



LEGISLATIVE COUNCIL

SELECT COMMITTEE ON THE IMPACT OF TECHNOLOGICAL AND OTHER CHANGE  
ON THE FUTURE OF WORK AND WORKERS IN NEW SOUTH WALES

# Impact of technological and other change on the future of work and workers in New South Wales

## First report - The gig economy



Report 1

April 2022

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Select Committee on the Impact of Technological and  
Other Change on the Future of Work and Workers in  
New South Wales

# **Impact of technological and other change on the future of work and workers in New South Wales**

First report – The gig economy

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Impact of Technological and Other Change on the Future of Work and Workers in New South Wales

“April 2022”

Chair: The Hon. Daniel Mookhey, MLC



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## Terms of reference

That a select committee be established to inquire into and report on the impact of technological and other change on the future of work and workers in New South Wales, with particular reference to:

- (a) changes in the earnings, job security, employment status and working patterns of people in New South Wales,
- (b) the extent, nature and impact on both the New South Wales labour market and New South Wales economy of:
  - (i) the 'on-demand' or 'gig-economy',
  - (ii) the automation of work,
  - (iii) the different impact of (i) and (ii) on regional New South Wales,
  - (iv) the wider effects of (i) and (ii) on equality, government and society,
- (c) the impact of the 'on-demand' or 'gig economy' and the automation of work on long-term productivity growth, economic growth, as well as the overall attractiveness of New South Wales as an investment destination for the advanced technological sector,
- (d) the effectiveness of Commonwealth and New South Wales laws in promoting fair competition and preventing monopolies and other anti-competitive behaviour in the 'on-demand' or 'gig-economy',
- (e) the adequacy of the New South Wales skills and education system in helping people adjust to the changing nature of work,
- (f) the impact of the 'on-demand' or 'gig economy' and the automation of work on:
  - (i) accident compensation schemes, payroll or similar taxes,
  - (ii) Commonwealth taxes which support New South Wales Government expenditures,
- (g) the application of workplace laws and instruments to people working in the 'on-demand' or 'gig-economy', 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 Commonwealth and New South Wales workplace laws and instruments to those persons, including, 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,
  - (iv) the effectiveness of the enforcement of those laws and regulations,
  - (v) regulatory systems in other Australian jurisdictions and in other countries, including how other jurisdictions regulate the on-demand workforce and are adapting to the automation of work,
  - (vi) Australia's obligations under international law, including International Labour Organisation conventions,
- (h) whether current laws and workplace protections are fit for purpose in the 21st century, including workplace surveillance laws and provisions dealing with workplace change obligations and consequences,

- (i) whether workers should have agency over the way the data they generate at work is used and, if so, what legal framework is required to provide this,
- (j) how employers and other businesses should manage and use the information generated by the workforce,
- (k) how government as a best practice employer should manage and use the information generated by its workforce,
- (l) whether, and what, legislative or other measures should be taken to:
  - (i) reform workplace laws and instruments to account for the emergence of the 'on-demand' or 'gig economy' and the automation of work,
  - (ii) reform the skills and education systems to help people adjust to the changing nature of work,
  - (iii) reform taxation laws to promote economic growth and protect public finances,
  - (iv) reform competition laws to promote fair competition and prevent monopolies in the on-demand or gig-economy,
  - (v) reform accident compensation schemes and other social insurance schemes to account for the emergence of the 'on-demand' or 'gig economy' and the automation of work, and
- (m) any other related matter.

The terms of reference were referred to the committee by the Legislative Council on 24 March 2020.<sup>1</sup>

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<sup>1</sup> *Minutes*, NSW Legislative Council, 24 March 2020, pp 863-865.

## Committee details

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### Committee members

<b>Hon Daniel Mookhey MLC</b>	Australian Labor Party	<i>Chair</i>
<b>Hon Mark Banasiak MLC</b>	Shooters, Fishers and Farmers Party	<i>Deputy Chair</i>
<b>Hon Lou Amato MLC*</b>	Liberal Party	
<b>Hon Scott Barrett MLC**</b>	The Nationals	
<b>Ms Abigail Boyd MLC***</b>	The Greens	
<b>Hon Greg Donnelly MLC****</b>	Australian Labor Party	
<b>Hon Courtney Houssos MLC</b>	Australian Labor Party	
<b>Hon Shayne Mallard MLC</b>	Liberal Party	
<b>Hon Mark Pearson MLC</b>	Animal Justice Party	
<b>Hon Adam Searle MLC</b>	Australian Labor Party	
<b>Mr David Shoebridge MLC</b>	The Greens	

### Contact details

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<b>Website</b>	<a href="http://www.parliament.nsw.gov.au">www.parliament.nsw.gov.au</a>
<b>Email</b>	<a href="mailto:futureofwork@parliament.nsw.gov.au">futureofwork@parliament.nsw.gov.au</a>
<b>Telephone</b>	(02) 9230 3586

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\* The Hon Lou Amato MLC replaced the Hon Wes Fang MLC as a substantive member of the committee from 25 January 2022. The Hon Wes Fang MLC replaced the Hon Sam Faraway as a substantive member of the committee from 3 August 2020 to 25 January 2022.

\*\* The Hon Scott Barrett MLC replaced the Hon Catherine Cusack MLC as a substantive member of the committee from 1 March 2022. The Hon Catherine Cusack MLC replaced the Hon Natasha Maclaren-Jones MLC as a substantive member of the committee from 25 January 2022 to 1 March 2022.

\*\*\* Ms Abigail Boyd MLC replaced Mr David Shoebridge MLC as a substantive member of the committee from 31 March 2022.

\*\*\*\* The Hon Greg Donnelly MLC is a participating member from 22 October 2020 for the duration of the inquiry.

## Chair's foreword

Over the last decade, the rise and accelerating growth of the 'gig economy', in which digital platforms facilitate the sourcing of on-demand workers to perform particular tasks, has challenged traditional workforce and economic arrangements, both internationally and in Australia. The growth of the gig economy, already accelerating with rapid technological change, has again transformed during the COVID-19 pandemic. Lockdowns and other restrictions have changed our dining and purchasing habits on a large scale, and what was once considered a luxury became crucial both for businesses and customers. Other international and Australian jurisdictions have taken significant steps forward in determining how best to regulate the gig economy, and now New South Wales has both the opportunity and the necessity to create desperately-needed reforms in this space.

Food delivery workers and rideshare drivers typify the on-demand workforce. These workers' legal status under Commonwealth legislation as 'independent contractors' as opposed to 'employees' means they have few workplace entitlements. While the committee has noted the positive impact of on-demand work on the New South Wales economy, and some benefits that can flow for workers from flexible arrangements, our primary focus has been on the many significant disadvantages attached: the absence of guaranteed minimum wages and working hours, and of paid leave provisions; poor safety standards; and the lack of a fair dispute system in the event of workplace injury.

In short, the cyclist who delivers our Friday night takeaway receives next to none of the conditions long considered fair and decent across Australia. The job itself also puts workers in very real danger of injury, abuse and harassment. Late 2020 was marked by the deaths of no less than five food delivery riders, all while this inquiry was underway. These deaths, and the high potential for further tragedy, underscore the need for immediate action by the NSW Government.

From extensive evidence over eight hearings to date, the committee has concluded that current laws perpetuate the overwhelming power imbalance between lone 'contractors' and multinational platform companies, rather than mitigating it. Correspondingly, we have made four key findings: that New South Wales is falling behind other states and comparable nations in developing laws that establish decent working conditions in the gig economy; that the failure to provide gig workers with a minimum wage, paid leave and other basic workplace entitlements is increasing inequality in New South Wales; that gig workers currently lack the power to interact and negotiate with on-demand platforms as equals in New South Wales; and that the failure to provide gig workers with access to a low-cost independent tribunal empowered to hear and decide disputes is leading to injustice in New South Wales.

The committee has made 22 recommendations to address these failings. The first embodies an overriding principle: that the NSW Government must commit to greater protections for gig economy workers, regardless of work status. To facilitate this, the committee's other recommendations focus on practical steps the NSW Government can take to ensure these greater protections. Foremost, the NSW Government must establish a tribunal or extend the jurisdiction of the existing tribunal, with the power to set minimum pay and conditions for gig workers who provide labour to on-demand platforms regardless of work status, to the extent permitted by the state's constitutional authority.

Other recommendations address access to basic entitlements, dispute resolution and transparency, collective bargaining, state taxation, work health and safety, and workers' compensation. Our final recommendation calls on the NSW Government to take a leadership role in the gig economy into the future, so as to establish the best regulatory measures and ensure optimal outcomes for workers, business and the broader community. NSW has been falling behind, and it falls upon us not just to catch up, but

to be world leaders in ensuring just outcomes and decent conditions for gig workers regardless of their work status.

The tabling of this report marks the start of the second phase of this inquiry, which will focus on two other key issues for the future of work that have emerged in the context of technological change: workplace surveillance and automation.

I am grateful to all stakeholders who have taken part in this inquiry to date via submissions, hearings and site visits. The broad range of perspectives – from workers themselves, unions, platform businesses and other industry bodies, academics, think tanks and others – have been invaluable to the debate that has informed this report. I thank all participants for their efforts in presenting their views.

I also thank my committee colleagues for their thoughtful engagement in this inquiry. While our work in this 57th Parliament has tended to focus on holding the executive government to account, the Legislative Council has a proud tradition of forward-looking inquiries that focus on how government can address emerging policy issues. The advent of the gig economy and the need for action to protect its workers is an incredibly important issue that will only grow in significance to the people and economy of New South Wales, and I am grateful to each member of the committee for their respective contributions.

Finally, I express my appreciation to the committee secretariat for their highly capable and substantial work on this inquiry.



Hon Daniel Mookhey MLC  
**Committee Chair**

## Findings

- Finding 1** **28**  
That New South Wales is falling behind other states and comparable nations in developing laws that establish decent work in the gig economy.
- Finding 2** **29**  
That the failure to provide gig workers with a minimum wage, paid leave and other basic workplace entitlements is increasing inequality in New South Wales.
- Finding 3** **59**  
That gig workers currently lack the power to interact and negotiate with on-demand platforms as equals in New South Wales.
- Finding 4** **59**  
That the failure to provide gig workers with access to a low-cost independent tribunal empowered to hear and decide disputes is leading to injustice in New South Wales.

## Recommendations

- Recommendation 1** 46  
That the NSW Government commit to greater protections for gig economy workers, regardless of work status.
- Recommendation 2** 47  
That the NSW Government establish a tribunal or extend the jurisdiction of the existing tribunal, with the power to set minimum pay and conditions for gig workers that provide labour to on-demand platforms regardless of work status, to the extent permitted by the state's constitutional authority.
- Recommendation 3** 48  
That the NSW Government introduce legislation to extend Chapter 6 of the *Industrial Relations Act 1996* to include at least rideshare and food delivery workers as well as those engaged to deliver bread, milk and cream.
- Recommendation 4** 48  
That the NSW Government establish a portable entitlement scheme for gig and other precarious workers, in partnership with employers, unions and gig platforms.
- Recommendation 5** 60  
That the NSW Government give the tribunal envisaged in recommendation 2 the power to advise on, oversee and make binding rulings on disputes between gig workers and on-demand platforms, to the extent permitted by the state's constitutional authority.
- Recommendation 6** 60  
That the NSW Government mandate improved transparency between platforms and workers concerning average earnings, most profitable times to work, real time use of the platform, data collection and utilisation, and performance management systems.
- Recommendation 7** 60  
That the NSW Government require platform companies to publish regular data on their scope and operations, and the earnings of their workers in New South Wales.
- Recommendation 8** 66  
That the NSW Government publicly affirm the right of gig workers to freely associate by joining (or not joining) a union.
- Recommendation 9** 66  
That the NSW Government legislate to establish a system of collective bargaining for workers providing labour to on-demand platforms, to the extent permitted by the state's constitutional authority.
- Recommendation 10** 67  
That the NSW Government amend Chapter 6 of the *Industrial Relations Act 1996* to establish a collective bargaining system that includes rideshare, food delivery and parcel delivery workers.

- Recommendation 11** 67  
That the NSW Government give the tribunal envisaged in recommendation 2 the power to recognise an agreement reached by an on-demand platform and its workers (or their representatives) that improves the minimum conditions a worker is otherwise entitled to.
- Recommendation 12** 76  
That the NSW Government urgently review the grouping provisions of the *Payroll Tax Act 2007* to ensure that on-demand platforms are not obtaining an advantage over other businesses who are not trading in the gig economy.
- Recommendation 13** 76  
That the NSW Government undertake a study of the advantages and disadvantages of replacing payroll tax with a business cash-flow tax.
- Recommendation 14** 100  
That the NSW Governments legislate to establish a requirement for all on-demand platforms to register with SafeWork NSW before they begin trading.
- Recommendation 15** 100  
That the NSW Government introduce discrete and enforceable codes of conduct for work performed by on-demand platforms in the rideshare, food delivery, parcel delivery and disability care sectors of the gig economy.
- Recommendation 16** 101  
That the NSW Government introduce a scheme that delivers standardised workplace health and safety training to workers providing labour to on-demand platforms in high-risk industries, which can be recognised by all platforms that a worker chooses to work for.
- Recommendation 17** 101  
That the NSW Government partner with on-demand platforms, employers and unions to develop an enforcement regime which provides for the inspection, auditing and reporting of an on-demand platform's compliance with workplace health and safety laws by organisations independent of that platform.
- Recommendation 18** 101  
That the NSW Government review health and safety legislation to ensure workers in the gig economy are protected by health and safety laws, including reviewing the definitions of 'person conducting a business or undertaking' and 'worker' in the *Work Health and Safety Act 2011*.
- Recommendation 19** 102  
That SafeWork NSW urgently review the *Work Health and Safety Act 2011*'s provisions for health and safety representatives, to ensure that they are able to operate effectively for gig economy workers.
- Recommendation 20** 103  
That the NSW the NSW Government provide full workers compensation benefits to on-demand platform workers that are equivalent to the level of benefits currently provided to employees injured in New South Wales workplaces.

**Recommendation 21**

**111**

That the NSW Government take greater leadership in the gig economy by actively anticipating the changes taking place, monitoring those changes and their effects, engaging with both business and workers, and establishing the best regulatory measures to ensure optimal outcomes for workers, business and the broader community.

**Recommendation 22**

**111**

That the NSW Government support ongoing data collection on and research into on-demand work, specific to New South Wales, including longitudinal research that tracks changes in participation in digital platform work, the experience of workers and businesses, and the outcomes for the economy and broader community.

## Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 24 March 2020.

The committee received 53 submissions and one supplementary submission.

The committee held six public hearings at Parliament House in Sydney and two virtual hearings.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.

## Chapter 1 Background

Over the last decade, the rise and accelerating growth of 'on-demand' work or the 'gig economy', driven by rapid technological development and other factors, has challenged traditional workforce and economic arrangements, both internationally and in Australia. Australian governments have now begun to examine this new policy area, both nationally and at the state and territory level, with a view to determining the most appropriate role that government can play in regulating work arrangements.

This inquiry is the first comprehensive examination of the on-demand or gig economy in New South Wales. This chapter provides background information and context to the inquiry, detailing important developments around the world, key reviews undertaken by other governments and parliaments in Australia, existing data relating to this aspect of the workforce, and the current legislative and regulatory framework that applies to these types of workers in New South Wales. It sets the scene for the analytical chapters that follow.

### Structure of the inquiry

- 1.1 This select committee was established by the Legislative Council on 24 March 2020 to inquire into the impact of technological and other change on the future of work and workers in New South Wales.<sup>2</sup>
- 1.2 The terms of reference for this inquiry, shown on pages vi-vii, require the committee to examine how the advancement of technology is changing the world of work, the challenges and opportunities that arise, and the implications for current workplace laws and regulation, the economy and taxation. To date, the committee has conducted eight hearings and received 53 submissions. Due to the breadth of issues covered, the committee will produce two reports for this inquiry.
- 1.3 This first report provides a comprehensive analysis of the on-demand or gig economy in New South Wales, addressing whether current workplace laws and regulation adequately protect these types of workers in New South Wales.
- 1.4 The committee will hold more hearings in early 2022 to gather further evidence for the final report. That report will closely examine two key issues in the terms of reference: the nature and extent of automation and workplace surveillance, including the appropriateness of current legislation and how both issues will further change the nature of work in New South Wales.

### Defining 'on-demand', 'gig economy' and 'platform work'

- 1.5 There are no clear or consistent definitions of the terms 'on-demand' or 'gig economy'; throughout this inquiry participants have either offered a distinction between the two, or in other instances used the terms interchangeably. Similarly, research into this aspect of the

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<sup>2</sup> *Minutes*, NSW Legislative Council, 24 March 2020, pp 863-865.

workforce indicates difficulties in defining these terms due to the range of work performed and the variety of ways in which the work is structured or organised.<sup>3</sup>

- 1.6** In general, 'on-demand' work is a broad term that refers to the long-standing practice of workers being employed or engaged in providing short term services on an 'as needed by a business' basis. This can include labour hire, casual work, fixed-term contracts and independent contractors.<sup>4</sup> On a large scale, digital platforms facilitate the sourcing of workers 'on-demand', often to perform a particular 'gig' or task; hence the 'gig economy'.<sup>5</sup>
- 1.7** Previous inquiries into this aspect of the workforce have also used the term 'platform work', defining it as a sub-set of 'on-demand' work, accessed through or organised by digital platforms which connects workers with clients via internet based applications.<sup>6</sup>
- 1.8** According to Unions NSW, the modern 'gig economy' is underpinned by five key features:
- it is work that is fragmented into specific individual tasks or jobs, with no guarantees of continuous work
  - the work is performed by individuals but may be commissioned by an individual or business
  - it can be work that is facilitated by a for-profit company that charges users for this service, often through a web-based application managed and controlled by the company
  - workers are considered independent contractors by the facilitating companies and are not afforded employment protections or minimum standards in the performance of their work
  - the price charged for each job is set by the facilitating company or commissioning customer, collected through the platform and payment (net of the platform's margin) is then disbursed to the worker.<sup>7</sup>
- 1.9** For the purposes of this inquiry and its focus, the terms 'on-demand', 'gig economy' or 'platform work' are used interchangeably, and in reference to the temporary work arrangements that are facilitated by digital platforms.

## Context of the inquiry

- 1.10** The emergence of the modern gig economy as result of new technology in the last five to ten years has led to legal and public policy debate in Australia across the world. Debate on this issue has largely attempted to address:

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<sup>3</sup> Victorian Government, Department of Premier and Cabinet, *Report of the Inquiry into the Victorian On-demand Workforce*, (July 2020), p 11.

<sup>4</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 8.

<sup>5</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 4.

<sup>6</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 8 and Select Committee on Job Security, Australian Senate, *First interim report: on-demand platform work in Australia*, (2020), pp 1-2.

<sup>7</sup> Submission 28, Unions NSW, p 18.

- what this emergence means for the future of work and its nature, extent and impact on labour markets and the economy
- whether current workplace laws are adequate in regulating the gig economy, specifically as it relates to 'work status' and the subsequent obligations of businesses and entitlements of workers.

- 1.11** There have been significant decisions made by courts, tribunals and legislatures in other jurisdictions that contribute to this ongoing debate.
- 1.12** In the United States, a Californian court, for example, applied an 'ABC test' and found that a worker who performed services for a platform was an 'employee'. A subsequent bill (AB 5) was introduced to codify the 'ABC test'.<sup>8</sup> Later, a successful referendum (Proposition 22) which was initiated by several platforms created an exemption to this bill, so that platform workers in the transport sector were re-classified as 'independent contractors'. In lieu, these workers were given some entitlements to a minimum earnings guarantee, a healthcare subsidy, compensation for vehicle expenses, basic accident insurance and protection against discrimination.<sup>9</sup> But in August 2021, a superior court judge ruled that two sections of Proposition 22 were unconstitutional and as a whole unenforceable.<sup>10</sup>
- 1.13** In the United Kingdom, under the *Employment Rights Act 1996* (UK), a third category of employment exists (beyond employees and self-employed) to include a 'worker'.<sup>11</sup> In 2018, an employment tribunal determined that Uber drivers should be classed as 'workers', and therefore entitled to minimum wage and paid holidays. This decision was confirmed by the UK Supreme Court in February 2021. In March 2021, Uber responded by announcing that its drivers would be re-classed as 'workers' and thereby have access to minimum wages, paid holidays and a pension.<sup>12</sup>
- 1.14** In contrast, Australia has to date seen seven cases brought to the Fair Work Commission that sought a determination on the 'work status' of platform workers in the rideshare and food delivery sector. Five of the cases involved Uber rideshare drivers or delivery riders, one involved a Deliveroo delivery rider and one involved a Foodora delivery rider. In each of the Uber cases,

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<sup>8</sup> According to AB 5, businesses are required to apply the 'ABC test' when categorising a worker. For a worker to be an independent contractor, businesses must prove that the worker is A: free from the company's control; B: doing work that isn't central to the company's business; and c: has an independent business in that industry. If a worker does not meet all three criteria then the worker is an employee (Select Committee on Job Security, *First interim report: on-demand platform work in Australia*, pp 201-204).

<sup>9</sup> Select Committee on Job Security, *First interim report: on-demand platform work in Australia*, pp 201-204.

<sup>10</sup> Ballotpedia, *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative*, (2020), [https://ballotpedia.org/California\\_Proposition\\_22,\\_AppBased\\_Drivers\\_as\\_Contractors\\_and\\_Labor\\_Policies\\_Initiative\\_\(2020\)#Castellanos\\_v.\\_California](https://ballotpedia.org/California_Proposition_22,_AppBased_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)#Castellanos_v._California).

<sup>11</sup> The United Kingdom has three categories of employment status: employees, workers and self-employed. Employees and workers have workplace entitlements such as minimum wage, paid holidays, wage theft protection. Employees have additional entitlements such as sick leave and redundancy pay, whereas workers have entitlements similar to the Australian category of 'casual worker'. (Select Committee on Job Security, *First interim report: on-demand platform work in Australia*, pp 209-210).

<sup>12</sup> Select Committee on Job Security, *First interim report: on-demand platform work in Australia*, pp 211-212.

the Commission found that the applicants were 'independent contractors' rather than employees and thus did not qualify for entitlements. One of the drivers then appealed to the Federal Court. However the Court did not reach a judgement as the parties agreed to a settlement, which resulted in Uber paying the driver \$400,000.<sup>13</sup>

- 1.15** In the Deliveroo and Foodora cases, the Commission found that the applicant was an employee and had been unfairly dismissed.<sup>14</sup> These cases, in relation to the work status of a person, is examined in more detail at paragraphs 3.4 – 3.11.

### **Australian reviews**

- 1.16** In recent years, Australian governments have begun to examine the public policy response to the gig economy, investigating ways to appropriately address this aspect of the labour market.

#### ***Inquiry into the Victorian on-demand workforce***

- 1.17** In 2018, the Victorian Government commissioned an independent inquiry into the *Victorian On-demand Workforce* (hereafter the Victorian inquiry), chaired by former Fair Work Ombudsman, Ms Natalie James. The report was tabled in July 2020, providing a comprehensive examination of the on-demand workforce in Victoria, specifically addressing what entitlements or arrangements apply to platform workers and whether they are fair. The inquiry also took into consideration the COVID-19 pandemic.<sup>15</sup>
- 1.18** The Victorian Government responded to the inquiry by supporting all of its recommendations in full or in principle.<sup>16</sup> The government has since proposed 28 draft minimum standards. They include giving workers 'fair and decent' pay and conditions, providing them their pay rates in writing and providing an appeal mechanism for employees or workers removed from a platform.<sup>17</sup>

#### ***Senate inquiry into job security***

- 1.19** In December 2020, a Senate committee was established to inquire into job security in Australia, looking at workplace and consumer trends and the associated impact on employment arrangements in sectors of the economy including the on-demand or gig economy. The committee has since tabled three reports in June, October and November 2021. As of April 2022, the Federal Government is yet to respond to that inquiry's recommendations, particularly those in its interim report, which specifically considered on-demand platform work in Australia.<sup>18</sup>

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<sup>13</sup> David Marin-Guzman, 'Uber paid 'incredible' amount to avoid landmark judgement', *Financial Review*, 10 June 2021.

<sup>14</sup> Submission 26, Department of Premier and Cabinet – Employee Relations, pp 3-4.

<sup>15</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 4.

<sup>16</sup> Victorian Government response to the Inquiry into the Victorian On-demand Workforce, 13 May 2021, p 3.

<sup>17</sup> Victorian Government, Department of Premier and Cabinet, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce Consultation Paper*, December 2021.

<sup>18</sup> Select Committee on Job Security, *First interim report: on-demand platform work in Australia*, terms of reference, item (c).

## **Other key developments**

- 1.20** Two key developments have been especially significant in driving a better understanding of the need for improved policy responses to the gig economy: the COVID-19 pandemic and the recent deaths of delivery drivers.

### ***The COVID-19 pandemic***

- 1.21** The COVID-19 pandemic began when this inquiry was commencing. It continues to drastically affect jobs and the Australian economy. Many businesses have come to rely on gig economy workers to provide services during lockdowns, while many workers have come to rely on gig platforms to earn their income. So it has been timely for a parliamentary committee to examine the gig economy in New South Wales in the context of the ongoing pandemic, and address the underlying public policy issues that have been amplified as a result.<sup>19</sup> The impact of COVID-19 on the gig economy is explored further from paragraphs 2.12 – 2.22.

### ***Deaths of delivery drivers***

- 1.22** In 2020, various media reports disclosed the death of five on-demand food delivery drivers on New South Wales roads.<sup>20</sup> In response to the deaths, the NSW Government announced a taskforce comprised of the NSW Police Force, Transport for NSW and SafeWork NSW 'to tackle this emerging road safety risk' and 'ensure the safety of gig economy workers'.<sup>21</sup>
- 1.23** Sadly, these deaths highlighted the immediate need for greater scrutiny of workplace health and safety and compensation entitlements for workers in the 'gig economy'. These issues are examined in detail in chapter 7.

### ***Ola cuts Australian operations***

- 1.24** In December 2020 the media reported that the rideshare company Ola had closed 'most of its operations' in Australia, with the company's managing director departing the business, local driver offices closed and personal accident insurance for drivers cancelled. The company was quoted as saying it still had a future in Australia, although it had advised drivers that local driver offices would be closed 'until further notice'. The closure, which occurred a month after Ola representatives gave evidence to the committee, was attributed by the media to challenges competing with Uber and others in the market, and the broader context of the pandemic.<sup>22</sup>

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<sup>19</sup> The COVID-19 pandemic and its impact on the economy and employment have been discussed in detail by various submission authors, see for example: Submission, Uber Australia, p 13; Submission 15, upcover, p 7; Submission 19, Shop, Distributive and Allied Employee's Association (NSW Branch), p 9; Submission 20, Ola Australia, p 17; Submission 28, Unions NSW, p. 8 and Submission 29, International Transport Workers' Federation, p 8.

<sup>20</sup> See for example Naaman Zhou, 'Australia's delivery deaths: the riders who never made it and the families left behind', *The Guardian*, 21 November 2020; Nick Bonyhady and Laura Chung, 'Fifth food delivery rider dies following truck crash in central Sydney', *The Sydney Morning Herald*, 23 November 2020.

<sup>21</sup> Submission 42, Transport for NSW, p 7.

<sup>22</sup> Cara Waters, 'Uber rival Ola cuts operations fanning fears it may leave Australia', *The Sydney Morning Herald*, 1 December 2020.

## Data on platform work

- 1.25 During this inquiry the NSW Government confirmed that it does not collect data on the number of gig economy workers in New South Wales, or their wage rates.<sup>23</sup>
- 1.26 Significantly, the Victorian inquiry found that there 'was not recent or comprehensive research or data directly going to the extent or nature of platform work in Australia'. As a result, a national survey was commissioned in 2019 (hereafter the 2019 national survey) to assist that inquiry.<sup>24</sup> The results of the 2019 national survey were acknowledged by a vast number of participants in our own inquiry, and provided some useful insights into the gig economy in New South Wales.<sup>25</sup>
- 1.27 Compared to other states and territories, the 2019 national survey concluded that New South Wales had the highest levels of participation in digital platform work compared with other states and territories, with 14.3 per cent of respondents having participated at some time, and 7.9 per cent participating at the time of the survey.<sup>26</sup>

### *Worker characteristics, income and hours worked*

- 1.28 In relation to age, gender and any other indicators, the national survey found:
- higher proportions of younger people (aged 18-34) and males were working through digital platforms
  - female respondents were only half as likely as males to work on digital platforms
  - temporary residents were three times more likely to be a current platform worker than permanent residents or citizens
  - students, respondents who were otherwise unemployed, and those who spoke a language other than English at home, were all more likely to be current digital platform workers
  - survey respondents located in regional and remote areas were less likely than those in a major city to participate in digital platform work..<sup>27</sup>
- 1.29 A survey conducted by the Transport Workers' Union of 450 of its members working in the gig economy in 2020 noted both differences and similarities between the rideshare and food delivery sectors. It found that for the food delivery sector, a majority were 25-34 years old and visa holders, whilst in the rideshare sector the majority were aged over 45 years and Australian

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<sup>23</sup> Answers to questions on notice, Department of Premier and Cabinet – Employee Relations, p 4.

<sup>24</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p. 13. See also Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes and Damien Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact*, Queensland University of Technology, The University of Adelaide and the University of Technology Sydney, November 2019.

<sup>25</sup> See for example Submission 10, Deliveroo, p 13; Submission 15, upcover, p 3; Submission 21, Australian Road Transport Industrial Organisation, p 4; Submission 36, Australian Industry Group, p 1; Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 2; Submission 14, QUT Centre for Decent Work and Industry.

<sup>26</sup> Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes and Damien Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact*, p 5.

<sup>27</sup> Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes and Damien Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact*, p 5.

citizens. Respondents in both sectors, however, were predominately male and relied on this form of work as their main source of income.<sup>28</sup>

- 1.30** Income and number of hours worked was another focus of the 2019 national survey, which concluded that the average earnings of workers varies significantly across different industry sectors in the gig economy.<sup>29</sup> Importantly, platform work appeared to supplement income, with four in five current platform workers reporting that digital platform work made up less than half of their total annual income.<sup>30</sup> The earnings of gig economy workers is explored in detail in chapter 2 of this report.

### *Prevalence in the market*

- 1.31** Official data relating to the prevalence of the gig economy in New South Wales is limited and difficult to calculate due to traditional labour data sets and the nature of gig economy work, however inferences about the size of the workforce can be drawn from the following research:

- The Australian Bureau of Statistics determined that as of August 2019, main job 'independent contractors' made up around 8 per cent of the workforce in Australia, with platform workers being a subset of this group.<sup>31</sup>
- In the 2019 national survey, 7.1 per cent of respondents were working through a digital platform or had done so in the previous 12 months, while 13.1 per cent of respondents, had at some time undertaken platform work.<sup>32</sup>

- 1.32** Whilst no data capturing the extent of growth in platforms' labour market associated with the COVID-19 pandemic was available to the committee, the following research indicated that the workforce was growing up until that time:

- Research commissioned by the NSW Government found that between 2014 and 2016, the number of people working in the gig economy in New South Wales almost doubled to 92,400 and that revenue generated increased from \$1.6 billion to \$2.6 billion.<sup>33</sup>
- Research conducted by the Actuaries Institute revealed that between 2015 and 2019, the gig economy in Australia had grown nine-fold to capture 6.3 billion in consumer spend, and to involve as many as 250,000 workers.<sup>34</sup>
- The Victorian inquiry presented evidence of an overall 40 per cent increase in Australian Business Number (ABN) applications between 2011-2012 and 2017-2018 financial years. A breakdown of industry applications for the same period revealed a 249 per cent increase in ABN applications in the transport, postal, warehousing industry along with a 103 per

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<sup>28</sup> Submission 30, Transport Workers' Union, pp 7-16.

<sup>29</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 55.

<sup>30</sup> Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes and Damien Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact*, p 7.

<sup>31</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 17.

<sup>32</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 13.

<sup>33</sup> Deloitte Access Economics, *Developments in the Collaborative Economy in NSW*, NSW Department of Finance, Services & Innovation, 2017, p 4.

<sup>34</sup> Actuaries Institute, *The Rise of the Gig Economy and its Impact on the Australian Workforce*, December 2020, p 5.

cent increase in administrative and support services, which includes building, cleaning and gardening services. The Australian Taxation Office observed that these sectors appear to have links to the growing gig economy.<sup>35</sup>

### **Overview of platform work**

- 1.33** This section provides an overview of the different platforms facilitating the gig economy, and details generally how platforms work, noting further examination of the operation of platforms is provided in chapter 2.
- 1.34** Generally the different types of platforms operating in Australia include:
- rideshare platforms such as Uber and Ola
  - food delivery platforms such as Deliveroo, Menulog and Uber Eats
  - platforms such as Hireup and Mable connecting care providers (that is, aged care and disability support workers) with those requiring these services
  - platforms facilitating accommodation like Airbnb and Stayz
  - home cleaning service platforms including Whizz and Helpling
  - online marketplaces for hand-crafted goods such as Etsy
  - platforms like Airtasker and Freelancer which facilitate more varied and ad hoc work
  - new entrant to the Australian market Amazon Flex, which operates in a similar manner to rideshare but for delivery of goods.<sup>36</sup>
- 1.35** The 2019 national survey found that transport and food delivery dominates platform work with 18.6 per cent of 14,000 respondents performing work in this sector, followed by professional services work at 16.9 per cent. It also determined that Airtasker and Uber were the two most commonly used platforms, at 34.8 per cent and 22.7 per cent respectively.<sup>37</sup>

### ***How platforms work***

- 1.36** It is generally acknowledged that platform work involves at least three main parties: the platform, client and the worker. In other forms of platform work, such as food delivery services, there may be additional related parties, for example restaurants.<sup>38</sup>
- 1.37** While each platform operates under a unique model, both the Victorian inquiry and Senate committee distinguished two broad operating models that platforms use: 'crowd-work systems'

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<sup>35</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 29.

<sup>36</sup> Submission 28, Unions NSW, p 18.

<sup>37</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, pp 33-34. The Victorian inquiry provided a breakdown of 'headline data' from the 2019 national survey. This includes a list of the five most common platforms and a table of the different types of work performed by platform workers on their main digital platform.

<sup>38</sup> Submission 14, QUT Centre for Decent Work and Industry, p. 2.

and 'work on-demand' systems. The distinction between the two models is whether it is the platform or the end user who determines which worker will carry out the task.

- Crowd-work is a system where skilled or unskilled users maintain an online profile, in order to apply or bid competitively to complete a task, for example with Mable and Airtasker.
- Work on-demand is a system where the platform allocates a task directly to a registered or available worker, and the services are usually expected to meet a pre-determined minimum standard set by the platform, for example Uber, Deliveroo and Menulog.<sup>39</sup>

**1.38** Depending on the platform, a worker must go through a specific 'onboarding' and 'approval' process such as obtaining police checks, providing qualifications and licences, and showing proof of a visa or right to work in Australia. 'Onboarding', or in other terms recruitment, largely occurs to meet consumer demand.<sup>40</sup> After this process the worker agrees to the terms and conditions in the contract set out by the platform.<sup>41</sup> Platforms may provide to the worker education and training materials, policies and insurance information.<sup>42</sup> They may provide workplace insurance to their workers, with varying benefits subject to specific conditions.<sup>43</sup>

**1.39** In addition to agreeing to the terms and conditions of the platform, certain platforms allow for a worker to enter into a specific contract or agreement with a client. Mable workers, for example, can document an agreement with a client via the platform if they both reach a decision to engage in a service. The agreed service is logged and payment is made through the platform upon completion.<sup>44</sup>

**1.40** Workers generate an income from each completed service, with platforms generating revenue by deducting a percentage of the service price from both the worker and client or a 'booking fee'. The amount charged is set by the platform.<sup>45</sup> Workers may generate income from working

<sup>39</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p. 15. See also Select Committee on Job Security, *First interim report: on-demand platform work in Australia*, pp 13-14.

<sup>40</sup> See for example, Evidence, Mr Esteban Salazar, Food Delivery Worker, 9 November 2020, p 9; Evidence, Mr Steve Khouw, Food Delivery Worker, 9 November 2020, p 13; Evidence, Ms Tina Sun, Human Resources Manager, Hungry Panda, 23 February 2021, p 28; Evidence, Ms Julia Duck, Head of Operations, Strategy and Performance, Deliveroo, 30 March 2021, p 3; Evidence, Mr Peter Scutt, Co-founder and Chief Executive Officer, Mable, 10 September 2021, p 20; Submission 50, Mable, p 7; Evidence, Ms Rebecca Burrows, General Manager, DoorDash Australia, 10 September 2021, p 4.

<sup>41</sup> See for example, Answers to questions on notice, Mr Steve Khouw, Food Delivery Worker, copy of contract, 11 January 2021; Answers to questions on notice, Mr Fang Sun, Food Delivery Driver, Hungry panda, copy of contract, 23 March 2021; Evidence, Mr Tim Fung, Co-Founder and Chief Executive Officer, Airtasker, 30 March 2021, p 24.

<sup>42</sup> See for example, Uber, 'Support for driver and delivery partners', <https://www.uber.com/au/en/drive/insurance/injury-protection/>; Evidence, Ms Burrows, 10 September 2021, p 4; Evidence, Mr Fung, 30 March 2021, p 24; Evidence, Ms Sun, 23 February 2021, p 28; Submission 50, Mable, p 7; Answers to questions on notice, HungryPanda, 25 March 2021, p 2.

<sup>43</sup> See for example, Submission 52, Doordash, p 52; Answers to questions on notice, Deliveroo, 29 April 2021, p 4; Evidence, Ms Duck, 30 March 2021, p 2; Evidence, Mr Fung, 30 March 2021, p 19.

<sup>44</sup> Evidence, Mr Scutt, 10 September 2021, p 3.

<sup>45</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 15.

across multiple platforms at once.<sup>46</sup> All of these operations are carried out by the individual platform's application (app).

- 1.41 Some platforms rely on algorithmic systems to set prices and fees, control methods and standards of performance, apply reputational rating systems, prescribe routes and destinations, and enforce rules governing access to the platform. Issues relating to algorithmic systems are explored in chapter 4.<sup>47</sup>

## Legislation that applies to platforms and workers

- 1.42 Most platforms in Australia classify their workers as 'independent contractors' rather than employees. This section explains how the status of workers is determined, then documents the relevant legislation that applies to platform workers in New South Wales in respect of work health and safety, workers compensation, point to point transport and superannuation. This information sets the scene for the detailed analysis provided in chapters 2 to 7 of the report.

### Work status

- 1.43 In Australian jurisdictions, the legal entitlements and obligations of all workers are determined by their status as workers. Workers can either be:
- employees, in a contract of service (written or implied), or
  - independent contractors, in a contract for services (more often written than implied).<sup>48</sup>
- 1.44 On this determination, workplace obligations and entitlements are subsequently regulated by both Commonwealth and state legislation.
- 1.45 The test to determine the status of a worker, established in common law over decades and set out in the High Court decision in *Hollis v Vabu*,<sup>49</sup> is largely relied upon in current legislation. The Federal Court describes this as a 'multi-factor test' or 'multifactorial assessment' based on the following relevant indicia:
- the terms of the contract
  - the intention of the parties
  - whether tax is deducted
  - whether sub-contracting is permitted
  - whether holidays are permitted
  - whether tools are supplied

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<sup>46</sup> Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes and Damien Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact*, p 8.

<sup>47</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 14.

<sup>48</sup> Submission 26, Department of Premier and Cabinet – Employee Relations, p 2.

<sup>49</sup> *Hollis v Vabu Pty Ltd* [2001] HCA 4.

- the extent of control of, or the right to control, the putative employee whether actual or de jure
- whether wages are paid or instead whether there exists a commission structure
- whether one party 'represents' the other
- for whom the benefit of the goodwill in the business inures and
- how 'business-like' the alleged business of the putative employee is – whether there are systems, manuals and invoices.<sup>50</sup>

**1.46** In instances of dispute, courts and tribunals are responsible for determining the establishment of an employment relationship or independent contractor arrangement. Each case will turn on its relevant facts, meaning a particular finding in one case may or may not be relevant to another.

**1.47** The Fair Work Commission has applied the 'multi-factor test' to assess specific platform work arrangements, finding on different occasions the worker to be either an 'independent contractor' or an 'employee'.<sup>51</sup>

### **Relevant legislation**

**1.48** In 2009, the NSW Government referred its powers to regulate private sector industrial relations to the Commonwealth. From that point, New South Wales private sector workers deemed to be 'employees' became subject to the provisions of the *Fair Work Act 2009* (Cth) (hereafter the Fair Work Act).<sup>52</sup>

**1.49** Under the Fair Work Act, an 'employee' is afforded workplace protections set out in the National Employment Standards (NES), which include minimum wages, maximum working hours, leave provisions, unfair dismissal protections and other protective conditions. The Fair Work Act also allows employees to collectively bargain to make an enterprise agreement and provides for dispute resolution procedures.<sup>53</sup> In addition, it recognises 'sham contracting', whereby an employer, knowingly or recklessly, misrepresents an employment relationship. Contravention of this provision results in fines to the employer.<sup>54</sup>

**1.50** Workers deemed to be 'independent contractors' are subject to provisions of the *Independent Contractors Act 2006* (Cth) (hereafter the IC Act), as well as commercial law such as the *Competition and Consumer Act 2010* (Cth).<sup>55</sup> Generally, this means that workers subject to these provisions are not afforded the minimum protections of those in an 'employment relationship', such as those listed in paragraph 1.49.

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<sup>50</sup> Submission 26, Department of Premier and Cabinet – Employee Relations, p 2.

<sup>51</sup> Submission 26, Department of Premier and Cabinet – Employee Relations, p 3.

<sup>52</sup> Public sector 'employees' are regulated by the State under the *Industrial Relations Act 1996* (NSW), and the *Long Service Leave Act 1955* (NSW), amongst others: (Submission 26, Department of Premier and Cabinet, Employee Relations, p 2).

<sup>53</sup> *Fair Work Act 2009* (Cth), s 3.

<sup>54</sup> *Fair Work Act 2009* (Cth), s 357-359.

<sup>55</sup> Submission 26, Department of Premier and Cabinet – Employee Relations, p 2.

- 1.51** The IC Act excludes certain state and territory laws from its remit. Relevant to this inquiry is Chapter 6 of the *Industrial Relations Act 1996* (NSW) (hereafter the IR Act), which provides employment protections to certain workers in the transport industry who would otherwise be classed as 'independent contractors', for example, drivers in the taxi industry.
- 1.52** In assessing whether a gig economy worker falls within the scope of Chapter 6, each case will turn on the facts of the arrangement. At present, Chapter 6 of the IR Act generally excludes the rideshare and food delivery sector. This is due to the definition of 'contract of carriage' within the IR Act being where the owner-driver is performing work for one principal contractor and the nature of gig economy work being where people are working for multiple principal contractors. Additionally, there are a number of exclusions in section 309 of the IR Act that do not fall within the terms of a 'contract of carriage'. Relevant to gig economy work is the exclusion of delivery of food to premises.<sup>56</sup>
- 1.53** Detailed below are the legislative underpinnings of additional workplace obligations and entitlements, such as health and safety obligations, workers' compensation, point to point regulation, taxation and superannuation. Much of this legislation relies on 'work status' to determine its application, however in some circumstances legislation is expanded to explicitly include 'independent contractors'.

#### ***Work health and safety***

- 1.54** In 2011, SafeWork Australia, the national agency responsible for regulating work health and safety (WHS), developed a single set of WHS model laws (model laws) to be implemented across Australia.<sup>57</sup>
- 1.55** New South Wales adopted the model laws under the *Work Health and Safety Act 2011* (hereafter the WHS Act), together with the Work Health and Safety Regulation 2017 and various codes of practice.<sup>58</sup> This legislative framework sets out the health and safety obligations of businesses and entitlements of workers in New South Wales, such as in respect of duty of care, provision of personal protective equipment and safety training, and requirements to report serious accidents, injury or death in the workplace.<sup>59</sup>
- 1.56** Persons providing on-demand services and gig economy workers are captured within the current WHS Act,<sup>60</sup> which a 'worker' includes:

work as, an employee, a contractor or subcontractor, an employee of a contractor or subcontractor, an employee of a labour hire company who has been assigned to work in the person's business or undertaking, an outworker, an apprentice or trainee, a student gaining work experience, volunteer or a person of a prescribed class.<sup>61</sup>

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<sup>56</sup> Evidence, Mr Charlie Heuston, Acting Executive Director, Employee Relations, Community Engagement, Department of Premier and Cabinet, 9 November 2020, p 46.

<sup>57</sup> Submission 27, SafeWork NSW, p 2.

<sup>58</sup> Submission 27, SafeWork NSW, p 4.

<sup>59</sup> *Work Health and Safety Act 2011* (NSW), s 19, ss 35-39; Work Health and Safety Regulation 2017, ss 45-47.

<sup>60</sup> Evidence, Mr Peter Dunphy, Executive Director, Compliance and Dispute Resolution, SafeWork NSW, 16 November 2020, p. 33; Submission, SafeWork NSW, p 4.

<sup>61</sup> Submission 27, SafeWork NSW, p 2.

- 1.57 Legal obligations under the WHS Act are extended to any 'person conducting business or undertaking' (PCBU), meaning a platform company can be a PCBU that has a general duty to provide a safe workplace and eliminate risk.<sup>62</sup>
- 1.58 A PCBU is required to notify SafeWork NSW of a serious accident, injury or death that occurs at work. SafeWork NSW is responsible for investigating the incident. Over the three years to July 2020, 24 notifications were received by SafeWork NSW in relation to work in the gig economy, with 19 notifications received in 2020 alone.<sup>63</sup>
- 1.59 According to SafeWork NSW, due to the nature of work in the gig economy, a platform worker can be a 'worker' for the purposes of the legislation and 'can also be a person conducting a business or an undertaking, as well as the platform operator, which can also be a person conducting a business or undertaking'.<sup>64</sup> This issue will be examined further in chapter 7 of this report, along with broader questions regarding the adequacy of work health and safety protections for platform workers at present.

