplace Health and Safety Officials
- 1 September 2019 – From National Disability Insurance Scheme containing information
- 23 September 2019 – To ASBFEO requesting additional information
- 23 September 2019 – From Australian Competition and Consumer Commission containing requested information (contains information provided in confidence)
- 25 September 2019 – To Federal Court Registry requesting information
- 2 October 2019 – To National Disability Insurance Agency requesting a meeting
- 2 October 2019 – To Australian Taxation Office re. upcoming consultation
- 2 October 2019 – To Fair Work Ombudsman requesting information
- 2 October 2019 – To Office of the Secretary of Commonwealth Attorney-General requesting information
- 9 October 2019 – Email to Australian Financial Complaints Authority requesting information
- 11 October 2019 – From Fair Work Ombudsman containing information
- 16 October 2019 – From National Disability Insurance Agency containing information
- 25 October 2019 – From Australian Taxation Office (contains information provided in confidence)
- 14 November 2019 – From Office of the Secretary of Commonwealth Attorney-General containing information
- 20 December 2019 – To Fair Work Ombudsman requesting additional information
- 23 December 2019 – To Department of Social Services requesting information
- 20 December 2019 – To National Disability Insurance Agency requesting additional information
- 24 December 2019 – From Federal Court Registry