### ***Workers compensation***

- 1.60 In New South Wales, the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (hereafter the Workers Compensation Act) ensures 'employers' obtain a worker's compensation policy for a 'worker' and pay workers compensation premiums. The Workers Compensation Act also sets out obligations relating to workplace injury prevention, injury management and measures to assist and injured workers back to work.<sup>65</sup>
- 1.61 Schedule 1 of the Workers Compensation Act defines 'worker' as a person who has entered into or works under a contract of service or a training contract with an employer.<sup>66</sup>
- 1.62 According to the State Insurance Regulatory Authority (SIRA), which is responsible for regulating New South Wales' workers compensation scheme, the 'existing workers compensation legislation is based on a traditional employment relationship'. In relation to the gig economy, there is a complexity in determining whether an individual worker is covered by workers compensation. Each claim is assessed on the worker's circumstances and business arrangements.<sup>67</sup>
- 1.63 Most people providing gig economy food delivery services are not covered by the workers compensation scheme.<sup>68</sup> Some workers who are injured whilst driving in the course of delivering food may have access to statutory benefits under the Compulsory Third Party (CTP) scheme or make a common law claim for damages under the *Motor Accident Injuries Act 2017*.<sup>69</sup>

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<sup>62</sup> Evidence, Mr Dunphy, 16 November 2020, p 33.

<sup>63</sup> Evidence, Mr Dunphy, 16 November 2020, p 36.

<sup>64</sup> Evidence, Mr Dunphy, 16 November 2020, p 38.

<sup>65</sup> Submission 25, State Insurance Regulatory Authority (SIRA), p 2.

<sup>66</sup> *Workplace Injury Management and Workers Compensation Act 1998* (NSW), schedule 1.

<sup>67</sup> Submission 25, State Insurance Regulatory Authority, pp 3 and 4.

<sup>68</sup> State Insurance Regulatory Authority, *Consultation on personal injury insurance arrangements for food delivery riders in the gig economy*, stakeholder discussion paper, April 2021, p 4.

<sup>69</sup> State Insurance Regulatory Authority, *Consultation on personal injury insurance arrangements for food delivery riders in the gig economy*, pp 5-6.

***Point to point transport***

- 1.64** In New South Wales, the point to point transport industry includes any passenger service in a vehicle (other than a bus) that can take customers on a route they choose for a fare. This includes taxis, limousines, airport transfers, and relevant to the gig economy, rideshare services. The industry is governed by the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* (hereafter the Point to Point Act) and Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017 (hereafter the Point to Point Regulation).<sup>70</sup>
- 1.65** The Point to Point Act sets out the legal framework for how service providers must conduct their business and provides for the NSW Point to Point Transport Commissioner (hereafter the Point to Point Commissioner) to authorise service providers, issue taxi licences, manage compliance and enforcement of the legislation and recommend safety standards. The Point to Point Regulation goes into greater detail regarding safety standards for service providers and passengers, such as relating to vehicle standards, fares and driver obligations.<sup>71</sup>
- 1.66** Additionally, under the legislative and regulatory framework, a passenger service levy was introduced to assist the taxi-industry to adjust to the introduction of the legislation. Authorised service providers must collect \$1 from passengers for each trip they take. The Point to Point Commissioner is responsible for compliance and enforcement of this levy.<sup>72</sup>
- 1.67** The Point to Point Commissioner is also required to conduct safety audits of service providers. In 2021, Uber was issued with thirteen improvement notices and over \$200,000 in fines following a safety audit. Areas of particular concern identified in the audit were driver fatigue, incident management, driver training and delays in reporting notifiable occurrences.<sup>73</sup> Chapter 6 will further explore issues relating to compliance and enforcement with this particular legislation as it applies to the gig economy.

***Payroll tax***

- 1.68** Payroll tax is the state-based tax that businesses must pay on their employees' wages, if their total wages exceed the threshold amount set out in the legislation. In New South Wales, it is the *Payroll Tax Act 2007* (NSW) (the PT Act) which imposes this tax.<sup>74</sup>
- 1.69** As in employment law, the PT Act relies on the establishment of a common law employment relationship determined by the 'multi-factor test'. Revenue NSW, the NSW Government agency responsible for administering the State's taxation laws, applies this test when assessing payroll tax liability.<sup>75</sup>

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<sup>70</sup> Point to Point Transport Commissioner, NSW Government, *What is point to point transport?*, <https://www.pointtopoint.nsw.gov.au/about-commissioner/what-point-to-point-transport>.

<sup>71</sup> Point to Point Transport Commissioner, NSW Government, *The Act and Regulation* <https://www.pointtopoint.nsw.gov.au/about-commissioner/act-and-regulation>.

<sup>72</sup> Point to Point Transport Commissioner, NSW Government, *Passenger Service Levy*, <https://www.pointtopoint.nsw.gov.au/what-a-service-provider/passenger-service-levy>. See also Evidence, Mr Anthony Wing, NSW Point to Point Transport Commissioner, 18 October 2021, p 5.

<sup>73</sup> Media release, NSW Point to Point Transport Commissioner, 'Uber directed to improve its security systems', 12 August 2021.

<sup>74</sup> *Payroll Tax Act 2007* (NSW), ss 6-9.

<sup>75</sup> Submission 34, Revenue NSW, p 1.

- 1.70 Under the PT Act, payments to 'independent contractors' may also be liable to payroll tax even though such contractors are not common law employees.<sup>76</sup> This may occur where there is a relevant contract – that is, a contract, agreement or arrangement under which the contractor provides their services, or the services of other workers, when performing work for the business and none of the exemptions under the Act apply.<sup>77</sup>
- 1.71 According to Revenue NSW, some exemptions may apply to gig economy businesses, depending on the facts of individual cases, including:
- where the workers provided services to the employer for less than 90 days in a financial year
  - where the workers provided their services to at least another employer in that financial year
  - where the workers' services are ancillary to the conveyance of goods by a vehicle provided by the person conveying them.<sup>78</sup>
- 1.72 Issues relating to the enforcement of payroll tax are explored in chapter 6 of this report.

### ***Superannuation***

- 1.73 Across all Australian jurisdictions, 'employers' are required to make compulsory superannuation contributions to their 'employees' nominated fund under the *Superannuation Guarantee (Administration) Act 1992* (Cth) (hereafter the Super Guarantee Act).<sup>79</sup>
- 1.74 The Super Guarantee Act expands the meaning of an 'employee' at common law to include a person who works under a contract that is wholly or principally for the labour of the person.<sup>80</sup>
- 1.75 The Victorian inquiry determined from its evidence that 'it was unclear whether most non-employee platform workers might be eligible for superannuation' under the extended definition of 'employee' in the Super Guarantee Act.<sup>81</sup>

## **Who regulates the gig economy in New South Wales?**

- 1.76 Regulation of the gig economy as a whole is primarily left to the federal jurisdiction. At the same time, in New South Wales, state laws as they relate to platform work (as described above) are regulated by SafeWork NSW, Revenue NSW, the Point to Point Transport Commission and the State Insurance Regulatory Authority (hereafter SIRA). Their roles are set out in more detail in the sections below.

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<sup>76</sup> Submission 34, Revenue NSW, p 1.

<sup>77</sup> Submission 34, Revenue NSW, p 1.

<sup>78</sup> Submission 34, Revenue NSW, p 3.

<sup>79</sup> There are limited exceptions to compulsory payments by employers, for example, when earnings are less than \$450 per month. Employers are required to pay a percentage of an employee's ordinary time earnings. From 1 July 2021- 30 June 2022 this is percentage is set at 10 per cent. (Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 132).

<sup>80</sup> *Superannuation Guarantee (Administration) Act 1992*, s 12(2).

<sup>81</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 134.

### **SafeWork NSW**

- 1.77** SafeWork NSW is the state's WHS regulator. It works with the community to reduce work-related fatalities, serious injuries and illnesses and to facilitate safer business operations. It also provides advice on improving WHS, provides licences and registration for potentially dangerous work, investigates workplace incidents, and enforces WHS laws in New South Wales.<sup>82</sup>

### **Revenue NSW**

- 1.78** Revenue NSW is responsible for the fair and impartial administration of the state's taxation laws, including under the PT Act (see paragraphs 1.68 – 1.72). It also provides information, education and tools for businesses to understand their obligations.
- 1.79** In terms of compliance, Revenue NSW uses data analytics and risk assessment processes to identify taxpayers who may be non-compliant and use specialist analytical software to review taxpayer data obtained from a number of sources. Within the gig economy context, Revenue NSW will consider the 'substance and totality of the relationship' to determine whether a payroll tax liability exists, regardless of whether a business classifies its workers as contractors.<sup>83</sup>
- 1.80** Revenue NSW is also a member a taskforce, alongside the Australian Taxation Office, that looks into tax matters related to gig economy companies. Revenue NSW collaborates with other jurisdictions and shares audit information with other state revenue authorities about businesses that operate in more than one jurisdiction.<sup>84</sup>

### **Point to Point Transport Commission**

- 1.81** The Point to Point Transport Commission is the regulator for the point to point industry, which is any commercial passenger service in a vehicle other than a bus.
- 1.82** The Commission is responsible for authorising service providers, issuing taxi licences, managing compliance and enforcement, and making recommendations for passenger and driver safety in New South Wales. It utilises safety audits, targeted campaigns, on-street compliance, advisory visits, investigations and enforcement to ensure that the point to point transport industry is safe for both drivers and passengers.<sup>85</sup>

### **State Insurance Regulatory Authority**

- 1.83** SIRA is responsible for regulating the state's workers compensation and compulsory third party (CTP) schemes. icare is responsible for the administration of NSW's main workers compensation scheme.

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<sup>82</sup> Submission 27, SafeWork NSW, p 1.

<sup>83</sup> Evidence, Mr Scott Johnston, Deputy Secretary and Chief Commissioner of State Revenue, Revenue NSW, 18 October 2021, p 15.

<sup>84</sup> Evidence, Mr Johnston, 18 October 2021, p 49.

<sup>85</sup> Evidence, Mr Anthony Wing, NSW Point to Point Transport Commissioner, 18 October 2021, p 2.

## Chapter 2      **The nature and impact of on-demand work in New South Wales**

As noted in the previous chapter, our understanding of on-demand work and its impact on the workforce and economy of New South Wales is relatively limited to date. This chapter will explore the impact by first examining the different platforms operating in New South Wales, their entrance into the economy, the current size of their workforce and the average earnings of their workers. Next, it considers the impact that platform work has had on the broader economy, especially during the COVID-19 pandemic, then examines the different perspectives on the benefits and disadvantages of on-demand work for workers. Finally, it introduces calls for increased regulation in the sector, which is examined further in the following chapters of the report.

### **Platforms in New South Wales: how many workers and how much do they earn?**

**2.1**      Due to the varied and evolving business models of platforms it is difficult to accurately capture the size of the gig economy workforce, along with workers' average earnings and number of hours worked. In order to improve transparency regarding the characteristics of platform work and the experience of platform workers, the committee actively sought detailed information from each of the major platforms operating in New South Wales. The following section documents the information that platforms provided to the committee about the size of their respective workforces and workers' earnings over the course of the first stage of the inquiry.<sup>86</sup>

**2.2**      At the committee's request, platforms provided evidence to the committee regarding the number of workers on their platform, their income, hours and platform fees. The following table sets out the information provided, noting that there are complexities attached to the figures which limit their ability to be compared, such as:

- some data is based on the workforce in Australia rather than New South Wales
- whether workers are currently engaged with the platform or have been at some point
- earnings are generally calculated by item of service rather than per hour
- the varied nature of the service performed within the relevant app
- time worked versus time logged onto the app.

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<sup>86</sup> This information was provided by the various platforms to the committee between November 2020 and October 2021 and has not been updated.

**Table 1 Platform workers, their earnings and hours, 2020-2021**

<b>Platform</b>	<b>Number of workers<sup>87</sup></b>	<b>Income as reported by platform</b>	<b>Hours worked/ services performed on the platform</b>	<b>Platform fees/commission</b>
Uber <sup>88</sup>	Approximately 60,000 active driver-partners across Australia	\$21.00 per hour	10 hours per week	Not provided to the committee
Ola <sup>89</sup>	Approximately 24,000 drivers in New South Wales	\$26.00 or \$25.00 per hour	25 per cent work full-time hours, the remainder work part-time	15 per cent commission in New South Wales
Deliveroo <sup>90</sup>	2,500 riders in New South Wales	\$10-11 per delivery	18 hours per week	Not provided to the committee
Hungry Panda <sup>91</sup>	As of 16 March 2021, in NSW, 958 people have provided delivery service to Hungry Panda since 2019	Not provided to the committee	Not provided to the committee	Not provided to the committee
Menulog <sup>92</sup>	28,000 restaurants	\$11-12 per delivery, couriers can safely complete [on average approximately] two deliveries per hour.	Not provided to the committee	Not provided to the committee

<sup>87</sup> Platforms provided a breakdown of how many workers are currently engaged or have been engaged with their platform since commencing operation. Some platforms provided this data based on their workforce in Australia rather than in New South Wales, and in the instance of Menulog the figure of 28,000 restaurant partners was provided instead of the number of delivery partners.

<sup>88</sup> Hourly rate was calculated after app service fees, and other expenses such as GST, fuel, insurance, maintenance and depreciation. See Alphabet, *Flexibility and fairness: What matters to workers in the new economy*, March 2019, p 6.

<sup>89</sup> The figure of 24,000 drivers in New South Wales was calculated from evidence which revealed 80 per cent of 75,000 Ola drivers are located in Australia, of those approximately 40 per cent are located in New South Wales. See Evidence, Mr Simon Smith, Managing Director Australia, Ola, 9 November 2020, p 28).

<sup>90</sup> Evidence, Mr Ed McManus, Chief Executive Officer, Deliveroo, 31 March 2021, pp 2-3; Evidence, Ms Julia Duck, Head of Operations, Strategy and Performance, Deliveroo, 31 March 2021, pp 2-3.

<sup>91</sup> The number of workers includes those people that are not currently actively providing delivery service to HungryPanda. See Answers to questions on notice, Hungry Panda, 25 March 2021, p 1.

<sup>92</sup> Evidence, Mr Morton Belling, Managing Director, Menulog, 17 May 2021, p 3; Answers to questions on notice, Menulog, 16 June 2021, p 3.

Doordash <sup>93</sup>	10,000 drivers in New South Wales	\$32 per hour when on delivery in NSW	Dashers work on average less than three hours per week	Not provided to the committee
EASI <sup>94</sup>	5,000 delivery users in New South Wales, on a daily basis 300 to 500 delivery users will be active online	\$8 to \$9 per order and they normally could complete about four to five orders within one hour generally <sup>95</sup>	Not provided to the committee	10 per cent commission charged to riders
Mable <sup>96</sup>	11,000 small business providers who have gone through an onboarding and approval process	Minimum rate of \$25 per hour, average rate for Personal Care Monday to Friday is almost \$38.50 and for Social Support and Domestic Assistance it is around \$37.50	Not provided to the committee	5 per cent consumer platform fee and a 10 per cent worker platform fee
Hireup <sup>97</sup>	6,000 support workers actively engaged in working support shifts	Not provided to the committee	Not provided to the committee	Not provided to the committee
Airtasker <sup>98</sup>	As at 10 May 2021, more than 51,000 unique Taskers have closed a task in NSW	In 2021, the average price per task was \$189. As at 10 May 2021, for more than 31,000 unique active	70 per cent of Taskers do less than five completed jobs per month	Around 17 per cent commission of the job rate.

<sup>93</sup> Submission 52, Doordash, p 2; Evidence, Ms Rebecca Burrows, General Manager, DoorDash Australia, 10 September 2021, p 2.

<sup>94</sup> Evidence, Ms Kitty Lu, Compliance and Public Relations Manager, EASI, 10 September 2021, pp 10-11.

<sup>95</sup> EASI adopts a smart algorithm system which allows delivery users to complete two to three pick-ups and drop-offs at the same route at once.

<sup>96</sup> Mable stated that in regards to the average numbers of hours worked, the platform enables service providers to work anywhere between 40 hours a week or as little as 5, 10 or 15 hours per week dependent on the service providers personal preferences and circumstances. See Submission 50, Mable, pp 7, 8 and 11; Evidence, Mr Peter Scutt, Co-founder and Chief Executive Officer, Mable, 10 September 2021, p 20.

<sup>97</sup> Submission 53, Hireup, p. 6.

<sup>98</sup> Answers to questions on notice, Airtasker, 12 May 2021, pp 1-2; Evidence, Mr Tim Fung, Co-Founder and Chief Executive Officer, Airtasker, 30 March 2021, p 21.

		Taskers (over the past 12 months) 89.4 per cent earned less than \$5,000		
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- 2.3** Other inquiry participants disputed the accuracy of certain platform's claims.<sup>99</sup>
- 2.4** Gig economy platforms participating in the inquiry also shared information on their entrance into the New South Wales market, documented in their submissions and oral evidence. Noteworthy examples include Uber, which commenced operating in Australia in 2012 and has expanded across Sydney and to regional communities such as Newcastle, Wagga Wagga, Wollongong and Byron Bay.<sup>100</sup> On a larger scale, Menulog commenced its Australian operations in 2006 and has since evolved into an app based food delivery business that now covers most of New South Wales, and approximately 80 per cent of the Australian population.<sup>101</sup>

## Economic impact

- 2.5** The committee received evidence about the impact of on-demand work on the New South Wales economy, with multiple inquiry participants noting that it has added economic value, particularly in the context of the ongoing COVID-19 pandemic.
- 2.6** Industry groups, including Business NSW and the Australian Industry Group (hereafter Ai Group), observed that the economic value of the gig economy was 'underappreciated'. These organisations suggested that platform businesses have derived many economic benefits to the community, including the creation of jobs, increasing participation levels in the workforce and reducing barriers to workforce entry.<sup>102</sup>
- 2.7** For example, Business NSW's Chief Economist, Mr Mark Frost, explained that digital platforms and their technologies are 'unlocking' and 'enabling' new economic capacity that may not have existed before. Mr Frost used the example of Uber Pool (where people are matched with other users heading in a similar direction, reducing the total price of the trip) and argued that without Uber's technological innovation, it was 'very hard to think' of how any business model could have safely and efficiently delivered such a service.<sup>103</sup>
- 2.8** Similarly, platforms gave evidence to the committee about how their technology and innovation has created new ways of working, and in turn, generated economic benefit for New South Wales. For example, the Managing Director of Ola Australia, Mr Simon Smith, noted that rideshare and other forms of on-demand work have made significant contributions to the New South

<sup>99</sup> See for example Submission 30, Transport Workers Union, pp 18-21; Submission 28, Unions NSW, p 33; Evidence, Mr Fang Sun, HungryPanda Deliver Rider, 23 February 2021, p 3; Evidence, Mr Jun Yang, HungryPanda Delivery Rider, 23 February 2021, p 3.

<sup>100</sup> Submission 13, Uber, p 5.

<sup>101</sup> Evidence, Mr Belling, 17 May 2021, p 3.

<sup>102</sup> Submission 7, Business NSW, p 1; Attachment to Submission 36, Australian Industry Group, pp 5 and 7.

<sup>103</sup> Evidence, Mr Mark Frost, Chief Economist, Business NSW, 9 November 2020, p 63.

Wales economy and given people work options that may otherwise not have been forthcoming.<sup>104</sup>

- 2.9** Airtasker's Co-founder and Chief Executive Officer, Mr Tim Fung, went as far to say that Airtasker's 'core purpose' is to create jobs, including those that previously did not exist. Mr Fung explained to the committee that Airtasker allows people to get paid for skills that would not have traditionally earned them a wage, such as removing spiders from ceiling fans or writing poems for someone else's spouse:

I would say it is taking existing skills which are currently dormant. A lot of people have existing skills but they are currently not using those skills or do not have a channel to be able to realise value from their skills.

By reducing friction Airtasker is taking existing skills and creating an outlet for them through our marketplace.<sup>105</sup>

- 2.10** Mr Fung also commented that the platform allows people to reinvent their careers, citing examples of workers in the airline industry who were furloughed during the COVID-19 pandemic. Through the Airtasker platform, Mr Fung suggested, these workers are now able to capitalise on other skillsets and work as videographers or other types of freelancers.<sup>106</sup>
- 2.11** Ola Australia also suggested that the gig economy will continue to aid economic recovery following the present recession as it gives businesses the flexibility and ability to bring in talent for specific tasks, to surge for projects and to access new skills as the situation requires.<sup>107</sup>

### **COVID-19 and the gig economy**

- 2.12** As noted in the previous chapter, the COVID-19 pandemic drastically impacted the economy and employment in Australia. As one aspect of this, a number of inquiry participants highlighted that certain parts of the gig economy had also added significant value to the New South Wales economy during the COVID-19 pandemic and associated lockdowns in 2020 and 2021. For example, numerous stakeholders noted that insecure forms of work became more prevalent throughout this period and many individuals turned to work in the gig economy, as unemployment rates rose and consumer demand changed for particular industries.<sup>108</sup>
- 2.13** Industry bodies including Business NSW and the Ai Group highlighted that platform businesses had played a 'critical role' supplementing the availability of work options for people who had lost their jobs and had also been a 'lifesaver' for businesses in the restaurant industry.<sup>109</sup>

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<sup>104</sup> Evidence, Mr Smith, 9 November 2020, p 27.

<sup>105</sup> Evidence, Mr Fung, 30 March 2021, p 22.

<sup>106</sup> Evidence, Mr Fung, 30 March 2021, p 18; Submission 47, Airtasker, p 11.

<sup>107</sup> Submission 20, Ola Australia, p 17.

<sup>108</sup> See for example Submission 37, Shop, Distributive and Allied Employee's Association (NSW Branch), Appendix A, p. 26; Submission 20, Ola Australia, p 5 and 18; Submission 36, The Australian Industry Group, p. 4; Submission 46, Woolworths Group Ltd, p. 3; Evidence, Mr Wes Lambert, Chief Executive Officer, Restaurant and Catering Industry Association, 23 February 2021, p. 7.

<sup>109</sup> Attachment to Submission 36, Ai Group, p 5; Evidence, Mr Frost, 9 November 2020, pp 64-65.

**2.14** The Chief Economist of Business NSW, Mr Mark Frost, explained to the committee that the gig economy had also allowed restaurant businesses to 'pivot' to takeaway and continue operating:

It has put an option on the table for businesses looking to pivot, whether temporarily or permanently, it has put new opportunities on the table that did not exist prior to—well, you could just imagine a world where we did not have these platforms, they would not have any source of income, many businesses.<sup>110</sup>

**2.15** Mr Frost observed that whilst restaurants have delivered food to homes for many years, the explosion in demand for food delivery services during COVID has created a new market, demonstrated in the popularity of the relevant platforms, which has been 'very beneficial' to the economy and community.<sup>111</sup>

**2.16** Consistent with this, food delivery platforms such as Deliveroo and Uber stated that the flexible work their platforms offered had acted as a 'lifeline' to many, and the pandemic demonstrated how 'vital' the on-demand sector is as a source of work for both workers and restaurants.<sup>112</sup> Deliveroo noted that food delivery platforms had driven revenue in the restaurant sector and made a significant contribution to Australia's economic recovery.<sup>113</sup>

**2.17** In one of the reports it commissioned, Deliveroo recorded that during the first national lockdown in March 2020, thousands of restaurants pivoted from dining in to offering takeaway and delivery for the very first time. The report also found that, of the New South Wales restaurants that introduced new revenue streams, 90 per cent said they would continue with some or all into the future, with home delivery through a third party (54 per cent) and takeaway (53 per cent) the most popular.<sup>114</sup>

**2.18** Deliveroo further told the committee that within two months of the first national lockdown in 2020, the company experienced a significant increase of 2,100 new restaurant partners joining the platform nationally. Deliveroo also received a surge of applications from people who wanted to become riders during the COVID-19 crisis, with hundreds of riders onboarded nationally between April and August 2020.<sup>115</sup>

**2.19** On the other hand, rideshare platforms like Ola reported a reduction of up to 75 per cent of trips on their platform during the peak periods of lockdown.<sup>116</sup>

**2.20** Airtasker reported that during the COVID-19 lockdowns, their platform had seen a 'change in the dynamics of what customers were requesting' and service providers began offering their services in new and innovative ways, including remotely. Mr Fung told the committee that whilst listings for tasks like domestic cleaning and home removals dropped by 50 per cent, requests

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<sup>110</sup> Evidence, Mr Frost, 9 November 2020, p 65.

<sup>111</sup> Evidence, Mr Frost, NSW, 9 November 2020, pp 64-65.

<sup>112</sup> Submission 13, Uber, pp 5-6; Submission 10, Deliveroo, pp 1-2.

<sup>113</sup> Submission 10, Deliveroo, pp 1-2.

<sup>114</sup> Submission 10, Deliveroo, pp 3-4.

<sup>115</sup> Submission 10, Deliveroo, p 5.

<sup>116</sup> Submission 20, Ola Australia, p 15.

for bicycle repairs increased significantly by 160 per cent. Other increases included home office IT support and online fitness training.<sup>117</sup>

- 2.21** Mr Fung explained that the Airtasker platform was able to adapt to the lockdown situation very quickly and stated, "The result of that is that our marketplace in 2020 grew rapidly point to point, despite having a revenue impact during specific lockdowns."<sup>118</sup>
- 2.22** Ola Australia also noted that the gig economy will play an ongoing role in helping to 'arrest the unemployment crisis and economic recovery following COVID-19'.<sup>119</sup>

## Flexibility, choice and control

- 2.23** The committee heard from platform companies who espoused the benefits of on-demand work compared to more traditional forms of work, in terms of flexibility, independence, financial freedom and choice. In contrast, gig workers, unions and academics argued that these benefits are limited by the fact that platforms have a high degree of control over its workers. These perspectives are explored below.
- 2.24** Whilst each platform operates under its own unique model with various benefits and conditions, a widely held view among platforms is that their business provides workers with the following key benefits:
- flexibility to choose when, how and how many hours they will work<sup>120</sup>
  - supplementary income<sup>121</sup>
  - easier access to paid work<sup>122</sup>
  - opportunity to run their own business and grow their skills.<sup>123</sup>
- 2.25** Platforms provided data to the committee from surveys they commissioned of their workers to support these views. For example, Uber reported that 'four in ten [of its] driver partners were using the Uber ridesharing platform to earn supplemental income on top of their full-time or part-time jobs'.<sup>124</sup> Mable stated that for 87 per cent of its workers the most important factor for engaging with the platform was the ability to choose the hours they work so that their work fits in with other responsibilities and commitments.<sup>125</sup>

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<sup>117</sup> Evidence, Mr Fung, 30 March 2021, p 29.

<sup>118</sup> Evidence, Mr Fung, 30 March 2021, p 29.

<sup>119</sup> Submission 20, Ola Australia, p 18.

<sup>120</sup> Submission 20, Ola Australia, p 13; Submission 13, Uber, p 10; Submission 10, Deliveroo, pp 5-6; Submission 52, Doordash, pp 1-2; Submission 47, Airtasker, p 9.

<sup>121</sup> Submission 20, Ola Australia, p 13; Submission 13, Uber, p 11; Submission 10, Deliveroo, pp 5-6; Submission 52, Doordash, pp 1-2; Submission 47, Airtasker, p 9.

<sup>122</sup> Submission 20, Ola Australia, p 13; Submission 13, Uber, p 11; Submission 47, Airtasker, p 9

<sup>123</sup> Submission 50, Mable, p 10; Submission 47, Airtasker, p 9.

<sup>124</sup> Submission 13, Uber, p 11.

<sup>125</sup> Submission 50, Mable, p 10.

- 2.26** Airtasker, a platform for ad hoc services, told the committee that in addition to key benefits such as supplementing income and flexibility, the platform provides working opportunities to people that have unique skills that are difficult to monetise through traditional supply-led channels.<sup>126</sup>
- 2.27** With regard to flexibility, Airtasker advised that survey results indicate that significantly more people are looking for flexible job hours over predictability of work.<sup>127</sup>
- 2.28** Also emphasising flexibility, Mr Peter Scutt, Co-Founder and Chief Executive of the aged care and disability services platform Mable, advised the committee that it is 'all about choice' for the service provider, that is, the individual worker, as 'we are also enabling people choosing to engage in a different way to come into the sector'.<sup>128</sup>
- 2.29** The Australian Industry Group argued that platform work provides additional avenues for workers to earn an income, alleviating the adverse effects associated with unemployment such as social isolation, poorer mental health and reduced confidence. In regards to flexibility, they asserted that this type of work appeals to individuals that would like to be in the workforce but struggle with the lack of flexibility offered in more traditional forms of employment, for example, students, who need to meet their other personal commitments.<sup>129</sup>
- 2.30** The gig economy workers who spoke directly with the committee acknowledged that there was some level of flexibility with platform work in the rideshare and food delivery sector, however they said that flexibility was conditional.
- 2.31** For example, Mr Malcolm Mackenzie, a rideshare driver, told the committee that from his perspective there is flexibility to choose when to work and the jobs you accept however if you want to earn an income you have to 'work the peaks ... you are drawn into working for those peaks by the offer of surge pricing, quest bonuses, where a series of three jobs have to be performed in a row in order to get a bonus'. The bonuses received then contribute to a benefit scheme where drivers are given more information about the job request, including where the customer wants to travel to. In addition, other metrics are collected, including the driver's cancellation rate, star rating and acceptance rate. Mr Mackenzie argued that a combination of these metrics on the platform results in drivers being 'performance managed', and concluded that the work is 'not a truly flexible arrangement'.<sup>130</sup>
- 2.32** Unions and academics agreed that platforms exercise a level of control that compromises their promise of flexibility, independence and choice, especially for platforms which rely on algorithmic systems to manage the performance, allocation and execution of work. Academics, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen told the committee that their research had found that algorithmic systems within platforms result in workers having limited ability to influence the amount of work allocated to them. The algorithms inhibit

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<sup>126</sup> Submission 47, Airtasker, p 9.

<sup>127</sup> Australian representative research indicates that the most important thing people are looking for in a job is flexibility of hours (37.4 per cent responded that this was the most important thing). Flexibility of hours was deemed to be significantly more important than the predictability of work (7.5%). See Submission 47, Airtasker, p 9.

<sup>128</sup> Evidence, Mr Scutt, p 25.

<sup>129</sup> Submission 36, The Australian Industry Group, pp 1-2.

<sup>130</sup> Evidence, Mr Malcolm Mackenzie, Rideshare Driver, 9 November 2020, p 6.

workers' discretion to reject tasks uneconomic or unfavourable to them and lead to uncertainty in the earnings that a worker will take home, increasing precariousness in their work and broader life.<sup>131</sup> The need for better dispute resolution in the context of the high level of algorithmic control over workers is explored in chapter 4.

- 2.33** Beyond the algorithmic systems, the Transport Workers' Union (TWU) asserted that within the rideshare and food delivery sector, work arrangements are characterised by a lack of flexibility, a high degree of employer control and significant worker dependency as the workers 'do not have an ability to set their own prices, develop their own clientele, develop a brand, invest significantly in their business or have any influence over the terms of their engagement or contract'.<sup>132</sup>

### **Lack of minimum worker entitlements**

- 2.34** The committee received evidence from unions, academics and gig economy workers united in their view that a significant disadvantage of on-demand work is the lack of worker entitlements, such as to minimum pay, minimum working hours, paid leave and superannuation.

- 2.35** Unlike employees, gig economy workers do not have the same access to a basic suite of minimum entitlements because they are often classified as 'independent contractors' in their contracts with platforms.<sup>133</sup> In particular, Mr Hugh McMaster, Secretary and Treasurer of the Australian Road Transport Industrial Organisation, New South Wales Branch, told the committee:

[G]ig workers in the transport industry are not covered by our industrial laws ... in road transport it is clear that market power rests with companies like Uber, Deliveroo and Ola, not gig workers. This means gig workers universally are not entitled to a minimum wage or other protections, cannot collectively bargain, have no paid leave, minimum hours, superannuation, protection from unfair dismissal, recourse to a dispute settlement mechanism or effective insurance protection.<sup>134</sup>

- 2.36** In evidence to the committee, gig economy workers in the rideshare and food delivery sector confirmed they do not receive a minimum wage or hours, paid leave entitlements or superannuation contributions due to their work status as independent contractors.<sup>135</sup>

- 2.37** Mr Costa of Unions NSW stated that the current legislation, which permits platforms not to pay minimum wages or provide compensation, undermines the community standard and expectation that all workers deserve certain entitlements and conditions. In doing so, he

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<sup>131</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 3.

<sup>132</sup> Submission 30, Transport Workers' Union, p 28.

<sup>133</sup> See for example, Evidence, Mr Hugh McMaster, Secretary and Treasurer, Australian Road Transport Industrial Organisation New South Wales Branch, 16 November 2020, p 2; Evidence, Mr Richard Olsen, Secretary, NSW Branch, Transport Workers' Union, 16 November 2020, p 12; Evidence, Dr Alex Veen, Lecturer (Academic Fellow), University of Sydney Business School, 30 March 2021, p 73; Evidence, Mr Diego Franco, Food Delivery Worker, 9 November 2020, p. 7.

<sup>134</sup> Evidence, Mr McMaster, 16 November 2020, p 2.

<sup>135</sup> Evidence, Mr Esteban Salazar, Food Delivery Worker, 9 November 2020, p. 7; Evidence, Mr Diego Franco, 9 November 2020, p. 7; Evidence, Mr Mackenzie, 9 November 2020, p. 7.

highlighted that ultimately this can lead to situations of extreme risk for individual workers, with no safety net:

What has happened is that there are some employers or platforms ... that now use the independent contracting definition as a way to employ people below that community standard and that leads to situations, at the very worst, where people are injured or killed without compensation because they do not provide those benefits, and at the bare minimum they just do not pay minimum wages.<sup>136</sup>

**2.38** Almost unanimously, platforms expressed the contrasting view that their independent contractor model would be compromised if minimum entitlements, including minimum pay or working hours, were enforced.<sup>137</sup> Mr Ed McManus, Chief Executive Officer of Deliveroo, went so far as to emphasise that his company's riders want to maintain the flexibility of the independent contractor model and do not want to be employees:

When we talk to riders about what they want—you describe a situation that is our model today, which is an independent contractor or an employee model. The employee model would mean riders can only work for Deliveroo, you have to work shifts and there is a minimum wage. What they tell us is, 'We want to work for multiple platforms, we want to choose for whom we work and we see minimum wage as maximum wage so we do not want to be employees. We want to be contractors.'<sup>138</sup>

**2.39** Platforms acknowledged however that they would be open to consider some entitlements if this did not undermine the benefits of the current independent contractor model. Mr McManus agreed that whilst it would 'seem fair' for somebody who spends a lot of time completing deliveries for Deliveroo to be entitled to sick leave if they became ill, he was concerned that the provision of sick leave would consequently form part of the work status test to determine whether the worker was an employee or an independent contractor.<sup>139</sup>

**2.40** In the same vein, gig economy platforms such as Uber and Deliveroo expressed hesitation in taking specific action such as the provision of safety protections and entitlements, if it would result in the reclassification of their workers from independent workers to employees. Specifically, Uber pointed to discussions of this issue in the recent report of the Victorian inquiry and stressed that 'providing additional benefits to independent workers is not something contemplated by the existing employment regimes and could create the risk of having partners lose their independent status'.<sup>140</sup>

**2.41** Uber Eats explained that its business model was markedly different to a traditional employment model as it did not pay riders for the time they spent waiting between deliveries, and riders could work for multiple platforms at once. Its General Manager, Mr Matthew Denman, emphasised that any entitlements would need to be considered in the context of these differences:

So in that way you might be able to extend benefits, but it would look different to a normal employment model with an hourly minimum wage, and so that is why I think what we are really clear on is this is a different type of work.

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<sup>136</sup> Evidence, Mr Thomas Costa, Assistant Secretary, Unions NSW, 9 November 2020, p 17.

<sup>137</sup> See for example, Evidence, Mr Matthew Denman, General Manager, Uber Eats, 19 April 2021, p 43.

<sup>138</sup> Evidence, Mr McManus, 30 March 2021, p 5.

<sup>139</sup> Evidence, Mr McManus, 30 March 2021, p 5.

<sup>140</sup> Submission 13, Uber, p 15.

That does not mean that we cannot improve the quality of the work and improve the benefits, but we ought to start from the premise that it is different and therefore the way we go about extending those benefits will need to be different.<sup>141</sup>

- 2.42** Mr Denman noted to the committee that the company was having this discussion around the world, and is 'very keen' to do so in Australia too.<sup>142</sup>

## The need for regulatory intervention

- 2.43** As discussed at paragraphs 2.23 – 2.33 above, some inquiry participants advocated that flexibility, independence, and choice are clear benefits for people who work in the gig economy, however it is also clear that these benefits can be a double edged sword and that there are some serious disadvantages to this type of work. Some of the costs to workers highlighted by stakeholders include the absence of guaranteed minimum wages and working hours and of leave provisions, poor safety standards and the lack of a security net in the event of workplace injury (see paragraphs 2.34 – 2.42).
- 2.44** Whatever the benefits to individual workers and the economy, multiple inquiry participants advocated to the committee that regardless of their formal work status (see chapter 3), all workers in Australia should be entitled to certain minimum protections, based on principles of fairness and justice, which are considered fundamental to Australian labour standards.<sup>143</sup> Throughout the inquiry, the committee received evidence pointing to a need for urgent regulatory intervention to ensure that gig workers do not fall below acceptable community standards for wages, conditions and safety.
- 2.45** On the basis of their research into application-based gig work over the past four years, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen argued that regulatory intervention into the gig economy is necessary as market forces cannot be relied on to bring about meaningful change for workers.
- 2.46** The academics explained that consumers are pivotal to the existence and functioning of such platforms because consumers generate work opportunities through their demand. Dr Barratt and colleagues also noted that consumers act as 'co-managers' of gig workers through the system of performance ratings (for example, giving a five star rating to a food delivery rider).<sup>144</sup> Their survey of 737 consumers found that whilst approximately two-thirds of Australian consumers are willing to pay more for services to improve gig workers' wages and conditions, the quantum

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<sup>141</sup> Evidence, Mr Denman, 19 April 2021, p 43. See also Evidence, Emeritus Professor David Peetz, Department of Employment Relations and Human Resources, Griffith University, 30 March 2021, p 73.

<sup>142</sup> Evidence, Mr Denman, 19 April 2021, p 43.

<sup>143</sup> Evidence, Professor Rae Cooper, Professor of Gender, Work and Employment Relations, University of Sydney – Australian Women's Working Futures, 19 April 2021, p 59; Evidence, Dr Penny Williams, Senior Lecturer, School of Management, Queensland University of Technology, 19 April 2021, p 59; Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 7; Submission 40, Australian Institute of Employment Rights, pp 4-5; Evidence, Professor Daryll Hull, Executive Chair, Transport Education Audit Compliance Health Organisation (TEACHO), 30 March 2021, p 74. See also Submission 28, Unions NSW, p 17.

<sup>144</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 4.

of money they indicated (even if passed on in full to the worker) was insufficient to meet the basic conditions and wages associated with employee status in Australia.<sup>145</sup> The academics concluded:

... the findings raise serious questions about relying upon consumers or market forces to improve working conditions in line with remuneration or entitlements that have traditionally been guaranteed by employment. As such, this would suggest that if consumers are left to regulate this space this will have a significant impact on the NSW (and Australian) labour market. Hence it can be concluded that there is a role to be played by Australian regulators to uphold minimum work standards and conditions.<sup>146</sup>

**2.47** Similarly, the Australian Institute of Employment Rights warned that if market forces dictate pay, in the absence of minimum standards, pay will be subject to a 'race to the bottom'.<sup>147</sup>

## Committee comment

**2.48** In the past five to ten years significant advances in technology have enabled the emergence of the gig economy, and with it have brought international debate as to its nature, extent and impact on the broader economy and labour markets. This has led to, in some circumstances, policy changes to ensure workers in the gig economy are better protected in the workplace. The committee notes the legislative reforms and court decisions in both the United States and the United Kingdom, which we consider steps in the right direction to providing gig workers with decent working conditions, leave and pay. Additionally, the work of both the Senate and Victorian inquiries have been particularly insightful regarding the Australian context, and we are encouraged to see the Victorian Government support that inquiry's 20 recommendations and subsequently draft 28 minimum standards that ensure 'fair and decent' conditions and entitlements for on-demand workers.

**2.49** As this inquiry is the first to examine the gig economy in New South Wales, the committee considers that it is an important step towards achieving legislative reform so that gig workers in this state are adequately protected at work, consistent with fundamental and longstanding principles of fairness and justice. However, the progress that other states and comparable nations have already made brings the committee to find that New South Wales is falling behind in developing laws that establish decent work in the gig economy.

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### Finding 1

That New South Wales is falling behind other states and comparable nations in developing laws that establish decent work in the gig economy.

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**2.50** The committee notes that currently the NSW Government does not collect data relating to the size of the gig economy workforce in New South Wales. We therefore acknowledge inquiry participants who provided insight into the extent of this workforce, as well as various data relating to workers' income and hours. Our own effort to collect and patch together workforce

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<sup>145</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 4.

<sup>146</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 4.

<sup>147</sup> Submission 40, Australian Institute of Employment Rights, p 5.

information has highlighted to the committee that there is a need for a reliable and ongoing collection of relevant labour statistics to fully comprehend the needs of workers and the issues facing the gig economy. We revisit this issue in chapters 4 and 8.

- 2.51** Examining the benefits of on-demand work, it is clear to the committee that it has added value to the NSW economy, especially during the COVID-19 pandemic. The committee acknowledges the evidence that platform work played an important role in sustaining the livelihoods of workers and businesses impacted by the pandemic and its various lockdowns.
- 2.52** Similarly, the committee notes the views of platforms and industry groups that gig work offers certain benefits often not found in traditional employment, such as flexibility, independence, and choice. Nevertheless, the committee cannot ignore the first-hand experiences of workers in the gig economy whom we spoke with, and agrees that these benefits are compromised greatly in instances where a platform is able to set workers' terms and conditions of employment, limit workers' ability to set their own fees, and control through algorithmic systems and incentive programs workers' ability to earn a decent income or to actually exercise choice over their work. These first hand experiences were matched with the systemic observations of both researchers and unions. The evidence before the committee is that the disbenefits of platform work predominately occur in the rideshare and food delivery sectors.
- 2.53** It was also readily apparent to the committee that whilst there is a community expectation that all workers should have access to certain minimum entitlements and protections, this is not a reality for most gig workers. Most are left without basic worker entitlements, such as access to a minimum wage, minimum working hours, paid leave and compensation. It is clear to the committee that this is due to their classification as 'independent contractors', other workplace laws not being fit for purpose in the gig economy, and the fact that platform companies operating in Australia hold significant market power.
- 2.54** As a result, we have observed that gig workers are left significantly disadvantaged in regards to basic worker entitlements, and indeed that some are encouraged to take health and safety risks to support themselves and their families. Again, this offends against fundamental principles of fairness and justice. It is the committee's view that these factors contribute to inequality in New South Wales, and as such the committee finds that the failure to provide gig workers with a minimum wage, paid leave and other basic workplace entitlements is increasing inequality in New South Wales.

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### **Finding 2**

That the failure to provide gig workers with a minimum wage, paid leave and other basic workplace entitlements is increasing inequality in New South Wales.

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- 2.55** Consistent with these findings, the committee also accepts stakeholders' calls for regulatory intervention on numerous fronts. The following chapters of this report address specific reforms to the current legislative and regulatory frameworks to better protect gig workers in New South Wales.



## Chapter 3 Work status test

A gig worker's classification as either an employee or an independent contractor, as decided by the work status test, determines their minimum workplace entitlements. Many inquiry participants highlighted this test as the key factor which affects a gig workers' susceptibility to exploitation.

This chapter begins by exploring the current legislative framework around work status and the associated common law decisions. The chapter then considers the key issues related to the work status test, including discussion about codifying worker status in legislation and whether platforms are correctly classifying their workers as independent contractors. The chapter also includes a case study of Menulog's operations as it adopts a trial that treats its workers as legal 'employees'.

The crossover between Commonwealth and state legislation is examined in more detail, with consideration given to how the Commonwealth Government is regulating platform work. As New South Wales has the greatest number of gig workers, it is the state most affected by the Commonwealth's actions or inaction. Given the absence of a Commonwealth-led initiative, the chapter then considers what options are available to the NSW Government for reform to better protect platform workers in this state.

### Current legislative framework

- 3.1 As detailed in chapter 1, the legal work status of a gig economy worker can be categorised as either an employee under the *Fair Work Act 2009* (Cth) or an 'independent contractor' subject to the provisions of the *Independent Contractors Act 2006* (Cth).
- 3.2 The multi-factor test set out in the High Court decision in *Hollis v Vabu*<sup>148</sup> is used in common law to determine whether a worker is an employee or independent contractor (see paragraph 1.45 for which factors are considered). The Department of Premier and Cabinet – Employee Relations explained to the committee that as the nature of on-demand work is broad and encompasses a large range of tasks, each individual case needs to be considered on its relevant facts, and a particular finding in one case may or may not be relevant to another.<sup>149</sup>
- 3.3 The committee heard that most gig workers, particularly those in food delivery or rideshare, are classified as independent contractors and thus do not have the same minimum workplace protections afforded to employees under the *Fair Work Act 2009*, including minimum wages, working hours, leave provisions and other protective conditions of employment.<sup>150</sup> The status of independent contractors was thus a fundamental area of discussion in this inquiry.

#### Common law decisions – Fair Work Commission rulings

- 3.4 The Fair Work Commission's rulings to date have mostly classified on-demand workers as independent contractors. The Transport Education Audit Compliance Health Organisation (hereafter TEACHO) explained that in making its determinations, the Fair Work Commission (hereafter the Commission) has to consider the specific terms of the relevant worker's contract

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<sup>148</sup> *Hollis v Vabu Pty Ltd* [2001] HCA 4.

<sup>149</sup> Submission 26, Department of Premier and Cabinet – Employee Relations, p 3.

<sup>150</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 10.

of engagement because a worker's status is determined by their particular contract with the platform, as manifested not only in the written terms, but in the practices adopted by the parties in performing the arrangement.<sup>151</sup>

- 3.5** The Commission has made seven rulings to date relating to platform work arrangements, involving five former Uber rideshare or delivery drivers, one former Foodora delivery rider and one former Deliveroo delivery rider. In each case, the applicant sought a determination that they were employees in a contract of service with the platform.
- 3.6** The Commission found in each of the five Uber cases that the applicants were independent contractors, rather than employees.<sup>152</sup> As discussed in chapter 1, one of the drivers then appealed to the Federal Court. However the Court did not make a judgement, after the parties agreed to a settlement which resulted in Uber paying the driver \$400,000.<sup>153</sup>
- 3.7** Separately in 2019, the Fair Work Ombudsman<sup>154</sup> conducted an investigation into Uber's arrangements with its drivers and found that the parties were not in an employment relationship, and thus the Fair Work Ombudsman would not take compliance action in relation to Uber's arrangements with its drivers.<sup>155</sup>
- 3.8** In the Foodora case, the Commission found that the applicant was an employee and that he had been unfairly dismissed by Foodora.<sup>156</sup> Foodora then shut down its Australian operations.
- 3.9** In the seventh and most recent case, Mr Diego Franco, a motorbike delivery driver, argued that he had been unfairly dismissed by Deliveroo. The Commission found Mr Franco to be an employee under the *Fair Work Act 2009*, not an independent contractor. The Commission made its decision based on the significant level of control that Deliveroo had over Mr Franco, considering it to be a strong factor indicating the existence of an employment relationship.<sup>157</sup> Deliveroo is currently appealing the decision.

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<sup>151</sup> Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 10.

<sup>152</sup> *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; *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* [2019] FWC 5008; *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFCB 1698.

<sup>153</sup> David Marin-Guzman, 'Uber paid 'incredible' amount to avoid landmark judgement', *Financial Review*, 10 June 2021.

<sup>154</sup> The Fair Work Ombudsman is separate to the Fair Work Commission. They both regulate the Australian workplace relations system but have different roles. The Fair Work Ombudsman enforces compliance with the *Fair Work Act 2009* and relevant legislation, and provides advice, education and assistance on pay rates and workplace rights and obligations. In contrast, the Fair Work Commission is the independent national workplace relations tribunal, including being responsible for maintaining a safety net of minimum wages and employment conditions. See for more information: <https://www.fairwork.gov.au/about-us/our-role-and-purpose/fair-work-commission-how-were-different>.

<sup>155</sup> Submission 26, Department of Premier and Cabinet – Employee Relations, p 4.

<sup>156</sup> *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

<sup>157</sup> *Diego Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818.

- 3.10** Mr Franco appeared before the inquiry as a witness. He gave the committee evidence on his dismissal and the impact it had on his family:

Deliveroo was my main source of income, pretty much since I have arrived here in Australia in December 2016. So [my dismissal] affects me a lot, myself and my family because at this time we have a small baby. Mainly my wife has to take care of the baby and I am pretty much the only provider for the family.<sup>158</sup>

- 3.11** Noting these outcomes, the Department of Premier and Cabinet – Employee Relations advised in its submission to the inquiry that, 'Gig economy work arrangements are considered to not be employee-employer arrangements, but to instead involve a principal-contractor arrangement, with individual workers having the status of independent workers.'<sup>159</sup>

## Key issues

- 3.12** Multiple stakeholders, particularly unions, highlighted to the committee that the current legislative framework was not designed to accommodate the types of working relationships found in the gig economy. They argued that the impact of technological change on traditional employer-employee relationships and the emergence of an algorithmic management system had not been envisaged at the time the Fair Work legislation was drafted.<sup>160</sup> The Assistant Secretary of Unions NSW, Mr Thomas Costa, highlighted the massive technological, economic and social changes that have taken place so rapidly in the world of work, which have challenged widely accepted standards in workers' entitlements:

When we adopted these definitions of 'independent contractor', an employee had not seen the iPhone. There was no understanding of where technology was going to take us. The minimum expectation among the community was that people would get paid a minimum wage, they would have decent work health and safety protections, and workers compensation to an adequate level.<sup>161</sup>

- 3.13** Two particular issues emerged in the discussion about the work status test: whether work status should be codified in legislation to provide workers with minimum entitlements; and whether platforms are intentionally classifying their workers as independent contractors to avoid their legal obligations.

### The need to codify work status in legislation

- 3.14** A number of inquiry participants suggested that the reliance on common law cases to determine the work status of gig economy workers causes confusion. In order to alleviate this, some

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<sup>158</sup> Evidence, Mr Diego Franco, Food Delivery Worker, 9 November 2020, p 4.

<sup>159</sup> Submission 26, Department of Premier and Cabinet – Employee Relations, p 3.

<sup>160</sup> See for example, Submission 30, Transport Workers' Union, p 72; Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 8; Submission 28, Unions NSW, p 24; Submission 22, Restaurant & Catering Industry Association, p 3; Submission 23a, Australian Workers Union, pp 4-5; Submission 25, State Insurance Regulatory Authority (SIRA), p 4.

<sup>161</sup> Evidence, Mr Thomas Costa, Assistant Secretary, Unions NSW, 9 November 2020, p 17.

stakeholders recommended that the work status of gig economy workers be clarified and codified, including by establishing a statutory definition of 'worker'.<sup>162</sup>

- 3.15** Other stakeholders including TEACHO and the Restaurant and Catering Industry Association questioned the effectiveness and accessibility of the work status test. They also warned that the high thresholds enabling classification as an employee under the multi-factor test suggest that Fair Work Commission decisions are unlikely to change in the future.<sup>163</sup>
- 3.16** The Victorian report into the on-demand workforce also noted that without some form of regulatory assistance or intervention, a worker often has little choice but to accept their 'presumed' work status as independent contractor.<sup>164</sup> The report highlighted the power imbalance between companies and workers, stating that the current framework could be 'ripe for exploitation by those who have access to lawyers and advisers to structure their arrangement and minimise their compliance costs.'<sup>165</sup>
- 3.17** Conversely, other participants defended the utility of the existing framework. Ola Australia described the current legislation as 'fit for purpose'<sup>166</sup> while the majority of rideshare and delivery platforms asserted that the traditional employer-employee relationship was 'fundamentally different' and incompatible with their business models. They claimed that defining workers as employees would put their highly-valued flexibility and independence of work at risk.<sup>167</sup>
- 3.18** Industry representatives such as the Australian Industry Group (Ai Group) and Business NSW maintained that no change was needed as the current legal and regulatory arrangements are capable of satisfactorily accommodating the gig economy. As the gig economy encompasses diverse and flexible work, industry groups argued that a 'one size fits all' approach does not work for the industry and that statutory definitions would prove to be constraining to both platforms and workers in the future.<sup>168</sup>
- 3.19** Mr Luis Izzo, representative of Australian Business Industrial, expressed the view that the federal workplace relations industrial landscape had already become 'quite rules-based'. He warned that increased regulation and a 'fixed approach' could elevate form over substance, with people ticking the relevant boxes to categorise themselves as an independent contractor or employee to suit their needs.<sup>169</sup>

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<sup>162</sup> Submission 28, Unions NSW, p 24; Submission 22, Restaurant and Catering Industry Association, p 3; Evidence, Mr Peter Dunphy, Executive Director, Compliance and Dispute Resolution, SafeWork NSW, 16 November 2020, p 36.

<sup>163</sup> Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 12; Submission 22, Restaurant & Catering Industry Association, p 3.

<sup>164</sup> Victorian Government, Department of Premier and Cabinet, *Report of the Inquiry into the Victorian On-Demand Workforce*, (July 2020), p 146.

<sup>165</sup> Victorian Government, *Report of the Inquiry into the Victorian On-demand Workforce*, p 147.

<sup>166</sup> Submission 20, Ola, pp 19-20.

<sup>167</sup> For example, Submission 10, Deliveroo, p 6; Evidence, Mr Matthew Denman, General Manager, Uber Eats, 19 April 2021, p 43.

<sup>168</sup> Submission 7, Business NSW, p 1; Submission 36, Australian Industry Group, p 2.

<sup>169</sup> Evidence, Mr Luis Izzo, Representative, Australian Business Industrial, 9 November 2020, p 66.

**3.20** Similarly, the NSW Government's Commissioner of State Revenue, Mr Cullen Smythe, described statutory definitions in legislation as a 'double-edged sword' that 'can lose relevance reasonably quickly'. Mr Smythe commended the versatility of the common law approach, particularly given the speed with which a number of industries are changing.<sup>170</sup> Mr Smythe suggested at a later hearing that whilst new legislation might simplify administration for Revenue NSW, the resulting processes could become 'more challenging' and carry additional consequences for genuine independent contractors by applying a tax levy on them.<sup>171</sup>

**3.21** The Ai Group also raised the point that aligning work status across state workplace laws was 'not possible or desirable'. It argued that while the definitions used within income tax and superannuation legislation are workable for the purposes to which they are directed, they would not be workable for the purposes of defining an 'independent contractor' under the Commonwealth *Independent Contractors Act 2006* or the *Fair Work Act 2009*.<sup>172</sup>

### **Intentional misclassification of workers – sham contracting and the gig economy**

**3.22** As noted in chapter 1, the legal work status of a person will affect whether their employer needs to pay payroll tax, superannuation and workers compensation. Numerous inquiry participants went so far as to argue that by classifying their workers as independent contractors, gig economy platforms are engaging in sham contracting, whereby a business knowingly or recklessly misclassifies an employee as an independent contractor in order to avoid workplace laws, with effects on worker safety and broader implications for the community.<sup>173</sup>

**3.23** Unions NSW contended that platforms use the independent contracting definition to 'employ people below [the] community standard' on worker safety, leading to situations of people being injured or killed whilst working without access to adequate compensation.<sup>174</sup> It also noted that the independent contractor status narrows the avenues available for workers to pursue disputes and seek remedies, including for unfair dismissal.<sup>175</sup> Dispute resolution mechanisms are discussed in detail in chapter 4.

**3.24** The Australian Lawyers Alliance (ALA) explained that platforms' decisions to categorise gig workers as independent contractors has broader effects on the economy. It contended that through the denial of legal safeguards to independent contractors, platforms effectively shift worker costs to the taxpayer, such as compensation for work injuries and reliance on the aged pension due to a lack of superannuation.<sup>176</sup> Moreover, the ALA expressed concern that sham contracting is occurring in certain sectors such as the gig economy, and expanded on the reasons

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<sup>170</sup> Evidence, Mr Cullen Smythe, Commissioner of State Revenue, Revenue NSW, 23 February 2021, p 51.

<sup>171</sup> Evidence, Mr Smythe, 18 October 2021, p 20.

<sup>172</sup> Submission 36, Australian Industry Group, p 3.

<sup>173</sup> See for example, Submission 31, Rideshare Drivers Association of NSW, p 9; Submission 40, Australian Institute of Employment Rights, p 5; Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), pp 14-15; Evidence, Mr Scott Johnston, Deputy Secretary and Chief Commissioner of State Revenue, Revenue NSW, 18 October 2021, pp 15-16.

<sup>174</sup> Evidence, Mr Costa, 9 November 2020, p 17.

<sup>175</sup> Submission 28, Unions NSW, p 20.

<sup>176</sup> Submission 2, Australian Lawyers Alliance, p 7. See also Submission 28, Unions NSW, p 24.

why, also pointing to the power differential that exists between individual workers and platforms:

The ALA is concerned that this sort of sham contracting and misclassification of employees often occurs in sectors where there is a pronounced power difference between the worker and the employer; there is a general industry practice to use insecure forms of work; the business operates within a highly competitive industry; and the workers feel powerless to do anything about unfair practices due to the fear of losing their jobs or residential status.<sup>177</sup>

- 3.25** Platforms, however, defended the classification of their workers as independent contractors under current law as indicative of a truly different work status. They argued that if workers are able to work simultaneously for multiple platforms in the practice colloquially known as 'multi-apping', they are exempt from a traditional employer-employee relationship.<sup>178</sup> In addition, many of the major platforms including Deliveroo, Uber Eats, DoorDash and Menulog, allow their delivery workers to delegate their tasks to others.<sup>179</sup> Revenue NSW confirmed to the committee that the power to multi-app and delegate may exempt the worker from being considered an employee for the purposes of paying payroll tax.<sup>180</sup> Similarly, the ability to multi-app has been cited as a relevant factor by the Fair Work Commission when deeming someone as an independent contractor.<sup>181</sup> Multi-apping is discussed in detail in chapter 7 in relation to work health and safety.
- 3.26** The majority of the gig economy platforms emphasised to the committee that they were meeting all obligations under strict state and federal workplace laws with some going beyond what was expected of them.<sup>182</sup> For example, Menulog insisted that it was meeting all of its obligations<sup>183</sup> and Uber told the committee that despite there being no legal requirement at the time, it had chosen to roll out minimum injury protection insurance and mental health support for its workers.<sup>184</sup> (See chapter 7 for more information on workers compensation in the gig economy.)
- 3.27** Stakeholders such as the Australian Lawyers Alliance and icare observed that it is an expensive and often inaccessible process for workers to bring a claim of misclassification to the Fair Work Commission. They noted that the ambiguity surrounding the work status of gig workers means that the onus is unfairly placed on workers to bring a claim that they have been misclassified as an independent contractor by a platform.<sup>185</sup>

<sup>177</sup> Submission 2, Australian Lawyers Alliance, p 7.

<sup>178</sup> Submission 10, Deliveroo, pp 6 and 11; Submission 13, Uber, p 11; Submission 20, Ola Australia and New Zealand, p 12. See also Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 13.

<sup>179</sup> Evidence, Mr Ed McManus, Chief Executive Officer, Deliveroo, 30 March 2021, p 2; Evidence, Mr Denman, 19 April 2021, p 44; Evidence, Mr Steven Teoh, Director of Delivery, Menulog, 17 May 2021, p 11; Evidence, Mr Puji Fernando, Senior Manager, Strategy and Operations, DoorDash Australia, 10 September 2021, p 8.

<sup>180</sup> Submission 34, Revenue NSW, p 3.

<sup>181</sup> *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

<sup>182</sup> Submission 20, Ola, pp 19-20

<sup>183</sup> Evidence, Mr Morten Belling, Managing Director, Menulog, 17 May 2021, p 4.

<sup>184</sup> Evidence, Mr Denman, 19 April 2021, p 36.

<sup>185</sup> Submission 2, Australian Lawyers Alliance, p 9; Answers to questions on notice, icare, 20 January 2021, p 5.

- 3.28** The Australian Lawyers Alliance explained that workers face serious barriers to establishing the legitimacy of their claim, including the inability to afford the costs of litigation, lack of awareness of what they are entitled to, and fear of reprisals. At the same time, platforms have a strong monetary incentive to avoid an adverse decision from a court or tribunal and thus are willing to spend large sums of money defending and settling litigation.<sup>186</sup>
- 3.29** In addition, Professor Rae Cooper, Professor of Gender, Work and Employment Relations, University of Sydney, observed that considering the expenses required to bring a case before the Fair Work Commission, it would be 'very unlikely' for an individual to bring a case on their own without the assistance of a union. In addition, unions would not represent all the cases brought to their attention because, as Professor Cooper noted, they themselves have multiple factors to 'think very closely' about, including the amount of money that they are going to spend and the likelihood of being successful in a very expensive long-running case.<sup>187</sup>

### **Menulog's new employment model for food delivery**

- 3.30** During the course of the inquiry, Menulog announced that it would be breaking away from the general food delivery model and begin trialling a new model where it would employ its workers. Their approach is considered as a case study below:

#### **Case study: Menulog's new employment model**

In April 2021, Menulog announced its intention to move away from the common food delivery model of engaging independent contractors and instead make steps towards an employee model in Australia by considering ways to bridge the gap between the benefits and entitlements their existing couriers receive. Instead it is trialling engaging hundreds of their couriers who work in the Sydney CBD as traditional employees.

Menulog's Managing Director, Mr Morten Belling, told the committee that the surprising decision was based on a moral imperative. 'We believe that to achieve the clarity and the minimum standard that we feel these courier drivers deserve, the best way of getting there is through employment.'<sup>188</sup> He specified that these minimum entitlements would include sick leave and adequate protection through workers compensation insurance.

Mr Belling explained that the process had been difficult to implement, one of the reasons being that the current industrial relations system does not accommodate the non-traditional working arrangements commonly found within the gig economy, such that no modern awards are appropriate. So Menulog will first trial its employment model under the Miscellaneous Award, which comes with a minimum pay rate of \$20.33 hour and a 250 per cent penalty rate on weekends and public holidays. It then plans to apply for a new industrial award better tailored to its business and industry.<sup>189</sup>

<sup>186</sup> Submission 2, Australian Lawyers Alliance, p 9.

<sup>187</sup> Evidence, Professor Rae Cooper, Professor of Gender, Work and Employment Relations, University of Sydney – Australian Women's Working Futures, 19 April 2021, pp 56-57.

<sup>188</sup> Evidence, Mr Belling, 17 May 2021, p 4.

<sup>189</sup> In December 2021, Menulog urged the Fair Work Commission to establish a new 'on-demand industry award' because the role is too different to be covered by the existing fast food or road

Menulog acknowledged that this trial and new system of making voluntary payments may end up costing the business more but reiterated that it was 'the right decision for us to lift the standards'.<sup>190</sup> The purpose of the trial is to evaluate what costs and shift patterns would be sustainable for the business. Mr Belling told the committee that Menulog would welcome the rest of the industry following its lead and implementing national minimum standards for their workers.<sup>191</sup>

Menulog's competitors such as Uber defended the status quo, emphasising that their workers valued the flexibility of working their own hours when they wanted under the independent contractor model.<sup>192</sup>

- 3.31** The committee also notes the entry into the market in 2021 by grocery delivery platforms Milkrun, Voly and Send, all utilising a traditional employment model by which staff enjoy minimum wages, superannuation payments and workers compensation among other benefits.<sup>193</sup>

### Possible legislative reforms

- 3.32** As noted earlier, private sector employees in New South Wales are subject to the *Fair Work Act 2009* and its awards and agreements. If there is a dispute about a worker's status, courts and tribunals will make a determination on a case-by-case basis using a multifactorial assessment.<sup>194</sup>
- 3.33** Inquiry participants recognised that the alternative to federal legislation to protect platform workers, whereby New South Wales and other state and territory governments instead would implement reforms, carries the trade-off of probable inconsistency of worker protections and platform obligations between jurisdictions.
- 3.34** Platforms, industry and government representatives strongly advocated for harmonisation of legislation across all Australian jurisdictions, observing that any state laws seeking to regulate workplace independent contractor arrangements would be vulnerable to constitutional challenge and cause confusion for platforms regarding their compliance with legal and regulatory obligations.<sup>195</sup>
- 3.35** As an example of the practical value of harmonisation, Revenue NSW advised the committee that a largely harmonised framework for payroll tax exists in New South Wales and Victoria, such that the provisions are the same, and interpreted and implemented in the same way. This

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transport and distribution awards: Josh Taylor, 'Menulog makes case for new award for delivery riders in gig economy shake-up', *The Guardian*, 6 December 2021.

<sup>190</sup> Evidence, Mr Belling, 17 May 2021, p 6.

<sup>191</sup> Evidence, Mr Belling, 17 May 2021, p 6.

<sup>192</sup> Evidence, Mr Denman, 19 April 2021, p 43.

<sup>193</sup> Nick Bonyhady, '10-minute dash: New startups join fast delivery race', *Sydney Morning Herald*, 8 January 2022.

<sup>194</sup> Submission 26, Department of Premier and Cabinet – Employee Relations, p 2.

<sup>195</sup> For example, Submission 20, Ola, p 26, Submission 13, Uber, p 14; Submission 10, Deliveroo, pp 11-12; Evidence, SafeWork NSW, 16 November 2020, p 43; Submission 25, SIRA, p 4; Submission 36, Ai Group, p 2.

template has also gone on to be adopted by most other jurisdictions (Western Australia and Queensland are exceptions). Harmonisation of payroll tax legislation had been pursued to minimise costs to businesses operating in more than one jurisdiction (which applies to the majority of gig platforms participating in this inquiry).<sup>196</sup>

- 3.36** Inquiry participants made varying recommendations for legislative reform so that courts and tribunals do not need to rely on the common law definition in respect to platform work. Some of the options are explored in the section below.

### Amendments to Commonwealth legislation

- 3.37** One option proposed to the committee is for the Commonwealth Government to amend the *Fair Work Act 2009* and *Independent Contractors Act 2006* to broaden and codify the definitions of 'employee', 'employment' and 'independent contractor' to accommodate gig workers and other non-traditional forms of employment.<sup>197</sup>
- 3.38** The TWU told the committee that surveys it had conducted indicate considerable appetite amongst current rideshare and delivery workers to be classified as an employee with the associated entitlements. The TWU surveys found that 72 per cent of food delivery workers surveyed thought they should be an employee not an independent contractor and 87 per cent of delivery worker respondents considered they should be entitled to superannuation, sick leave, penalty rates and a minimum wage.<sup>198</sup> Just less than half (48 per cent) of rideshare drivers surveyed thought that they should be employees.<sup>199</sup>
- 3.39** The Australian Lawyers Alliance suggested that instead of relying on the common law approach, Australia could follow the Californian decision of 2018 to adopt an 'ABC test' to determine the factors that categorise a worker as an independent contractor or employee. This approach takes on comparatively narrow criteria to be fulfilled for a worker to be considered an independent contractor, including their being free from any control or direction in work performance, performing work outside the usual course of hirers' business, and being customarily engaged in an independently established trade, occupation or work of the same nature. It is a significantly lower threshold than the current common law standard.<sup>200</sup>
- 3.40** Others including TEACHO noted, however, that there may be considerable opposition from workers and platforms if statutory definitions are adopted. TEACHO suggested that some workers would prefer to retain the status of contractor (preferably with additional rights and entitlements) than be 'pigeon-holed' in the employee category.<sup>201</sup> The Ai Group also strongly supported retention of the common law approach on the basis that it is better equipped to

<sup>196</sup> Answers to questions on notice, Revenue NSW, 22 March 2021, pp 2-3; Submission 34, Revenue NSW, pp 3-4.

<sup>197</sup> Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 14; Submission 31, Rideshare Drivers Association of Australia, p 15; Submission 2, Australian Lawyers Alliance, p 10. See also Submission 22, Restaurant & Catering Industry Association, p 3; Submission 45, National Farmers' Association, p 5.

<sup>198</sup> Submission 30, Transport Workers' Union, p 10.

<sup>199</sup> Submission 30, Transport Workers' Union, p 16.

<sup>200</sup> Submission 2, Australian Lawyers Alliance, p 2.

<sup>201</sup> Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), pp 14-15.

assess the substance and nuances of a particular relationship than a 'one size fits all' definition. The Ai Group maintained that the common law is 'best placed' to determine work status due to its ability to deal with a multitude of work and business arrangements. It also warned of ripple effects where a statutory definition could disrupt a large number of existing and legitimate contractual arrangements.<sup>202</sup>

**3.41** Some unions also strongly opposed the idea of creating a new classification of worker, arguing that this would be ineffective and lead to companies exploiting the new category. Both the TWU and Unions NSW instead advocated for enforcement of greater protections within the current system.<sup>203</sup>

**3.42** Notwithstanding these concerns, Uber and the Ai Group recommended that the *Fair Work Act 2009* be amended so that platforms can explicitly provide safety protections and entitlements to independent contractors, while protecting themselves from disincentives related to impact on work status. Uber reiterated its intention to improve the quality and security of all forms of independent work<sup>204</sup> and stated, "This would empower platform businesses to provide and do more for workers, improving the quality of work across the board."<sup>205</sup>

**3.43** The Ai Group recommended that the following additional wording be inserted into section 12 of the *Fair Work Act 2009* (words in bold refer to the existing provision) in order to address the risk of disincentive:

**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 for services:

- a. Safety systems and equipment;
- b. Training;
- c. Insurance;
- d. Standard prices or payment terms;
- e. Consultation processes.<sup>206</sup>

### **New legislation**

**3.44** Other inquiry participants suggested that new legislation be drafted to accommodate modern ways of working as well as emerging technologies and markets. For example, the Australian Road Transport Industrial Organisation (New South Wales Branch) suggested creating a new category of employment for the gig worker. Its Secretary and Treasurer, Mr Hugh McMaster,

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<sup>202</sup> Attachment A to Submission 36, Ai Group, p 6.

<sup>203</sup> Submission 30, Transport Workers' Union, p 72; Submission 28, Unions NSW, p 23.

<sup>204</sup> Submission 13, Uber, p 3.

<sup>205</sup> Submission 13, Uber, p 15; Attachment A to Submission 36, Ai Group, pp 9-10.

<sup>206</sup> Attachment A to Submission 36, Ai Group, p 10.

reflected that recognising the unique nature of work and relationships within the gig economy would need a 'new area of legislation'.<sup>207</sup>

- 3.45 Deliveroo recommended the creation of a new *Future of Work Act*, which 'could set out the specific responsibilities companies have to contractors – to the freedoms and flexibility that contractors can rely on as well as the security and protections they can expect'.<sup>208</sup> On the other hand, TEACHO advocated for federal legislation establishing an industry-specific tribunal, similar to the former Road Safety Remuneration Tribunal, which had set pay and conditions for road transport drivers in the road transport industry.<sup>209</sup>

### **A unique approach for New South Wales – extension of Chapter 6 of the *Industrial Relations Act***

- 3.46 While many stakeholders emphasised the importance of a Commonwealth-led approach to reform and/or advocated for harmonisation of legislation amongst jurisdictions, a question the committee considered was, 'In the absence of Commonwealth-led reform, what options are available to the NSW Government to provide minimum entitlements and protections to gig economy workers?' The committee recognises that there is a heightened sense of urgency for change in New South Wales as it has the largest economy in the country and a comparatively large proliferation of gig economy businesses operating across the State.<sup>210</sup>
- 3.47 The committee heard that an option in the face of Commonwealth Government delay or inaction, which would bring about significant improvements for a large portion of the platform workforce, is for the NSW Government to expand the scope of Chapter 6 (Public Vehicles and Carriers) of the New South Wales *Industrial Relations Act 1996*<sup>211</sup> (IR Act) to include rideshare and food delivery workers.
- 3.48 Chapter 6 was one of the few exemptions when the state passed its employment law to the federal government under the *Fair Work Act 2009* that remained under New South Wales jurisdiction.<sup>212</sup> Its operation is preserved by the *Independent Contractors Act 2006*.<sup>213</sup>
- 3.49 The Australian Institute of Employment Rights (hereafter AIER) outlined that Chapter 6 provides for the making of contract determinations (which operate in a similar way to minimum awards to provide a safety net of decent remuneration) and contract agreements, following collective bargaining.<sup>214</sup>

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<sup>207</sup> Evidence, Mr Hugh McMaster, Secretary and Treasurer, Australian Road Transport Industrial Organisation, NSW Branch, 16 November 2002, p 8. See also Submission 21, Australian Road Transport Industrial Organisation, NSW Branch, p 6.

<sup>208</sup> Submission 10, Deliveroo, pp 12-13.

<sup>209</sup> Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 20.

<sup>210</sup> See also Submission 14, QUT – Centre for Decent Work and Industry, pp 3-4, which lists participation rates in the gig economy by state and territory. New South Wales has the highest levels of participation in digital platform work.

<sup>211</sup> *Industrial Relations Act 1996*, Chapter 6.

<sup>212</sup> Evidence, Professor Daryll Hull, Executive Chair, Transport Education Audit Compliance Health Organisation (TEACHO), 30 March 2021, p 74.

<sup>213</sup> *Independent Contractors Act 2006* (Cth), s 7(2)(b)(i).

<sup>214</sup> Submission 40, Australian Institute of Employment Rights, p 8.

- 3.50** TEACHO explained that under Chapter 6, a system of 'contract determinations' and 'contract agreements' govern the direct relationship in a range of road transport industry subsectors, including general transport, couriers and taxis. In each subsector, there are minimum rates and conditions tailored to each group of workers who fall outside the common law definition of employment. These minimum rates take the form of cost recovery rates of pay that account for all costs incurred by owner-drivers in providing road transport services. Owner-drivers are allowed to negotiate agreements above these minimum rates, as well as almost any other condition of engagement. The agreements can be registered with the NSW Industrial Relations Commission and must provide conditions that are no less favourable than those available under the applicable transport determinations.<sup>215</sup>
- 3.51** Chapter 6 has the effect of extending all of the employee enforcement provisions under the IR Act to contractors, including:
- remedies for unfair or arbitrary termination of owner-driver contracts
  - representation of owner-drivers by the relevant union
  - a simple and effective tribunal system for dispute resolution between owner-drivers and businesses that directly hire them
  - an effective enforcement regime.<sup>216</sup>
- 3.52** Inquiry participants explained to the committee that Chapter 6 is not currently able to accommodate the gig economy, again highlighting that legislation in this area is outdated and not fit for purpose. For example, the AIER pointed out that Chapter 6 specifically excludes food delivery drivers and cyclists<sup>217</sup> because legislators at the time would only have considered them to be 'meals on wheels' charity workers or restaurant employees. It argued that food delivery workers are ironically 'the very kind of workers who Chapter 6 was designed to protect'.<sup>218</sup>
- 3.53** The committee heard that the results of Chapter 6 have been advantageous for owner-drivers, with remuneration rates for New South Wales owner-drivers 'amongst the best in Australia'. In addition, hiring businesses have largely complied with the terms and conditions mandated under Chapter 6 instruments, creating certainty for owner-drivers, as well as for those who hire them.<sup>219</sup>
- 3.54** However, there were mixed responses from inquiry participants on whether the expansion of Chapter 6 to rideshare and food delivery drivers was the optimal path for legislative reform. The Department of Premier and Cabinet – Employee Relations acknowledged that it had had some discussion about potential new areas of work that directly overlap with existing classes under Chapter 6, and specifically about the possible application of existing contract determinations. Its Acting Executive Director, Mr Charlie Heuston, noted that a party (such as a platform or

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<sup>215</sup> Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 19.

<sup>216</sup> Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 19.

<sup>217</sup> *Industrial Relations Act 1996*, s 309(4)(i) – a 'contract of carriage' does not include a contract for the delivery of meals by couriers to home or other premises for consumption.

<sup>218</sup> Submission 40, Australian Institute of Employment Rights, pp 8-9.

<sup>219</sup> Evidence, Professor Hull, 30 March 2021, p 75; Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 19.

union) could bring an application to the Industrial Relations Commission for a new determination of Chapter 6, however such a determination may potentially clash with the federal *Independent Contractors Act 2006*.<sup>220</sup> DoorDash described Chapter 6 as 'ill-suited' for the industry and advocated for legislative reform to be made at a federal level to avoid inconsistencies.<sup>221</sup>

- 3.55** On the other hand, based on legal advice it had received, the TWU was of the belief that there would be no constitutional issue triggered by extending Chapter 6 and its application to the gig economy.<sup>222</sup>
- 3.56** Unions NSW, the TWU and the Australian Road Transport Industrial Organisation NSW Branch all supported expanding the coverage of rights and protections in Chapter 6 to gig economy workers, but identified that this was not a sufficient solution. They described the issue as a 'unique problem that needs something more than extension of Chapter 6' and advocated for several additional measures, such as a new chapter under the IR Act with a similar tribunal mechanism to Chapter 6 or a new system altogether 'covering all forms of work across all industries' as offering a more comprehensive solution.<sup>223</sup>
- 3.57** From TEACHO's perspective, Chapter 6 is the best existing model for national regulation of on-demand road transport work as it is an 'effective mandatory scheme of sustainable minimum rates and conditions protecting the interest of a broad range of transport workers'. However, TEACHO also noted that gig work extends beyond the road transport industry and recommended the establishment of a separate tribunal, similar to the now defunct Road Safety Remuneration Tribunal, which could cover both contractor and employee drivers.<sup>224</sup>
- 3.58** Professor Daryll Hull, Executive Chair of TEACHO, also highlighted that Chapter 6 is exclusive to New South Wales and thus would not be a viable solution for other jurisdictions and their industrial relations frameworks.<sup>225</sup>

### **Portable entitlement scheme and superannuation**

- 3.59** In considering possible options to improve gig workers access to workplace entitlements, the committee heard from academics, unions, certain platforms, and insurers, who supported the implementation of a portable entitlements scheme for all workers, including those in the gig economy and other precarious forms of work.

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<sup>220</sup> Answers to questions on notice, Department of Premier and Cabinet – Employee Relations, 22 January 2021, p 7; Evidence, Mr Charlie Heuston, Acting Executive Director, Employee Relations, Community Engagement, Department of Premier and Cabinet, 9 November 2020, pp 46 and 48. See also Evidence, Professor Hull, 30 March 2021, p 74, who suggests that additional categories would not pose a constitutional challenge.

<sup>221</sup> Answers to questions on notice, DoorDash, 7 October 2021, p 4.

<sup>222</sup> Answers to questions on notice, Transport Workers' Union, 20 January 2021, pp 2-8.

<sup>223</sup> Submission 28, Unions NSW, p 6; Submission 30, Transport Workers' Union, pp 71 and 73; Evidence, Mr Mark Morey, Secretary, Unions NSW, 9 November 2020, p 15; Submission 21, Australian Road Transport Industrial Organisation NSW Branch, p 5.

<sup>224</sup> Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 16.

<sup>225</sup> Evidence, Professor Hull, 30 March 2021, p 74.

**3.60** Unions NSW sought the establishment of such a scheme of portable leave entitlements for all gig workers regardless of who they work for. They highlighted that currently workers in particular industries have the ability to transfer their accrued long service leave entitlement to a new employer within the industry.<sup>226</sup> In evidence, Mr Mark Morey, Secretary of Unions NSW, responded to questions from the committee about how the scheme would operate for gig workers:

It is along the ... long service leave commission model that they use in the construction industry and the cleaning industry. There is a government fund, employers pay into that fund, and then the fund is administered as people take, in this instance, long service leave but we always think it would be better if there is a broader run around leave and sick leave provisions on that.<sup>227</sup>

**3.61** To demonstrate the benefits of such a scheme, the McKell Institute referred to its own body of research detailing the expansion of existing portable entitlement schemes to all Australian workers, not just those in the gig economy. It suggested that for independent contractors, portable leave entitlements would 'encourage talent' in industries with high rates of contracting, 'discourage sham contracting', and place 'upward pressure' on wages.<sup>228</sup>

**3.62** Further, the McKell Institute's research detailed how a 'portable entitlement fund (PEF)' would operate for workers classified as independent contractors:

- A PEF would be a fund linked to an individual that would be activated once that individual is hired as an 'independent contractor' by company
- A PEF contribution would be applied to payments made to that contractor by an employer
- The individual contractor would be able to draw down on this accruing fund to access income when they are forced to take sick leave or choose to take other forms of leave such as annual leave
- The individual contractor's PEF is attached to the individual, not the employer, allowing the fund to be truly portable
- Payment into the PEF would be coordinated by employers and made into the approved PEF.<sup>229</sup>

**3.63** The Australian Services Union supported the implementation of a portable entitlement scheme for all workers providing services under the National Disability Insurance Scheme (NDIS), including those within the gig economy. They argued it would resolve issues of 'wage suppression' and 'fraud' within the sector:

Disability supports under the NDIS are priced by the National Disability Insurance Authority (NDIA) based on assumptions about the relevant minimum award pay rates. The problem is that there is no corresponding obligation for NDIS agencies to pass on to their workers the minimum rates of pay. So we see platform providers in particular undercutting the minimum wage and pocketing the difference, effectively ripping off people with disability and the taxpayer simultaneously. These problems can be solved

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<sup>226</sup> Submission 28, Unions NSW, p 40.

<sup>227</sup> Evidence, Mr Morey, 9 November 2020, p 25.

<sup>228</sup> Tabled document, McKell Institute, *Insecure work and portable entitlements: A solution for Australia*, January 2021, pp 42 – 43.

<sup>229</sup> Tabled document, McKell Institute, *Insecure work and portable entitlements: A solution for Australia*, January 2021, p 42.

via an enforceable safety net and a portable entitlement scheme in the NDIS. ...  
Portable leave, especially isolation leave in the COVID world, is critical for all NDIS  
workers to access.<sup>230</sup>

- 3.64** Notably, Menulog, in discussing its intention to move to an employment model and provide its workers with minimum entitlements and benefits (see case study at paragraph 3.30), expressed support for a 'fair' and 'reasonable' portable leave entitlements scheme, explaining that 'we are at very early stages ... [u]ltimately we want to provide these entitlements and this could be an option of getting there.'<sup>231</sup>
- 3.65** In terms of superannuation, Uber recognised that many of its workers could accumulate significant savings if they put a portion of their earnings from the Uber app into superannuation. Uber stated to the committee its willingness to work with Australian governments and relevant stakeholders to create a framework for streamlined arrangements for contributions from multiple sources of work.<sup>232</sup>
- 3.66** The committee is aware that commercial companies exist in the market to provide self-employed people or independent contractors with personalised and flexible insurance protection and portable benefits including sick leave, holiday and maternity leave. In its submission to the inquiry, upcover, an insurance company, described its products as a global first 'pay-as-you-go cover protecting the worker with a blended personal and commercial insurance product'.<sup>233</sup>

## Committee comment

- 3.67** It is clear to the committee that the current legal framework governing work status, and therefore a broad range of worker entitlements, is ill suited to the gig economy and offers few protections for its workers.
- 3.68** The committee shares the concern of numerous inquiry participants that within the context of a clear power imbalance between platforms and workers, the present legal framework serves to the advantage of companies. We further note the evidence before us that the ambiguity in the current legislation places an unfair onus on workers to challenge their classification as independent contractors if they do not agree with their status, and that they face significant barriers, including affordability, to doing so. Again this points to a significant power differential that does not sit right with the committee, and which is a recurring theme in subsequent chapters of this report.
- 3.69** The trialling of a new employment model by Menulog, as well as the recent emergence of delivery platforms under a similar model, attest to the openness of certain platforms to pursue a fairer way of engaging their workers that furnishes a reasonable set of entitlements.

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<sup>230</sup> Evidence, Ms Natalie Lang, Australian Services Union (NSW & ACT Branch), 10 September 2021, p 30.

<sup>231</sup> Evidence, Mr Morten Belling, Menulog, 17 May 2021, pp 2 and 10.

<sup>232</sup> Submission 13, Uber, p 15.

<sup>233</sup> Submission 15, upcover, p 1.

- 3.70** The fact that the current law is so ill suited to the gig economy is not simply by design but very significantly the product of the advent and rapid evolution of on-demand work. The evolving nature of work in the gig economy, combined with varying levels of control that platforms have over their workers, means that the law's existing classifications of work status are not easily applied to platform work. Linked to this, inconsistent decisions regarding 'work status' in case law have caused uncertainty about the status of on-demand workers, and their subsequent rights and obligations. In addition, Menulog's experience has highlighted that modern awards do not accommodate the non-traditional arrangements commonly found in the gig economy.
- 3.71** Also of great concern to the committee is the evidence that platforms intentionally misclassify their workers in order to avoid the costs of legal obligations arising from employment. Noting the first-hand testimonies of gig workers, as well as evidence from unions and academics, that many gig workers are actually in an employer-employee relationship with the platform without any of the benefits, it is difficult for the committee to accept platforms' claims that they appropriately classify their workers as independent contractors.
- 3.72** We also share the view of stakeholders that a platform's decision to classify its workers' as independent contractors has broader impacts on the economy and community in terms of risks to worker health and safety and costs to the taxpayer. The former is explored in detail in chapter 7. These impacts are to nobody's benefit and are certainly not in the interests of New South Wales.
- 3.73** For all these reasons, the committee believes it is imperative for the NSW Government to provide for the community standard of fair and decent work to be applied to all workers. As a fundamental step, the committee recommends that the NSW Government commit to greater protections for gig economy workers, regardless of work status.

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### **Recommendation 1**

That the NSW Government commit to greater protections for gig economy workers, regardless of work status.

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- 3.74** Observing the possible options for reform, we make particular mention of the view of many stakeholders that the ideal solution would be harmonised across all Australian jurisdictions. The committee wholeheartedly agrees that the best remedy for the unhelpful distinction between 'employee' and 'independent contractor' would be a Commonwealth led response to ensure workplace laws consistently capture work in the gig economy across each state and territory. This would avoid the potential for constitutional challenge. More fundamentally, it would be both simpler for platforms and fairer for employees.
- 3.75** On that basis, we acknowledge the amendments proposed to Commonwealth legislation to avoid the application of the common law work status test, such as codifying definitions of 'employee', 'employment' and 'independent contractor', establishing a statutory definition of 'worker', adopting an 'ABC test' similar to the Californian decision, and inserting additional wording to address disincentives related to impact on work status. We also recognise the views of unions and certain industry bodies who opposed the adoption of statutory definitions in order to avoid the common law approach, but rather advocated for greater protections within the current system. Others argued for new legislation.

- 3.76** Whilst the committee welcomes these options for reform we concur that without a Commonwealth led response, the NSW Government is obliged to act as the gig workforce continues to expand in New South Wales, leaving more workers unprotected and without basic entitlements.
- 3.77** In this regard, the committee recognises that a simple and effective tribunal system is a fundamental mechanism for fairness in work arrangements that is currently lacking in the gig economy. An accessible tribunal for certain transport workers is provided for under Chapter 6 of the *Industrial Relations Act 1996*, and we acknowledge that one option is to simply expand the remit of this existing body to other specified workers. Whether it is a new body or an extension of the existing tribunal with the far reaching powers necessary to regulate conditions of engagement and employment, is an open question. The core task is to urgently create the extended jurisdiction to protect gig workers. We recommend that the NSW Government establish a tribunal with the power to set minimum pay and conditions for gig workers that provide labour to on-demand platforms regardless of work status, to the extent permitted by the state's constitutional authority. In subsequent chapters we explore other roles that this tribunal could fulfil in the interests of fairness for and protection of platform workers.

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### **Recommendation 2**

That the NSW Government establish a tribunal or extend the jurisdiction of the existing tribunal, with the power to set minimum pay and conditions for gig workers that provide labour to on-demand platforms regardless of work status, to the extent permitted by the state's constitutional authority.

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- 3.78** Beyond the issue of a tribunal, the committee acknowledges the evidence of stakeholders advocating for the NSW Government to extend Chapter 6 of the *Industrial Relations Act 1996* to include gig workers who fall outside the common law definition of employment, such as rideshare and food delivery workers, or more broadly to gig workers across all industries. We agree that extension of Chapter 6 is an option that the NSW Government must consider, as it will allow the on-demand workforce or at least a large portion of it, to have access to basic entitlements such as decent rates of remuneration, representation by a relevant union, remedies for unfair or arbitrary termination, and an effective enforcement regime. In this regard, the committee notes legislation passed by the Legislative Council in 2019 to make changes to Chapter 6 to delete s309(4)(d) and permit those delivering milk, cream and bread to be covered by a contract determination. As such, the committee recommends that the NSW Government puts forward legislation to the Parliament to extend Chapter 6 of the *Industrial Relations Act 1996*, to include at least rideshare and food delivery workers as well as those engaged to deliver bread, milk and cream.<sup>234</sup> This would not provide all the essential protections that these workers deserve, nor will it address the needs of all vulnerable workers in the gig economy, but it would be a significant advance for rideshare and food delivery workers and can be achieved rapidly within a well-established legal framework.

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<sup>234</sup> See *Industrial Relations (Contract of Carriage) Bill 2019*, debated in the Legislative Council on 30 May and 14 November 2019.

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**Recommendation 3**

That the NSW Government introduce legislation to extend Chapter 6 of the *Industrial Relations Act 1996* to include at least rideshare and food delivery workers as well as those engaged to deliver bread, milk and cream.

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- 3.79** The committee agrees with the view of stakeholders that gig workers' and those in other forms of insecure work would benefit significantly from a portable entitlement scheme that enables them to collect and consolidate entitlements including for sick leave, annual leave and long service leave.
- 3.80** The committee was encouraged to see support of such a scheme from unions, research institutes and certain platforms. It is evident that portable entitlements would be progress towards safeguarding all workers, including those in the gig economy, by providing access to entitlements across different platforms and employers. Therefore as an immediate recommendation, we call on the NSW Government to establish a portable entitlement scheme for gig and other precarious workers, in partnership with employers, unions and gig platforms.
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**Recommendation 4**

That the NSW Government establish a portable entitlement scheme for gig and other precarious workers, in partnership with employers, unions and gig platforms.

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## Chapter 4      **Dispute resolution and transparency**

Gig workers, by virtue of not being treated legally as employees, do not have access to a no-cost dispute resolution mechanism. Unlike employees, there is no option for them to raise complaints to a human resources team or easily bring a claim against unfair dismissal in a tribunal like the Fair Work Commission. Whilst this may not be a major issue for some other ‘independent contractors’ such as highly skilled sole traders or businesses, the committee heard that it is particularly problematic for some sections of the gig economy, where a significant power imbalance exists between the worker and the company.

This chapter begins by examining this imbalance of power between the platform and worker, and how platforms' use of an algorithm as a 'manager' exacerbates it. Notwithstanding this, having no formal dispute resolution mechanism has led to a general lack of procedural fairness for workers, as well as very limited recourse if their access to a platform is terminated. The chapter also considers what options there are to provide gig workers with some level of dispute resolution, also noting what other inquiries have recommended.

Closely linked to the issue of procedural fairness is the lack of transparency about platforms' conduct and their business operations. The chapter finishes by examining the need for greater transparency in the gig economy, particularly in relation to the algorithms that govern so many aspect of on-demand work, as well as in relation to platform policies and practices, contractual arrangements and worker pay.

### **Power imbalance**

- 4.1 Academics and unions highlighted to the committee that platform workers have limited power in comparison with the digital platforms that they sign up to. They noted that platforms can hold a significant level of control over the worker in terms of pay, number of hours worked, availability of jobs and data collection.
- 4.2 The Australia Institute's Centre for Future of Work noted that in the current economic and political context, the implementation of new technology has systematically enhanced the power and profitability of employers and financial investors, whilst undermining the position of workers and their organisations.<sup>235</sup>
- 4.3 Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen also discussed how classifying platform workers as independent contractors has 'skewed' the power balance towards the platforms, who are able to downgrade the terms and conditions of work in the gig economy.<sup>236</sup>
- 4.4 The Transport Workers' Union (hereafter the TWU) provided an example of this power imbalance as it relates to pay, stating that with the introduction of rideshare in 2011, gig economy companies have routinely compromised working conditions to maintain their competitiveness in the market:

[F]ood delivery companies paid an hourly rate and provided superior terms and conditions for delivery workers in the early years of their entry into Australia. As

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<sup>235</sup> Submission 5, Centre for Future Work, p 11.

<sup>236</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p. 3.

competition has intensified, many food delivery companies now pay a variable rate for each food delivery.<sup>237</sup>

- 4.5 The Victorian inquiry into the on-demand workforce (hereafter the Victorian inquiry) also received evidence about how the power imbalance between platforms and workers is exacerbated by the lack of transparency in how work is allocated and the algorithms used to rank and assess workers.<sup>238</sup> This is explored later in the chapter.

## Dispute resolution

- 4.6 The committee heard that an adequate dispute resolution process is important to ensure procedural fairness, to protect the rights of workers and to provide the opportunity to address discrimination, unfair treatment and termination.
- 4.7 As noted in chapter 1, independent contractors do not have access to the same dispute resolution mechanisms available to individuals categorised as employees under the *Fair Work Act 2009*.<sup>239</sup> Employees are able to refer disputes to the Fair Work Commission, whereas gig economy workers have very limited mechanisms for dispute resolution, including for unfair dismissal and termination of their access from the applications.
- 4.8 Beyond the *Fair Work Act 2009*, contract carriers under Chapter 6 of the *Industrial Relations Act 1996*<sup>240</sup> also have access to a tribunal system which resolves disputes between the drivers and businesses that hire them. Under Chapter 6, there is an effective enforcement regime and drivers also have access to remedies for unfair or arbitrary termination of their contracts.<sup>241</sup>
- 4.9 Numerous inquiry participants stipulated that gig economy workers should also have access to an adequate dispute resolution mechanism. They held that the absence of a dispute mechanism for independent contractors is particularly concerning for those gig economy workers who engage in lower-paid work, have uncertain work hours and are subject to algorithmic management systems. This issue and the accompanying lack of procedural fairness is explored in further detail below.

### 'My manager is an algorithm'

- 4.10 Inquiry participants advised the committee that a primary way that rideshare and food delivery platforms exert a high level of control over their workers is through their models of algorithmic management. This is because these platforms' algorithms determine the allocation, remuneration, chastisement and even the termination of labour.<sup>242</sup>

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<sup>237</sup> Submission 30, Transport Workers' Union, p. 23.

<sup>238</sup> Victorian Government, Department of Premier and Cabinet, *Report of the Inquiry into the Victorian On-Demand Workforce*, (July 2020), p 70.

<sup>239</sup> *Fair Work Act 2009* (Cth), s 3.

<sup>240</sup> *Industrial Relation Act 1996*, s 332.

<sup>241</sup> Submission 43, Transport Education Audit Compliance Health Organisation (TEACHO), p 19.

<sup>242</sup> See for example, Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, pp 3 and 6; Submission 29, International Transport Workers' Federation (ITF), p 14; Submission 5, Centre for Future Work, p 18; Evidence, Ms Lauren Kelly, Media and Research, Office

- 4.11** The committee asked Dr Alex Veen, Lecturer (Academic Fellow) with the University of Sydney Business School, whether workers feel they are able to negotiate with the platform to adjust the algorithmic systems or management systems that impact how work is allocated. He responded that in his research, he had not encountered 'any workers who experienced that they were able to have discussions with these organisations about these processes'. Dr Veen went so far as to refer to the way that certain platforms operate as 'dehumanised practices'.<sup>243</sup>
- 4.12** In their submission, Dr Veen and his colleagues observed that the level of algorithmic control exercised by platforms had been 'under recognised' in regulatory decisions by the Fair Work Commission. The academics highlighted that the current multifactor test to determine the work status of a person (see paragraph 1.45 and chapter 3) fails to consider the nature and impact of algorithmic management on the level of control that workers experience, as well as the amount of choice in the performance of their work they are able to exercise. They observed that worker behaviour is actually indirectly controlled by the platform because workers know that performance metrics are being gathered by the algorithm, and may even be used to terminate their services without due process, thus their discretion to reject uneconomic or unfavourable tasks is curtailed.<sup>244</sup>
- 4.13** The TWU also observed that in contrast to a traditional human resources officer or manager, the algorithm is unable to exercise any sort of discretion or consideration for individual circumstances.<sup>245</sup>
- 4.14** However Dr Veen noted that platforms' algorithmic models differ in terms of complexity and levels of human interaction. He stated that whilst larger platforms like Uber Eats and Deliveroo have sophisticated algorithmic management systems, which mean that it can be quite challenging for workers to have any direct interaction with a representative of the company, other platforms like EASI and Hungry Panda have comparatively higher levels of human intervention in the allocation process.<sup>246</sup>
- 4.15** Deliveroo told the committee that its algorithm only uses 'objective functions' to determine which rider is likely to be able to deliver the food order in the quickest time. It stated that its algorithm does not consider any performance metrics or personal characteristics (such as how quickly a rider delivers food or how frequently they reject orders) in the allocation of orders.<sup>247</sup>

### **'Removal from the platform'**

- 4.16** There was some comment during the inquiry on the specific issue of termination and removal from the platform. Platforms such as Ola, Hungry Panda and Mable confirmed that they do have the ability to terminate a worker's contract, which is set out in the terms and conditions of

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of the National Secretary, United Workers Union, 17 May 2021, p 32; Evidence, Mr Thomas Costa, Assistant Secretary, Unions NSW, 9 November 2020, p 17.

<sup>243</sup> Evidence, Dr Alex Veen, Lecturer (Academic Fellow), University of Sydney Business School, 30 March 2021, p 76.

<sup>244</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, pp 3 and 6-7.

<sup>245</sup> Submission 30, Transport Workers' Union, p 56.

<sup>246</sup> Evidence, Dr Veen, 30 March 2021, p 77.

<sup>247</sup> Submission 10, Deliveroo, p 7.

service required to be adopted by workers.<sup>248</sup> The TWU highlighted to the committee the automated removal of workers from food delivery and ride share platforms:

Often platforms do not notify workers of complaints or negative feedback received until the point of deactivating a platform workers account, rendering them unable to access work with the provider. This effectively renders the worker dismissed from the workplace.<sup>249</sup>

- 4.17** Mable advised the committee that service providers may be removed from its platform due to infringement of its terms and conditions. It stated that from October 2020 to October 2021, 45 people who had provided services were removed from the platform due to infringements of the Mable terms, which includes an undertaking to comply with the National Disability Insurance Scheme Code of Conduct.<sup>250</sup>

### **Lack of procedural fairness**

- 4.18** Directly related to the power exerted by the algorithms in controlling gig workers' experience that sometimes culminates in removal from the platform is the lack of procedural fairness in the treatment of workers, highlighted by numerous inquiry participants as a key feature of the gig economy.

- 4.19** The TWU stated that the model of algorithmic management has resulted in gig workers being 'routinely' terminated without due process.<sup>251</sup> In a survey of its rideshare members, the TWU found:

- 18 per cent of respondents reported that they had been suspended without pay
- 9 per cent reported their access to the platform had been deactivated as a result of false allegations
- 56 per cent felt that they had been unfairly treated by a company without being able to defend themselves.<sup>252</sup>

- 4.20** The inability of workers to challenge the way platforms operate was also highlighted by the Transport Education, Audit and Compliance Health Organisation Limited (hereafter TEACHO). Having examined the terms and conditions of the Uber contract, it highlighted that drivers' access to the app could be blocked with no right to any warning or opportunity to respond to a poor rating. If drivers wish to 'contest a decision to block them from the app, or bring any other dispute under the contract, an arbitration clause requires them to arbitrate the matter, at their own expense, in the Netherlands'.<sup>253</sup>

<sup>248</sup> Evidence, Ms Ann Tan, Head of Business Excellence and Legal, Ola Australia and New Zealand, pp. 37-38; Answers to questions on notice, Mable, 7 October 2021, p. 1; Evidence, Ms Tina Sun, Human Resources Manager, Hungry Panda, 23 February 2021, p 30.

<sup>249</sup> Submission 30, Transport Workers Union, p 57.

<sup>250</sup> Answers to questions on notice, Mable, 7 October 2021, p 1.

<sup>251</sup> Submission 30, Transport Workers' Union, p 2. See also Evidence, Mr Malcolm Mackenzie, Rideshare Driver, 9 November 2020, p 5.

<sup>252</sup> Submission 30, Transport Workers' Union, p 14.

<sup>253</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p. 5.

- 4.21** Academics, Dr Tom Barratt and colleagues, advised that their research had also revealed that in practice, some gig workers differ from genuine independent contractors. They explained that the features that set them apart is that gig workers, particularly in food delivery or rideshare, have very limited opportunities to influence the amount of work allocated to them or to respond to allegations of poor performance and poor customer reviews.<sup>254</sup>
- 4.22** Some platforms advised the committee about the ways they have incorporated procedural fairness into their decision-making, including whether to restrict a person's access to the app. For example, Mable stated that workers can escalate matters to their internal incidents and complaints team or lodge a complaint via the feedback and complaints section on the Mable website. If a service provider is still unhappy with the outcome, they can request a review by the Mable executive team or can go as far as escalating the complaint to external agencies.<sup>255</sup>
- 4.23** Other platforms, including Ola and EASI, stated that they also have internal mechanisms where drivers and riders can raise complaints, including about pay.<sup>256</sup> Ms Ann Tan, Head of Business Excellence and Legal, Ola Australia and New Zealand, told the committee that termination is not a regular occurrence at Ola but can arise if a driver consistently receives negative feedback ratings. The process leading to termination includes counselling the driver or asking them to complete some sort of training, followed by suspension from the app if the rating do not improve. Termination then follows suspension if the bad feedback rating continues.<sup>257</sup>
- 4.24** Similarly, Hungry Panda told the committee that in the event of poor performance it would begin a review process with the worker and give them up to three opportunities to improve their ratings in 'not very serious situations'. If customer ratings continued to be negative, Hungry Panda could then terminate their access to its app.<sup>258</sup>
- 4.25** Ola and Uber representatives further noted that if drivers are unsatisfied with the results of an internal review about pay or termination, alternative remedies include approaching Fair Trading or the courts.<sup>259</sup>
- 4.26** The TWU advised the committee that in the aforementioned survey, dispute resolution had been the highest ranked protection sought by rideshare respondents, with 83 per cent seeking this protection.<sup>260</sup>

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<sup>254</sup> See also Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 3.

<sup>255</sup> Answers to questions on notice, Mable, 7 October 2021, pp. 1-2.

<sup>256</sup> Evidence, Mr Simon Smith, Managing Director, Ola Australia and New Zealand, 9 November 2020, p 35; Evidence, Ms Kitty Lu, Compliance and Public Relations Manager, EASI, 10 September 2021, p 12.

<sup>257</sup> Evidence, Ms Ann Tan, Ola Australia and New Zealand, pp 37-38.

<sup>258</sup> Evidence, Ms Tina Sun, Human Resources Manager, Hungry Panda, 23 February 2021, p 30.

<sup>259</sup> Evidence, Mr Smith, 9 November 2020, p 35. See also Evidence, Ms Amanda Gilmore, Head of Driver Operations, Uber, 17 May 2021, p 49.

<sup>260</sup> Submission 30, Transport Workers' Union, p 15.

### ***A case of unfair dismissal at Deliveroo***

- 4.27** Throughout the course of the inquiry, the committee received evidence from and about Mr Diego Franco, a Deliveroo food delivery driver who brought a claim of unfair dismissal to the Fair Work Commission. His case is set out as a case study below.

#### **Case study: Mr Diego Franco and Deliveroo**

Mr Diego Franco is a food delivery rider who completed jobs for Deliveroo for almost three years after moving to Sydney from Brazil. In April 2020, the company emailed Mr Franco notifying him that he would be terminated in seven days, as he had been too slow to deliver orders and that he had been previously notified of issues with his performance.<sup>261</sup> Mr Franco disputed this, arguing that prior to receiving this email, he had not received any emails, correspondence or counselling regarding his performance, nor any indication as to what a 'reasonable time period' meant.<sup>262</sup>

Seven days after the first email, Mr Diego was terminated from the Deliveroo platform. As food delivery was his primary source of income, this left him unable to provide for his wife and baby in the midst of the first COVID-19 lockdown.<sup>263</sup>

Of note, the termination was automated and did not invite Mr Franco to respond to allegations. It did not provide an individual contact person to speak to, did not show cause, did not provide specific information about complaints nor what information the company relied on to deem Mr Franco in breach of its supplier agreement.<sup>264</sup>

Mr Franco told the committee that in the absence of any human contact point, he tried to engage with the platform via email to dispute their decision,<sup>265</sup> but the only response he received stated that the reasons for his termination had already been explained to him in the initial email.<sup>266</sup>

Mr Franco went on to make an unfair dismissal case to the Fair Work Commission with TWU representation and support. This was successful, with the Commission finding that Mr Franco had been unfairly dismissed with no valid reason.

In a significant decision for the gig economy, the Commission found that Mr Franco had engaged in delivery work as an employee of Deliveroo, and not as an independent contractor.<sup>267</sup>

#### **Providing for dispute resolution**

- 4.28** Certain stakeholders including unions recommended that the NSW Government establish an independent tribunal or other separate body that has the capacity to consider and help resolve

<sup>261</sup> Evidence, Mr Diego Franco, Food Delivery Worker, 9 November 2020, p 2.

<sup>262</sup> Submission 30, Transport Workers' Union, p 58.

<sup>263</sup> Submission 30, Transport Workers' Union, p 23.

<sup>264</sup> Submission 30, Transport Workers' Union, p 58.

<sup>265</sup> Evidence, Mr Franco, 9 November 2020, p 4.

<sup>266</sup> Submission 30, Transport Workers' Union, p 8.

<sup>267</sup> *Diego Franco v Deliveroo Australia Pty Ltd* (U2020/7066).

worker disputes in on-demand work.<sup>268</sup> For example, TEACHO emphasised that on-demand workers should have access to an affordable and informal avenue to resolve grievances with a platform, similar to what is available to employees.<sup>269</sup> The United Workers Union stated that such a body could also provide important oversight of the fairness of the algorithmic models and any other automated decision making in the sector.<sup>270</sup>

- 4.29** Other inquiry participants, including the Australian Road Transport Industrial Organisation (hereafter ARTIO) NSW Branch and the Australian Institute of Employment Rights, noted that rideshare drivers and food delivery workers would gain access to an existing dispute resolution tribunal if Chapter 6 were extended to incorporate them.<sup>271</sup> As noted at the start of this chapter (see paragraph 4.8), ARTIO NSW Branch's Secretary and Treasurer, Mr Hugh McMaster, explained that under Chapter 6, any owner-driver or group of owner-drivers can lodge a dispute through the TWU in the NSW Industrial Relations Commission which will be conciliated and if necessary, arbitrated.<sup>272</sup>
- 4.30** Dr Tom Barratt and his colleagues noted that in Victoria, the mediation processes for disputes between food delivery independent contractors and platforms are provided by the state's Small Business Commission.<sup>273</sup>
- 4.31** Taking a different approach, Professor David Peetz, Emeritus Professor of Griffith University's Department of Employment Relations and Human Resources, suggested that it would be 'near impossible for workers to be universally protected by a legislative prescription' on artificial intelligence human resource management as each firm's algorithm would differ. Instead, Professor Peetz suggested that each company should set up its own independent ethics committee to 'assess the ethical dimensions of each use of algorithms by the organisation' and to resolve any disputes.<sup>274</sup>
- 4.32** The committee notes that the Victorian inquiry made the following recommendations to establish adequate dispute resolution mechanisms and related advice and support for gig economy participants:

**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.

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<sup>268</sup> Submission 30, Transport Workers' Union, p 72; Submission 31, Rideshare Drivers Association of Australia, p 14.

<sup>269</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 42.

<sup>270</sup> Submission 6, United Workers Union, p 9; Evidence, Ms Kelly, 17 May 2021, p 31.

<sup>271</sup> Evidence, Mr Hugh McMaster, Secretary and Treasurer, Australian Road Transport Industrial Organisation NSW Branch, 16 November 2020, p 8; Submission 40, Australian Institute for Employment Rights, pp 2 and 8.

<sup>272</sup> Evidence, Mr McMaster, 16 November 2020, p 8.

<sup>273</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 8.

<sup>274</sup> Evidence, Emeritus Professor David Peetz, Department of Employment Relations and Human Resources, Griffith University, 30 March 2021, p 72; Appendix B to Submission 17, Professor David Peetz, p 21.

**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.<sup>275</sup>

**4.33** The Senate committee also made a similar recommendation about establishing a separate body to provide advice and make rulings relating to employment relationships:

**Recommendation 11:** The committee recommends that the Australian Government provide greater protections for independent contractors who are sole traders by establishing an accessible low-cost national tribunal to advise on, oversee, and make rulings relating to employment relationships involving low-leveraged independent contractors, such as those in the rideshare and other platform sectors.<sup>276</sup>

## Transparency of platform conduct and operations

**4.34** Another issue raised by inquiry participants is the lack of transparency in platform conduct and operations, and the broader implications for many aspects of platform work.<sup>277</sup> Similar to the issues pertaining to dispute resolution and algorithmic management, where gig workers and unions do not have a clear idea about how algorithms allocate work or manage performance, they do not know what data is collected and used by the platform. The committee heard that this lack of transparency and the absence of a formal employment relationship can further exacerbate the power imbalance between worker and platform.

**4.35** The International Transport Workers Federation suggested that the lack of transparency, particularly about the algorithms, further increases the power imbalance between the worker and the platform, and contributes to exploitation of workers.<sup>278</sup> In addition, the Australia Institute's Centre for Responsible Technology stated that the lack of information means that

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<sup>275</sup> Victorian Government, Department of Premier and Cabinet, *Report of the Inquiry into the Victorian On-demand Workforce*, (July 2020), pp 196 and 201.

<sup>276</sup> Select Committee on Job Security, Australian Senate, *First interim report: on-demand platform work in Australia* (2021), p 168.

<sup>277</sup> See for example Submission 30, Transport Workers' Union, p 78; Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 8; Submission 3, The Australia Institute's Centre for Responsible Technology, p 7.

<sup>278</sup> Submission 29, International Transport Workers' Federation (ITF), p 14. See also Submission 30, Transport Workers' Union, p 60.

workers and their representatives do not know why decisions have been made and are therefore unable to challenge them.<sup>279</sup>

**4.36** The TWU described platforms' algorithms as a 'mystery' and noted that companies operating in the transport sector of the gig economy have generally refused to provide workers with meaningful information about how their algorithms function, despite their being used to control work and influence earnings, job security and safety.<sup>280</sup>

**4.37** Dr Veen and his colleagues also called for greater transparency between platforms and workers, especially concerning average earnings across the sector and in specific geographical and temporal contexts, the most profitable times to work, data collection and the utilisation of performance management systems.<sup>281</sup> Dr Veen proposed that greater transparency may provide starting point in reducing the imbalance of power between platforms and workers:

Platforms know how many workers are logged in at any certain point in time; workers do not. They do not know how many peers they are competing with for a finite number of gigs at any point in time. Having such transparency on these platforms might even be a first step to mitigate some of these most pressing issues.<sup>282</sup>

**4.38** In addition, the International Transport Workers Federation and Dr Veen recommended further transparency and sharing of data between platforms.<sup>283</sup>

**4.39** Whilst platforms were forthcoming with the committee on a number of issues, including the number of workers they had in New South Wales, average pay and various policies, the committee received limited evidence about how algorithms are used by platforms. Nevertheless, some platforms expressed a commitment to greater transparency.

**4.40** Airtasker's Co-founder and CEO, Mr Tim Fung, told the committee that his company is committed to this:

Anything that we can do to provide information to our consumers and to our make things more transparent and accountable for our Taskers is absolutely something that we think, is going to be conducive to job creation. That is exactly what we want to do.<sup>284</sup>

**4.41** The General Manager of Uber Eats, Mr Matthew Denman, also advised that Uber is working to provide more transparency in respect of its policies and is establishing driver advocacy forums to discuss concerns and practical ways to address them.<sup>285</sup>

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<sup>279</sup> Submission 3, Australia Institute's Centre for Responsible Technology, p 7. See also Evidence, Mr Michael Kaine, National Secretary, Transport Workers' Union, 16 November 2020, p 16.

<sup>280</sup> Answers to questions on notice, Transport Workers' Union, 20 January 2021, p 2.

<sup>281</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 8.

<sup>282</sup> Evidence, Dr Veen, 30 March 2021, p 73.

<sup>283</sup> Submission 29, International Transport Workers' Federation (ITF), p 14; Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 8.

<sup>284</sup> Evidence, Mr Tim Fung, Co-founder and Chief Executive Officer, Airtasker, 30 March 2021, p 27.

<sup>285</sup> Evidence, Mr Matthew Denman, General Manager, Uber Eats, 19 April 2021, p 36.

- 4.42** The Victorian inquiry recommended that platforms be transparent with workers, customers and regulators about their worker contracts and that arrangements be fair.<sup>286</sup>
- 4.43** In its response to this recommendation, however, the Australian Industry Group (hereafter Ai Group) described it is 'unnecessary and inappropriate' considering that other businesses are not required to publicly display the terms of their contracts. It also noted that a platform could have multiple versions of a contract, including privacy considerations that should not be published.<sup>287</sup>
- 4.44** The lack of transparency surrounding gig companies appeared to extend to the government level too. At a hearing in November 2020, representatives of the Department of Premier and Cabinet – Employee Relations advised the committee that the NSW Government has not collected evidence or commissioned studies comparable to the data collected by the Victorian inquiry into on demand work.<sup>288</sup> In its answers to questions on notice, the Department of Premier and Cabinet – Employee Relations confirmed that it was not collecting data on the number of gig economy workers in New South Wales or their wage rates; nor had it commissioned any third party to gather this data. It also advised that NSW Treasury neither collects nor holds this type of data.<sup>289</sup>

## Committee comment

- 4.45** The committee wholeheartedly agrees with inquiry participants that gig workers should have access to an accessible and affordable mechanism to resolve grievances with a platform, similar to that available to other employees.
- 4.46** A power imbalance exists in any employer–worker relationship, and there is clear evidence before us that that imbalance is heightened in the gig economy context, by virtue of workers' status as independent contractors, as well as the mechanised, dehumanised management model that operates via platforms' algorithms. Accompanying the arm's length relationship between platforms and their low paid, insecure staff, is the disposability of workers' labour: how easily they can be terminated, how platforms can operate on the assumption that other individuals will readily provide their services, and the inability of workers to challenge the operator's decisions about anything from task allocation to disciplinary action. Within this context workers have little discretion over their work, and little choice but to accept their treatment. It is the committee's firm conclusion that gig workers currently lack the power to interact and negotiate with on-demand platforms with any equality.

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<sup>286</sup> The Victorian inquiry into the on-demand workforce made the following recommendation: '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'.

<sup>287</sup> Attachment to Submission 36, Australian Industry Group, p 14.

<sup>288</sup> Evidence, Mr Charlie Heuston, Acting Executive Director, Employee Relations, Community Engagement, Department of Premier and Cabinet, 9 November 2020, p 55.

<sup>289</sup> Answers to questions on notice, Department of Premier and Cabinet – Employee Relations, 22 January 2021, p 4.

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### Finding 3

That gig workers currently lack the power to interact and negotiate with on-demand platforms as equals in New South Wales.

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- 4.47 The power imbalance between workers and platforms is of course exemplified in the ability of platforms to terminate the services of workers without due process. Inquiry participants highlighted the lack of procedural fairness as a key feature of the gig economy, and the case study of Mr Diego Franco's unfair dismissal by Deliveroo illuminated the human experience of automated termination shared by so many others.
- 4.48 While the committee received evidence that some smaller platforms have incorporated fairness mechanisms into their internal processes, there was a very strong message that these are sorely lacking in the rideshare and larger food delivery platforms. Moreover, there is no independent tribunal or other body with capacity to consider and help resolve worker disputes in on-demand work. The data collected by the TWU that 83 percent of its rideshare survey respondents sought an affordable dispute resolution mechanism highlights the extent to which workers consider that this would assist them.
- 4.49 The presence of an affordable, independent dispute resolution body is a key feature of any fair industrial relations system, and a key means by which the power differential between worker and employer can be rebalanced. Without such a mechanism, that power differential is perpetuated. Accordingly, the committee considers that the failure to provide gig workers with access to a low-cost independent tribunal empowered to hear and decide disputes is actually leading to injustice in New South Wales.
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### Finding 4

That the failure to provide gig workers with access to a low-cost independent tribunal empowered to hear and decide disputes is leading to injustice in New South Wales.

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- 4.50 The imperative to establish a dispute resolution mechanism to protect workers and rebalance the power relationship was recognised by both the Victorian and Senate inquiries, and is recognised by ours. The committee notes in particular the Senate Committee on Job Security's recommendation only last year that the Australian Government provide greater protections for independent contractors by 'establishing an accessible, low cost national tribunal to advise on, oversee and make rulings related to employment relationships involving low-leveraged independent contractors, such as those in the rideshare and other platform sectors'.<sup>290</sup>
- 4.51 The committee concurs that this is a Commonwealth government responsibility, and we strongly believe that the Australian Government should address this serious systemic void. However, the committee considers that it is incumbent on the NSW Government to protect vulnerable gig workers of this state, to the extent that this is permitted by the state's constitutional authority. In the committee's view, this dispute resolution role could be fulfilled by the tribunal we recommended in chapter 3 of this report. To do so, it must be empowered
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<sup>290</sup> Select Committee on Job Security, *First interim report: on-demand platform work in Australia* (2021), p 168.

to advise on, oversee and make binding rulings on disputes between gig workers and on-demand platforms.

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#### **Recommendation 5**

That the NSW Government give the tribunal envisaged in recommendation 2 the power to advise on, oversee and make binding rulings on disputes between gig workers and on-demand platforms, to the extent permitted by the state's constitutional authority.

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**4.52** It is also clear from the evidence before the committee that the lack of transparency in platform operations further exacerbates the power imbalance between worker and platform. Workers are kept from understanding how the algorithms that control their work actually function; nor do they have access to information from their platforms about earnings, profitable times to work, how data about them is utilised to allocate work and manage their performance, and indeed how many other workers are logged in at the same time as they are, competing for the same work. The committee considers that this lack of transparency must be addressed, again in the interests of fairness and to redress the power differential between workers and platforms.

**4.53** The mandating of improved transparency should include granting the right to registered organisations to inspect the code/software algorithms/platforms used to allocate work, establish rosters, distribute additional shifts and ensure all work is made available on a non-discriminatory basis, subject to appropriate protections.

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#### **Recommendation 6**

That the NSW Government mandate improved transparency between platforms and workers concerning average earnings, most profitable times to work, real time use of the platform, data collection and utilisation, and performance management systems.

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**4.54** The committee recognises that transparency with government and the broader community also needs to be addressed. As the gig economy engages more workers and there continue to be regulatory gaps relating to their work health and safety, the committee shares the view of inquiry participants that it is imperative for gig companies, regardless of their size, to have mandatory disclosure requirements. Improved transparency will improve the government's understanding of this rapidly evolving sector and ability to plan for it – as is explored in chapter 8 of this report. More immediately, it will also enable greater accountability and therefore fairness across the sector as a whole. The committee recommends that platform companies be required to publish regular data on their scope and operations, as well as the earnings of their workers in New South Wales.

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#### **Recommendation 7**

That the NSW Government require platform companies to publish regular data on their scope and operations, and the earnings of their workers in New South Wales.

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## Chapter 5 Collective bargaining

Another entitlement that differentiates employees and independent contractors is the ability to collectively bargain and unionise. Certain inquiry participants highlighted this as not only as a right not available to platform workers, but as a key mechanism by which the power imbalance between workers and platforms can be addressed, and ultimately, the conditions of platform workers improved.

This chapter begins by considering the barriers that on-demand workers face when trying to bargain collectively or access union representation. It examines the current legislative framework and its practical implications in the gig economy. The chapter then explores specific stakeholder concerns in relation to the *Competition and Consumer Act 2010* (Cth), and limitations in Chapter 6 of the *Industrial Relations Act 1996*.

### Current legislative framework

- 5.1 The ability to collectively bargain is another entitlement that separates legal employees from independent contractors. The *Competition and Consumer Act 2010* (Cth) (hereafter the Act) prohibits 'cartel conduct' which involves the fixing of prices by businesses (in this case individual contractors) through collective means.<sup>291</sup> The 'Transport Workers' Union (hereafter 'TWU') noted that the Act regulates conduct which is considered anti-competitive and establishes a criminal offence for individuals and businesses that engage in cartel conduct. The union explained that the rationale for prohibiting cartel behaviour in Australia is that it artificially inflates prices for consumers, hinders consumer confidence, limits innovation and makes it harder for new businesses and ventures to compete in the market.<sup>292</sup>
- 5.2 The committee heard that this provision in the Act has the effect of limiting the ability of on-demand workers to take collective action, including through a union.<sup>293</sup>
- 5.3 However, for owner-drivers in New South Wales, Chapter 6 of the *Industrial Relations Act 1996* grants bargaining rights and allows these workers to have representation through union delegates. Rates of remuneration are determined according to an agreed cost structure and calculation methodology, and owner-drivers also have access to a tribunal for arbitration.<sup>294</sup>
- 5.4 Many inquiry participants were concerned about the barriers to collective bargaining in the gig economy and called for it to be established as a right so that platform workers can pursue improved working conditions. Some of these views are canvassed below.

### Collective bargaining in the gig economy

- 5.5 A number of platforms such as DoorDash, EASI and Ola told the committee that collective bargaining is not a feature of their engagement with their workforce, in the context of a non-

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<sup>291</sup> *Competition and Consumer Act 2010* (Cth).

<sup>292</sup> Submission 30 Transport Workers' Union, p 68.

<sup>293</sup> Submission 28, Unions NSW, p 31.

<sup>294</sup> Submission 28, Unions NSW, p 32; Submission 21, Australian Road Transport Industrial Organisation, NSW Branch, p 5.

traditional employment relationship.<sup>295</sup> Ms Rebecca Burrows, DoorDash's General Manager, advised that people who use their platform can see the information about the work available, including the rate to be paid, and can choose whether to accept or reject any delivery.<sup>296</sup>

**5.6** Documents Deliveroo provided to the committee suggest that there is some scope for that company's workers to negotiate pay, but on a more individual basis. Deliveroo noted that of its current active fleet of riders, 609 of them have non-standard terms (that is, a set fixed fee) and 20 of those riders have negotiated variations of these non-standard fees.<sup>297</sup>

**5.7** However, many inquiry participants, particularly unions, underscored that regardless of work status, gig workers should have access to collective bargaining and the ability to join and be represented by a union.<sup>298</sup> The United Workers Union, for example, emphasised that there needs to be genuine worker voice and engagement with platforms, and that unions should be 'empowered to represent and organise workers in the realities of twenty-first century workplaces'.<sup>299</sup>

**5.8** Further, Unions NSW expressed the view that the legal framework which limits a workers ability to collectively bargain and unionise serves to exacerbate the disadvantage of workers in the gig economy:

Compounding the exploitation in the gig economy causing low pay and poor conditions, gig economy workers (as independent contractors) are limited in their legal ability to take collective action, including through a union. ... [The Act] adversely affects platform workers to the extent the law might consider them to be independent contractors, preventing them from unionising.<sup>300</sup>

**5.9** Similarly, the Nurses and Midwives' Association expressed strong concern that the inability to collectively bargain for improved terms and conditions of employment, places platform workers at greater risk of exploitation, insecure work and financial hardship, to the detriment of workers and ultimately also their clients:

These factors can result in workers working multiple jobs leading to tiredness and errors in judgement. This not only leaves nurses professionally compromised but is wholly undesirable in the care industry given the vulnerability of people likely to use care platforms ...<sup>301</sup>

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<sup>295</sup> Evidence, Ms Kitty Lu, Compliance and Public Relations Manager, EASI, 10 September 2021, p 12; Evidence, Ms Rebecca Burrows, General Manager, DoorDash, 10 September 2021, p 5; Evidence, Mr Simon Smith, Managing Director, Ola Australia and New Zealand, 9 November 2020, p 35.

<sup>296</sup> Evidence, Ms Burrows, 10 September 2021, p 5.

<sup>297</sup> Answers to questions on notice, Deliveroo, 29 April 2021, p 4.

<sup>298</sup> See for example, Submission 30, Transport Workers' Union, p 73; Submission 38, Unions NSW, p 32; Submission 6, United Workers Union, p 9; Submission 19, Shop, Distributive and Allied Employees' Association (NSW Branch), p 3; Submission 29, International Transport Workers' Federation (ITF), p 3; Submission 5, Centre for Future Work, p 19.

<sup>299</sup> Submission 6, United Workers Union, p 9.

<sup>300</sup> Submission 28, Unions NSW, p 31.

<sup>301</sup> Submission 49, NSW Nurses and Midwives' Association, p 5.

- 5.10** Within this vein, unions including the Shop, Distributive and Allied Employee's Association advocated that changes be introduced to give independent contractors the right to bargain collectively and be covered by enterprise agreements to improve their working conditions.<sup>302</sup>
- 5.11** The Australia Institute's Centre for Future Work argued that in the face of rapid technological change, 'workers need more effective rights to negotiate the terms of digital workplace monitoring and performance evaluation through the collective bargaining process'.<sup>303</sup>
- 5.12** Certain inquiry participants, including the International Transport Workers Federation and Australian Institute for Employment Rights (AIER), highlighted that Australia was actually contravening its obligations under international law by not granting workers the ability to collectively bargain.<sup>304</sup> The AIER noted that Australia has ratified the core *International Labour Organisation Labour Conventions, Numbers 87 and 98*, dealing with freedom of association and collective bargaining including sector and industry-wide bargaining.<sup>305</sup>
- 5.13** The AIER compared this situation with the conditions in Scandinavian countries, where broad definitions of employment include independent contractors, and sector-wide and platform-wide collective agreements have been established, with the effect of greater protections for workers.<sup>306</sup>
- 5.14** The TWU told the committee that in its survey of rideshare and food delivery workers, the majority of participants had indicated their strong preference to have the option of collective bargaining. Their surveys found that 90 per cent of food delivery participants and 80 per cent of rideshare participants reported that they 'should be able to form a union to collectively represent their interest'.<sup>307</sup>

## Competition law and collective bargaining

- 5.15** Other inquiry participants who pointed out, as highlighted above by the TWU, that the current provisions in competition law create barriers for independent contractors to be able to unionise to improve their working conditions, included the Australian Road Transport Industrial Organisation NSW Branch, Shop, Distributive and Allied Employee's Association (NSW Branch), and rideshare driver Mr Malcolm Mackenzie.<sup>308</sup>
- 5.16** The Australian Road Transport Industrial Organisation NSW Branch further stated that compared to the protections that ensure employees have minimum standards of remuneration and conditions, collective bargaining does not appear to be available to gig workers through the

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<sup>302</sup> Submission 19, Shop, Distributive and Allied Employee's Association (NSW Branch), p 12.

<sup>303</sup> Submission 5, Centre for Future Work, p 19.

<sup>304</sup> Submission 29, International Transport Workers' Federation (ITF), p 8; Submission 40, Australian Institute of Employment Rights, pp 5-6. See also Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 39.

<sup>305</sup> Submission 40, Australian Institute of Employment Rights, pp 5-6.

<sup>306</sup> Submission 40, Australian Institute of Employment Rights, p 4.

<sup>307</sup> Submission 30, Transport Workers' Union, pp 10 and 15.

<sup>308</sup> See for example, Submission 21, Australian Road Transport Industrial Organisation NSW Branch, p 4; Submission 19, Shop, Distributive and Allied Employee's Association (NSW Branch), p 3; Evidence, Mr Malcolm Mackenzie, Rideshare driver, 9 November 2020, p 14.

Act's competition and consumer regulatory arrangements regulated by the Australian Competition and Consumer Commission (hereafter ACCC).<sup>309</sup>

**5.17** At the same time, the Transport Education, Audit and Compliance Health Organisation (hereafter TEACHO) noted that the *Competition and Consumer Act 2010* has some exemptions. In October 2020, the ACCC issued a new class exemption for independent contractors (and businesses with a turnover of less than \$10 million) to collectively bargain without having to apply to the ACCC. From early 2021 such contractors only have to lodge a one-page notice with the ACCC and with each business to be bargained with. TEACHO explained that this now allows road transport on-demand workers to engage in some forms of collective bargaining.<sup>310</sup>

**5.18** However, TEACHO expressed concern that there are still 'significant limitations' compared to the broad collective bargaining rights of employees as the exemption restricts a worker from accessing a full suite of collective bargaining rights:

[T]he exemption does not permit collective boycott conduct or withdrawal of labour and limits information-sharing among a group of contractors. Moreover, there is no bargaining infrastructure like the agreement-making provisions in the Fair Work Act. In particular, there are no mechanisms such as bargaining orders, good faith provisions or majority support determinations to compel a work provider to bargain in good faith with workers. Additionally, there is no mechanism to register a collective agreement.<sup>311</sup>

**5.19** Furthermore, TEACHO noted that whilst the exemption provides immunity from competition and consumer statute law, it will do little to address other legal liabilities that arise under the common law.<sup>312</sup>

**5.20** The Australian Industry Group (hereafter Ai Group) held opposing views and considered that the option for non-employee platform workers to collectively bargain with ACCC authorisation meant that there are no 'excessive' barriers under current legislation.<sup>313</sup> Its Head of National Workplace Relations Policy, Mr Stephen Smith, suggested that no changes to the status quo are necessary:

There are a lot of these exemptions and some of them have been applied for by the TWU. So to the extent that there is any need for a mechanism in this space, that mechanism, we would argue, already exists under the exemption process in the *Competition and Consumer Act*.<sup>314</sup>

**5.21** The Ai Group also noted that there is 'absolutely nothing' legal stopping workers from joining the TWU or other unions to access their services.<sup>315</sup>

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<sup>309</sup> Submission 21, Australian Road Transport Industrial Organisation NSW Branch, p 4.

<sup>310</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), pp 41-42.

<sup>311</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 42.

<sup>312</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 42.

<sup>313</sup> Attachment to Submission 36, Australian Industry Group, p 14.

<sup>314</sup> Evidence, Mr Stephen Smith, Head of National Workplace Relations Policy, Australian Industry Group, 16 November 2020, p 28.

<sup>315</sup> Evidence, Mr Stephen Smith, 16 November 2028, p 28.

**5.22** Perhaps indicating that some platforms recognise that collective bargaining is inevitable in parts of the gig economy, Mr Simon Smith, the Managing Director of Ola Australia and New Zealand (hereafter Ola) indicated that Ola is willing to engage in discussions with unions and potentially allow collective bargaining for its workers. Mr Smith stated that Ola has been in discussions with the TWU regarding drivers' ability to bargain pricing, but acknowledged it had been a 'slow process'.<sup>316</sup> He also expressed the view that collective bargaining will eventually become legal for their industry and spoke of this as 'something we are definitely open to'.<sup>317</sup>

### **Potential opportunities arising from Chapter 6 of the *Industrial Relations Act 1996***

**5.23** As noted earlier, Chapter 6 of the *Industrial Relations Act 1996* (hereafter IR Act) recognises the vulnerability of owner-drivers who work under contracts of bailment and contracts of carriage in the transport industry, granting them bargaining rights and a framework of protections allowing enforceable minimum pay and conditions to be determined.

**5.24** The TWU and Unions NSW highlighted that whilst Chapter 6 is an example of a legislative instrument that has provided contractors with semi-flexible work arrangements, basic rights and entitlements, its limitations include that it has restricted application and does not facilitate collective bargaining.<sup>318</sup> These stakeholders explained that under the IR Act, the NSW Industrial Relations Commission (hereafter the NSW IRC) is able to establish minimum pay and conditions for owner-drivers in the transport sector based on 'contract determinations', broadly analogous to industry awards, that can cover the entire state, industry, company or even a single carrier. The NSW IRC has the power to make these contract determinations on the basis of an application by either party, as well as to approve 'contract agreements', broadly analogous to enterprise agreements.<sup>319</sup>

**5.25** In respect of Chapter 6's limitation in that it does not expressly facilitate collective bargaining, the TWU explained that the whilst owner-drivers are allowed to collectively bargain, the NSW IRC does not have the ability to assist parties in bargaining. So while a party is allowed to apply for a contract determination that would have a similar effect, according to the TWU that this is a much more time-consuming process than it could be, requiring evidence and arbitration.<sup>320</sup>

**5.26** The union further explained that owner-drivers do not have the right to take protected industrial action to pursue claims and that the NSW IRC has previously found that principal contractors have been within their rights to dismiss owner-drivers who have taken such industrial action in relation to their claims.<sup>321</sup>

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<sup>316</sup> Evidence, Mr Simon Smith, Managing Director, Ola Australia and New Zealand, 9 November 2020, p 35.

<sup>317</sup> Evidence, Mr Simon Smith, 9 November 2020, p 37.

<sup>318</sup> Submission 28, Unions NSW, p 32; Submission 30, Transport Workers' Union, p 73.

<sup>319</sup> Submission 30, Transport Workers' Union, pp 73-74.

<sup>320</sup> Submission 30, Transport Workers' Union, pp 74-75.

<sup>321</sup> Submission 30, Transport Workers' Union, p 75.

- 5.27 Notwithstanding the limitations of Chapter 6, Unions NSW argued that workers in the gig economy should have access to protections similar to or greater than those found there.<sup>322</sup>

### Committee comment

- 5.28 The committee notes that a fundamental right of all workers, consistent with international human rights instruments, is to collectively bargain and unionise. As noted in chapter 3, the committee fundamentally disagrees with the artificial and unhelpful distinction between legal employees and independent contractors. Moreover, we consider that the criminal prohibition on collective organisation and action by workers as 'cartel behaviour' is a distortion of the collective bargaining concept. By prohibiting collective action, the present legislative framework actively limits the ability of gig workers to improve their working conditions. In doing so it perpetuates the power differential between workers and platforms and cements poor pay and conditions.
- 5.29 As an essential first step in addressing this wrong, the committee calls on the NSW Government to publicly affirm the right of on-demand workers to freely associate by joining (or not joining) a union.

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#### Recommendation 8

That the NSW Government publicly affirm the right of gig workers to freely associate by joining (or not joining) a union.

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- 5.30 While once again it is incumbent on the Commonwealth Government to rectify this wrong by amending the *Competition and Consumer Act*, the committee also considers that the imperative to address this is so strong that the NSW Government should act, for the benefit of gig workers, to allow them to bargain collectively. The committee recommends that the NSW Government legislate to establish a system of collective bargaining for on-demand workers, to the extent permitted by the state's constitutional authority. Specifically, the committee considers that the NSW Government should amend Chapter 6 of the IR Act to establish a collective bargaining system that includes rideshare, food delivery and parcel delivery workers. The Act would need to be amended to expressly facilitate collective bargaining, and to extend its reach beyond owner-drivers to these other categories of workers.

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#### Recommendation 9

That the NSW Government legislate to establish a system of collective bargaining for workers providing labour to on-demand platforms, to the extent permitted by the state's constitutional authority.

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<sup>322</sup> Submission 28, Unions NSW, p 32.

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**Recommendation 10**

That the NSW Government amend Chapter 6 of the *Industrial Relations Act 1996* to establish a collective bargaining system that includes rideshare, food delivery and parcel delivery workers.

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- 5.31** Matched with this, the committee recognises the need to establish a mechanism for institutional recognition of agreements reached through means of collective action between a platform business and its workers. In the committee's view this should be built into the role of the tribunal recommended in chapter 3 of this report. We recommend that the NSW Government empower the tribunal to recognise an agreement reached by an on-demand platform and its workers (or their representatives) that improves the minimum conditions a worker is otherwise entitled to.
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**Recommendation 11**

That the NSW Government give the tribunal envisaged in recommendation 2 the power to recognise an agreement reached by an on-demand platform and its workers (or their representatives) that improves the minimum conditions a worker is otherwise entitled to.

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## Chapter 6 State taxation

Whilst income tax and company tax are the remit of the Commonwealth Government, two areas of state taxation – payroll tax and the passenger service levy – were the focus of some discussion during the committee's exploration of the gig economy. The committee heard that by classifying their workers as independent contractors, companies can avoid their liabilities under state taxation, including payroll tax.

This chapter considers payroll tax within the platform economy context, examining the recent Foodora case in which the Fair Work Commission found that an employee relationship existed between the company and a worker. The chapter also considers evidence about Revenue NSW investigations into gig economy companies and briefly considers the issue of multinational corporations avoiding tax obligations. It then explores the evidence the committee received about the passenger service levy, which is enforced on taxi service providers and booking service providers.

### Payroll tax in the gig economy

- 6.1 As noted in chapter 1, the *Payroll Tax Act 2007* (hereafter the Act) determines whether businesses in New South Wales need to pay payroll tax on their employees' wages, using the multi-factor test to establish whether a common law employment relationship exists.
- 6.2 In chapter 3 the committee noted that the legal status of a person will affect whether their employer needs to pay payroll tax, among other potential requirements. The committee heard evidence throughout the inquiry that gig economy platforms may be reticent to pay payroll tax for independent contractors as where such payments are liable, the worker could be deemed to be an employee, and the platform now their employer, with broader consequences for the status and entitlements of that worker.<sup>323</sup>
- 6.3 However, Revenue NSW, which is responsible for administering the state's taxation laws, told the committee that payments to independent contractors may be liable for payroll tax even though contractors are not common law employees.
- 6.4 A number of stakeholders cited the 2018 Foodora case,<sup>324</sup> where the Fair Work Commission (hereafter the Commission) determined that a food delivery driver was an employee of the German-founded food delivery platform for the purposes of an unfair dismissal complaint.<sup>325</sup>
- 6.5 Academics Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen advised the committee that as a result of the Commission's decision, the Australian Taxation Office (hereafter the ATO) had also formed the view that Foodora should have been collecting income tax and making superannuation contributions and was liable for millions of dollars of unpaid taxes and superannuation. On the basis of these findings, the administrator responsible for the company after it entered voluntary administration in 2018 agreed that Foodora had 'probably

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<sup>323</sup> Submission 34, Revenue NSW, pp 1-2; Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 5.

<sup>324</sup> *Joshua Klooger v Foodora Australia Pty Ltd*, [2018] FWC 6836.

<sup>325</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), pp 10-11; Attachment to Submission 36, Australian Industry Group, p 3; Submission 2, Australian Lawyers Alliance, pp 5-6.

wrongly classified its workers as independent contractors'.<sup>326</sup> Unions NSW representatives informed the committee that as a result of the Commission's rulings, Foodora withdrew from the Australian market owing 'quite a bit of money to workers and also some tax debt'. As there was no legally incorporated entity to sue, only some workers received the money due to them.<sup>327</sup>

- 6.6** Dr Barratt and colleagues noted that distinct differences existed between platforms including Foodora, Uber Eats and Deliveroo at that time. In addition, a number of Fair Work Commission determinations confirmed that Uber's classification of its workers as independent workers was appropriate.<sup>328</sup>
- 6.7** Hireup, an online platform which provides disability support services and employs their workers, noted that state governments are potentially losing 'millions of dollars' in payroll tax revenue when businesses classify their workers as independent contractors.<sup>329</sup>

### **Business perspectives on payroll tax**

- 6.8** Industry groups argued to the committee that payroll tax should be abolished or replaced with an alternative, a business cash flow tax,<sup>330</sup> on the basis that it is discriminatory by design and its application is neither fair nor equitable, as evidenced by how it applies to gig economy businesses.<sup>331</sup> The Ai Group's Head of New South Wales, Mr Mark Goodsell, further observed that payroll tax is 'not particularly efficient' nor 'satisfactory', and that these issues broadly affect other sectors too.<sup>332</sup> In written answers to questions, the Ai Group acknowledged the complex considerations at play:

Ai Group is keenly interested in reforms to taxation arrangements. One approach would be to remove payroll tax completely. This would of course also remove all discriminatory features of the tax and would also remove the deadweight losses it imposes on the economy. The complicating consideration is whether other taxes would need to rise to make up for the loss of payroll tax and/or whether government spending could be reduced to make up for the lower level of revenue collected. The fairness, equity and efficiency implications of the alternative taxes or of the lower spending would need to be assessed in light of concrete proposals.<sup>333</sup>

- 6.9** The committee questioned Revenue NSW about the practice of gig companies maintaining separate corporate structures across different jurisdictions to avoid their payroll tax obligations. Revenue NSW indicated that it considers various factors when investigating whether grouping provisions should apply to such businesses. These factors include the level of control exerted (that is, whether a single entity controls two or more businesses, whether that control is direct or indirect, whether there are common director provisions) and whether there is sufficient

<sup>326</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 5.

<sup>327</sup> Evidence, Ms El Leverington, Legal and Industrial Officer, Unions NSW, 9 November 2020, p 19; Evidence, Mr Thomas Costa, Assistant Secretary, Unions NSW, 9 November 2020, p 19.

<sup>328</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 5.

<sup>329</sup> Submission 53, Hireup, p 2.

<sup>330</sup> Evidence, Mr Mark Goodsell, Head of NSW, Australian Industry Group, 16 November 2020, p 25.

<sup>331</sup> Answers to questions on notice, Ai Group, 14 January 2021, p 3.

<sup>332</sup> Evidence, Mr Goodsell, 16 November 2020, p 25.

<sup>333</sup> Answers to questions on notice, Australian Industry Group, 14 January 2021, p 4.

evidence that the businesses conducted by the entities are actually separate, with very little to associate them.<sup>334</sup>

**6.10** For payroll tax purposes, businesses can be grouped with other businesses – and thereby made liable for payroll tax if they meet the threshold – if there is a link between the companies. Revenue NSW noted that grouping can occur regardless of where the businesses operate, that is, across different jurisdictions and even if one is an overseas holding company. A group exists where:

- the threshold entitlement is based on the proportion of New South Wales wages against total Australian wages
- a single threshold deduction applies to the group
- every member of the group is liable for any outstanding payroll tax of other group members.<sup>335</sup>

**6.11** However, Business NSW was of the opinion that the grouping provisions in respect of payroll tax disadvantage businesses who are not a part of the gig economy. It stated that the rules applying to whether the earnings of independent contractors are wages for the purposes of payroll tax, make payroll tax administration difficult for many businesses. Business NSW thus advocated that the payroll tax environment should be simplified to make it easier for businesses to determine their obligations when engaging independent contractors.<sup>336</sup>

### **Challenges for Revenue NSW**

**6.12** The Chief Commissioner of State Revenue, Mr Scott Johnston, acknowledged that the payroll tax system for the gig economy is a 'very complex area of compliance for Revenue NSW' because of the emerging companies and their differing business models. The Chief Commissioner also stated that companies are 'not static' and constantly change their business models, meaning that one year's assessment for a company may differ to the following year's.<sup>337</sup>

**6.13** Revenue NSW noted that it is currently modernising its penalty regime, both in terms of the quantity of financial penalties, and by strengthening the consequences for attempts to mislead or provide false information to the Chief Commissioner. It stated that a 'robust regime that disincentivises those unwilling to contribute their fair share' is needed, and that legislation to update these provisions was before the Parliament, as at December 2021.<sup>338</sup>

**6.14** Revenue NSW advised the committee that it continues to conduct investigations into gig companies' liabilities under payroll tax. This issue is explored further in the next section.

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<sup>334</sup> Evidence, Mr Cullen Smythe, Commissioner of State Revenue, Revenue NSW, 23 February 2021, p 48.

<sup>335</sup> Revenue NSW, *Taxes, duties, levies and royalties*, <https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/payroll-tax/grouping>.

<sup>336</sup> Submission 7, Business NSW, p 3; Evidence, Mr Mark Frost, Chief Economist, Business NSW, 9 November 2020, p 69.

<sup>337</sup> Evidence, Mr Scott Johnston, Deputy Secretary and Chief Commissioner of State Revenue, Revenue NSW, 18 October 2021, p 19.

<sup>338</sup> Answers to questions on notice, Revenue NSW, 8 December 2021, p 8.

### Revenue NSW investigations – Uber and Deliveroo

- 6.15** Revenue NSW representatives told the committee that that agency conducts investigations into businesses where it identifies a likelihood of non-compliance with tax liabilities. It uses a risk-based framework that categorises businesses or industries into categories of risk.<sup>339</sup>
- 6.16** The Chief Commissioner stated that evolving and new industries are given more attention to see 'how they are behaving and how they are responding to us'.<sup>340</sup> The Commissioner of State Revenue, Mr Cullen Smythe, acknowledged that whilst larger companies are more likely to be on Revenue NSW's radar, it is more difficult to be across smaller or new gig companies. However the Commissioner affirmed that Revenue NSW has processes in place to try and reach out proactively to those businesses who do not self-register for payroll tax:
- It can be quite difficult, especially with businesses that are smaller but are starting to see some success. Before they hit our radar, part of our analytics is to try and notify them and let them know that this is something they may well need to deal with in the future.<sup>341</sup>
- 6.17** In response to a question as to whether any platform-based companies are under investigation for unpaid liabilities under payroll tax, Revenue NSW confirmed to the committee that it had commenced investigations into 13 entities in the gig economy over a period of 12 months to March 2021.<sup>342</sup> At a later appearance before the committee in October 2021, the Chief Commissioner confirmed that nine of those investigations had concluded, with a number of notices of assessment provided to the relevant companies.<sup>343</sup> In answers to questions on notice, Revenue NSW advised that it had issued notices of assessment for unpaid tax to three customers, totalling more than \$84 million (including interest and penalty).<sup>344</sup>
- 6.18** Due to secrecy provisions, the Chief Commissioner was unable to provide specific information on which companies were issued assessment notices, however he did concede to the committee that media reports about Revenue NSW issuing Uber with assessment notices regarding a significant amount of unpaid payroll tax, reportedly \$81.5 million<sup>345</sup> were 'broadly accurate'.<sup>346</sup> Revenue NSW subsequently advised that the notices of assessment issued to Uber were the highest amount it had produced as a result of a payroll tax audit over the last five years.<sup>347</sup>
- 6.19** Revenue NSW also confirmed that it had issued notices of assessment to Uber for six years, for the financial years 2015 to 2020. Its investigation into Uber reviewed both the rideshare business

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<sup>339</sup> Evidence, Mr Johnston, 23 February 2021, p 44; Evidence, Mr Smythe, 23 February 2021, p 44.

<sup>340</sup> Evidence, Mr Johnston, Revenue NSW, 23 February 2021, p 45.

<sup>341</sup> Evidence, Mr Smythe, Revenue NSW, 23 February 2021, pp 45-46.

<sup>342</sup> Answers to questions on notice, Revenue NSW, 22 March 2021, p 1. Further information was sought by the NSW Legislative Council in November 2020 under Standing Order 52. More information can be found at <https://www.parliament.nsw.gov.au/tp/files/78790/Index%20-%20Revenue%20NSW%20Investigations%20-%2020December%202020.PDF>.

<sup>343</sup> Evidence, Mr ScTT Johnston, Revenue NSW, 18 October 2021, p 16.

<sup>344</sup> Answers, to questions on notice, Revenue NSW, 8 December 2021, p 1.

<sup>345</sup> Nassim Khadem, 'How Uber Australia fills a Dutch 'cash pool' and why it is fighting an \$81.5m payroll tax bill', *ABC News*, 8 September 2021.

<sup>346</sup> Evidence, Mr Johnston, 18 October 2021, pp 16-17.

<sup>347</sup> Answers to questions on notice, Revenue NSW, 8 December 2021, p 3.

and the food delivery business. Revenue NSW reported that payments to food delivery workers were found to be wholly exempt from payroll tax as the services provided were ancillary to the conveyance of goods.<sup>348</sup> Therefore, assessment notices only included payroll tax on omitted payments to rideshare drivers and did not include any payments made to food delivery workers.<sup>349</sup>

- 6.20** Revenue NSW's investigation also determined that, for payroll tax purposes, rideshare drivers were contractors of Uber.<sup>350</sup>
- 6.21** Revenue NSW further advised the committee that in April 2021, Uber lodged an objection to the notices of assessment, which was disallowed in August 2021. Uber has since filed an appeal with the NSW Supreme Court.<sup>351</sup>
- 6.22** Revenue NSW also confirmed that Deliveroo had been issued with assessment notices<sup>352</sup> and that it is planning to investigate Ola.<sup>353</sup>
- 6.23** Revenue NSW representatives explained that they work closely with the ATO in terms of investigations and how Revenue NSW determines which areas or businesses to investigate. Mr Smythe stated that the ATO also sends data to Revenue NSW, which can then be matched and fed into its analytics process.<sup>354</sup>
- 6.24** Revenue NSW can also obtain information in relation to a particular taxpayer from the ATO, but the Commissioner flagged that the data may not be specific to the state, 'which can create some difficulties'.<sup>355</sup>
- 6.25** Further to this, the Chief Commissioner highlighted that the revenue commissioners across jurisdictions and the ATO meet on a quarterly basis to discuss how they will work individually and together, and endeavour to align their efforts where possible.<sup>356</sup> For example, Revenue NSW noted that, whilst not sharing specific details of its investigation into Uber, it had provided regular updates on the issues identified during the audit to all jurisdictions via the inter-jurisdictional compliance working group.<sup>357</sup>

### **Multinational corporations and payroll tax**

- 6.26** Some inquiry participants also raised that certain multinational corporations had undermined state revenue by evading local tax obligations and repatriating profits abroad.<sup>358</sup> The

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<sup>348</sup> s 32(3)(d), *Payroll Tax Act 2007*.

<sup>349</sup> Answers to questions on notice, Revenue NSW, 8 December 2021, p 3.

<sup>350</sup> Answers to questions on notice, Revenue NSW, 8 December 2021, p 3.

<sup>351</sup> Answers to questions on notice, Revenue NSW, 8 December 2021, p 1.

<sup>352</sup> Evidence, Mr Johnston, 18 October 2021, p 22.

<sup>353</sup> Answers to questions on notice, Revenue NSW, 8 December 2021, p 8.

<sup>354</sup> Evidence, Mr Smythe, 23 February 2021, pp 45-46 and 51.

<sup>355</sup> Evidence, Mr Smythe, 23 February 2021, p 51.

<sup>356</sup> Evidence, Mr Johnston, 23 February 2021, p 51.

<sup>357</sup> Answers to questions on notice, Revenue NSW, 8 December 2021, p 6.

<sup>358</sup> Submission 30, Transport Workers' Union, p 69.

Commissioner of State Revenue explained to the committee that the regulator had 'good tools' in place to collect any revenue owed by multinational corporations. The Commissioner said that he was not aware of any recent international factors related to payroll tax that had a negative impact on Revenue NSW's ability to collect from such overseas entities.<sup>359</sup>

- 6.27** In its answers to questions taken on notice, Revenue NSW explained that the issue of whether drivers are engaged by overseas or Australian entities does not impact the amount of taxable wages paid by a group to workers (such as Uber rideshare drivers); nor does it influence the question of whether drivers are contractors or employees. It only determines which entity in a particular group of companies is liable for payroll tax.<sup>360</sup>

## Passenger service levy

- 6.28** A second area of state taxation that was a focus of the inquiry was the passenger service levy. In New South Wales, authorised taxi service providers and booking service providers (which includes rideshare platforms) are required to pay a passenger service levy of one dollar plus goods and services tax (GST) per trip.<sup>361</sup> The Point to Point Transport Commissioner, Mr Anthony Wing, advised the committee that the passenger service levy had been established to cover the costs of providing industry assistance, primarily for taxi licences.<sup>362</sup> The levy was intended to be temporary, contributing to a \$250 million compensation package for the taxi industry, within the context of the advent of rideshare services such as Uber.<sup>363</sup> Revenue NSW is responsible for the collection of the passenger service levy and does so via direct debit, customer bank accounts and debt recovery.<sup>364</sup>
- 6.29** By 30 June 2021, the levy has collected almost \$211 million. The Point to Point Transport Commissioner stated that in the financial year 2020-2021 the levy collected \$52.63 million.<sup>365</sup> In the first quarter of 2021, the levy collected approximately \$11.5 million.<sup>366</sup>
- 6.30** The Point to Point Transport Commissioner stated that NSW Treasury paid out 'significant amounts' as a result of the assistance package following the first stage of reforms and has recently announced that there will be a further assistance package.<sup>367</sup> The Point to Point Transport Commission advised that more than \$145 million has been paid out in assistance to the point to point transport industry so far.<sup>368</sup>
- 6.31** In answers to questions on notice, the Point to Point Transport Commission also informed the committee that the passenger service levy will be extended on all point to point transport trips

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<sup>359</sup> Evidence, Mr Smythe, NSW, 18 October 2021, p 21.

<sup>360</sup> Answers to questions on notice, Revenue NSW, 8 December 2021, p 7.

<sup>361</sup> Revenue NSW, *Passenger service levy*, <https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/passenger-service-levy>.

<sup>362</sup> Evidence, Mr Anthony Wing, NSW Point to Point Transport Commissioner, 18 October 2021, p 5.

<sup>363</sup> Clare Blumer, 'A \$1 tax on NSW Uber and taxi rides starts Thursday', , 30 January 2018.

<sup>364</sup> Evidence, Mr Johnston, 18 October 2021, p 22.

<sup>365</sup> Evidence, Mr Wing, 18 October 2021, p 5.

<sup>366</sup> Answers to questions on notice, Revenue NSW, 8 December 2021, p 9.

<sup>367</sup> Evidence, Mr Wing, 18 October 2021, p 5.

<sup>368</sup> Answers to questions on notice, Point to Point Transport Commission, 8 December 2021, p 3.

to raise an additional \$154.2 million over 2024-25. The Commission stated that this additional revenue will fund a further industry assistance package, in recognition of ongoing reforms in the point to point sector.<sup>369</sup>

- 6.32** The Point to Point Transport Commissioner advised that Uber is the 'most significant taxpayer' for the levy and has complied with all of its obligations.<sup>370</sup>
- 6.33** He also stated that the Commission has audited a number of booking service providers for underpayment. The Commissioner confirmed that some companies had been told to rectify the underpayments, and they have subsequently done so.<sup>371</sup>
- 6.34** In relation to compliance and how the Point to Point Transport Commission decides whom to audit, the Commissioner advised that it is a combination of random audits and following up on companies who had not been putting in returns, or had lodged returns based on an estimate which had not changed for some time.<sup>372</sup>

### Committee comment

- 6.35** The fact that 13 entities in the gig economy were investigated by Revenue NSW in the 12 months to March 2021, and that notices of assessment totalling \$84 million for unpaid tax were issued to three companies, indicates that avoidance of payroll tax by platforms is a live issue in New South Wales. The size of this figure of course speaks to the substantial sums involved, while reports attributing \$81.5 million of that total to a single company – Uber – points to the fundamental principle of fairness that underpins taxation. Avoidance of tax by any company is profoundly unfair to the community in which a business operates, and to others in the marketplace against whom the business is competing.
- 6.36** In the gig economy context it is also profoundly unfair to workers if a company seeks to avoid payroll tax in order to also avoid the obligations to workers that would flow from them being classified as employees. The Foodora case highlights the potential for misclassification of workers in the gig economy, and the price that individual workers and the people of New South Wales pay when businesses manipulate this system. Moreover, where the workers involved are poorly paid and insecure, while large profits flow to multinational companies, this offends deeply against our nation's principles of fairness.
- 6.37** The committee wholeheartedly agrees with Revenue NSW that a robust regime with strong disincentives against the avoidance of payroll tax by any businesses, including platform companies, is highly desirable. We welcome Revenue NSW's work to modernise its penalty regime to ensure that all companies pay their fair share to the state purse, by increasing the quantity of financial penalties and strengthening the consequences of attempts to avoid tax. We look forward to considering this legislation in the coming months.
- 6.38** At a structural level, the committee is concerned that because the payroll tax system was designed well before the emergence of digital platforms, it is not fit for purpose in respect of

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<sup>369</sup> Answers to questions on notice, Point to Point Transport Commission, 8 December 2021, p 3.

<sup>370</sup> Evidence, Mr Wing, 18 October 2021, p 5.

<sup>371</sup> Evidence, Mr Wing, 18 October 2021, p 6.

<sup>372</sup> Evidence, Mr Wing, 18 October 2021, p 7.

them. We share the concern of industry groups that payroll tax can operate inequitably between digital and other businesses, is open to manipulation, and lacks efficiency.

- 6.39** Recognising that grouping provisions are a particular weakness in the payroll tax regime, the committee recommends that as a priority, the government review these provisions to ensure that on-demand platforms are not obtaining an advantage over other businesses not trading in the gig economy.
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#### **Recommendation 12**

That the NSW Government urgently review the grouping provisions of the *Payroll Tax Act 2007* to ensure that on-demand platforms are not obtaining an advantage over other businesses who are not trading in the gig economy.

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- 6.40** Finally, the committee is very open to the suggestion that New South Wales would be better served by a different tax regime altogether to payroll tax. Industry representatives made a strong case to the committee that the system needs a fundamental rethink in order to operate more fairly between sectors and businesses, and more simply overall, while also highlighting that other considerations would make this a complex task. Nevertheless, in the committee's view it is worth doing.
- 6.41** In order to address the fairness concerns documented in this chapter, and to modernise the state taxation system in the context of the advent and ongoing rapid evolution of the gig economy, the committee recommends that the NSW Government consider undertaking a study of the advantages and disadvantages of replacing payroll tax with a business cash-flow tax.
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#### **Recommendation 13**

That the NSW Government undertake a study of the advantages and disadvantages of replacing payroll tax with a business cash-flow tax.

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## Chapter 7 Work health and safety and workers compensation

Following the deaths of five food delivery riders in late 2020, the work health and safety of platform workers and their access to adequate workers compensation emerged as critical issues for this inquiry. Work health and safety measures, with their preventive focus, along with the key system of workers compensation when safety is compromised, were explored extensively during the inquiry.

This chapter considers the specific work health and safety concerns present in the gig economy, particularly in rideshare and food delivery, and reviews the current work health and safety legislative and regulatory frameworks. This includes platform businesses' obligation to create a safe working environment, involving fatigue management and safety systems, and provision of safety and personal protective equipment. The chapter considers the findings of a recent Point to Point Transport Commission safety audit of Uber and the call for more effective enforcement of laws and greater regulation across the industry.

The second part of this chapter reviews the current arrangements for workers compensation in the gig economy, examining the level of access available and what the platforms offer in lieu of the state's workers compensation scheme. The chapter concludes by considering whether minimum insurance standards should be implemented across the industry and what options there are to achieve meaningful reform.

### Poor safety in the gig economy

- 7.1** Inquiry participants highlighted that one of the most important and pressing issues related to the gig economy is the poor safety standards for its workers. The committee heard that gig workers, particularly those who work on the roads or enter other people's homes, are at much higher risk of injury, harassment and abuse.<sup>373</sup>
- 7.2** In a survey it conducted of rideshare and food delivery members, the Transport Workers' (TWU) found a third of gig workers reported that they had been seriously hurt or injured at work while 66 per cent of rideshare drivers indicated that they had been subject to some form of harassment or abuse than other workers.<sup>374</sup> The TWU argued that '[t]echnological change is contributing to a 'safety crisis' in the transport sector', with the gig economy 'driving dangerous and unsustainable practices which are placing Australian transport workers and the public at risk'.<sup>375</sup>
- 7.3** Others also argued that the legal framework governing occupational health and safety has not kept pace with the gig economy and is circumvented by gig companies who classify their workers as independent contractors.<sup>376</sup> In chapter 3 the committee explored broader allegations that

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<sup>373</sup> Submission 28, Unions NSW, p 26; Submission 30, Transport Workers' Union, p 60, Submission 29, International Transport Workers' Federation, pp 7-8; Submission 49, NSW Nurses and Midwives' Association, p 9.

<sup>374</sup> Submission 30, Transport Workers' Union, pp 8 and 13; Evidence, Mr Richard Olsen, Secretary, NSW Branch, Transport Workers' Union, 16 November 2020, p 12.

<sup>375</sup> Submission 30, Transport Workers' Union, pp 3 and 4.

<sup>376</sup> See for example Submission 2, Australian Lawyers Alliance, p 5;

platforms deliberately classify their workers in this way to avoid the obligations that accompany traditional employer – employee arrangements.

- 7.4 Perhaps as an indication that significant gaps do exist in the gig economy's safety framework, in 2020 five food delivery riders tragically lost their lives while working. Four of these deaths alone were in New South Wales. The names of the riders were Mr Dede Fredy (Uber), Mr Xiaojun Chen (Hungry Panda), Mr Chow Khai Shien (DoorDash), Mr Bijoy Paul (Uber) and Mr Ik Wong (Uber). These riders were all foreign nationals, often repatriating their wages to help their families overseas.
- 7.5 Mr Xiaojun Chen's widow, Ms Lihong Wei, gave evidence to the committee that her husband had emigrated to Australia to work as a food delivery rider for two years 'in order to bring a happy life for our children'.<sup>377</sup> Her loss was palpable as she described the effects of losing her husband and their family's primary breadwinner:

His passing away has had a huge impact and has been devastating to our family. Until now I still cannot believe that my husband has left us forever, my eight-year-old son has lost his father and the elderly parents with grey hair have lost their son forever.

I cannot imagine how we are going to carry on our lives.<sup>378</sup>

- 7.6 The TWU suggested that due to underreporting, the number of deaths and injuries are likely to be higher than what has been reported.<sup>379</sup> The issue of work health and safety was brought up repeatedly during /the inquiry, as well as what recourse is available to individuals and their families after serious injury or death. These issues are explored in detail in the sections below.

## Work health and safety in the gig economy

- 7.7 As detailed in chapter 1, under the *Work Health and Safety Act 2011* (hereafter WHS Act) and *Work Health and Safety Regulation 2017*, platform businesses have a legal obligation to provide a safe workplace and eliminate risk for persons providing on-demand services.<sup>380</sup>
- 7.8 The committee has already identified that in a notable departure from other workplace laws, the WHS Act's definition of 'worker' is broad and extends the liability of ensuring workplace health and safety (WHS) beyond employment contracts.<sup>381</sup>
- 7.9 In addition, and very significantly, unlike other legislation the WHS Act broadly defines an 'employer' as a person conducting a business or undertaking (hereafter PCBU), whereas in other legislation the definition of 'employer' is much more narrow. In the gig economy context, PCBUs, namely platforms, are responsible for ensuring safe working conditions, including consultation with workers about safety matters.<sup>382</sup>

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<sup>377</sup> Evidence, Ms Lihong Wei, Widow of Mr Xiaojun Chen, Food Delivery Worker, 9 November 2020, p 42.

<sup>378</sup> Evidence, Ms Wei, 9 November 2020, p 41.

<sup>379</sup> Submission 30, Transport Workers' Union, p 38.

<sup>380</sup> *Work Health and Safety Act 2011*, ss 19 and 35-39; *Work Health and Safety Regulation 2017*, ss 45-47.

<sup>381</sup> *Work Health and Safety Act 2011*, s 7.

<sup>382</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 24.

- 7.10** In many cases, platforms require their workers to create their own Australian Business Number (ABN). In these cases, the worker is 'self-employed' and will also be a PCBU as defined by the WHS Act. This means for example, a rideshare driver or food delivery rider will have responsibilities as both a worker and as a PCBU – meaning they have a duty to ensure, as far as is reasonably practicable, their own health and safety while at work and that the health and safety of other people is not put at risk as a result of their activities at work.<sup>383</sup>
- 7.11** The Executive Director of Compliance and Dispute Resolution at SafeWork NSW, Mr Peter Dunphy, confirmed to the committee that the drafting of New South Wales WHS legislation had been deliberately broad to deal with work being performed in 'any single place and not necessarily at a single fixed workplace'. He noted that gig economy companies and digital platforms therefore hold a general duty to provide a safe workplace, eliminate risk and notify the regulator in the instance of a workplace death.<sup>384</sup>
- 7.12** In its submission to the inquiry, SafeWork NSW also expressed the view that WHS laws are effective and enforceable in the management of worker safety in emerging non-traditional work environments, and will continue to be so into the future. It stated that the legislation can 'anticipate all sorts of other work environments that may have not been anticipated when [it] was written'.<sup>385</sup>
- 7.13** Regarding point to point transport legislation, Transport for NSW noted that the legislation also accommodates new booking technologies and changing customer expectations.<sup>386</sup> Under point to point transport legislation, rideshare platforms are classified as booking service providers and are responsible for ensuring the journeys they arrange are safe for drivers, passengers and other persons through the implementation of a safety management system and compliance with other management systems of booking service providers to ensure they are meeting their obligations. Breaches or incidents must be reported to the Point to Point Transport Commission as 'notifiable occurrences'.<sup>387</sup>
- 7.14** The Point to Point Transport Commission advised the committee that in the financial year 2020-21, it conducted 35 safety audits on booking service providers. In addition, it conducted 55 advisory visits to booking service providers.<sup>388</sup>

### **Point to Point Transport Commission's safety audit of Uber**

- 7.15** The committee noted that the Point to Point Transport Commission recently conducted a safety audit of Uber's system operations in New South Wales, issuing the company with 13 improvement notices and over \$200,000 in fines for not reporting notifiable occurrences to the Point to Point Transport Commissioner as soon as practicable, as required under the WHS Act.

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<sup>383</sup> SafeWork NSW, 'Food delivery industry', <https://www.safework.nsw.gov.au/your-industry/transport,-postal-and-warehousing/food-delivery-industry>.

<sup>384</sup> Evidence, Mr Peter Dunphy, Executive Director, Compliance and Dispute Resolution, SafeWork NSW, 16 November 2020, pp 33-34.

<sup>385</sup> Submission 27, SafeWork NSW, pp 2 and 3.

<sup>386</sup> Submission 42, Transport for NSW, p 1.

<sup>387</sup> Point to Point Transport Commission, 'Booking Service Providers', <https://www.pointtopoint.nsw.gov.au/what-a-service-provider/booking-service-providers>.

<sup>388</sup> Answers to questions on notice, Point to Point Transport Commission, 8 December 2021, p 2.

The Commissioner, Mr Anthony Wing, highlighted the following areas of particular concern from the safety audit: driver fatigue, incident management, driver training and notifiable occurrences.<sup>389</sup> It was revealed that Uber had taken over two years to report some notifiable occurrences.<sup>390</sup>

- 7.16** One of the Commission's findings was that within a two-week sample period, 37 per cent of Uber drivers had more than 12 hours of continuous driving time, with some logged on to the Uber app for 17 hours of continuous driving time. Under national fatigue laws, drivers should not be driving more than 12 hours without specific accreditation. Commissioner Wing also affirmed to the committee that service providers must take responsibility for fatigue management of their drivers.<sup>391</sup>
- 7.17** Commissioner Wing advised the committee that whilst Uber had a number of safety systems in place, these were not 'fully effective'. He indicated that a number of significant notifiable occurrences had not been reported to the regulator, including serious mechanical failures in vehicles and incidents which should have also been reported to the police. A number of alleged sexual assaults had also been reported to the police but not to the Commission.<sup>392</sup> The Commissioner conceded that sexual assault reports to the police were likely to have been made by the complainant and not by Uber, such that the company may have had no knowledge of the incident because its system had not picked up the alleged assault at all.<sup>393</sup>
- 7.18** The Commissioner explained that it is essential that notifiable occurrences are reported in a timely manner, to give the regulator sufficient time to follow up with the police and ensure proper action has been taken.<sup>394</sup>
- 7.19** The Commissioner also confirmed that other gig platforms had been fined for not reporting notifiable occurrences, but their fines were not to the scale of Uber's, which were the 'largest' of their kind.<sup>395</sup> Uber has disagreed with the findings of the Point to Point Transport Commission's report and sought further clarification on improvement notices relating to fatigue, incident management, real time identification and disqualifying offences and eligibility.<sup>396</sup>
- 7.20** The Commissioner noted that after being issued with an improvement notice for 'Primary Duty of Care – Fatigue' on 28 July 2021, Uber submitted its rectification proposal on 8 December 2021. He advised that Commission staff were actively working with Uber to ensure that they make the required changes and improvements.<sup>397</sup>

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<sup>389</sup> Media release, Mr Anthony Wing, NSW Point to Point Transport Commissioner, 'Uber directed to improve its security systems', 12 August 2021.

<sup>390</sup> Answers to questions on notice, Point to Point Transport Commission, 8 December 2021, p 3.

<sup>391</sup> Evidence, Mr Anthony Wing, NSW Point to Point Transport Commissioner, 18 October 2021, p 9.

<sup>392</sup> Evidence, Mr Wing, 18 October 2021, pp 3-4.

<sup>393</sup> Evidence, Mr Wing, 18 October 2021, p 9.

<sup>394</sup> Evidence, Mr Wing, 18 October 2021, p 4.

<sup>395</sup> Evidence, Mr Wing, 18 October 2021, p 4.

<sup>396</sup> Evidence, Mr Wing, 18 October 2021, p 10; Answers to questions on notice, Point to Point Transport Commission, 8 December 2021, p 6.

<sup>397</sup> Answers to questions on notice, Point to Point Transport Commission, 8 December 2021, p 6.

- 7.21 With regard to disqualifying offences, in answers to questions on notice, the Commissioner stated that he has an information sharing agreement in place with the NSW Police Force for the purpose of the Driver Vehicle Dashboard, which allows service providers to check whether a driver has any such offences. The Commissioner can also request further information from the NSW Police Force for the purposes of an investigation under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*.<sup>398</sup>

## Obligation to create a safe working environment

- 7.22 Inquiry participants generally agreed that the current legislation is sufficiently broad to capture on-demand workers so as to protect their WHS.<sup>399</sup> However some suggested that platform businesses were not meeting their legal obligations relating to safety and that there should be more effective enforcement of both the WHS and point to point laws. These issues are considered in the sections below.

### Fatigue management and safety systems

- 7.23 Gig companies affirmed to the committee their commitment to the safety of their delivery workers and other users,<sup>400</sup> however some inquiry participants suggested that their actions, including the lack of effective fatigue management and safety systems, indicated otherwise.
- 7.24 The TWU reported to the committee that its survey of food delivery and rideshare services found that 73 per cent of respondents were worried about being hurt or injured at work, 36 per cent had been hurt or injured on the job, and of those, 81 per cent did not receive any support from the platform company.<sup>401</sup>
- 7.25 The NSW Government noted that whilst the number of reported incidents involving food delivery workers is low, there has been an 'exponential increase' in cases over several years – from one incident reported in 2017 to 19 in the first half of 2020 alone.<sup>402</sup>
- 7.26 In a report about the WHS of food delivery workers in the gig economy that it commissioned, the NSW Government found that food delivery workers generally have a 'relatively low level of WHS knowledge', particularly about Australian road rules and bicycle safety.<sup>403</sup>
- 7.27 The committee received evidence from gig companies indicating that they have implemented in some form, safety policies, practices and insurance for workers engaged with their platform. These policies, practices and insurances vary significantly between each platform. For example, Ola advised that a feature of its 'comprehensive' fatigue management plan is the presence of mechanisms in the app to allow for drivers to have breaks. The app also detects irregular vehicle

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<sup>398</sup> Answers to questions on notice, Point to Point Transport Commission, 8 December 2021, pp 4-5.

<sup>399</sup> Submission 30, Transport Workers' Union, p 4; Submission 36, Australian Industry Group, p 2; Submission 20, Ola Australia and New Zealand, pp 19-20;

<sup>400</sup> Submission 20, Ola Australia, p 23; Submission 10, Deliveroo, p 4; Submission 13, Uber, p 12.

<sup>401</sup> Submission 30, Transport Workers' Union, p 35.

<sup>402</sup> Tabled document, SafeWork NSW, *Work health and safety of food delivery workers in the gig economy*, November 2020, p 1.

<sup>403</sup> Tabled document, *Work health and safety of food delivery workers in the gig economy*, p 3.

activity, has an emergency button that triggers a response from the platform's safety team and has a unique start code that the passenger must tell the driver for the driver to receive the destination.<sup>404</sup>

- 7.28** Similarly, Uber representatives told the committee that their fatigue management system is designed so that drivers and delivery-partners automatically go offline for eight hours after being online on the app for up to 12 hours.<sup>405</sup> Uber's safety team also reviews passenger and driver feedback and takes action when something dangerous or inappropriate is reported. Uber provides education and mandatory training modules about how drivers can stay safe when out on the road and especially around fatigue management.<sup>406</sup> (See paragraphs 7.15 – 7.21 for further information about a Point to Point Transport Commission safety audit of Uber's systems).
- 7.29** Airtasker advised that it does not have a specific work health and safety policy, but has worked together with Unions NSW to publish educational content to make sure Taskers are aware of all the relevant safety regulations.<sup>407</sup>
- 7.30** EASI's fatigue management system is comparatively weaker than other platforms'. Its representatives told the committee that their system does not ever restrict driver access to its app, only sending reminder notifications for the driver to take a break after eight, 10 and 12 hours of continuous time logged on.<sup>408</sup>
- 7.31** In its report on WHS and food delivery platforms, the NSW Government noted that the WHS laws are generally not prescriptive, allowing food delivery platforms to determine how to ensure the WHS of their workers. The report further noted that this range in WHS management approaches is likely to impact the WHS perceptions and behaviours of food delivery workers, especially for those who work for multiple platforms.<sup>409</sup>
- 7.32** All of these platforms highlighted that their Safety Management Plans can only account for the time a driver is logged into their app, and that they have no visibility if the driver is logged into multiple apps at the same time.<sup>410</sup>

### **Multi-apping**

- 7.33** Evidence to the committee indicates that food delivery riders and rideshare drivers are often multi-apping when awaiting a call out. For example, in a survey the NSW Government

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<sup>404</sup> Submission 20, Ola Australia, pp 19 and 23. See also Mr Simon Smith, Managing Director, Ola Australia and New Zealand, 9 November 2020, p 29.

<sup>405</sup> Submission 13, Uber, p 12.

<sup>406</sup> Evidence, Ms Amanda Gilmore, Head of Driver Operations, Uber, 19 April 2021, p 44.

<sup>407</sup> Evidence, Mr Tim Fung, Co-Founder and Chief Executive Officer, Airtasker, 30 March 2021, p. 18.

<sup>408</sup> Evidence, Ms Kitty Lu, Compliance and Public Relations Manager, EASI, 10 September 2021, p 12; Evidence, Mr Young Hou, Drivers Operations Manager, EASI, 10 September 2021, p 12.

<sup>409</sup> Tabled document, SafeWork NSW, *Work health and safety perceptions of food delivery platforms in the gig economy*, November 2020, p 10.

<sup>410</sup> Submission 20, Ola Australia, p 23; Evidence, Ms Gilmore, 19 April 2021, p 44; Evidence, Ms Lu, 10 September 2021, p 12.

conducted of food delivery workers, more than 40 per cent of respondents reported working for more than one platform concurrently in the same shift.<sup>411</sup>

- 7.34** Unions NSW, the Rideshare Drivers Association of Australia and Transport Education, Audit and Compliance Health Organisation (hereafter TEACHO), expressed concern that some workers were driving for excessive and unchecked periods of time by logging in and out of multiple apps to earn more money.<sup>412</sup> Ms El Leverington, Legal and Industrial Officer at Unions NSW, explained that the lack of transparency and regulation around multi-apping is a concerning safety issue, especially with regard to fatigue:

So whilst in principle you can work between platforms, and often you will get an Uber and they have also got Ola or DiDi or Taxify running, they have the opportunity to earn a little bit more by staying online.

The reality of that really, and driven by the fact that they are often not even earning minimum wage by working on a platform is that they could then perhaps reach the limits of what is allowed per day on a particular platform if there is a limit and then go to another one and there are no checks in place to, say, manage fatigue and ensure that correct breaks are being taken.<sup>413</sup>

- 7.35** Like Unions NSW, TEACHO pointed to studies linking poor safety in the rideshare and food delivery sector to low pay. In particular, it highlighted the preparedness of platform workers to tolerate risks in their efforts to earn money. TEACHO stated that food delivery workers 'routinely take risks on the road and engage in hazardous practices to meet unreasonable deadlines ... the threat of termination for working too slowly can also contribute to poor safety for these workers'.<sup>414</sup>
- 7.36** In a similar vein, the TWU expressed concern that safety conditions are being eroded in the transport sector because of the gig companies' practices. The TWU suggested that by compromising working conditions and reducing pay below the minimum wage, the gig companies are able to control their position in the market and compel their competition to do the same.<sup>415</sup> The union insisted that transport companies should prioritise fatigue management plans and establish safe working conditions.<sup>416</sup>
- 7.37** Similarly, the Health Services Union (NSW, ACT & QLD) argued that fatigue management must be addressed in the aged care and disability services sector. Noting new entrants like Mable and HireUp, the union stated that the COVID-19 pandemic and increased risk of transmission amongst vulnerable clients has underscored the importance of visibility about how many hours an individual has worked and whether they work across multiple workplaces.<sup>417</sup>

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<sup>411</sup> Tabled document, *Work health and safety of food delivery workers in the gig economy*, p 27.

<sup>412</sup> Evidence, Ms El Leverington, Legal/Industrial Officer, Unions NSW, 9 November 2020, p 19; Submission 31, Rideshare Drivers Association of Australia, p 3; Submission 42, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 6.

<sup>413</sup> Evidence, Ms Leverington, 9 November 2020, p 19.

<sup>414</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p. 7.

<sup>415</sup> Submission 30, Transport Workers' Union, p 28.

<sup>416</sup> Submission 30, Transport Workers' Union, p 48.

<sup>417</sup> Evidence, Ms Lauren Hutchins, Division Secretary, Aged Care & Disabilities, Health Services Union (NSW, ACT & QLD), 10 September 2021, pp 34-35.

- 7.38** In evidence to the committee, gig platforms such as Uber and EASI indicated their willingness to consult across the industry on how they can improve safety concerns where people are using multiple apps or platforms.<sup>418</sup>
- 7.39** Some gig platforms, such as Doordash and Deliveroo, told the committee that they had also set up WHS committees with worker representatives to engage with the business on a range of issues, including about pay, safety issues, issues they are having with merchants and consumers, or enhancements to the app.<sup>419</sup>

### Health and safety representatives

- 7.40** In examining whether platforms are meeting their legal obligations to ensure a safe workplace, inquiry participants raised the issue of gig workers entitlement to form work groups and elect health and safety representatives (HSRs) as prescribed under WHS legislation.
- 7.41** Currently, under the WHS Act, workers have the power to form work groups and elect HSR's to act on behalf of a work group regarding health and safety conditions in the workplace. A work group consists of workers in a similar type of work with similar health and safety conditions, and an elected HSR is given certain powers and responsibilities, such as investigating complaints, inspecting the workplace, and monitoring the measures taken by PCBU to comply with WHS legislation.<sup>420</sup>
- 7.42** In evidence, SafeWork NSW confirmed that HSR provisions extend to workers in the gig economy, advising that to their knowledge there had only been one request to form work groups and elect HSRs and that was by Deliveroo riders.<sup>421</sup>
- 7.43** Detailing the process that occurred at Deliveroo, SafeWork NSW advised that following the failure to reach an agreement on the location and size of the work groups, the case was taken to the Industrial Relations Commission for determination, with a decision handed down in December 2020 now subject to appeal. SafeWork NSW noted that they are 'assisting the parties to resolve some issues relating to the conduct of HSR elections'.<sup>422</sup>
- 7.44** Mr Steve Khouw, a food delivery driver at Deliveroo, expressed frustration to the committee with the process which began in 2019. He argued that his as yet unsuccessful attempt to form a work group and elect an HSR highlights that platform businesses are reluctant to support these mechanisms and may actively work against them:

We started the process with Deliveroo in November last year, and it was a hard slog because they were not interested in getting any work groups going or in the idea of

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<sup>418</sup> Evidence, Ms Gilmore, Uber, 19 April 2021, p 44; Evidence, Ms Lu, EASI, 10 September 2021, pp 14-15.

<sup>419</sup> Evidence, Ms Rebecca Burrows, General Manager, DoorDash Australia, p 5.

<sup>420</sup> *Work Health and Safety Act 2011*, ss 51-68. See also SafeWork NSW, 'Work Groups', <https://www.safework.nsw.gov.au/safety-starts-here/consultation@work/workgroups>; SafeWork NSW, 'Health and Safety Representatives', <https://www.safework.nsw.gov.au/safety-starts-here/consultation@work/health-and-safety-representatives>.

<sup>421</sup> Answers to questions on notice, SafeWork NSW, 24 February 2022, p 3.

<sup>422</sup> Answers to questions on notice, SafeWork NSW, 24 February 2022, pp 3-4.

having health and safety as part of their modus operandi. ... Right now we are trying to elect a health and safety representative in these work groups. The issue at hand is delivery companies want to take control over the election process. The legislation is very clear—it is up to the workers to decide how we conduct an election. ... In terms of health and safety, the delivery companies use the privacy Act as an excuse for not providing us the names and details of the workers in each of these work groups. We cannot conduct an election unless we know who is going to be in that election.<sup>423</sup>

- 7.45** Discussing its recent experience, Deliveroo welcomed reform in this area so that legal obligations relating to HSRs are 'fit-for-purpose' in the gig economy.<sup>424</sup> In contrast to the evidence of workers involved in the HSR process, Mr Ed McManus, Chief Executive Officer of Deliveroo, stated that the lack of control that platform businesses have over their workplaces, together with the fact that many people work across multiple platforms, makes the process to establish HSRs difficult compared to in traditional employment:

[T]he gig economy was always going to be less straightforward than perhaps the establishment of HSRs in a traditional workplace. ... To be clear, any safety initiative is a good thing, and we are working closely with each HSR to try and drive insights as to how we can improve the safety of the workplace, but there are a few issues ... one is that the majority of riders do not work exclusively for Deliveroo. They do not work set hours or a roster where we can be sure that they will be in the workplace, and we do not control the workplace to the same extent as an employer would, in the definition of a workplace that was considered when the HSR system was developed.<sup>425</sup>

- 7.46** Separate to the case at Deliveroo, Hungry Panda told committee that in 2020 it did not have an HSR for its workers, however in response to safety concerns from drivers, it was 'working on worker groups', as of February 2021.<sup>426</sup>

### **Provision of safety and personal protective equipment**

- 7.47** Separate to the implementation of safety and fatigue management policies, inquiry participants raised that another example of how the gig economy platforms are avoiding their obligations under WHS legislation is by not providing appropriate safety equipment and/or personal protective equipment (PPE) during the COVID-19 pandemic.
- 7.48** SafeWork NSW confirmed to the committee that PCBUs have an obligation to provide safety equipment and PPE to a person carrying out work for them, unless the equipment has already been provided by another PCBU.<sup>427</sup> On its website, SafeWork NSW notes that platforms are 'best placed' to purchase and distribute PPE and safety equipment including bicycle helmets, bike lights, reflectors and hi-visibility vests.<sup>428</sup>

<sup>423</sup> Evidence, Mr Steve Khouw, Food Delivery Worker, 9 November 2020, p 14.

<sup>424</sup> Answers to questions on notice, Deliveroo, 29 April 2021, p 9.

<sup>425</sup> Evidence, Mr Ed McManus, Chief Executive Officer, Deliveroo, 30 March 2021, p 16.

<sup>426</sup> Evidence, Ms Tina Sun, Human Resources Manager, Hungry Panda, 23 February 2021, p 20 and 24.

<sup>427</sup> Evidence, Mr Dunphy, 16 November 2020, p 40.

<sup>428</sup> SafeWork NSW, 'Food delivery industry', <https://www.safework.nsw.gov.au/your-industry/transport,-postal-and-warehousing/food-delivery-industry>.

- 7.49** In evidence to the committee, platforms such as Uber and Deliveroo advised that they had provided their workers with free PPE (hand sanitiser, disinfectant wipes and masks) during COVID-19 and associated lockdowns.<sup>429</sup>
- 7.50** However a number of delivery and rideshare workers told the committee that, contrary to their obligations, food delivery and rideshare platforms had not provided adequate supplies of PPE during COVID-19 outbreaks and most of these were purchased at the worker's expense.<sup>430</sup> One worker thus described the platforms as paying 'lip service' to safety.<sup>431</sup> These claims were supported by the TWU survey of the food delivery sector, where 65 per cent of respondents said that they were not provided with any safety training during the pandemic and lockdown, and almost 50 per cent reported that they were not provided with sufficient or free PPE.<sup>432</sup>
- 7.51** The NSW Nurses and Midwives Association flagged that Mable's terms and condition state that the responsibility for WHS falls entirely to the client and worker. It noted that Mable has no obligation to ensure workers are equipped with PPE, nor any responsibility to ensure that a client's place of residence is safe, or subject to infection prevention and control measures.<sup>433</sup>

### **More effective enforcement and regulation**

- 7.52** Whilst some inquiry participants such as Ola and Business NSW suggested that safety in the gig economy is 'well regulated',<sup>434</sup> others raised significant concerns that platforms are delaying the reporting of serious injury or death of workers whilst on a gig, and in the worst instances, not reporting them at all to SafeWork NSW.<sup>435</sup> For example, the committee heard that it was the TWU, not Hungry Panda, who reported the tragic death of Mr Xiaojun Chen, a Hungry Panda delivery rider in October 2020. As a result, SafeWork NSW conducted an investigation into the incident and into the platform's response.<sup>436</sup>
- 7.53** SafeWork NSW admitted to the committee that prior to Mr Chen's death, it was not 'familiar' with Hungry Panda as a platform but advised that through its investigation, it had made 'all endeavours' to identify the extent of Hungry Panda's operations in New South Wales and to gather information about any notifications that the platform should be providing.<sup>437</sup>
- 7.54** Mr Dunphy of SafeWork NSW observed that there is a 'constant need' for that agency to monitor the gig economy industry and to identify emerging players. He noted that SafeWork NSW has a specific team trying to engage proactively with the industry:

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<sup>429</sup> Submission 13, Uber, p 5; Submission 10, Deliveroo, p 5.

<sup>430</sup> Evidence, Mr Khouw, 9 November 2020, p 9; Evidence Mr Esteban Salazar, Food Delivery Worker, 9 November 2020, p 9; Evidence, Mr Diego Franco, Food Delivery Worker, 9 November 2020, p 9.

<sup>431</sup> Evidence, Mr Khouw, 9 November 2020, p 9.

<sup>432</sup> Submission 30, Transport Workers' Union, p 8. See also p 13.

<sup>433</sup> Submission 49, NSW Nurses and Midwives Association, p 6.

<sup>434</sup> Submission 20, Ola Australia and New Zealand, pp 19-20; Submission 7, Business NSW, p 7; Evidence, Mr Luis Izzo, Representative, Australian Business Industrial, 9 November 2020, p 66.

<sup>435</sup> For example, Submission 30, Transport Workers' Union, p 4;

<sup>436</sup> Evidence, Mr Dunphy, 16 November 2020, p 34.

<sup>437</sup> Evidence, Mr Dunphy, 16 November 2020, p 35.

We do have a team—the work health and safety metro team—who are looking at this issue. We have got inspectors in there who are working with the industry and who are keeping their eyes and ears on the ground in terms of trying to identify any new players who are coming into the area. We certainly would reach out to them.<sup>438</sup>

- 7.55** SafeWork NSW told the committee that over the past three years, an increasing number of notifications have been issued to gig economy companies and digital platforms and that as a result, the regulator is working 'closely' with the platforms to ensure that they are aware of their legal obligations and the practicalities of how to implement them.<sup>439</sup> SafeWork NSW acknowledged that further work needs to be done to ensure that both platforms and workers have a clear understanding of PCBU responsibilities under WHS legislation.<sup>440</sup>
- 7.56** Unions also put forward the view that SafeWork NSW as the regulator must enforce the WHS laws more effectively, thereby ensuring that gig economy companies and digital platforms know, understand and carry out their obligations.<sup>441</sup> For example, the TWU considered that SafeWork NSW is ineffectively enforcing WHS laws and was concerned that it had not made any guidance materials available about how the gig economy interacts with WHS laws.<sup>442</sup>

### ***NSW Government Taskforce and National Safety Principles***

- 7.57** As noted in chapter 1, the deaths of five food delivery workers in New South Wales in late 2020 prompted calls to urgently review and reform the state's WHS laws. As a result, in November 2020, the NSW Government announced an investigative taskforce to examine whether any avoidable risks may have contributed to the five fatalities that had occurred within two months. The taskforce was led by SafeWork NSW and Transport for NSW, and included the NSW Police Force.<sup>443</sup>
- 7.58** The Minister for Better Regulation and Innovation, the Hon Kevin Anderson MP, stated in his joint media release with the Minister for Transport and Roads that SafeWork NSW would investigate each death and make findings for any immediate improvements or compliance activity that can be implemented to better protect food delivery riders. The Taskforce would also assess the safety measures currently implemented by each food delivery operator and potential avenues for regulatory reform to improve safety in the industry.<sup>444</sup>
- 7.59** The joint taskforce facilitated the creation of an industry action plan through collaboration between the government and industry participants, including platforms Deliveroo, DoorDash Australia, EASI, Hungry Panda, Menulog and Uber Eats. The action plan was published in April 2021 and highlighted the specific activities that companies had agreed to implement to improve

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<sup>438</sup> Evidence, Mr Dunphy, 16 November 2020, p 40.

<sup>439</sup> Evidence, Mr Dunphy, 16 November 2020, p 36.

<sup>440</sup> Evidence, Mr Dunphy, 16 November 2020, p 36.

<sup>441</sup> Submission 28, Unions NSW, p 25; Submission 30, Transport Workers' Union, p 34.

<sup>442</sup> Submission 30, Transport Workers' Union, pp 29, 34, 36-7.

<sup>443</sup> Media release, Hon Kevin Andersen MP, Minister for Better Regulation and Innovation and Hon Andrew Constance MP, Minister for Transport and Roads, 'New taskforce to investigate gig economy deaths', 24 November 2020.

<sup>444</sup> Media release, 'New taskforce to investigate gig economy deaths', 24 November 2020.

the health and safety of their riders.<sup>445</sup> The action plan listed the five safety areas that should be prioritised over a period of 12 months:

- safe design of work – work is designed to eliminate hazards and minimise risks
- safe riders – riders are competent and drive safely
- safe bikes and equipment – vehicles and other equipment and fit for purpose and regularly maintained
- safe workplaces and communities – riders and the community interact in a respectful manner
- safe working environment and safe roads – people responsible for planning and designing public roads and places do so with riders in mind.<sup>446</sup>

**7.60** The TWU and its rider members had also been a part of the taskforce, however it refused to endorse the industry action plan and withdrew from the taskforce. In a media release, the TWU criticised the taskforce for 'downgrading the crisis in food delivery and caving to pressure from companies to roll back a global push for gig economy reform.'<sup>447</sup>

**7.61** Following the taskforce's final report in June 2021, the NSW Government introduced new amendments to the Work Health Safety Regulation 2017. The measures included ensuring riders are provided with PPE by food delivery platforms, the implementation of compulsory induction training and a new penalty system for riders to crackdown on repeated unsafe practices.<sup>448</sup>

**7.62** The taskforce's final report also recommended a number of operational changes including enhanced reporting of incidents, increased compliance activity by SafeWork NSW, Transport for NSW and NSW Police, and issuing riders with a unique identification number.<sup>449</sup>

**7.63** The NSW Government commented to the inquiry that whilst it is 'committed to ensuring the safety of all road users', road safety is a 'shared responsibility' with all road users and those that employ riders and drivers.<sup>450</sup>

**7.64** The food delivery platforms – Deliveroo, DoorDash, Menulog and Uber Eats – have separately established the 'Food Delivery Platform National Safety Principles' to promote the safety of workers using their platforms in Australia. The principles focus on issues such as training and information, delivery equipment and PPE, and incident reporting and investigation. The

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<sup>445</sup> NSW Government Food Delivery Riders Safety Taskforce, 'Working together to improve Food Delivery Rider safety: Industry action plan 2021-2022', (April 2021).

<sup>446</sup> NSW Government Food Delivery Riders Safety Taskforce, 'Working together to improve Food Delivery Rider safety: Industry action plan 2021-2022', pp 8, 13, 18, 23 and 26.

<sup>447</sup> Media release, Transport Workers' Union, 'TWU warns more riders will die as NSW Taskforce refuses to regulate', 8 April 2021.

<sup>448</sup> Media release, Hon Kevin Anderson MP, Minister for Better Regulation and Innovation and Hon Andrew Constance MP, Minister for Transport and Roads, 'New laws to drive safety outcomes in the gig economy', 5 June 2021.

<sup>449</sup> Media release, 'New laws to drive safety outcomes in the gig economy', 5 June 2021.

<sup>450</sup> Submission 42, Transport for NSW, p 7.

platforms have all pledged to adopt, implement and hold themselves accountable to the principles, with annual reviews managed by the Ai Group.<sup>451</sup>

- 7.65** The two leaders in the market, Uber and Menulog, also recommended to the committee that there be nationally consistent minimum standards around safety and insurance across the industry to ensure that the workers are as safe as possible.<sup>452</sup> Insurance is discussed in detail in the following sections.

## Workers compensation in the gig economy

- 7.66** As noted in chapter 1, independent contractors are generally not covered by the state's workers compensation scheme. Gig economy participants who are injured whilst working may make a claim to icare, which is responsible for the administration of the workers compensation scheme. icare assesses each claim on a case-by-case basis, taking the worker's circumstances and business arrangements into account.<sup>453</sup>
- 7.67** Personal accident and injury insurances schemes are also available to gig economy workers, however SIRA noted that these are relatively expensive and do not have the same level of benefits as the workers compensation scheme.<sup>454</sup>
- 7.68** As noted earlier in the chapter, the deaths of five food delivery riders in New South Wales in late 2020 prompted calls for urgent reform of the state's work health safety laws, as well as for the establishment of mandatory minimum insurance protections for all workers. This section considers the level of statutory workers compensation coverage available to gig inquiry participants, and in lieu of its protection, the adequacy of insurance policies provided by the companies. Calls to implement minimum safety insurance standards in the gig economy are also reviewed, along with how reform could achieve this.

## Exclusion from access

- 7.69** Currently in New South Wales, two decisions (*Hassan v Uber Australia Pty Ltd*<sup>455</sup> and *Kahin v Uber Australia Pty Ltd*<sup>456</sup>) have suggested that Uber drivers do not meet the definition of an 'employee' working under a contract of service, and thus are excluded from the state's workers compensation scheme.<sup>457</sup>

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<sup>451</sup> Deliveroo, 'Launching the National Food Delivery Platform Safety Principles' (14 July 2021); Ai Group, 'Gig & Platform', <https://www.aigroup.com.au/sectors-and-advocacy/gig--platform/>.

<sup>452</sup> Evidence, Mr Matthew Denman, General Manager, Uber Eats, 19 April 2021, pp 38, 40; Evidence, Mr Morten Belling, Managing Director, Menulog, 17 May 2021, p 8.

<sup>453</sup> Evidence, Mr Rob Craig, Interim Group Executive, Personal Injury, icare, 16 November 2020, p 50.

<sup>454</sup> Submission 25, State Insurance Regulatory Authority (SIRA), p 3.

<sup>455</sup> *Hassan v Uber Australia Pty Ltd* [2018], NSWCC 21.

<sup>456</sup> *Kahin v Uber Australia Pty Ltd* [2020] NSWCC 118, [81].

<sup>457</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 27; Submission 40, Australian Institute of Employment Rights, p 9.

7.70 This position was also upheld in the recent tragedy of Mr Xiaojun Chen, a Hungry Panda delivery rider who was killed whilst on a delivery in 2020.<sup>458</sup> icare's investigation determined that Mr Chen was not eligible for a workers compensation claim because he was neither a worker under section 4 of the *Workplace Injury Management Act 1998* nor a deemed worker of Hungry Panda under clause 2 of schedule 1 of the same act. icare also used additional information provided by Hungry Panda to reach its determination that Mr Chen was engaged by the platform as an independent contractor. icare advised the committee that remedies for Mr Chen's widow include the option to request a review of icare's decision or to lodge a dispute with the Workers Compensation Commission.<sup>459</sup>

7.71 icare provided to the committee a breakdown of the claims made by workers in the gig economy and their outcome between April 2009 to November 2020, set out on the following page.

**Table 2 Workers compensation claims and outcomes, gig economy platforms in New South Wales, April 2009 to November 2020<sup>460</sup>**

Platform	Total claims April 2009 – Nov 2020	Accepted	Declined	Other liability status*	Main reason for decline
Deliveroo	138	40 (delivery drivers)	8	90	Not a worker/deemed worker, injured on non-compensable journey to work
DoorDash	1	-	-	1	-
Easi	5	1 (operational assistant)	4	-	Not a worker/deemed worker
HungryPanda	2	-	-	2	-
Menulog	9	1 (admin assistant)	-	8	-
Uber	33	1 (manager)	18	14	Not a worker/deemed worker

\* notification only, not yet determined, reasonable excuse, provisional paid, duplicates, nulled, withdrawn.

7.72 Noting the ongoing discussions around increased protections for gig workers, in April 2021 SIRA released a discussion paper titled *Consultation on personal injury insurance arrangements for food delivery riders in the gig economy*.<sup>461</sup> The discussion paper sought feedback on potential options for mandatory insurance for food delivery riders in the gig economy, including:

- requiring gig platforms to provide personal injury and income protection insurance cover
- establishing a new personal injury safety net

<sup>458</sup> Lydia Feng, 'Widow of man killed while delivering food for Hungry Panda calls for reform', *ABC News*, 9 November 2020.

<sup>459</sup> Answers to question on notice, icare, 20 January 2021, p 6.

<sup>460</sup> Answers to questions on notice, icare, 20 January 2021, p 4.

<sup>461</sup> State Insurance Regulatory Authority, *Consultation on personal injury insurance arrangements for food delivery riders in the gig economy*, Stakeholder discussion paper, April 2021.

- extending the existing workers compensation scheme
- establishing a new scheme for gig economy food delivery riders that is modelled on the existing workers compensation or compulsory third party (CTP) schemes.<sup>462</sup>

**7.73** The SIRA discussion paper highlighted that regulatory intervention is needed because food delivery riders are at higher risk of injury when working and because many gig workers are not covered by the workers compensation scheme.<sup>463</sup> Other inquiry participants argued that it is more important to implement specific protections for rideshare and food delivery workers as their work is paid at lower rates; hence it is unreasonable to expect them to take out the appropriate insurance cover at their own expense.<sup>464</sup>

**7.74** The committee heard that the process to make a claim for workers compensation can be expensive and inaccessible, requiring a thorough, detailed investigation by icare. icare advised that whilst in some cases it is very clear that there is no coverage under the current workers compensation legislation, in others, parties will expend substantial resources for legal opinion, investigation reports and information pertaining to contractual and financial obligations, as well as records of activities.<sup>465</sup>

**7.75** The TWU informed the committee that in the absence of access to the state's workers compensation scheme, gig economy workers have access to insurance primarily from two sources: policies they individually enter into or policies provided by the company. However both types of insurance fall short of what is offered by the state scheme.<sup>466</sup>

**7.76** Another key difference is that that there is no minimum standard of protection or minimum benefits that must be made available to non-employees in the event of injury or death.<sup>467</sup>

**7.77** Under the state's workers compensation scheme, employers must additionally have a return to work program that supports an individual after a work-related injury. Inquiry participants highlighted that it would be beneficial to establish similar return to work obligations for the gig economy, but also acknowledged that it would be difficult to establish them in the absence of a formal employment arrangement.<sup>468</sup> The Chief Executive of SIRA at the time of the hearings, Ms Carmel Donnelly, stated that this would be possible however, noting that the current

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<sup>462</sup> State Insurance Regulatory Authority, *Consultation on personal injury insurance arrangements for food delivery riders in the gig economy*, p 3.

<sup>463</sup> State Insurance Regulatory Authority, *Consultation on personal injury insurance arrangements for food delivery riders in the gig economy*, p 4. See also Submission 30, 'Transport Workers' Union, pp 39-40, which explains that gig economy transport workers are considered contractors for the purposes of workers compensation.

<sup>464</sup> Submission 40, Australian Institute of Employment Rights, p 10.

<sup>465</sup> Answers to questions on notice, icare, 20 January 2021, p 5.

<sup>466</sup> Submission 30, Transport Workers' Union, p 40.

<sup>467</sup> State Insurance Regulatory Authority, *Consultation on personal injury insurance arrangements for food delivery riders in the gig economy*, p 6.

<sup>468</sup> Submission 23a, Australian Workers Union, p 5; Submission 30, 'Transport Workers' Union p 44; Submission 17, Professor David Peetz, p 5.

workers compensation system is able to support workers who are unable to return to work to their previous employer.<sup>469</sup>

- 7.78** With regard to insurance coverage within the industry, Menulog representatives acknowledged that in the absence of access to the state's workers compensation scheme, workers in the gig economy are making the decision to not protect themselves with their own personal insurance:

We believe in proper protection and security out there through insurance. When you are an employee you get workers compensation insurance, and we have learned that far from everybody out there are protecting themselves with insurance like they are supposed to.<sup>470</sup>

### **Insurance policies provided by the company**

- 7.79** Some gig platforms advised the committee that they had voluntarily organised insurance cover for their independent contractors, however the committee noted that the level of cover varies widely depending on the platform's size and scope of work. For example, Uber provides its drivers and delivery partners with insurance for certain accidental injuries that occur on-trip,<sup>471</sup> which includes reimbursement or lump sum payments for certain common injuries, hospitalisation, permanent disability and accidental death.<sup>472</sup> Under its current policy with Chubb insurance, Uber also offers an accidental death benefit of \$500,000, with additional payments available for funeral, repatriation and spousal benefits.<sup>473</sup>
- 7.80** Similarly, Menulog's insurance policy (also with Chubb) offers accidental death insurance cover of up to \$585,000, inclusive of funeral and dependent benefits. The policy also includes compensation for inability to work for a certain amount of time, as well as for permanent impairment.<sup>474</sup> Menulog's Managing Director, Mr Morten Belling, advised that as part of Menulog's trial of an employment model (discussed in detail in chapter 3), the platform was setting up injury insurance for all of its couriers with conditions as close to the state's workers compensation cover as possible.<sup>475</sup>
- 7.81** Through Chubb, DoorDash provides personal accident insurance, along with general liability coverage for third party bodily injury and property damage for incidents that occur during a DoorDash delivery.<sup>476</sup>

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<sup>469</sup> Evidence, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, 16 November 2020, p 58.

<sup>470</sup> Evidence, Mr Belling, 17 May 2021, p 4.

<sup>471</sup> 'On trip' means the period from accepting a transportation or delivery request, until 15 minutes after that ride or delivery is completed or cancelled, whichever is earlier.

<sup>472</sup> Answers to questions on notice, Uber, 23 June 2021, p 4.

<sup>473</sup> Evidence, Mr Denman, Uber Eats, 19 April 2021, p 39. See also Evidence, Mr Esteban Salazar, 9 November 2020, pp 3 and 8, of his post-injury experience and payments received from Uber.

<sup>474</sup> Evidence, Mr Belling, 17 May 2021, p 8. See for more detail, Answers to questions on notice, Menulog, 16 June 2021, p 4.

<sup>475</sup> Evidence, Mr Belling, 17 May 2021, p 2.

<sup>476</sup> Submission 52, Doordash, p. 3

- 7.82** Having taken a different approach, Deliveroo told the committee that it had initially included its riders in calculations for rateable remuneration for the state's workers compensation scheme. However it stopped this in 2019, in part due to having eight workers compensation claims rejected by icare. Deliveroo stated that it now offers an independent third-party, non-workers compensation insurance scheme with Chubb, which it considers to be 'very comparable' to the state's workers compensation.<sup>477</sup>
- 7.83** While these large food delivery and rideshare platforms told the committee that Chubb was the only real option available for their industry,<sup>478</sup> other gig platforms had different arrangements. For example, EASI, a smaller food delivery platform, had signed its insurance policy with Windsor Income Protection to provide their injured drivers with a weekly benefit of up to 85 per cent of income to a maximum of \$1,000 per week.<sup>479</sup> In contrast, Ola and Hungry Panda told the committee that they required their workers to have their own insurance policy.<sup>480</sup>
- 7.84** Other platforms that do not operate in the food delivery or rideshare sectors differed again in their approach to insurance for their workers. For example, the Mable platform, which connects clients with aged care and disability support service providers, provides its support workers and providers with public liability, personal accident, professional indemnity and medical malpractice cover.<sup>481</sup> On the other hand, Airtasker, which describes itself as a 'marketplace for local practices', told the committee that it provides third-party liability insurance and its independent contractors can apply for their own injury insurance if they wish. Airtasker's co-founder and CEO, Mr Tim Fung, advised that the company had made its decision after initially offering salary continuance and accident protection insurances, but abandoned these after having minimal take up by its service providers.<sup>482</sup>
- 7.85** As noted above, both icare and the TWU stated that policies chosen at the discretion of the platforms offer significantly less coverage than what is available through the workers compensation scheme.<sup>483</sup> Under the workers compensation scheme, the benefits available to an injured worker with no capacity to work include up to 95 per cent of average earnings for first 13 weeks and then up to 80 per cent thereafter, up to \$849,300 lump sum for accidental death, and up to \$100,000 for medical and hospital expenses.<sup>484</sup>
- 7.86** Whilst acknowledging that some platforms provide insurance for workplace accidents and injuries, the *Report of the Inquiry into the Victorian On-Demand Workforce* (hereafter the Victorian report) observed that 'it is not always clear or obvious which work based activities are covered

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<sup>477</sup> Evidence, Ms Julia Duck, Head of Operations, Strategy and Performance, Deliveroo, 30 March 2021, pp 6-7.

<sup>478</sup> For example, Evidence, Mr Steven Teoh, Director of Delivery, Menulog, 17 May 2021, p 9.

<sup>479</sup> Answers to questions on notice, EASI, 6 October 2021, p 67.

<sup>480</sup> Evidence, Ms Sun, 23 February 2021, p 21; Evidence, Mr Simon Smith, Ola Australia and New Zealand, 9 November 2020, p 31.

<sup>481</sup> Evidence, Mr Peter Scutt, Co-founder and Chief Executive Officer, Mable, 10 September 2021, p 23.

<sup>482</sup> Evidence, Mr Fung, 30 March 2021, p 19.

<sup>483</sup> Submission 30, Transport Workers' Union, p 40; Attachment to answers to questions on notice, icare, 20 January 2021, p 7.

<sup>484</sup> State Insurance Regulatory Authority, *Workers compensation benefits guide* (October 2021), [https://www.sira.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0006/530862/Workers-compensation-benefits-guide.pdf](https://www.sira.nsw.gov.au/__data/assets/pdf_file/0006/530862/Workers-compensation-benefits-guide.pdf).

and these schemes may involve additional fees for the worker'.<sup>485</sup> One of its surveys had 45.5 per cent of gig worker respondents report that their main platform did not cover them for any type of worker-related insurance. Similarly, 40 per cent of respondents said that their main platform require them to take out their own insurance, and over 20 per cent did not know whether their platforms provided them with insurance or required them to take out their own.<sup>486</sup>

- 7.87** The Victorian report concluded that that platform workers are often uncertain about insurance and therefore may have inferior or inadequate coverage for work based injuries.<sup>487</sup> Mr Esteban Salazar, an injured food delivery worker, told the committee of his experiences after being hit by a tram whilst on an Uber Eats food delivery. He said that following the accident, the process of applying for compensation was 'very difficult' for him because of his limited English skills. Mr Salazar further stated that he had not known all of the policies related to his contract, including that he was not covered by workers compensation.<sup>488</sup>
- 7.88** The TWU expressed further concern that gig companies are making 'no attempt' to provide injured workers with the ability to recover at work, as they are not required to facilitate a return to work process as is the case under the workers compensation scheme.<sup>489</sup> The TWU argued that this 'piecemeal' approach to insurance, whether provided by the company or signed up to by an individual, is 'fundamentally unable to provide a suitable pathway for injured workers to recover at work'.<sup>490</sup> The unions thus highlighted that this situation creates further uncertainty for an already vulnerable group of workers.

### **Minimum insurance standards across the industry**

- 7.89** Reflecting on the broad and diverse group of companies across the gig economy and types of work conducted there, inquiry participants agreed that the industry is lacking a general statutory minimum standard for insurance.<sup>491</sup>
- 7.90** There was also a particular emphasis that additional protections need to be provided to workers who work in transport or on the roads.<sup>492</sup> For example, Mr Hugh McMaster, Secretary and Treasurer of the Australian Road Transport Industrial Organisation (hereafter ARTIO) NSW Branch, explained that this work is comparatively more dangerous, so it is especially important for those who do it, although as a matter of principle, all should be adequately protected:

<sup>485</sup> Victorian Government, Department of Premier and Cabinet, *Report of the Inquiry into the Victorian On-demand Workforce*, (July 2020), p 120.

<sup>486</sup> *Report of the Inquiry into the Victorian On-demand Workforce*, p 121.

<sup>487</sup> *Report of the Inquiry into the Victorian On-demand Workforce*, p 120.

<sup>488</sup> Evidence, Mr Salazar, 9 November 2020, p 9.

<sup>489</sup> Submission 30, Transport Workers' Union, p 44.

<sup>490</sup> Submission 30, Transport Workers' Union, pp 41-42.

<sup>491</sup> See for example, Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen, p 8; Submission 30, Transport Workers' Union p 40; Evidence, Mr Denman, 19 April 2021, p 40; Evidence, Mr Michael Buckland, Chief Executive Officer, McKell Institute, 17 May 2021, p 47; Evidence, Mr Mark Morey, Secretary, Unions NSW, 9 November 2020, p 18; Evidence, Dr Alex Veen, Lecturer (Academic Fellow), University of Sydney Business School, 30 March 2021, p 79; Submission 19, Shop, Distributive and Allied Employee's Association (NSW Branch), p 3.

<sup>492</sup> See for example, Submission 40, Australian Institute of Employment Rights, p 9; NSW Government, 'Work health and safety of food delivery workers in the gig economy', November 2020, p 12.

It does not matter what their employment or engagement status is. It does not matter whether they have an Australian Business Number or whether they are a Pay As You Go employee. That, in our view, is irrelevant. The important thing is that every worker deserves to be covered under the workers compensation system—and, as I say, particularly those who do dangerous work.<sup>493</sup>

- 7.91** Industry bodies such as the Australian Industry Group (hereafter Ai Group) and Business NSW expressed hesitation, however, about making minimum insurance mandatory across the sector as they consider that the current regulatory arrangements are sufficient. At the same time, these organisations acknowledged that nuances exist between the various types of gig work and it is difficult to cater to all of these differences.
- 7.92** For example, the Ai Group's Head of New South Wales, Mr Mark Goodsell, emphasised that it is more important for all independent contractors to know and understand the nature of the contractual arrangements that they are entering into, so that they can make the appropriate decisions about personal insurance and protection. Mr Goodsell said that he knew of some workers who choose to drive on Friday and Sunday nights on rideshare platforms because they can earn more money, whilst knowing they are not covered by workers compensation or other benefits. He explained that drivers make this conscious choice because it is more lucrative than working overtime under an awards system with the associated entitlements.<sup>494</sup>
- 7.93** The Ai Group also raised that there would be administrative and legal complexities involved with establishing a blanket mandate of minimum insurance. Specifically, it questioned how the equivalent of a payroll base for premium calculations could be established when no wages are being paid, when workers are simultaneously covered by policies paid by two or more platforms, and when contracting relationships reduce the ability of premium payers to control the risks that they are required to pay for.<sup>495</sup>
- 7.94** Amongst the gig platforms there appeared to be cautious agreement that minimum protections including mandatory insurance could be introduced, but with conditions. Ola representatives indicated that they would follow any legal requirement for mandatory workers compensation, including in respect of provisions for workers returning to work.<sup>496</sup> However, Uber and Menulog representatives raised that any minimum standard must be consistent nationally, particularly for those platforms that operate across different jurisdictions.<sup>497</sup> (See paragraphs 3.32 – 3.35 for further information on harmonisation of legislation.)
- 7.95** Other inquiry participants including unions acknowledged that the nature of gig work, and particularly in food delivery, does not fit within the traditional employment model or workers compensation scheme, for reasons including that workers can multi-app and delegate their

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<sup>493</sup> Evidence, Mr Hugh McMaster, Secretary and Treasurer, Australian Road Transport Industrial Organisation NSW Branch, 16 November 2020, p 3.

<sup>494</sup> Evidence, Mr Mark Goodsell, Head, NSW Australian Industry Group, 16 November 2020, p 26.

<sup>495</sup> Submission 36, Australian Industry Group, p 6.

<sup>496</sup> Evidence, Mr Smith, 9 November 2020, p 36. See also Evidence, Ms Lu, 10 September 2021, p 14, who committed that EASI would be willing to comply with any mandatory regulations around fatigue management.

<sup>497</sup> Evidence, Mr Denman, 19 April 2021, p 40; Evidence, Mr Belling, 17 May 2021, p 8. See also Evidence, Ms Donnelly, 16 November 2020, p 52; Evidence, Mr Izzo, 9 November 2020, p 68.

work.<sup>498</sup> SIRA suggested that it was necessary to balance the flexibility of the working arrangements with protecting the worker and thus proposed that different insurance models could be considered, including those that offer optimal coverage or allow the purchase of top-up or bundled products.<sup>499</sup>

- 7.96** In a similar vein, the committee explored whether a worker should be covered by insurance when waiting between gigs, and before or after a trip. For example, Deliveroo's evidence was that their insurance scheme covers riders and delegates whenever they are logged into the app, including up to an hour after they have logged out. Therefore as long as a rider is logged into the Deliveroo application, their claim will be accepted if an incident occurs.<sup>500</sup> Some stakeholders, including the ARTIO NSW Branch and Dr Tom Barratt and his colleagues, proposed that workers should be covered during waiting times because they had effectively 'turned up to work'.<sup>501</sup>

### Options for reform

- 7.97** Inquiry participants proposed a number of options that could extend workers compensation to gig workers, particularly those who work in food delivery or rideshare given the greater risk of poor safety at work. The options included amending the *Workplace Injury Management and Workers Compensation Act 1998* to explicitly include rideshare and food delivery workers, and also mandatory contributions by platforms to a pooled fund. These options are explored in the sections below.

#### ***Amending the Workplace Injury Management and Workers Compensation Act 1998 to explicitly include rideshare and food delivery workers***

- 7.98** Multiple inquiry participants suggested that rideshare and food delivery workers in New South Wales could be covered by the state's workers compensation scheme if Schedule 1 of the *Workplace Injury Management and Workers Compensation Act 1998* is amended to specifically name rideshare drivers and food delivery workers as deemed workers.<sup>502</sup>
- 7.99** Schedule 1 of the *Workplace Injury Management and Workers Compensation Act 1998* deals with the deemed employment of workers and defines who a worker is for the purposes of the Act. Clauses 2 and 10 are relevant as they could potentially be amended to cover transport gig workers:

#### **2 Other contractors**

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<sup>498</sup> See for example, Submission 30, Transport Workers' Union, p 41; Evidence, Mr Morey, 9 November 2020, p 18; Submission 25, State Insurance Regulatory Authority, p 4; Attachment to answers to questions on notice, icare, 20 January 2021, p 1.

<sup>499</sup> Submission 25, State Insurance Regulatory Authority, p 4; Evidence, Ms Gilmore, 19 April 2021, p 42.

<sup>500</sup> Evidence, Ms Duck, 30 March 2021, p 7.

<sup>501</sup> Evidence, Mr McMaster, 16 November 2020, p 4; Evidence, Dr Tom Barratt, Lecturer, Centre for Work + Wellbeing, Edith Cowan University, 30 March 2021, p 79.

<sup>502</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 30; Submission 40, Australian Institute of Employment Rights, p 9.

(1) Where a contract--

(a) to perform any work exceeding \$10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name), or

is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor.

(3) A person excluded from the definition of

"worker" in section 4 (1) because of paragraph (d) of that definition is not to be regarded as a worker under this clause.<sup>503</sup>

### 10 Drivers of hire-vehicles or hire-vessels--contract of bailment

A person engaged in plying for hire with any vehicle or vessel, the use of which is obtained by that person under a contract of bailment (other than a hire purchase agreement), in consideration of the payment of a fixed sum, or a share in the earnings or otherwise, is, for the purposes of this Act, taken to be a worker employed by the person from whom the use of the vehicle or vessel is so obtained.<sup>504</sup>

- 7.100** The Australian Institute of Employment Rights (hereafter AIER) suggested that Clause 2 in its current form arguably covers the typical rideshare or food delivery rider. However the AIER flagged that the clause has also been regularly interpreted in the light of the common law multifactor test, distinguishing an employee working under a contract of service from a genuine independent contractor.<sup>505</sup>
- 7.101** The committee heard that recent common law has found gig workers fall outside the scope of Clause 2. For example, *Malivanek v Ring Group Pty Ltd*<sup>506</sup> sets out a range of factors determining whether a worker is the kind of contractor covered by Clause 2, including the provision of tangible assets for undertaking work. Rideshare and delivery workers generally provide their own vehicles, mobile phones and data plans in order to undertake the work, so this factor tends towards excluding them from coverage.<sup>507</sup>
- 7.102** In addition, Clause 10 of Schedule 1 does not currently include drivers who own or lease their own vehicles, so TEACHO and AIER explained that this provision excludes rideshare drivers who own their own vehicles. This is despite the fact that the work they perform is the same as that of the drivers of hire vehicles or vessels under contracts of bailment (for example, taxi drivers), who are covered by Clause 10.<sup>508</sup>

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<sup>503</sup> *Workplace Injury Management And Workers Compensation Act 1998* Sch 1 cl 1.

<sup>504</sup> *Workplace Injury Management And Workers Compensation Act 1998* Sch 1 cl 10.

<sup>505</sup> Submission 40, Australian Institute of Employment Rights, p 9.

<sup>506</sup> *Malivanek v Ring Group Pty Ltd* [2014] NSWCCPD 4.

<sup>507</sup> Submission 40, Australian Institute of Employment Rights, p 10; Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), pp 27-28. See also *McLean v Shoalhaven City Council* [2015] NSWCC 186 where it was held that a contract driver who performed delivery work for a local council was not a deemed worker under this provision.

<sup>508</sup> Submission 40, Australian Institute of Employment Rights, p 10.

- 7.103** Ms Donnelly, SIRA's then Chief Executive, acknowledged that Schedule 1 could be amended to extend to delivery riders and drivers who work in a 'high risk working environment' on the roads, as opposed to genuine independent contractors who 'seem quite content with the independence and the autonomy and who do not seek workers compensation benefits'.<sup>509</sup>

***Mandatory platform contributions to a pooled fund***

- 7.104** The committee heard that another option to introduce minimum insurance standards is for contracting entities (that is, platforms) to contribute to a workers compensation pool of funds, paying a percentage or nominal amount each time a task is completed (for example, when a rider drops off a food delivery or completes a rideshare trip). Mr McMaster from the ARTIO NSW Branch explained that this pool could then ensure that all gig workers are compensated for any injury and their loved ones receive the benefit of the compensation arrangement in instances of fatality.<sup>510</sup> A pooled funds option could also solve the issue of people working for multiple platforms at once.<sup>511</sup>
- 7.105** A number of other stakeholders, supported a model based on some form of platform revenue,<sup>512</sup> including Professor David Peetz, Emeritus Professor at Griffith University's Department of Employment Relations and Human Resources. Dr Peetz has conducted comparable research for the Queensland Parliament, where he recommended a similar model centred on platforms paying calculated, risk-related premiums based on the gross income received by the platforms.<sup>513</sup>
- 7.106** In documents provided to the committee, icare revealed that a model based on platform revenue is also their preferred option because it can protect vulnerable workers, be applied flexibly and reduce administrative burdens on icare. However, icare noted that under that model it would be difficult to determine which platforms would be liable under the scheme.<sup>514</sup>
- 7.107** Notwithstanding the potential benefits from such a model, TEACHO warned that any proposal that falls short of providing full workers compensation benefits will 'fail to address the root of the problem'. In its submission to the inquiry, TEACHO emphasised that a fulsome workers compensation model would encourage better safety standards:

A workers compensation system that requires payment of premiums by the business controller who determines the system of work is far better suited to providing an incentive to improve safety standards, than a system that merely compensates victims after accidents have occurred.<sup>515</sup>

- 7.108** The absence of incentives for individual platforms to improve safety was also a major concern for the TWU, which stated:

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<sup>509</sup> Evidence, Ms Donnelly, 16 November 2020, p 52.

<sup>510</sup> Evidence, Mr McMaster, 16 November 2020, pp 3-4.

<sup>511</sup> Evidence, Mr McMaster, 16 November 2020, p 4.

<sup>512</sup> See for example, Submission 23a, Australian Workers Union, p 5.

<sup>513</sup> Evidence, Emeritus Professor David Peetz, Department of Employment Relations and Human Resources, Griffith University, 30 March 2021, p 79; Submission 17, Professor David Peetz, p 5.

<sup>514</sup> Attachment to answers to questions on notice, icare, 20 January 2021, pp 11 and 13.

<sup>515</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 31.

The existing workers compensation system provides a market based mechanism which economically incentivises safe work practices through fluctuating premium rates. The proposed approach would effectively aggregate such premiums on an industry-wide basis, leading to industry to disproportionately share the costs of poor safety practices, while failing to penalise those companies with high rates of injuries or deaths.<sup>516</sup>

- 7.109** The TWU also identified a second 'serious reservation' about how the pool model would operate, highlighting an 'adverse' and 'unintended' outcome that workers' safety would be further undermined as the costs of workers compensation could be passed onto gig workers through a reduction in pay, leading to gig workers taking more safety risks:

Such a system could lead to the costs of workers compensation being passed onto already lowly paid transport workers in the gig economy through the corresponding reduction of rates of pay. ... Reductions in pay will undermine safety by encouraging risk-taking behaviour like working while fatigued or speeding, costing lives and in turn, increasing the total cost of any like scheme. This link between remuneration structures and safety ... was tragically made evident in recent months following the deaths of five food delivery workers.<sup>517</sup>

## Committee comment

- 7.110** Work health and safety in the gig economy was undoubtedly a key issue in this inquiry and the tragic deaths of delivery drivers underscore the extreme and very real risks that exist for delivery riders using platforms, as well as the devastating consequences that their families then live with. The committee spoke directly with the recent widow of a delivery rider, Mr Xiaojun Chen. We express our profound sympathy with Ms Lihong Wei and her child, and like her, we express our sincerest hope that their story bring about change.
- 7.111** The committee is very mindful that deaths are underreported in the industry, as are the work-related injuries, serious and less serious, that occur in the industry. One need only look at a delivery rider pedalling on a busy road to recognise the risks to their safety. Alongside these risks are a raft of others that gig workers experience, including in respect of fatigue, protective equipment, entry into others' homes. All of these were powerfully highlighted to the committee and point to the very serious obligation on platforms to protect the health and safety of their workers, and on government, to promote and regulate those obligations.
- 7.112** The committee was pleased to note participants' views that the current WHS legislation is sufficiently broad to capture on demand workers, so as to protect their health and safety. However, stakeholders were clear that more active regulation is required to protect workers and ensure that platforms comply with their legal obligations, not least via more effective enforcement of both the WHS and point to point transport laws. We note that the NSW Government's own 2020 report on WHS in food delivery platforms is not prescriptive, but allows platforms to determine how they will ensure the health and safety of their workers.
- 7.113** The committee was extremely troubled by the findings of the Point to Point Commission's 2021 safety audit of Uber, which suggests a systemic disregard on the part of Uber for worker health and safety and for its obligations to report notifiable incidents to the regulator. The fact that the

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<sup>516</sup> Answers to questions on notice, Transport Workers' Union, 20 January 2021, p 1.

<sup>517</sup> Answers to questions on notice, Transport Workers' Union, 20 January 2021, p 1.

Commissioner has issued improvement notices to a number of other platforms is further evidence of the need for vigilance to ensure platforms compliance with their obligations.

- 7.114** We note that the deaths of the five workers became the catalyst for stronger action across government and industry via the joint taskforce that delivered an industry action plan in April 2021 that platforms had agreed to implement. The taskforce also resulted in amendments to the Work Health and Safety Regulation 2017 for compulsory provision of PPE for riders, mandatory induction training and a new penalty system for riders. In addition, it recommended operational changes including enhanced reporting of incidents and increased compliance activity by SafeWork NSW, Transport for NSW and NSW Police. These recommendations dovetail with the committee's own conclusions, and we emphasise the critical importance of action by the NSW Government on each of these fronts. Significantly, our recommendation 17 below takes this further with a focus on an enforcement regime.
- 7.115** The committee acknowledges the more proactive approach that SafeWork NSW is taking to engaging with the platforms to build their understanding of and compliance with their obligations. We also acknowledge the challenges of engaging them, given their arms-length business operating models. With this in mind, as an additional measure to those listed in the previous paragraph, the committee sees the need for a mechanism that will actually require platforms to engage with the regulator in respect of work health and safety. We recommend that NSW Governments legislate to establish a requirement for an on-demand platform to register with SafeWork NSW before they begin trading.
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#### **Recommendation 14**

That the NSW Governments legislate to establish a requirement for all on-demand platforms to register with SafeWork NSW before they begin trading.

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- 7.116** Furthermore, in order to build awareness of and compliance with obligations at a practical level, the committee sees value in the introduction of discrete and enforceable codes of conduct for work performed by on-demand platforms in the ride-share, food delivery, parcel delivery and disability care sectors of the gig economy. While having many things in common, each of these sectors has its own unique features and risks that should be reflected in each code. The committee also considers that discrete codes will deliver greater ownership and accountability on the part of platforms. Of course, enforceability will be an essential feature to ensure actual compliance and cultural change.
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#### **Recommendation 15**

That the NSW Government introduce discrete and enforceable codes of conduct for work performed by on-demand platforms in the rideshare, food delivery, parcel delivery and disability care sectors of the gig economy.

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- 7.117** Matched with this, the committee considers that an ambitious approach to WHS training is essential for the gig economy in New South Wales. Participants articulated very well how the poor pay and conditions of gig workers contribute to risky behaviours, and while the committee
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fundamentally considers that these features of the gig economy must be addressed, we also recognise the importance of workers themselves understanding and protecting their work health and safety. The committee recommends that the government introduce a scheme that delivers standardised workplace, health and safety training to workers providing labour to on-demand platforms in high-risk industries. This training should be able to be recognised by all platforms that a worker chooses to work for.

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**Recommendation 16**

That the NSW Government introduce a scheme that delivers standardised workplace health and safety training to workers providing labour to on-demand platforms in high-risk industries, which can be recognised by all platforms that a worker chooses to work for.

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- 7.118** As a final ambitious recommendation in respect of work health and safety, the committee considers that there would be significant value on the NSW Government partnering with on-demand platforms, employers and unions to develop an enforcement regime which provides for the inspection, auditing and reporting of an on-demand platform's compliance with workplace health and safety laws by organisations independent of that platform. The benefits of greater enforcement are well documented in this chapter, and the committee considers that a partnership approach between government, industry and worker representatives will be also be fundamental to real change. Independent enforcement is essential.

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**Recommendation 17**

That the NSW Government partner with on-demand platforms, employers and unions to develop an enforcement regime which provides for the inspection, auditing and reporting of an on-demand platform's compliance with workplace health and safety laws by organisations independent of that platform.

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- 7.119** The *Work Health and Safety Act 2011* is the principal piece of state legislation that deals with work health and safety in New South Wales. To guarantee that gig workers are protected by the Act, the committee recommends that the NSW Government review health and safety legislation to ensure workers in the gig economy are protected by health and safety laws including reviewing the definitions of 'person conducting a business or undertaking' and 'worker' in the *Work Health and Safety Act 2011*.

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**Recommendation 18**

That the NSW Government review health and safety legislation to ensure workers in the gig economy are protected by health and safety laws, including reviewing the definitions of 'person conducting a business or undertaking' and 'worker' in the *Work Health and Safety Act 2011*.

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- 7.120** The committee acknowledges platforms' perspective that legal provisions for health and safety representatives face practical challenges in non-traditional workplaces. At the same time, we

were very concerned by stakeholders' evidence that platforms are resistant to workers legitimately organising towards WHS by forming work groups and electing HSRs.

- 7.121** In the committee's view, work groups and HSRs are an important vehicle for protecting WHS that must be supported to operate – both by right under legislation, and because of the very real risks that gig workers face. In chapter 5 the committee examined the serious limitations on collective action that currently exist for the on-demand workforce. Here we recommend that SafeWork NSW undertake a review of HSR provisions, to ensure that they are able to operate effectively for gig economy workers.

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### **Recommendation 19**

That SafeWork NSW urgently review the *Work Health and Safety Act 2011*'s provisions for health and safety representatives, to ensure that they are able to operate effectively for gig economy workers.

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- 7.122** In respect of workers compensation, it is of very significant concern to the committee that gig workers, as independent contractors, are generally not covered by the state's workers compensation scheme. The committee considers that access to workers compensation provides a critically important protection for employees, and we note again that on-demand workers are of course significantly at risk of injury in the course of their work. In our view, it is fundamentally unfair that a workforce characterised by vulnerability is excluded from eligibility by virtue of work status. It follows that it is also unfair that in the absence of access to the state workers compensation scheme, gig workers only have access to alternatives that provide less protection.
- 7.123** While some platforms provide insurance in respect of workplace injury, the level of cover varies markedly, and as noted above, is significantly less than that provided under the state scheme. The committee shares the concern of unions that the non-requirement of return to work support by gig platforms means that they simply do not provide this important pathway of recovery at work. It also goes without saying that few on-demand workers would opt for personal insurance when their income is low and they have many other vulnerabilities. In each respect, the vulnerability of gig workers is compounded.
- 7.124** Numerous participants highlighted that the industry currently lacks a general statutory minimum standard for insurance. It is heartening that there appears to be cautious agreement among platforms that minimum protections including mandatory insurance be introduced, albeit with conditions.
- 7.125** Given the safety risks to platform workers, the committee considers it fundamentally important that they have access to workers compensation. As a fundamental principle, not least because of their multifaceted vulnerability as workers, their coverage must be comparable to that provided by the state scheme.
- 7.126** The committee agrees with stakeholders that a pooled revenue model without a mechanism that sees premiums rise and fall based on workplace safety history and injury records is less desirable than one which incentivises safe work practices through fluctuating premium rates, thereby protecting workers at two levels. We recommend that the NSW Government provide full

workers compensation benefits to on-demand platform workers that are equivalent to the level of benefits currently provided to employees injured in New South Wales workplaces.

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**Recommendation 20**

That the NSW the NSW Government provide full workers compensation benefits to on-demand platform workers that are equivalent to the level of benefits currently provided to employees injured in New South Wales workplaces.

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## Chapter 8 Looking to the future

Within a decade, the gig economy has emerged as a key labour trend in New South Wales, and disrupted and expanded on the notion of traditional employment. With its rapidly evolving technology and emphasis on flexibility and choice, the gig economy shows no indication of slowing down. Indeed, it can be expected to continue to expand into different industries, with significant implications for the individuals that comprise its workforce. Within this context, the committee considered the best role for the NSW Government in leading this evolving space, to ensure optimal outcomes for workers, business, the economy and the broader community.

Whilst much of this report has focused on rideshare and food delivery in the gig economy, this chapter begins by considering the different sectors that the gig economy is reportedly moving into, including the freight industry and the aged care and disability sector. It then explores the potential role of government in encouraging investment, proactive policy development and research, focusing on the benefits of greater government leadership in this rapidly evolving industry into the future.

### What's next for the gig economy?

**8.1** Much of this report has focused on rideshare and food delivery in the gig economy. These two areas have received considerable community and media attention and were described by stakeholders as ushering in the first and second waves of the gig economy. However inquiry participants advised the committee that the potential scope of on-demand work is limitless, noting that in New South Wales, it has already entered the freight industry and the disability and aged care services sector. These sectors are examined in more detail in the sections below.

#### Amazon Flex

**8.2** A number of inquiry participants raised concerns about platform companies such as Amazon Flex and Uber Freight (which is currently operating overseas) entering the freight industry and the subsequent impacts they will have on existing freight workers and companies.<sup>518</sup> The Transport Workers' Union (hereafter 'TWU') advised the committee that the entry of Amazon Flex in the Australian freight industry in February 2020 marked the 'third wave' of the gig economy in the transport sector, following food delivery and rideshare.<sup>519</sup> The union explained that Amazon is a 'last-mile' parcel delivery service, engaging people as 'contractors' to perform parcel delivery work in Uber-style arrangements through an app.<sup>520</sup>

**8.3** Similar to other gig economy arrangements explored in earlier chapters, the TWU argued that these drivers have deliberately been classified as independent contractors, despite there being several indicators of an employment-like relationship with Amazon. For example, the TWU explained that drivers work in a roster arrangement of four-hour shifts for which they are paid

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<sup>518</sup> Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 43; Submission 30, Transport Workers' Union, p 18.

<sup>519</sup> Submission 30, Transport Workers' Union, p 25.

<sup>520</sup> Submission 30, Transport Workers' Union, p 25.

a lump sum. Through this process, Amazon exerts a high level of control over the worker and is able to regulate their hours, reminiscent of a traditional employer-employee relationship.<sup>521</sup>

**8.4** The Transport Education, Audit and Compliance Health Organisation (hereafter TEACHO) and TWU also highlighted that the US-based company has incorporated specific clauses into its contracts to indemnify it against damage or harm caused to the driver, and to avoid other responsibilities usually required under an employment relationship.<sup>522</sup>

**8.5** The TWU identified specific concerns with the Amazon Flex model in Australia relating to low wages and work health and safety (WHS), including:

- workers earning between \$10-15 per hour on average after costs
- regularly overloading vehicles (commonly personal cars) to a point where driving vision is dangerously obstructed
- delivering packages which require two or more people to carry and transport
- workers feeling pressured to engage in dangerous road practices in order to complete an unrealistic amount of deliveries in short windows
- failing to provide sufficient training to workers with all training limited to a short two-minute training video covering safety, manual handling and use of the app prior to commencement of work.<sup>523</sup>

**8.6** The TWU pointed to the experience of Amazon Flex in the United States of America, foreshadowing what might happen in Australia, should these concerns not be proactively and adequately addressed. For example, the union cited studies documenting Amazon Flex drivers earning below the minimum wage, working under unsustainable work pressures, without basic protections and safety training.<sup>524</sup>

**8.7** The sheer scale of the company and potential scope of its operations in Australia also was a matter of concern for some inquiry participants.<sup>525</sup> For example, the TWU highlighted that Amazon as a company is worth 115 per cent of Australia's GDP, proposing that it is no understatement that the company has the power to 'radically transform' the economy and broader society.<sup>526</sup> To demonstrate the company's potential growth and impact on the Australian economy, the Secretary of the TWU's NSW Branch, Mr Richard Olsen, pointed to the United States where the company is expected to outgrow its national postal service by 2022:

The transport sector is about to be a hit by a huge third wave in this gig economy in the parcel delivery sector, marked by the entrance of Amazon Flex. ... The story of Amazon Flex workers will be that of rideshare and food delivery workers, just on a larger scale.

<sup>521</sup> Submission 30, Transport Workers' Union, p 25.

<sup>522</sup> Submission 30, Transport Workers' Union, p 26; Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 8.

<sup>523</sup> Submission 30, Transport Workers' Union, pp 26-27.

<sup>524</sup> Evidence, Mr Richard Olsen, Secretary, NSW Branch, Transport Workers' Union, 16 November 2020, p 12; Submission 30, Transport Workers' Union, p 26.

<sup>525</sup> See for example, Evidence, Professor Daryll Hull, Executive Chair, Transport Education Audit Compliance Health Organisation, 30 March 2021, p 79.

<sup>526</sup> Evidence, Mr Olsen, 16 November 2020, p 12.

Amazon Flex will be the biggest parcel delivery service in the United States by 2022, larger than United States Postal Service, equivalent to our Australia Post. There is no reason why Amazon Flex will not soon outpace our own Australia Post here in Australia.<sup>527</sup>

- 8.8** The TWU expressed serious concern that gig companies like Amazon Flex, were they to take a foothold in Australia, might take existing transport jobs with their associated benefits and entitlements, and replace them with low paid and unsafe 'counterfeits'. It also argued that the introduction of Amazon Flex into New South Wales threatens to aggravate the negative effects already caused by the gig economy, specifically rideshare and food delivery, on working conditions in the transport sector. Mr Olsen warned that Amazon Flex could soon outpace Australia Post's operations, and highlighted the need for proactive changes to regulation and legislation to prepare for such a scenario. Mr Olsen cautioned, 'The story of Amazon Flex will be that of rideshare and food delivery workers, just on a larger scale.'<sup>528</sup>
- 8.9** Both the TWU and TEACHO recommended urgent intervention by the NSW Government to address these issues.<sup>529</sup> Amazon chose not to give evidence to the inquiry after multiple invitations from the committee.

#### **Aged care and disability services**

- 8.10** The provision of aged care and disability services is another rapidly expanding area of the gig economy that is challenging the notion of traditional employment and exacerbating concerns about WHS of workers and clients. The committee understands that there are already a number of gig companies in the aged and disability sector, notably Mable, Hireup and Care.com.<sup>530</sup>
- 8.11** Mable describes itself as a 'safeguarded online platform that enables aged care and disability consumers to discover, connect and build tailored support relationships with people (small businesses) in their local community'. Mable advised the committee at the start of the inquiry that it had facilitated more than five million hours of support to date and then had around 11,000 approved and active small businesses offering services. It does not consider itself as being part of the gig economy, describing its business model as a 'horizontal' platform where it neither sets prices nor determines how services are provided, but rather, 'facilitates ongoing relationships of mutual choice'.<sup>531</sup>
- 8.12** Mable's Co-founder and Chief Executive Officer, Mr Peter Scutt, explained that the platform is also seeking to address the staffing shortages of disability support and aged care workers in Australia, and to provide choice, flexibility and control to workers and clients.<sup>532</sup>

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<sup>527</sup> Evidence, Mr Olsen, 16 November 2020, p 12.

<sup>528</sup> Evidence, Mr Olsen, 16 November 2020, p 12.

<sup>529</sup> Submission 30, Transport Workers' Union, pp 3 and 27; Submission 43, Transport Education, Audit and Compliance Health Organisation (TEACHO), p 9.

<sup>530</sup> Submission 49, NSW Nurses and Midwives' Association, p 3.

<sup>531</sup> Submission 50, Mable, p 2.

<sup>532</sup> Evidence, Mr Peter Scutt, Co-founder and Chief Executive Officer, Mable, 10 September 2021, p 19.

- 8.13** In contrast, Hireup advised that it is one of a handful of online platforms that directly employs its workforce and utilises a contractor-free model. It also is a national provider of disability support services and is registered through the National Disability Insurance Scheme (NDIS).<sup>533</sup>
- 8.14** The NSW Nurses and Midwives' Association expressed concern about the impact of gig platforms, specifically Mable, on the employment rights of workers and that the platform does not support nurses to fulfil their professional development obligations. The association explained that as part of their ongoing professional requirements to practice, registered and enrolled nurses must undertake 20 hours of continuous professional development relevant to their practice annually. The costs associated with this are usually covered by healthcare settings but it is notably absent in the gig economy, creating an additional financial burden on gig economy workers.<sup>534</sup>
- 8.15** As noted in chapter 5, the Nurses and Midwives' Association further noted that the inability to collectively bargain for improved terms and conditions of employment places nurses at greater risk of exploitation, insecure work and financial hardship, and may contribute to situations of fatigue and errors in judgement, to the detriment of both workers and clients in the care industry.<sup>535</sup>
- 8.16** The union warned that the gig economy has produced a 'dangerous loophole' in the system and expressed concern that it commercialises the provision of health and social care with little regard for worker and public safety. The Association highlighted that whilst it does not wish to stifle innovation within health and aged care, it believes that there must be adequate protections for both the client and worker arising from the provision of care to people and ensuring their general safety.<sup>536</sup>

### **Expansion into other sectors**

- 8.17** Inquiry participants, including the Queensland University of Technology's Centre for Decent Work and Industry and the Australian Institute for Employment Rights (hereafter AIER) observed that the gig economy is moving into new sectors, such as health, higher education and training. The AIER suggested that 'no sector is immune' from the potential reach of on-demand work, while the Centre for Decent Work and Industry contended that the gig economy poses potentially new problems for the safety and rights of workers and consumers.<sup>537</sup>
- 8.18** Both organisations noted that the emergence of the gig economy in new sectors presents distinct regulatory challenges, with the AIER advocating for regulatory gaps be addressed before gig work and undesirable business practices become institutionalised and more difficult to reform.<sup>538</sup>

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<sup>533</sup> Submission 53, Hireup, p 1.

<sup>534</sup> Submission 49, NSW Nurses and Midwives' Association, p 3.

<sup>535</sup> Submission 49, NSW Nurses and Midwives' Association, p 3.

<sup>536</sup> Submission 49, NSW Nurses and Midwives' Association, p 3.

<sup>537</sup> Submission 40, Australian Institute of Employment Rights, pp 3-4; Submission 14, QUT Centre for Decent Work and Industry, p 2.

<sup>538</sup> Submission 40, Australian Institute of Employment Rights, pp 3-4; Submission 14, QUT Centre for Decent Work and Industry, p 2.

## What role should government play?

- 8.19** The committee considered the importance of balancing the challenges presented by the emergence of the gig economy with the economic and social benefits it can bring to New South Wales. The evidence received about the overall attractiveness of the state as an investment destination for the advanced technological sector, the benefits that will flow from greater leadership in this area, as well as the need for ongoing research and proactive disclosure by platforms, are considered in the following sections.
- 8.20** The issue of technological change and its effect on the automation of jobs will be explored in the committee's final report.

### A proactive approach to policy

- 8.21** Some inquiring participants including the Queensland University of Technology's Centre for Decent Work and Industry recommended that the NSW Government take a proactive approach to policy-making in relation to the gig economy. It specifically recommended that evidence-informed regulatory and policy responses be developed to accommodate new and emerging forms of platform work.<sup>539</sup>
- 8.22** Linked to this, Dr Tom Barratt and his colleagues emphasised that the principles of fairness and justice, regardless of work status, have driven industrial relations policy in Australia for over a century, and that these principles should continue to inform policymakers into the future.<sup>540</sup> In a similar vein, the Australia Institute's Centre for Future Work highlighted that in the face of accelerating technological change, policymakers will need to address the power imbalance it can create between employers and workers. It argued that employers are increasingly willing to incorporate new technologies in the workplace in order to enhance their power and profits, and pointed to the role that government should play in mitigating these effects.<sup>541</sup>

### Ongoing research

- 8.23** The committee understands that research has begun to emerge on the nature and prevalence of platform work, with much of it focused on the food delivery and rideshare platforms. In addition, respective Senate and Victorian inquiries into on-demand work have produced important data and research about the industry.
- 8.24** The authors of the Queensland University of Technology's Centre for Decent Work and Industry submission have undertaken substantial research on digital platform work, including for the Victorian Department of Premier and Cabinet where it conducted the first national survey into digital platform work.<sup>542</sup>
- 8.25** The Centre for Decent Work and Industry highlighted that longitudinal research is required to furnish a better understanding how patterns of participation in the gig economy change over

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<sup>539</sup> Submission 14, QUT Centre for Decent Work and Industry, p 1.

<sup>540</sup> Submission 11, Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen,, p 7.

<sup>541</sup> Submission 5, Centre for Future Work, pp 3-4.

<sup>542</sup> Submission 14, QUT Centre for Decent Work and Industry, p 1.

time, how gender informs this participation, and the influence of social, economic and regulatory changes on the growth of digital platforms and participation in digital platform work.<sup>543</sup> It thus recommended that government should:

- develop a system to monitor, over time, new and emerging forms of platform work and their impacts on the pay and conditions of workers in Australia
- support longitudinal research that tracks changes in the extent of participation and in digital platform work and who is participating.<sup>544</sup>

## Committee comment

**8.26** Inquiry participants have highlighted to the committee that the emergence and rapid acceleration of the gig economy over the last decade has manifested clear economic value for business and the Australian community, but that there are also clear costs in terms of wages, safety and other protections for workers. The duality of these outcomes point to the challenges for government in determining the most appropriate role that it can play in regulating on-demand work arrangements. That role is more challenging still in the context of our federal-state system of industrial relations. In the committee's view, as platform work inevitably evolves and expands into other sectors, the NSW Government must take a renewed, more active approach, for the benefit of workers, consumers, the economy and the broader community.

**8.27** It is clear to the committee that the NSW Government must take greater leadership in this space. Government must be more active in anticipating the changes that are taking place in the rapidly evolving gig economy, and monitoring those changes and their effects. It must also be more active in engaging with both business and workers to shape their experiences of it, and proactively build the right regulatory measures to protect workers' rights and consumer safety.

**8.28** Much of this report has documented the poor outcomes that have flowed from minimal regulation that leaves platform markets to evolve as they wish, and the committee's recommendations thus far have focused on measures to remedy those poor outcomes. It is critical that government learn from the past and establish a lasting, future-focused perspective on this industry that appreciates the role for greater regulation.

**8.29** As one element of this renewed leadership, government needs to do more to support ongoing data collection and research into on-demand work, specific to New South Wales. In chapter 4, in order to improve transparency, the committee recommended that the government require platform companies to publish regular data on their scope and operations, and the earnings of their workers in New South Wales. In addition, the committee supports the call for greater research on the gig economy, including longitudinal research that tracks changes in participation in digital platform work, the experience of workers and businesses and the outcomes for the economy and broader community.

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<sup>543</sup> Submission 14, QUT Centre for Decent Work and Industry, p 6.

<sup>544</sup> Submission 14, QUT Centre for Decent Work and Industry, p 1.

**Recommendation 21**

That the NSW Government take greater leadership in the gig economy by actively anticipating the changes taking place, monitoring those changes and their effects, engaging with both business and workers, and establishing the best regulatory measures to ensure optimal outcomes for workers, business and the broader community.

**Recommendation 22**

That the NSW Government support ongoing data collection on and research into on-demand work, specific to New South Wales, including longitudinal research that tracks changes in participation in digital platform work, the experience of workers and businesses, and the outcomes for the economy and broader community.

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## Appendix 1 Submissions

No.	Author
1	University of Sydney – Australian Women's Working Futures Research Project
2	Australian Lawyers Alliance
3	The Australia Institute's Centre for Responsible Technology
4	Mr John Moratelli
5	Centre for Future Work
6	United Workers Union
7	Business NSW (formerly NSW Business Chamber)
8	The Law Society of New South Wales
9	Dr Eugene Schofield-Georgeson
10	Deliveroo
11	Dr Tom Barratt, Dr Caleb Goods, Dr Brett Smith and Dr Alex Veen
12	Australian Manufacturing Workers' Union, NSW and ACT Branch
13	Uber
14	QUT Centre for Decent Work and Industry
15	upcover
16	Australian Rail Tram and Bus Industry Union, NSW Branch
17	Professor David Peetz
18	Public Service Association of New South Wales
19	Shop, Distributive and Allied Employee's Association (NSW Branch)
20	Ola Australia Pty Ltd
21	Australian Road Transport Industrial Organisation, NSW Branch
22	Restaurant & Catering Industry Association
23	The Australian Workers' Union
23a	The Australian Workers' Union
24	New South Wales Society of Labor Lawyers
25	State Insurance Regulatory Authority (SIRA)
26	Department of Premier and Cabinet – Employee Relations
27	SafeWork NSW
28	Unions NSW
29	International Transport Workers' Federation (ITF)
30	Transport Workers' Union (TWU)
31	Rideshare Drivers Association of Australia

<b>No.</b>	<b>Author</b>
32	Motorcycle Council of New South Wales Incorporated
33	Direct Selling Australia
34	Revenue NSW
35	Mr Philip Sacks
36	Australian Industry Group (Ai Group)
37	The McKell Institute
38	Confidential
39	NSW Innovation and Productivity Council and NSW Productivity Commission
40	Australian Institute of Employment Rights
41	Pedestrian Council of Australia Limited
42	Transport for NSW
43	Transport Education, Audit and Compliance Health Organisation Limited (TEACHO)
44	Forrester Research Inc
45	NSW Farmers' Association
46	Woolworths Group Limited
47	Airtasker
48	ALDI
49	NSW Nurses and Midwives' Association
50	Mable
51	Confidential
52	Doordash
53	Hireup

## Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
<b>Monday 9 November 2020</b> <b>Macquarie Room</b> <b>Parliament House, Sydney</b>	Mr Malcolm Mackenzie	Rideshare Driver
	Mr Diego Franco	Food Delivery Worker
	Mr Esteban Salazar	Food Delivery Worker
	Mr Steve Khouw	Food Delivery Worker
	Mr Mark Morey	Secretary, Unions NSW
	Mr Thomas Costa	Assistant Secretary, Unions NSW
	Ms El Leverington	Legal/Industrial Officer, Unions NSW
	Mr Simon Smith	Managing Director, Ola Australia and New Zealand
	Ms Ann Tan	Head of Business Excellence and Legal, Ola Australia and New Zealand
	Ms Lihong Wei	Widow of Mr Xiaojun Chen, Food Delivery Worker
	Ms Tong Chen	Interpreter
	Ms Kate Foy	Deputy Secretary, Community Engagement, Department of Premier and Cabinet
	Mr Charlie Heuston	Acting Executive Director – Employee Relations, Community Engagement, Department of Premier and Cabinet
Mr Mark Frost	Chief Economist, Business NSW	
Mr Luis Izzo	Representative, Australian Business Industrial	
<b>Monday 16 November 2020</b> <b>Macquarie Room</b> <b>Parliament House, Sydney</b>	Mr Hugh McMaster	Secretary and Treasurer, Australian Road Transport Industrial Organisation NSW Branch
	Mr Michael Kaine	National Secretary, Transport Workers' Union

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Mr Richard Olsen	Secretary, NSW Branch of Transport Workers' Union
	Mr Jack Boutros	Strategic Campaigner, Transport Workers' Union
	Mr Mark Goodsell	Head, NSW Australian Industry Group
	Mr Stephen Smith	Head, National Workplace Relations Policy, Australian Industry Group
	Mr Peter Dunphy	Executive Director, Compliance and Dispute Resolution, SafeWork NSW
	Ms Skye Buatava	Director, Research and Evaluation, SafeWork NSW
	Ms Carmel Donnelly	Chief Executive, State Insurance Regulatory Authority (SIRA)
	Mr Darren Parker	Executive Director, Workers and Home Building Compensation Regulation, SIRA
	Dr Petrina Casey	Director, Health Policy, Prevention and Supervision, SIRA
	Mr Rob Craig	Interim Group Executive, Personal Injury, icare
	Dr Chris Colquhoun	Chief Medical Officer, icare
<b>Tuesday 23 February 2021</b>	Mr Jun Yang	Hungry Panda delivery driver
<b>Jubilee Room</b>	Mr Fang Sun	Hungry Panda delivery driver
<b>Parliament House, Sydney</b>	Ms Helen Yang	Interpreter
	Mr Wes Lambert	Chief Executive Officer, Restaurant and Catering Industry Association
	Mr Thomas Green	Head of Policy, Government and Public Affairs, Restaurant and Catering Industry Association
	Ms Tina Sun	Human Resources Manager, Hungry Panda
	Ms Chloe Smith	Executive Support and Projects Officer, Australian Manufacturing Workers' Union

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Ms Abha Devasia	National Research Coordinator, Australian Manufacturing Workers' Union
	Ms Claire Pullen	Project Officer, Public Service Association of New South Wales
	Mr Shay Deguara	Manager of Industrial Support, Public Service Association of New South Wales
	Mr Scott Johnston	Deputy Secretary, Chief Commissioner of State Revenue, Revenue NSW
	Mr Cullen Smythe	Commissioner of State Revenue, Revenue NSW
<b>Tuesday 30 March 2021</b>	Mr Ed McManus	Chief Executive Officer, Deliveroo
<b>Jubilee Room</b>	Ms Julia Duck	Head of Operations, Strategy and Performance, Deliveroo
<b>Parliament House, Sydney</b>	Mr Tim Fung	Co-Founder and Chief Executive Officer, Airtasker
	Mr Damien Scheidel	Managing Director, National Supply Chain, ALDI Australia
	Ms Jamila Gherjestani	National WHS Director, Australian Workers' Union
	Mr Alistair Sage	Senior Legal Officer, Australian Workers' Union
	Mr Toby Warnes	Director of Organising, Australian Rail Train and Bus Industry Union, NSW Branch
	Mr Alex Claassens	Branch Secretary, Australian Rail Train and Bus Industry Union, NSW Branch
	Mr Peter Achterstraat	NSW Productivity Commissioner
	Mr Neville Stevens	Chair, NSW Innovation and Productivity Council
	Professor David Peetz <i>(via videoconference)</i>	Emeritus Professor, Department of Employment Relations and Human Resources, Griffith Business School, Griffith University

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Dr Alex Veen	Lecturer (Academic Fellow), University of Sydney Business School
	Dr Tom Barratt <i>(via videoconference)</i>	Lecturer, Centre for Work + Wellbeing, Edith Cowan University
	Professor Daryll Hull	Executive Chair, Transport Education Audit Compliance Health Organisation (TEACHO)
<b>Monday 19 April 2021</b> <b>Macquarie Room,</b> <b>Parliament House, Sydney</b>	Ms Carmel Pelunsky	Director, Talent and Future of Work, Woolworths Group
	Ms Jessica Digby	Workplace Relations Partner, Woolworths Group
	Ms Rachel Elliott	Head of Government Relations – Retail, Woolworths Group
	Mr Tom Windeyer	General Manager, Last Mile, WooliesX
	Mr Craig Adams	General Manager, National Operations, Woolworths Group
	Mr Bernie Smith	Branch Secretary, Shop, Distributive and Allied Employees' Association, NSW Branch
	Mr Mitchell Worsley	Industrial Officer, Shop, Distributive and Allied Employees' Association, NSW Branch
	Mr Peter Arkle	Chief Executive Officer, NSW Farmers
	Ms Kathy Rankin	Policy Director – Rural Affairs and Business, Economics and Trade, NSW Farmers
	Ms Gracia Kusuma	Director Workplace Relations, NSW Farmers
	Mr Matthew Denman	General Manager, Uber Eats
	Ms Amanda Gilmore	Head of Driver Operations, Uber
	Professor Rae Cooper	Professor of Gender, Work and Employment Relations, University of Sydney – Australian Women's Working Futures

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Professor Robyn Mayes <i>(via videoconference)</i>	Director, Centre for Decent Work & Industry, Queensland University of Technology
	Dr Penelope Williams <i>(via videoconference)</i>	Senior Lecturer, School of Management, Queensland University of Technology
<b>Monday 17 May 2021</b> <b>Macquarie Room,</b> <b>Parliament House, Sydney</b>	Mr Morten Belling	Managing Director, Menulog
	Mr Steven Teoh	Director of Delivery, Menulog
	Ms Vittoria Bon <i>(via videoconference)</i>	Government and Industry Relations Manager, Corporate Affairs, Coles
	Ms Mel Gatfield	Director of New Organising, NSW Secretary, United Workers Union
	Ms Lauren Kelly <i>(via videoconference)</i>	Media and Research, Office of the National Secretary, United Workers Union
	Mr Michael Buckland	Chief Executive Officer, McKell Institute
<b>Friday 10 September 2021</b> <b>Via Videoconference</b>	Ms Rebecca Burrows	General Manager, Doordash
	Mr Puji Fernando	Senior Manager, Strategy and Operations, Doordash
	Mr Young Hou	Driver Operations Manager, EASI
	Mr Will Wang	Legal Manager, EASI
	Ms Kitty Lu	Compliance and Public Relations Manager, EASI
	Mr Peter Scutt	Co-Founder and Chief Executive Officer, Mable
	Ms Natalie Lang	Branch Secretary, Australian Services Union (NSW & ACT Branch)
	Mr Angus McFarland	Assistant Secretary, Australian Services Union (NSW & ACT Branch)
	Mr Gerard Hayes	Secretary, Health Services Union (NSW, ACT & QLD)

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Ms Lauren Hutchins	Division Secretary, Aged Care and Disabilities, Health Services Union (NSW, ACT & QLD)
<b>Monday 18 October 2021</b>	Mr Anthony Wing	Point to Point Transport Commissioner
<b>Via Videoconference</b>	Mr Scott Johnston	Deputy Secretary and Chief Commissioner of State Revenue, Revenue NSW
	Mr Cullen Smythe	Commissioner of State Revenue, Revenue NSW

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## Appendix 3 Minutes

### Minutes no. 1

Thursday 9 April 2020

Select Committee on the Impact of Technological and Other Change on Future Work and Workers in New South Wales

Via teleconference, 10.33 am

#### 1. Members present

Mr Mookhey, *Chair*

Mr Banasiak, *Deputy Chair*

Mr Buttigieg (participating)

Mr Faraway

Mrs Houssos

Mrs Maclaren-Jones

Mr Mallard

Mr Pearson

Mr Searle

Mr Shoebridge

#### 2. Tabling of resolution establishing the committee

The Chair tabled the resolution of the House establishing the committee on 24 March 2020, which reads as follows:

- (1) That a select committee be established to inquire into and report on the impact of technological and other change on the future of work and workers in New South Wales, with particular reference to:
  - (a) changes in the earnings, job security, employment status and working patterns of people in New South Wales;
  - (b) the extent, nature and impact on both the New South Wales labour market and New South Wales economy of:
    - i. the "on-demand" or "gig-economy";
    - ii. the automation of work;
    - iii. the different impact of (i) and (ii) on regional New South Wales; and
    - iv. the wider effects of (i) and (ii) on equality, government and society.
  - (c) the impact of the "on-demand" or "gig economy" and the automation of work on long-term productivity growth, economic growth, as well as the overall attractiveness of New South Wales as an investment destination for the advanced technological sector;
  - (d) the effectiveness of Commonwealth and New South Wales laws in promoting fair competition and preventing monopolies and other anti-competitive behaviour in the "on demand" or "gig-economy";
  - (e) the adequacy of the New South Wales skills and education system in helping people adjust to the changing nature of work;
  - (f) the impact of the "on-demand" or "gig economy" and the automation of work on:
    - i. accident compensation schemes, payroll or similar taxes; and
    - ii. Commonwealth taxes which support New South Wales Government expenditures.
  - (g) the application of workplace laws and instruments to people working in the "on-demand" or "gig-economy", 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 Commonwealth and New South Wales workplace laws and instruments to those persons, including 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;

- iv. the effectiveness of the enforcement of those laws and regulations;
    - v. regulatory systems in other Australian jurisdictions and in other countries, including how other jurisdictions regulate the on-demand workforce and are adapting to the automation of work; and
    - vi. Australia's obligations under international law, including International Labour Organization conventions.
  - (h) whether current laws and workplace protections are fit for purpose in the twenty-first century, including workplace surveillance laws and provisions dealing with workplace change obligations and consequences;
  - (i) whether workers should have agency over the way the data they generate at work is used and, if so, what legal framework is required to provide this;
  - (j) how employers and other businesses should manage and use the information generated by the workforce;
  - (k) how government as a best practice employer should manage and use the information generated by its workforce;
  - (l) whether, and what, legislative or other measures should be taken to:
    - i. reform workplace laws and instruments to account for the emergence of the "on demand" or "gig economy" and the automation of work;
    - ii. reform the skills and education systems to help people adjust to the changing nature of work;
    - iii. reform taxation laws to promote economic growth and protect public finances;
    - iv. reform competition laws to promote fair competition and prevent monopolies in the on-demand or gig-economy; and
    - v. reform accident compensation schemes and other social insurance schemes to account for the emergence of the "on-demand" or "gig economy" and the automation of work.
  - (m) any other related matter.
- (2) That, notwithstanding anything to the contrary in the standing orders, the committee consist of nine members comprising:
- (a) three government members, being nominated by the Leader of the Government;
  - (b) three opposition members, being the Hon Daniel Mookhey and two members nominated by the Leader of the Opposition, and
  - (c) three crossbench members, being Mr David Shoebridge, the Hon Mark Pearson and the Hon Mark Banasiak.
- (3) That the Chair of the committee be the Hon Daniel Mookhey and the Deputy Chair be the Hon Mark Banasiak.
- (4) That, notwithstanding anything to the contrary in the standing orders, at any meeting of the committee, any four members of the committee will constitute a quorum.
- (5) That, unless the committee decides otherwise:
- (a) submissions to inquiries are to be published, subject to the Committee Clerk
  - (b) checking for confidentiality and adverse mention and, where those issues arise, bringing them to the attention of the committee for consideration;
  - (c) the Chair's proposed witness list is to be circulated to provide members with an opportunity to amend the list, with the witness list agreed to by email, unless a member requests the Chair to convene a meeting to resolve any disagreement;
  - (d) the sequence of questions to be asked at hearings is to alternate between Government, Opposition and crossbench members, in order determined by the committee, with equal time allocated to each;
  - (e) transcripts of evidence taken at public hearings are to be published;
  - (f) supplementary questions are to be lodged with the Committee Clerk within two days, excluding Saturday and Sunday, following the receipt of the hearing transcript, with witnesses

requested to return answers to questions on notice and supplementary questions within 21 calendar days of the date on which questions are forwarded to the witness; and

- (g) answers to questions on notice and supplementary questions are to be published, subject to the Committee Clerk checking for confidentiality and adverse mention and, where those issues arise, bringing them to the attention of the committee for consideration.

### **3. Conduct of committee proceedings – media**

Resolved, on the motion of Mr Searle: That unless the committee decides otherwise, the following procedures are to apply for the life of the committee:

- the committee authorise the filming, broadcasting, webcasting and still photography of its public proceedings, in accordance with the resolution of the Legislative Council of 18 October 2007
- the committee webcast its public proceedings via the Parliament’s website, where technically possible
- the committee adopt the interim guidelines on the use of social media and electronic devices for committee proceedings, as developed by the Chair’s Committee in May 2013
- media statements on behalf of the committee be made only by the Chair.

### **4. Inquiry into the impact of technological and other change on the future of work and workers in New South Wales**

#### **4.1 Conduct of the inquiry**

The Chair briefed the committee on his proposals for the conduct of the inquiry:

- background paper from the library by the end of May, to be requested by the chair and be shared with committee members
- discussion paper to be released in June, prior to submissions closing, to draw on the background paper and include specific questions to which the committee is seeking answers
- interim reports to be tabled March/April 2021, focusing on evidence that reflects the current regulatory and practical landscape for workers, and potentially highlighting areas for recommendations
- final report to be tabled November 2021, containing recommendations for policy change.

#### **4.2 Proposed timeline**

Resolved, on the motion of Mr Pearson: That the committee adopt the following timeline for the administration of the inquiry:

- Submission close: Monday 31 August 2020
- Three hearings: Monday 12 October, Monday 19 October, Monday 9 November 2020, subject to members' availability
- Reserve hearing: Monday 16 November 2020
- Interim reports: March/April 2021
- Final report: November 2021.

#### **4.3 Stakeholder list**

Resolved, on the motion of Mr Mallard: That the secretariat email members with a list of stakeholders to be invited to make written submissions, and that members have two days from the email being circulated to amend the list or nominate additional stakeholders.

#### **4.4 Advertising**

All inquiries are advertised via Twitter, Facebook, stakeholder letters and a media release distributed to all media outlets in New South Wales.

#### **4.5 Discussion paper**

Resolved, on the motion of Mr Mallard: That the secretariat prepare a discussion paper for release in June, subject to approval of the committee, to assist in the making of submissions.

#### **4.6 Note on website and media release**

Resolved, on the motion of Mr Searle: That the secretariat add a note on the committee's webpage and in its initial media release that the inquiry will be focusing on policy issues and is not intended to be a forum to resolve individual grievances.

#### **5. Adjournment**

The committee adjourned at 10.50 am, *sine die*.

Laura Ismay

**Committee Clerk**

#### **Minutes no. 2**

Wednesday 23 September 2020

Select Committee on the Impact of Technological and Other Change on Future Work and Workers in New South Wales

Members' Lounge, Parliament House, Sydney at 1.36 pm

#### **1. Members present**

Mr Mookhey, *Chair*

Mr Banasiak, *Deputy Chair* (from 1.40 pm)

Mr Fang

Mrs Houssos

Mrs Maclaren-Jones

Mr Mallard

Mr Pearson

Mr Searle

Mr Shoebridge

#### **2. Draft minutes**

Resolved, on the motion of Mrs Houssos: That draft minutes no. 1 be confirmed.

#### **3. Correspondence**

The committee noted the following correspondence:

##### ***Received:***

- 3 August 2020 – Letter from Hon Don Harwin MLC, Leader of the Government in the Legislative Council, advising that Mr Fang will replace Mr Farraway on the Select Committee on the impact of technological and other change on future work and works in New South Wales.

#### **4. Inquiry**

##### **4.1 Provision of documents to participating member**

Resolved, on the motion of Mr Fang: That Ms Abigail Boyd MLC, who has advised the committee that she intends to participate for the duration of the inquiry into the impact of technological and other change on future work and workers in New South Wales, be provided with copies of all inquiry related documents, including meeting papers, unpublished submissions and other committee documents.

##### **4.2 Camera operator arrangements for committee hearings**

The committee noted camera operator arrangements for committee hearings.

##### **4.3 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submissions nos. 1-19, 21-28.

#### 4.4 Confidential submissions

The committee noted that the author of submission no 20 had requested that the submission be kept confidential. Noting that the submission was of considerable detail and appeared useful to the inquiry, the committee proposed that the Chair write to the author to discuss its publication status.

Resolved, on the motion of Mr Mallard: That the Chair write to the submission author to inform them of the committee's preference to publish the submission and invite them to redact any relevant sections.

#### 4.5 Consideration of hearing dates

Resolved, on the motion of Mrs Houssos: That the committee proceed with holding public hearings on Monday 9 November and Monday 16 November and that the inquiry website be updated to reflect these dates.

#### 4.6 Correspondence with stakeholders

The committee noted that a number of stakeholders did not respond to the committee's invitation to make a submission to the inquiry. The Chair also proposed inviting Revenue NSW and Ms Natalie James, former NSW Fair Work Ombudsman to make a submission to the inquiry.

Resolved, on the motion of Mrs Houssos: That:

- The committee write to those stakeholders who did not respond to the committee's invitation and to invite them again to make a submission to the inquiry
- Revenue NSW and Ms Natalie James, former NSW Fair Work Ombudsman be invited to make a submission to the inquiry.

#### 4.7 Discussion paper

Resolved, on the motion of Mr Searle: That:

- Proposed amendments to the discussion paper be provided by email by Wednesday 30 September 2020 and circulated to the committee, and
- The committee agree to publication of the discussion paper via email, unless a member raises any concerns.

### 5. Adjournment

The committee adjourned at 1.46 pm.

Laura Ismay

**Committee Clerk**

### Minutes no. 3

Monday 9 November 2020

Select Committee on the Impact of Technological and Other Change on Future Work and Workers in New South Wales

Macquarie Room, Parliament House, Sydney at 8.48 am

#### 1. Members present

Mr Mookhey, *Chair* (until 4.00 pm)

Mr Banasiak, *Deputy Chair*

Mr Donnelly (participating until 2.39 pm, substituting for Mr Searle from 2.39 pm)

Mr Fang

Mrs Houssos (until 8.50 am, and from 10.01 am to 3.09 pm)

Mrs Maclaren-Jones

Mr Mallard

Mr Pearson (until 4.02 pm)

Mr Searle (until 2.39 pm)

Mr Shoebridge (from 9.01 am to 11.50 am, and from 1.30 pm to 3.01 pm)

## 2. Draft minutes

Resolved, on the motion of Mr Fang: That draft minutes no. 2 be confirmed.

## 3. Correspondence

The committee noted the following correspondence:

### *Received:*

- 28 August 2020 – Email from Ms Lian Drinan, Legal and Compliance Officer, Airtasker, to the secretariat, declining to make a submission to the inquiry
- 7 October 2020 – Email from Safe Work Australia, to the secretariat, declining to make a submission to the inquiry
- 7 October 2020 – Email from Mr Isaac Jeffrey, Head of Government Relations, Ola Cabs, to the secretariat, confirming that the Ola submission be published as public document
- 19 October 2020 – Email from Ms Natalie James, Former Commonwealth Fair Work Ombudsman, to the secretariat, declining invitation to appear as a witness at the hearing on 9 November
- 22 October 2020 – Email from the Office of the Hon Mark Buttigieg MLC, Opposition Whip, to the secretariat, advising that the Hon Greg Donnelly MLC will be a participating member for the duration of the inquiry
- 23 October 2020 – Email from Mr Ruwan Subasinghe, Legal Advisor, International Transport Workers' Union, to the secretariat, advising that the organisation has no available representatives to appear as witnesses at the hearing on 16 November
- 5 November 2020 – Email from the Office of Ms Abigail Boyd MLC, to the secretariat, advising that Ms Boyd will no longer be a participating member of the inquiry.

### *Sent:*

- 1 October 2020 – Letter from Chair, to Ms Ann Tan, Chief of Staff, Ola Cabs, requesting Ola reconsider the publication status of its submission.

## 4. Provision of documents to participating member

Resolved, on the motion of Mr Banasiak: That the Hon Greg Donnelly MLC, who has advised the committee that he intends to participate for the duration of the inquiry into the impact of technological and other change on future work and workers in New South Wales, be provided with copies of all inquiry related documents, including meeting papers, unpublished submissions and other committee documents.

## 5. Participating member – Ms Abigail Boyd MLC

The committee noted correspondence from the Office of Ms Abigail Boyd MLC, dated 5 November 2020, that she will no longer be a participating member for the inquiry.

## 6. Public submissions

The committee noted that the following submission no. 29 was published by the committee clerk under the authorisation of the resolution appointing the committee.

Resolved, on the motion of Mrs Maclaren-Jones: That the committee authorise the publication of submission nos. 31-33.

## 7. Partially confidential submissions

Resolved, on the motion of Mr Pearson: That the committee authorise the publication of submission no. 30, with the exception of identifying and/or sensitive information which are to remain confidential, as per the recommendation of the secretariat.

## 8. Public hearing

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Malcolm Mackenzie, Rideshare Driver
- Mr Diego Franco, Food Delivery Worker
- Mr Esteban Salazar, Food Delivery Worker
- Mr Steve Khouw, Food Delivery Worker.

Mr Mackenzie tendered the following documents:

- Screenshots of dealings with rideshare platform.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined.

- Mr Mark Morey, Secretary, Unions NSW
- Mr Thomas Costa, Assistant Secretary, Unions NSW
- Ms El Leverington, Legal/Industrial Officer, Unions NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Simon Smith, Managing Director, Ola Australia and New Zealand
- Ms Ann Tan, Head of Business Excellence and Legal, Ola Australia and New Zealand.

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined:

- Ms Lihong Wei, Widow of Mr Xiaojun Chen, Food Delivery Worker.

Ms Tong Chen, Multicultural NSW, was present as an interpreter. She was admitted and sworn.

The evidence concluded and the witness withdrew.

The following witnesses were admitted, sworn and examined:

- Ms Kate Foy, Deputy Secretary, Community and Engagement, Department of Premier and Cabinet
- Mr Charlie Heuston, A/Executive Director – Employee Relations, Community Engagement, Department of Premier and Cabinet.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Mark Frost, Chief Economist, Business NSW
- Mr Luis Izzo, Representative, Australian Business Industrial.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.08 pm.

## 9. Tendered documents

The committee deferred consideration, until Monday 16 November 2020, of the acceptance and publication of the following document tendered during the public hearing:

- Screenshots of dealings with rideshare platform, tendered by Mr Mackenzie.

## 10. Letter to Airtasker

Resolved, on the motion of Mr Mallard: That the Chair, on behalf of the committee, write to Airtasker attaching a copy of the transcript from the hearing on 9 November 2020, requesting that it make a

submission to the inquiry and advising of the committee's intention to request that it appear as a witness at a future hearing for the inquiry.

## 11. Adjournment

The committee adjourned at 4.10 pm.

Helen Hong

**Committee Clerk**

## Minutes no. 4

Monday 16 November 2020

Select Committee on the Impact of Technological and Other Change on Future Work and Workers in New South Wales

Macquarie Room, Parliament House, Sydney at 9.17 am

### 1. Members present

Mr Mookhey, *Chair*

Mr Banasiak, *Deputy Chair* (from 9.48 am to 3.45 pm)

Mr Fang

Mrs Houssos

Mrs Maclaren-Jones (until 9.25 am, and from 1.45 pm to 5.02 pm)

Mr Mallard (until 11.30 am, and from 2.49 pm)

Mr Searle (until 3.09 pm)

Mr Shoebridge (from 9.34 am to 11.09 am, and from 4.00 pm)

### 2. Apologies

Mr Donnelly (participating)

Mr Pearson

### 3. Draft minutes

Resolved, on the motion of Mr Mallard: That draft minutes no. 3 be confirmed.

### 4. Correspondence

The committee noted the following correspondence:

#### ***Received:***

- 16 November 2020 – Email from Ms Luna Wei, Delivery Manager, Hungry Panda, to the secretariat, providing reasons as to her non-attendance at the hearing on 16 November.

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of the email from Ms Luna Wei, dated 16 November 2020.

### 5. Tended documents from 9 November 2020

Resolved, on the motion of Mr Searle: That the committee accept and publish the following document tendered during the public hearing on 9 November, with identifying details removed:

- Screenshots of dealings with rideshare platform, tendered by Mr Malcolm Mackenzie, Rideshare Driver.

### 6. Public submissions

Resolved, on the motion of Mrs Houssos: That the committee authorise the publication of submission nos. 34-37.

### 7. Public hearing

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Mr Hugh McMaster, Secretary and Treasurer, Australian Road Transport Industrial Organisation NSW Branch.

The evidence concluded and the witness withdrew.

The following witnesses were admitted, sworn and examined.

- Mr Michael Kaine, National Secretary, Transport Workers' Union
- Mr Richard Olsen, Secretary, NSW Branch of Transport Workers' Union
- Mr Jack Boutros, Strategic Campaigner, Transport Workers' Union.

Mr Olsen tendered the following documents:

- Rideshare Driver Survey
- Food Delivery Rider/Driver Survey.

The evidence concluded and the witnesses withdrew.

The Chair made a statement regarding the non-attendance of Ms Luna Wei, Delivery Manager, Hungry Panda, and the committee adjourned until the next session of witnesses.

The following witnesses were admitted, sworn and examined:

- Mr Mark Goodsell, Head, NSW Australian Industry Group
- Mr Stephen Smith, Head, National Workplace Relations Policy, NSW Australian Industry Group.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Peter Dunphy, Executive Director, Compliance and Dispute Resolution, SafeWork NSW
- Ms Skye Buatava, Director, Research and Evaluation, SafeWork NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority (SIRA)
- Mr Darren Parker, Executive Director, Workers and Home Building Compensation Regulation, SIRA
- Dr Petrina Casey, Director, Health Policy, Prevention and Supervision, SIRA
- Mr Rob Craig, Interim Group Executive, Personal Injury, icare
- Dr Chris Colquhoun, Chief Medical Officer, icare.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.13 pm.

## 8. **Tendered documents**

Resolved, on the motion of Mrs Houssos: That the committee accept and publish the following document(s) tendered during the public hearing:

- Rideshare Driver Survey, tendered by Mr Richard Olsen, Transport Workers' Union
- Food Delivery Rider/Driver Survey, tendered by Mr Richard Olsen, Transport Workers' Union.

## 9. **Letter to Hungry Panda**

Resolved, on the motion of Mr Shoebridge: That the Chair, on behalf of the committee, write to Ms Luna Wei, Delivery Manager, Hungry Panda, expressing the committee's disappointment in her non-attendance at the public hearing today and of its intention to invite her to the next hearing for the inquiry, noting the committee's powers to issue a summons under the *Parliamentary Evidence Act 1901*.

## 10. Adjournment

The committee adjourned at 5.19 pm.

Helen Hong

**Committee Clerk**

## Minutes no. 5

Friday 5 February 2020

Select Committee on the Impact of Technological and Other Change on Future Work and Workers in New South Wales

Webex and Room 1043, Parliament House, Sydney at 12.18 pm

### 1. Members present

Mr Mookhey, *Chair*

Mr Banasiak, *Deputy Chair*

Mr Fang

Mrs Houssos

Mrs Maclaren-Jones

Mr Mallard

Mr Pearson

Mr Searle

Mr Shoebridge

### 2. Apologies

Mr Donnelly (participating)

### 3. Draft minutes

Resolved, on the motion of Mr Mallard: That draft minutes no. 4 be confirmed.

### 4. Correspondence

The committee noted the following correspondence:

#### **Received:**

- 23 November 2020 – Letter from Mr Isaac Jeffrey, Head of Government Relations, Ola Australia and New Zealand, to the Chair, advising of Mr Simon Smith (CEO) and his resignation from the company
- 1 December 2020 – Email from Ms Luna Wei, Delivery Manager, Hungry Panda, to the Chair, confirming that a Hungry Panda representative will attend the hearing on 23 February 2021
- 19 January 2021 – Email from Mr Mark Simpson, General Counsel and Company Secretary, Airtasker, to the secretariat, advising that Airtasker will submit its submission to the inquiry by March 2021.

#### **Sent:**

- 27 November 2020 – Letter from the Chair, to Ms Luna Wei, Delivery Manager, Hungry Panda, requesting appearance at the next hearing on 23 February 2021
- 11 December 2020 – Letter from the Chair, to Ms Lian Drinan, Legal and Compliance Officer, Airtasker, requesting that Airtasker reconsider making a submission to the inquiry and advising of the committee's intention to invite it to attend a future hearing.

Resolved, on the motion of Mr Shoebridge: That on behalf of the committee, the Chair write to Ola, requesting that the company provide a response to all questions taken on notice by the former CEO, Mr Simon Smith.

Resolved, on the motion of Mr Shoebridge:

1. That the Chair write to the Delivery Manager of Hungry Panda, on behalf of the committee, reminding her of the committee's power to summons witnesses and compel their attendance to give evidence.

2. That, in the event of Hungry Panda declining this invitation or further non-attendance, the committee authorise the Chair to issue a summons to compel the attendance of Ms Luna Wei, Delivery Manager, Hungry Panda to give evidence.

**5. Public submissions**

The committee noted that submission nos 39-40 were previously published by the committee clerk under the authorisation of the resolution appointing the committee.

**6. Answers to questions on notice**

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Mr Esteban Salazar, Food Delivery Worker, received 9 November 2020
- Mr Malcolm Mackenzie, Rideshare Driver, received 10 November 2020
- SafeWork NSW, received 17 November 2020
- Unions NSW, received 21 December 2020
- Mr Steve Khouw, Food Delivery Worker, received 11 January 2021
- State Insurance Regulatory Authority (SIRA), received 13 January 2021
- Australian Industry Group, received 14 January 2021
- Business NSW, received 18 January 2021
- Transport Workers' Union, received 20 January 2021
- icare, received 20 January 2021
- Department of Premier and Cabinet – Employee Relations, received 22 January 2021.

It also noted that, as previously advised, the following organisations were granted extensions for the return of some or all of their answers to questions on notice until February:

- Australian Road Transport Industrial Organisation
- SIRA
- icare.

**7. Briefing from Ms Natalie James, Former Fair Work Ombudsman**

Resolved, on the motion of Mrs Houssos: That Ms Natalie James be invited to provide a private briefing on her report into the Victorian On-Demand Workforce.

**8. Hearings and site visits**

The committee noted that it had previously agreed via email to hold two further hearings, which have been confirmed for the following dates:

- Monday, 19 April 2021
- Monday, 17 May 2021.

Resolved, on the motion of Mr Searle: That the committee conduct a site visit to the Amazon Distribution Centre in Western Sydney on the morning of Monday, 17 May 2021, and return to Parliament House for a half-day hearing.

Resolved, on the motion of Mr Searle: That:

- the committee hold two further full hearings and one half-day hearing over the months of July to October 2021, and
- that dates for hearings be determined by the Chair after consultation with members regarding their availability.

**9. Proposed witnesses**

The committee noted that the following witnesses be invited to give evidence to committee on the scheduled hearing days.

**Tuesday, 23 February 2021**

<b>Witness and allocated time</b>	<b>Submission no.</b>
Hungry Panda (1 hour)	No submission
Restaurant and Catering Industry Association (1 hour)	22
Unions panel (1 hour)	
- Australian Manufacturing Workers' Union	No submission
- Australian Workers' Union	23
Revenue NSW (1 hour)	34

**Tuesday, 30 March 2021**

<b>Witness and allocated time</b>	<b>Submission no.</b>
Deliveroo (1 hour)	10
Airtasker (1 hour)	Pending
Supermarket panel (1 hour)	
- Coles	No submission
- Woolworths	No submission
- Aldi	No submission
Unions panel (1 hour)	
- Shop, Distributive and Allied Employee's Association	19
- Public Service Association	18
NSW Innovation and Productivity Council and NSW Productivity Commission (1 hour)	39 (joint sub)
Panel of experts – TBC (1 hour)	

**Monday, 19 April 2021**

<b>Witness and allocated time</b>	<b>Submission no.</b>
Uber (1 hour)	13
Farmers panel (1 hour)	
- National Farmers' Federation	No submission
- NSW Farmers' Association	Pending
- Dairy Connect	No submission
International Transport Workers' Federation (1 hour)	29
ACCC/Department of Education/Transport for NSW (1 hour)	Pending
Panel of experts – TBC (1 hour)	

**Monday, 17 May 2021 (half-day)**

Witness and allocated time	Submission no.
Mabel (1 hour)	No submission
Unions panel (1 hour) - United Workers' Union - Health Services Union	6 No submission
Other witnesses TBC	

**10. Letter to Coles, Woolworths and Aldi**

Resolved, on the motion of Mr Fang: That the Chair, on behalf of the committee, write to Coles Group, Woolworths Group and Aldi, requesting each company provide a submission to the inquiry and inviting them to give evidence on 30 March 2021.

**11. Adjournment**

The committee adjourned at 12.32 pm .

Helen Hong

**Committee Clerk**

**Minutes no. 6**

Tuesday 23 February 2021

Select Committee on the impact of technological and other change on the future of work and workers in New South Wales

Jubilee Room, Parliament House, Sydney at 9.02 am

**1. Members present**

Mr Mookhey, *Chair*

Mr Banasiak, *Deputy Chair*

Mr Donnelly (participating)

Mr Fang

Mrs Houssos (via Webex)

Mrs Maclaren-Jones

Mr Mallard (from 9.34 am to 11.30 am, and from 12.16 pm)

Mr Pearson (from 9.16 am to 12.40 pm, and from 2.10 pm)

Mr Searle

Mr Shoebridge (until 12.40 pm)

**2. Apologies**

**3. Public hearing**

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were admitted, sworn and examined:

- Mr Jun Yang, Hungry Panda delivery driver
- Mr Fang Sun, Hungry Panda delivery driver.

Ms Helen Yang, Associated Translators and Linguists (ATL), was present as an interpreter. She was admitted and sworn.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Wes Lambert, Chief Executive Officer, Restaurant and Catering Industry Association
- Mr Thomas Green, Head of Policy, Government and Public Affairs, Restaurant and Catering Industry Association.

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined:

- Ms Tina Sun, Human Resources Manager, Hungry Panda.

The evidence concluded and the witness withdrew.

The following witnesses were admitted, sworn and examined:

- Ms Chloe Smith, Executive Support and Projects Officer, Australian Manufacturing Workers' Union
- Ms Abha Devasia, National Research Coordinator, Australian Manufacturing Workers' Union
- Ms Claire Pullen, Project Officer, Public Service Association of New South Wales
- Mr Shay Deguara, Manager of Industrial Support, Public Service Association of New South Wales.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Scott Johnston, Deputy Secretary, Chief Commissioner of State Revenue, Revenue NSW
- Mr Cullen Smythe, Commissioner of State Revenue, Revenue NSW.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 2.43 pm.

#### 4. **Tendered documents**

Resolved, on the motion of Mr Donnelly: That the committee accept the following document tendered during the public hearing on 23 February:

- icare workers insurance documents relating to Hungry Panda, tendered by Mr David Shoebridge MLC.

#### 5. **Previous minutes**

Resolved, on the motion of Mrs Maclaren-Jones: That draft minutes no. 5 be confirmed.

#### 6. **Correspondence**

The committee noted the following items of correspondence:

##### ***Received***

- 10 February 2021 – Letter from Ms Ann Tan, Head of Legal and Business Excellence, Ola Australia, to the Chair, providing further information following the hearing on 9 November 2020
- 12 February 2021 – Email from Ms Annabel Johnson, Head of Policy and Advocacy, NSW Farmers, to the secretariat, declining to make a submission to the future of work inquiry.
- 22 February 2021 – Email from Ms Vittoria Bon, Government and Industry Relations Manager, Corporate Affairs, Coles Group, to the secretariat, declining committee's invitation to make a submission or nominate witnesses for the hearing on 30 March 2021
- 23 February 2021 – Email from Mr Christian Bennett, Group Head of Reputation, Government Relations and Industry Affairs, Woolworths Group, to the secretariat, advising that Woolworths plan to make a submission to the inquiry but declining invitation to nominate witnesses for the hearing on 30 March 2021
- 23 February 2021 - Email from Mr Adrian Christie, Director of Customer Relations, Aldi, to the secretariat, declining committee's invitation to make a submission or nominate witnesses for the hearing on 30 March 2021.

***Sent***

- 8 February 2021 – Letter from the Chair, to Ms Ann Tan, Head of Legal and Business Excellence, Ola Australia, following up on additional information following the hearing on 9 November 2020
- 8 February 2021 – Letter from the Chair, to Ms Luna Wei, Delivery Manager, Hungry Panda, formally inviting Hungry Panda to nominate witnesses for the hearing on 23 February 2021
- 9 February 2021 – Letter from the Chair, to Ms Vittoria Bon, Government and Industry Relations Manager, Corporate Affairs, Coles, requesting that Coles make a submission and nominate witnesses for the hearing on 30 March 2021
- 9 February 2021 – Letter from the Chair, to Mr Christian Bennett, Group Head of Reputation, Government Relations and Industry Affairs, Woolworths Group, requesting that Woolworths make a submission and nominate witnesses for the hearing on 30 March 2021
- 9 February 2021 – Letter from the Chair, to Mr Adrian Christie, Director, Customer Relations, Aldi, requesting that Aldi make a submission and nominate witnesses for the hearing on 30 March 2021.

Resolved, on the motion of Mr Banasiak: That the Chair, on behalf of the committee, write to NSW Farmers requesting that it provide a submission to the inquiry and nominate witnesses for the hearing on 30 March 2021.

Resolved, on the motion of Mr Searle: That the Chair, on behalf of the committee, write again to the Coles Group, Woolworths Group and Aldi seeking a submission to the inquiry, asking them to nominate witnesses for the hearing on 30 March 2021, and reminding them of the committee's power to summons witnesses to attend and give evidence.

**7. Public submission**

Resolved, on the motion of Mr Donnelly: That the committee authorise the publication of submission no. 41.

**8. Confidential submission**

Resolved, on the motion of Mr Fang: That the committee defer consideration of keeping submission no. 38 confidential until its next meeting.

**9. Attachments to submission**

Resolved, on the motion of Mrs Maclaren-Jones: That the committee authorise the publication of attachments to submission no. 39.

**10. Answers to questions on notice and supplementary questions**

Resolved, on the motion of Mr Pearson: That the committee authorise the publication of answers to questions on notice received from the Australian Road Transport Industrial Organisation and SIRA.

Resolved, on the motion of Mr Searle: That the committee defer consideration of Ola Australia's request to keep its answers to questions on notice and attachments confidential.

**11. Schedule of first report**

Resolved, on the motion of Mr Mallard: That the committee table its first report in August 2021.

**12. Briefing with Ms Natalie James, Chairperson of the Victorian inquiry**

Ms Natalie James, Chairperson of the Inquiry into the Victorian On-Demand Workforce, provided a private briefing to the committee on her report via Webex.

**13. Adjournment**

The committee adjourned at 4.31 pm, until Tuesday 30 March 2021 (public hearing).

Helen Hong

**Committee Clerk**

**Minutes no. 7**

Tuesday 30 March 2021

Select Committee on the impact of technological and other change on the future of work and workers in New South Wales

Jubilee Room, Parliament House, Sydney at 9.06 am

**1. Members present**Mr Mookhey, *Chair*

Mr Fang

Mrs Houssos (from 9.06 am to 9.08 am, 11.35 am to 2.30 pm, 3.30 pm to 3.50 pm, from 4.03 pm to 4.20 pm)

Mr Mallard (via Webex) (until 12.30 pm)

Mr Pearson (until 11.15 am, from 11.42 am to 12.21 pm, left at 3.06 pm)

Mr Searle

Mr Shoebridge (from 9.23 am to 10.30 am, 11.52 am to 12.30 pm, 1.58 to 2.58 pm, from 3.30 pm)

**2. Apologies**Mr Banasiak, *Deputy Chair*

Mrs Maclaren-Jones

Mr Donnelly (participating)

**3. Deputy Chair**

Resolved, on the motion of Mr Fang: That Mr Searle be elected Deputy Chair for the duration of the meeting only.

**4. Public hearing**

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were admitted, sworn and examined:

- Mr Ed McManus, Chief Executive Officer, Deliveroo
- Ms Julia Duck, Head of Operations, Strategy and Performance, Deliveroo.

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined:

- Mr Tim Fung, Co-Founder and Chief Executive Officer, Airtasker.

The evidence concluded and the witness withdrew.

The following witness was admitted, sworn and examined:

- Mr Damien Scheidel, Managing Director, National Supply Chain, ALDI Australia.

The evidence concluded and the witness withdrew.

The following witnesses were admitted, sworn and examined:

- Ms Jamila Gherjestani, National WHS Director, Australian Workers' Union
- Mr Alistair Sage, Senior Legal Officer, Australian Workers' Union
- Mr Toby Warnes, Director of Organising, Australian Rail Train and Bus Industry Union, NSW Branch
- Mr Alex Claassens, Branch Secretary, Australian Rail Train and Bus Industry Union, NSW Branch.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Peter Achterstraat, NSW Productivity Commissioner
- Mr Neville Stevens, Chair, NSW Innovation and Productivity Council.

The evidence concluded and the witnesses withdrew.

**5. Previous minutes**

Resolved, on the motion of Mr Searle: That draft minutes no. 6 be confirmed.

**6. Correspondence**

The committee noted the following items of correspondence:

***Received***

- 8 March 2021 – Email from Ms Rachel Elliott, Head of Government Relations and Industry Affairs – Retail, Woolworths Group, to the secretariat, declining invitation to nominate witnesses for the March hearing
- 8 March 2021 – Email from Mr Mitch Worsley, Industrial Officer, Shop, Distributive and Allied Employees' Association – NSW Branch, to the secretariat, declining invitation to nominate witnesses for the March hearing due to unavailability
- 11 March 2021 – Email from Ms Vittoria Bon, Government and Industry Relations Manager, Corporate Affairs, Coles, declining the committee's invitation to make a submission and nominate witnesses for the March hearing
- 22 March 2021 – Email from Ms Helen Macukewicz, Professional Officer – Professional Services, NSW Nurses and Midwives Association, to the secretariat, providing reasons as to why its submission should be kept confidential.

***Sent:***

- 4 March 2021 – Letter from the Chair, to Ms Vittoria Bon, Government and Industry Relations Manager, Corporate Affairs, Coles, requesting that Coles reconsider the committee's invitation to make a submission and nominate witnesses for the March hearing and reminding them of the committee's power to summon witnesses to attend and give evidence
- 4 March 2021 – Letter from the Chair, to Mr Christian Bennett, Group Head of Reputation, Government Relations and Industry Affairs, Woolworths Group, requesting that Woolworths reconsider the committee's invitation to nominate witnesses for the March hearing and reminding them of the committee's power to summon witnesses to attend and give evidence
- 4 March 2021 – Letter from the Chair, to Mr Adrian Christie, Director, Customer Relations, Aldi, requesting that Aldi reconsider the committee's invitation to make a submission and nominate witnesses for the March hearing and reminding them of the committee's power to summon witnesses to attend and give evidence
- 4 March 2021 – Letter from the Chair, to Ms Annabel Johnson, Head of Advocacy and Policy, NSW Farmers' Association, requesting that NSW Farmers reconsider the committee's invitation to make a submission and of its intention to invite NSW Farmers to nominate witnesses for the April hearing .

**7. Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 42-48.

**8. Confidential submission**

Resolved, on the motion of Mr Shoebridge: That the committee:

- keep submission no. 38 confidential as per the request of the author, as it contains sensitive information
- invite the author to provide a more general submission that could be published
- on receipt of the additional submission, potentially reconsider publication of submission no. 38
- keep the correspondence from Ms Helen Macukewicz, Professional Officer – Professional Services, NSW Nurses and Midwives Association, regarding the publication of its submission, dated 22 March 2021, confidential, as per the recommendation of the secretariat.

**9. Answers to questions on notice**

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, Strategy and Governance, icare, received 17 March 2021.

Resolved, on the motion of Mr Shoebridge: That the committee keep Ola Australia's answers to questions on notice and attachments confidential, as per the request of the author, as they are commercial-in-confidence.

**10. Coles and Woolworths witnesses**

Resolved, on the motion of Mr Shoebridge: That:

- the Chair, on behalf of the committee, request the Clerk of the Parliaments to seek legal advice as soon as possible from Professor Gabrielle Appleby, University of New South Wales Faculty of Law and Justice, on whether the committee's power to issue a summons under the Parliamentary Evidence Act 1901 extends outside of New South Wales
- following receipt of the legal advice, the committee meet to consider next steps regarding Woolworths and Coles, with a view to them giving evidence on 19 April 2021.

**11. Site visit**

Resolved, on the motion of Mr Shoebridge: That the Chair canvass with members the earliest practical date for a site visit and hearing on the Mid North Coast, focusing on the blueberry intensive horticulture industry, potentially hosted by the Coffs Harbour Council or another facility with remote access to facilitate remote attendance by Mr Fang.

**12. Public hearing**

The following witnesses were admitted, sworn and examined:

- Professor David Peetz, Emeritus Professor, Department of Employment Relations and Human Resources, Griffith Business School, Griffith University (*via videoconference*)
- Dr Alex Veen, Lecturer (Academic Fellow), University of Sydney Business School
- Dr Tom Barratt, Lecturer, Centre for Work + Wellbeing, Edith Cowan University (*via videoconference*)
- Professor Daryll Hull, Executive Chair, Transport Education Audit Compliance Health Organisation (TEACHO).

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.52 pm.

**13. Adjournment**

The committee adjourned at 4.52 pm, until Monday, 19 April 2021 (public hearing).

Helen Hong

**Committee Clerk**

**Minutes no. 8**

Monday 12 April 2021

Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales

Room 1136, Parliament House, Sydney at 3.34 pm

**1. Members present**

Mr Mookhey, *Chair*

Mr Banasiak, *Deputy Chair*

Mr Donnelly (*participating*)

Mr Fang

Mrs Houssos

Mr Mallard

Mr Searle

Mr Shoebridge

**2. Apologies**

Mrs Maclaren-Jones

Mr Pearson

**3. Previous minutes**

Resolved, on the motion of Mr Mallard: That draft minutes no.7 be confirmed.

**4. Correspondence**

***Received:***

- 29 March 2021 – Email from Mr Ryan Smith, Manager, Public Policy, Amazon Australia, to the secretariat, providing advice on the logistics of a site visit to the Amazon Distribution Centre
- 9 April 2021 – Memorandum to the Clerk of the Parliaments providing legal advice on the power of committees to summon witnesses outside of the state of New South Wales, from Professor Gabrielle Appleby, University of New South Wales Law and Justice.

***Sent:***

- 9 April 2021 – Letter from the Chair to Ms Helen Macukewicz, Professional Officer, Professional Services, NSW Nurses and Midwives' Association, inviting a general submission to the inquiry.

**5. Answers to questions on notice**

The following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Revenue NSW, received 22 March 2021
- Mr Fang Sun, Hungry Panda delivery driver, received 23 March 2021
- Hungry Panda, received 25 March 2021
- Restaurant and Catering Industry Association, received 25 March 2021
- Australian Manufacturing Workers' Union, received 26 March 2021.

**6. Coles and Woolworths witnesses**

The committee noted the legal advice provided by Professor Gabrielle Appleby, University of New South Wales Faculty of Law and Justice, to the Clerk of the Parliaments.

Resolved, on the motion of Mr Searle: That:

- The committee invite Mr Christian Bennett, Group Head of Reputation, Government Relations and Industry Affairs, Woolworths Group, to give evidence at the hearing on Monday 19 April 2021 from 9.45 am to 10.45 am, indicating that if Woolworths does not accept the invitation by 12 noon Wednesday 14 April 2021, the committee will issue a summons to compel Mr Bennett's attendance
- If the witness does not accept the invitation, under the authority of s 4(2) of the *Parliamentary Evidence Act 1901*, the Chair, on behalf of the committee, issue a summons to Mr Christian Bennett, Group Head of Reputation, Government Relations and Industry Affairs, Woolworths Group to attend and give evidence before the committee on Monday 19 April 2021 from 9.45 am to 10.45 am.
- Subject to further instruction from the Chair, the committee invite a representative of Coles in New South Wales to give evidence at the hearing on Monday 19 April 2021 from 9.45 am to 10.45 am, indicating that if Coles does not accept the invitation by 12 noon Wednesday 14 April, the committee will issue a summons to compel the representative's attendance

- If the representative of Coles does not accept the invitation, under the authority of s 4(2) of the *Parliamentary Evidence Act 1901*, the Chair, on behalf of the committee, issue a summons to the representative to attend and give evidence before the committee on Monday 19 April 2021 from 9.45 am to 10.45 am.

**7. Site visit to Amazon Distribution Centre**

The committee discussed practical arrangements for its site visit to the Amazon Distribution Centre in Western Sydney on the morning of Monday 17 May 2021.

**8. Site visit to Coffs Harbour**

The committee discussed practical arrangements for its site visit to Coffs Harbour including a blueberry farm visit and public hearing in July 2021.

**9. Adjournment**

The committee adjourned at 3.47 pm, until Monday 19 April 2021 (public hearing)

Merrin Thompson

**Committee Clerk**

**Minutes no. 9**

Monday 19 April 2021

Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales

Macquarie Room, Parliament House, Sydney at 9.31 am

**1. Members present**

Mr Mookhey, *Chair*

Mr Banasiak, *Deputy Chair* (until 12.57 pm)

Ms Boyd (substituting for Mr Shoebridge) (via Webex) (from 9.45 am)

Mr Donnelly (participating)

Mr Fang

Mrs Houssos (from 9.35 am)

Mr Mallard (via Webex) (from 9.37 am until 1.00 pm)

Mr Searle

**2. Apologies**

Mr Pearson

Mrs Maclaren-Jones

**3. Draft minutes**

Resolved, on the motion of Mr Fang: That draft minutes no. 8 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 13 April 2021 – Email from Ms Anju Sharma, Senior Parliamentary Officer, Parliamentary and Government Services, Office of the Secretary, Transport for NSW, to the secretariat, declining committee's invitation to give evidence at hearing on 19 April 2021
- 13 April 2021 – Email from Mr Baker Khundakji, Young Transport Workers Officer, International Transport Workers' Federation, to the secretariat, declining committee's invitation to give evidence at hearing on 19 April 2021

- 14 April 2021 – Email from Ms Catherine Savage, Executive Assistant, National Farmers Federation, to the secretariat, declining committee's invitation to give evidence at hearing on 19 April 2021
- 14 April 2021 – Email from Ms Donna Bennett, Executive Officer, Office of the Secretary, Department of Education, to the secretariat, declining committee's invitation to give evidence at hearing on 19 April 2021
- 15 April 2021 – Email from Ms Lisa Knight, Director, Parliamentary and Government Liaison, Australian Competition and Consumer Commission, to the secretariat, declining committee's invitation to give evidence at hearing on 19 April 2021.

***Sent:***

- 12 April 2021 – Letter from the Chair to Mr Christian Bennett, Group Head of Reputation, Government Relations and Industry Affairs, Woolworths Group, requesting his attendance at the hearing on 19 April 2021.

**5. Deputy Chair**

Resolved, on the motion of Mr Fang: That Mr Searle be elected Deputy Chair from 1.00 pm to the conclusion of the meeting.

**6. Submission**

Resolved, on the motion of Mr Searle: That the committee authorise the publication of submission no. 23a.

**7. Site visit to Amazon Distribution Centre**

The committee discussed practical arrangements for its site visit the Amazon Distribution Centre in Western Sydney on the morning of Monday 17 May 2021.

**8. Coles witnesses**

The committee discussed the attendance of Coles.

**9. Public hearing**

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were admitted, sworn and examined:

- Ms Carmel Pelunsky, Director, Talent and Future of Work, Woolworths Group
- Ms Jessica Digby, Workplace Relations Partner, Woolworths Group
- Ms Rachel Elliott, Head of Government Relations – Retail, Woolworths Group
- Mr Tom Windeyer, General Manager, Last Mile, WooliesX
- Mr Craig Adams, General Manager, National Operations, Woolworths Group.

Ms Elliott tendered the following document:

- Woolworths Group, Modern Slavery Statement 2020 – Respecting Human Rights.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Bernie Smith, Branch Secretary, Shop, Distributive and Allied Employees' Association, NSW Branch
- Mr Mitchell Worsley, Industrial Officer, Shop, Distributive and Allied Employees' Association, NSW Branch.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Peter Arkle, Chief Executive Officer, NSW Farmers
- Ms Kathy Rankin, Policy Director – Rural Affairs and Business, Economics and Trade, NSW Farmers

- Ms Gracia Kusuma, Director Workplace Relations, NSW Farmers.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Matthew Denman, General Manager, Uber Eats
- Ms Amanda Gilmore, Head of Driver Operations, Uber.

The Chair tendered the following document:

- SafeWork NSW Improvement Notices.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Professor Rae Cooper, Professor of Gender, Work and Employment Relations, University of Sydney – Australian Women's Working Futures (*via videoconference*)
- Professor Robyn Mayes, Director, Centre for Decent Work & Industry, Queensland University of Technology (*via videoconference*)
- Dr Penelope Williams, Senior Lecturer, School of Management, Queensland University of Technology (*via videoconference*).

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.15 pm.

#### 10. **Tendered documents**

Resolved, on the motion of Mr Fang: That the committee accept the following documents tendered during the public hearing:

- Woolworths Group, Modern Slavery Statement 2020 – Respecting Human Rights, tendered by Ms Rachel Elliott, Head of Government Relations – Retail, Woolworths Group
- SafeWork NSW Improvement Notices, tendered by the Chair.

#### 11. **Adjournment**

The committee adjourned at 5.16 pm, until Monday 17 May 2021 (site visit to Amazon Distribution Centre and public hearing).

Helen Hong

**Committee Clerk**

#### **Minutes no. 10**

Monday 17 May 2021

Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales

Amazon Distribution Centre, Moorebank at 9.30 am

#### 1. **Members present**

Mr Mookhey, *Chair*

Mr Banasiak, *Deputy Chair* (until 11.35 am)

Mr Donnelly (*participating*)

Mr Fang

Mrs Houssos (from 9.35 am)

Mr Mallard (*via Webex*) (from 1.33 pm)

Mrs Maclaren-Jones (from 1.31 pm)

Mr Pearson (until 3.21 pm)

Mr Searle

Mr Shoebridge

**2. Site visit to Amazon Distribution Centre**

The committee visited the Amazon Distribution Centre and received a briefing and tour, hosted by:

- Mr Craig Fuller, Director of Operations for Australia
- Mr Sid Yadwad, Site Lead, Moorebank Fulfilment Centre
- Mr Ryan Smith, Manager, Public Policy.

**3. Deputy Chair**

Resolved, on the motion of Mrs Houssos: That Mr Searle be elected Deputy Chair from 1.30 pm to the conclusion of the meeting.

**4. Public hearing**

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were admitted, sworn and examined:

- Mr Morten Belling, Managing Director, Menulog
- Mr Steven Teoh, Director of Delivery, Menulog.

Resolved, on the motion of Mrs Houssos: that the following answers to questions on notice and supplementary questions be published:

- NSW Productivity Commission and NSW Innovation and Productivity Council, received 22 April 2021
- Professor Daryll Hull, Executive Chair, Transport Education Audit Compliance Health Organisation, received 10 April 2021
- Deliveroo, received 29 April 2021
- ALDI Australia, received 30 April 2021
- Australian Workers' Union, received 30 April 2021
- Professor David Peetz, Emeritus Professor, Department of Employment Relations and Human Resources, Griffith Business School, Griffith University, received 30 April 2021
- Airtasker, received 12 May 2021.

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined:

- Ms Vittoria Bon, Government and Industry Relations Manager, Corporate Affairs, Coles (*via teleconference*).

The evidence concluded and the witness withdrew.

The following witnesses were admitted, sworn and examined:

- Ms Mel Gatfield, Director of New Organising, NSW Secretary, United Workers Union
- Ms Lauren Kelly, Media and Research, Office of the National Secretary, United Workers Union (*via videoconference*).

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined:

- Mr Michael Buckland, Chief Executive Officer, McKell Institute.

Mr Buckland tendered the following documents:

- Report – McKell Institute, *Blue Harvest: Wage theft & other labour infringements in the NSW Mid-North Coast's 2019/20 berry harvest* (December 2020)
- Report – McKell Institute, *Insecure Work & Portable Entitlements: A Solution for Australia* (February 2021).

The evidence concluded and the witness withdrew.

The public hearing concluded at 5.03 pm.

**5. Tendered documents**

Resolved, on the motion of Mrs Houssos: That the committee accept the following documents tendered during the public hearing:

- Report – McKell Institute, *Blue Harvest: Wage theft & other labour infringements in the NSW Mid-North Coast's 2019/20 berry harvest* (December 2020), tendered by Mr Michael Buckland, Chief Executive Officer, McKell Institute
- Report – McKell Institute, *Insecure Work & Portable Entitlements: A Solution for Australia* (February 2021), tendered by Mr Michael Buckland, Chief Executive Officer, McKell Institute.

**6. Draft minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no. 9 be confirmed.

**7. Correspondence**

The committee noted the following items of correspondence:

**Received:**

- 22 April 2021 – Letter from Mr Neville Stevens AO, Chair, Innovation and Productivity Council, to the Chair, requesting to clarify and amend his evidence at the hearing on 30 March 2021
- 12 May 2021 – Email from Mr Ryan Smith, Manager of Public Policy, Amazon Australia, to the secretariat, declining committee's invitation to give evidence at hearing on 17 May 2021
- 12 May 2021 – Email from Ms Donna Austin, Research Officer, Health Services Union NSW ACT QLD, to the secretariat, declining committee's invitation to give evidence at hearing on 17 May 2021.

**8. Clarification of evidence**

Resolved, on the motion of Mr Shoebridge: That the committee authorise:

- the publication of correspondence from Mr Neville Stevens AO, Chair, NSW Innovation and Productivity Council, clarifying his evidence at the hearing on 30 March 2021, and
- the addition of a footnote to Mr Stevens' evidence with a hyperlink to the clarification.

**9. Confidential submission**

Resolved, on the motion of Mr Fang: That the committee keep submission no. 38 confidential, as per the request of the author.

**10. Public submission**

The committee noted that submission no. 49 was published by the committee clerk under the authorisation of the resolution appointing the committee.

**11. Additional hearing in June**

Resolved, on the motion of Mr Shoebridge: That the committee:

- hold an additional half day hearing in June,
- invite Doordash, Easi, Mable and Amazon Australia to give evidence, and
- pending the decision of the Independent Legal Arbitrator, Hon Keith Mason AC, regarding a claim of privilege under standing order 52, make a decision on whether to re-invite Revenue NSW.

**12. Adjournment**

The committee adjourned at 5.13 pm, *sine die*.

Helen Hong  
Committee Clerk

**Minutes no. 11**

Friday 10 September 2021

Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in  
New South Wales

via Webex at 9.35 am

**1. Members present**

Mr Mookhey, *Chair*

Mr Banasiak, *Deputy Chair*

Mrs Houssos

Mrs Maclaren-Jones

Mr Mallard (until 9.55 am, from 11.44 am)

Mr Pearson

Mr Searle

Mr Shoebridge (from 9.42 am until 10.00 am, from 10.43 am until 11.7 am, and from 12.09 pm)

**2. Apologies**

Mr Donnelly (participating)

Mr Fang

**3. Draft minutes**

Resolved, on the motion of Mr Searle: That draft minutes no. 10 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 23 June 2021 – Email from Mr Ryan Smith, Manager, Public Policy, Amazon Australia, to the secretariat, declining the committee's invitation to attend the 26 July 2021 hearing
- 23 June 2021 – Email from Mr Mitch Cooper, Director, Public Policy - Australia and New Zealand, Uber, to the secretariat, clarifying one of its answers to questions on notice
- 13 July 2021 – Email from Ms Harriet Skinner, Executive Assistant, Office of the Director General, NSW Department of Primary Industries, to the secretariat, declining the committee's invitation to attend the 27 July 2021 hearing
- 13 July 2021 – Email from Office of Gurmeh Singh MP, Member for Coffs Harbour, to the secretariat, declining the committee's invitation to attend the 27 July 2021 hearing
- 19 July 2021 – Email from Ms Lisa Garden, Group Leader Governance Services, Coffs Harbour City Council, to the secretariat, declining the committee's invitation to attend the 27 July 2021 hearing
- 6 September 2021 – Letter from Mr Anthony Wing, Point to Point Transport Commissioner, to the Chair, responding to the request for the Uber safety audit report.

***Sent:***

- 20 May 2021 – Letter from the Chair, to Mr Ryan Smith, Manager of Public Policy, Amazon Australia, thanking him for facilitating the committee's visit to the Amazon warehouse and following up on questions asked
- 27 August 2021 – Letter from the Chair, to Mr Anthony Wing, Point to Point Transport Commissioner, requesting a copy of the Uber safety audit report and invitation to 18 October hearing.

**5. Public submission**

The committee noted that submission nos. 50 and 52 were published by the committee clerk under the authorisation of the resolution.

**6. Confidential submission**

Resolved, on the motion of Mr Searle: That the committee keep submission no. 51 confidential, as per the request of the author, as it contains unpublished research.

**7. Answers to questions on notice and supplementary questions**

The noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- NSW Farmers, received 12 May 2021
- Professor Rae Cooper, Professor of Gender, Work and Employment Relations, University of Sydney – Australian Women's Working Futures, received 12 May 2021
- Uber, received 13 May 2021
- Queensland University of Technology, received 13 May 2021
- Menulog, received 16 June 2021
- United Workers Union, received 18 June 2021
- Coles, received 25 June 2021.

Resolved, on the motion of Mr Banasiak: That the committee keep the answers to questions on notice and supplementary questions from Woolworths, received 17 May 2021, confidential, as per the request of the author, as they contain sensitive information.

**8. Briefing on virtual hearing proceedings**

The Chair briefed members on virtual hearing arrangements. Key points included:

- turning off the microphone if not speaking to remove background noise
- turning off the video or leaving and re-joining if connection issues
- try to avoid talking at the same time
- be clear on which witness your questions are directed to, or which witness should respond first
- a short break will follow each session, allowing the next witnesses to join the meeting and test their connection
- members should stay connected during these breaks, but noting that witnesses will be able to hear any discussions that are taking place between members during this time
- there is a time lag when people enter and leave the lobby and when coming on and off mute.

**9. Livestream and recording of hearing**

Resolved, on the motion of Mr Mallard: That the committee agree to record today's hearing, as well as any future virtual hearings for the inquiry, and that the recordings be placed on YouTube as soon as practicable after the hearing.

**10. Photo of committee for social media**

Resolved, on the motion of Mrs Maclaren-Jones: That the secretariat take a screenshot of the committee during its deliberative for the purposes of publishing on social media.

**11. Virtual committee guidelines**

The committee noted the DPS Virtual Committee Hearing Guidelines to help ensure that Hansard can transcribe the hearing, witnesses and/or members should avoid speaking over each other.

**12. Public hearing**

Witnesses, the public and media were admitted via video link.

The Chair made an opening statement regarding the broadcasting of proceedings, virtual hearing etiquette and other matters.

The following witnesses were admitted, sworn and examined:

- Ms Rebecca Burrows, General Manager, Doordash

- Mr Puji Fernando, Senior Manager, Strategy and Operations, Doordash.

The evidence concluded and the witnesses withdrew.

The following witnesses were admitted, sworn and examined:

- Mr Young Hou, Driver Operations Manager, EASI
- Mr Will Wang, Legal Manager, EASI
- Ms Kitty Lu, Compliance and Public Relations Manager, EASI.

The evidence concluded and the witnesses withdrew.

The following witness was admitted, sworn and examined:

- Mr Peter Scutt, Co-Founder and Chief Executive Officer, Mable.

The evidence concluded and the witness withdrew.

The following witnesses were admitted, sworn and examined:

- Ms Natalie Lang, Branch Secretary, Australian Services Union (NSW & ACT Branch)
- Mr Angus McFarland, Assistant Secretary, Australian Services Union (NSW & ACT Branch)
- Mr Gerard Hayes, Secretary, Health Services Union (NSW, ACT & QLD)
- Ms Lauren Hutchins, Division Secretary, Aged Care and Disabilities, Health Services Union (NSW, ACT & QLD).

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 1.04 pm.

### 13. **Witnesses for 18 October hearing**

The committee noted that there were no objections to the Chair's proposed invitations to the following witnesses for the hearing on 18 October 2021:

- Revenue NSW – Chief Commissioner of State Revenue
- Point to Point Transport Commission – Commissioner Anthony Wing.

Resolved, on the motion of Mrs Houssos: That the Chair, on behalf of the committee, write to Amazon Australia inviting it to appear at the upcoming hearing on 18 October 2021, and for members to circulate additional witness suggestions to the secretariat.

### 14. **Committee activities in COVID-19 outbreak**

The committee noted that it agreed via email that, in the circumstances of the COVID-19 outbreak, it would not proceed with the following planned activities:

- 26 July 2021 – hearing at Parliament House
- 27 July 2021 – site visit and hearing in Coffs Harbour
- 4 August 2021 – hearing at Parliament House.

The committee agreed to defer consideration of rescheduling Coffs Harbour site visit and hearing to a later date when Public Health Orders have been lifted.

The Chair noted that the inquiry would canvass hearing dates for the issue of workplace surveillance when face-to-face hearings return, pending advice from the Presiding Officers and Clerks, potentially in December 2021 or February 2022.

### 15. **Adjournment**

The committee adjourned at 1.11 pm, until Monday 18 October 2021 (virtual hearing).

Helen Hong  
**Committee Clerk**

**Minutes no. 12**

Monday 18 October 2021

Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales

via Webex at 9.32 am

**1. Members present**Mr Mookhey, *Chair*

Mrs Houssos (until 9.38 am)

Mr Fang

Mrs Maclaren-Jones (until 9.38 am)

Mr Pearson

Mr Mallard

Mr Searle

Mr Shoebridge (until 10.16 am)

**2. Apologies**Mr Banasiak, *Deputy Chair*

Mr Donnelly (participating)

**3. Previous minutes**

Resolved, on the motion of Mr Searle: That draft minutes no. 11 be confirmed

**4. Answers to questions on notice**

The committee noted that the following answers to question on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- EASI, received 6 October 2021
- Doordash, received 7 October 2021
- Mable, received 7 October 2021.

Resolved, on the motion of Mr Searle: That the committee authorise the publication of the attachments contained in answers to question on notice from EASI.

**5. Correspondence**

The committee noted the following items of correspondence:

***Received:***

- 6 October 2021 - Letter from Kitty Lu, Compliance Manager and Public Relations Manager, EASI Group, to the secretariat, seeking corrections to the transcript
- 14 October 2021 - Email from Ms Kitty Lu, Compliance Manager and Public Relations Manager, EASI Group, to the secretariat, providing clarification to transcript of evidence from 10 September hearing.

**6. Clarification of evidence – EASI**

Resolved, on the motion of Mr Searle: That the committee authorise the publication of Ms Lu's clarification of evidence and the insertion of a footnote in the hearing transcript for 10 September 2021, linked to Ms Lu's correspondence

**7. Future activities for the inquiry**

The committee agreed to the Chair's proposal that the committee conclude its gig economy hearings at this point and that the secretariat draft the first report for a report deliberative to be scheduled in February 2022, with hearings to commence in March for workplace surveillance and automation.

**8. Submission**

Resolved, on the motion of Mr Searle: That the committee authorise the publication of submission no. 53.

**9. Photo of committee for social media**

Resolved, on the motion of Mr Shoebridge: That the secretariat take a screenshot of the committee for this hearing and any future hearings for the inquiry, with its knowledge, for the purposes of publishing on social media.

**10. Public hearing**

Witnesses, the public and media were admitted via video link.

The Chair made an opening statement regarding the broadcasting of proceedings, virtual hearing etiquette and other matters.

The following witness was admitted, sworn and examined:

- Mr Anthony Wing, Point to Point Transport Commissioner.

The evidence concluded and the witness withdrew.

Witnesses were admitted via videolink.

The Chair reminded the following witnesses that they did not need to be sworn, as they had been sworn at an earlier hearing for the same inquiry:

- Mr Scott Johnston, Deputy Secretary and Chief Commissioner of State Revenue, Revenue NSW
- Mr Cullen Smythe, Commissioner of State Revenue, Revenue NSW.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 11.45 am.

**11. Adjournment**

The committee adjourned at 11.46 am, *sine die*.

Helen Hong and Donna Glover

**Committee Clerks**

**Draft minutes no. 13**

Monday 28 March 2022

Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales

Room 1043, Parliament House, 12.21 pm

**1. Members present**

Mr Mookhey, *Chair*

Mr Amato

Mr Donnelly (substituting for Mrs Houssos)

Mr Mallard

Mr Searle

Mr Shoebridge

**2. Apologies**

Mr Banasiak

Mr Barrett

Mr Pearson

Mrs Houssos

**3. Previous minutes**

Resolved on the motion of Mr Mallard: That draft minutes no. 12 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received***

- 25 March 2022 – Email from Cara Punch, Office of the Hon Mark Buttigieg MLC, Opposition Whip in the Legislative Council, advising that Mr Donnelly will be substituting for Mrs Houssos for the report deliberative.

**5. Answers to questions on notice**

The following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Point to Point Transport Commissioner, received 18 December 2021
- Revenue NSW, received 18 December 2021.

Resolved on the motion of Mr Shoebridge: That the committee keep the following information confidential, as per the recommendation of the secretariat: names and/or identifying and sensitive information in EASI's attachments to its answers to questions on notice.

Resolved on the motion of Mr Shoebridge: That the committee publish answers to questions on notice from SafeWork NSW, received 25 February 2022.

**6. Publication of 18 October 2021 transcript**

The committee noted that it agreed via email to publish the un-subedited transcript of the 18 October 2021 hearing.

**7. Future inquiry activities**

Resolved on the motion of Mr Searle: That the secretariat canvass members' availability for:

- two hearings in the second half of May or June
- the final report deliberative in September, after budget estimates.

**8. Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 20 and 41.

**9. Recording of deliberative meeting**

Resolved on the motion of Mr Donnelly: That the meeting be recorded through WebEx for the purposes of the secretariat cross-checking amendments following the meeting only, with the recording deleted after this use.

**10. Circulation of Chair's draft report**

The committee noted that it agreed via email that the Chair's draft report be circulated to the committee less than seven calendar days prior to the date scheduled for the deliberative.

**11. Consideration of Chair's draft report**

The Chair submitted his draft report entitled 'Impact of technological and other change on the future of work and workers in New South Wales – First report: The gig economy', which, having been previously circulated, was taken as being read.

Mr Mallard moved: That Findings 1 – 4 be omitted:

**'Finding 1**

That New South Wales is falling behind other states and comparable nations in developing laws that establish decent work in the gig economy.

**Finding 2**

That the failure to provide gig workers with a minimum wage, paid leave and other basic workplace entitlements is increasing inequality in New South Wales.

**Finding 3**

That gig workers currently lack the power to interact and negotiate with on-demand platforms as equals in New South Wales.

**Finding 4**

That the failure to provide gig workers with access to a low-cost independent tribunal empowered to hear and decide disputes is leading to injustice in New South Wales.'

and the following new findings be inserted instead:

**'Finding 1**

That the gig economy is an innovative workforce development driven by the ongoing digital revolution affecting all aspects of our lives.

**Finding 2**

That many thousands of gig workers appreciate the flexibility and opportunities that the gig economy provides.

**Finding 3**

The gig economy is a flexible, evolving work environment that requires minimalist government or external interventions.

**Finding 4**

That all workers should benefit from minimum standards of remuneration and work place safety protections.'

Question put.

The committee divided.

Ayes: Mr Amato, Mr Mallard.

Noes: Mr Mookhey, Mr Donnelly, Mr Searle, Mr Shoebridge.

Question resolved in the negative.

Mr Mallard moved: That Recommendations 2, 3, 5, 9, 10, 11, 14, 16 and 17 be omitted:

**'Recommendation 2**

That the NSW Government establish a tribunal with the power to set minimum pay and conditions for gig workers that provide labour to on-demand platforms regardless of work status, to the extent permitted by the state's constitutional authority.

**Recommendation 3**

That the NSW Government consider extending Chapter 6 of the *Industrial Relations Act 1996* to include at least rideshare and food delivery workers.

**Recommendation 5**

That the NSW Government give the tribunal envisaged in recommendation 2 the power to advise on, oversee and make binding rulings on disputes between gig workers and on-demand platforms, to the extent permitted by the state's constitutional authority.

**Recommendation 9**

That the NSW Government legislate to establish a system of collective bargaining for workers providing labour to on-demand platforms, to the extent permitted by the state's constitutional authority.

**Recommendation 10**

That the NSW Government amend Chapter 6 of the *Industrial Relations Act 1996* to establish a collective bargaining system that includes rideshare, food delivery and parcel delivery workers.

**Recommendation 11**

That the NSW Government give the tribunal envisaged in recommendation 2 the power to recognise an agreement reached by an on-demand platform and its workers (or their representatives) that improves the minimum conditions a worker is otherwise entitled to.

**Recommendation 14**

That the NSW Governments legislate to establish a requirement for all on-demand platforms to register with SafeWork NSW before they begin trading.

**Recommendation 16**

That the NSW Government introduce a scheme that delivers standardised workplace health and safety training to workers providing labour to on-demand platforms in high-risk industries, which can be recognised by all platforms that a worker chooses to work for.

**Recommendation 17**

That the NSW Government partner with on-demand platforms, employers and unions to develop an enforcement regime which provides for the inspection, auditing and reporting of an on-demand platform's compliance with workplace health and safety laws by organisations independent of that platform.'

Question put.

The committee divided.

Ayes: Mr Amato, Mr Mallard.

Noes: Mr Mookhey, Mr Donnelly, Mr Searle, Mr Shoebridge.

Question resolved in the negative.

Resolved on the motion of Mr Shoebridge: That:

- a) paragraph 3.77 be amended by omitting: 'However, our preference is that a separate expanded tribunal be established as a more inclusive, far-reaching approach', and inserting instead:

'Whether it is a new body or an extension of the existing tribunal with the far reaching powers necessary to regulate conditions of engagement and employment, is an open question. The core task is to urgently create the extended jurisdiction to protect gig workers.'

- b) Recommendation 2 be amended by inserting 'or extend the jurisdiction of the existing tribunal' after 'establish a tribunal'.

Resolved on the motion of Mr Searle: That:

- a) paragraph 3.78 be amended by omitting all words after 'effective enforcement regime', and inserting instead:

'In this regard, the committee notes legislation passed by the Legislative Council in 2019 to make changes to Chapter 6 to delete s309(4)(d) and permit those delivering milk, cream and bread to be covered by a contract determination. As such, the committee recommends that the NSW Government puts forward legislation to the Parliament to extend Chapter 6 of the Industrial Relations Act 1996, to include at least rideshare and food delivery workers as well as those engaged

to deliver bread, milk and cream.' [FOOTNOTE: See Industrial Relations (Contract of Carriage) Bill 2019, debated in the Legislative Council on 30 May and 14 November 2019]

- b) Recommendation 3 be amended by omitting: 'consider extending Chapter 6 of the Industrial Relations Act 1996 to include at least rideshare and food delivery workers', and inserting instead:

'introduce legislation to extend Chapter 6 of the Industrial Relations Act 1996 to include at least rideshare and food delivery workers as well as those engaged to deliver bread, milk and cream.'

Resolved on the motion of Mr Shoebridge: That paragraph 3.78 be amended by inserting at the end: 'This would not provide all the essential protections that these workers deserve, nor will it address the needs of all vulnerable workers in the gig economy, but it would be a significant advance for rideshare and food delivery workers and can be achieved rapidly within a well-established legal framework.'

Resolved on the motion of Mr Donnelly: That the following new paragraph be inserted after paragraph 4.52:

'The mandating of improved transparency should include granting the right to registered organisations to inspect the code/software algorithms/platforms used to allocate work, establish rosters, distribute additional shifts and ensure all work is made available on a non-discriminatory basis, subject to appropriate protections.'

Resolved on the motion of Mr Donnelly: That the following new paragraph and recommendation be inserted before paragraph 7.119

'The *Work Health and Safety Act 2011* is the principal piece of state legislation that deals with work health and safety in New South Wales. To guarantee that gig workers are protected by the Act, the committee recommends that the NSW Government review health and safety legislation to ensure workers in the gig economy are protected by health and safety laws including reviewing the definitions of 'person conducting a business or undertaking' and 'worker' in the Work Health and Safety Act 2011.'

#### **Recommendation X**

That the NSW Government review health and safety legislation to ensure workers in the gig economy are protected by health and safety laws, including reviewing the definitions of 'person conducting a business or undertaking' and 'worker' in the Work Health and Safety Act 2011.'

Resolved on the motion of Mr Shoebridge: That paragraph 7.125 be amended by inserting 'without a mechanism that sees premiums rise and fall based on workplace safety history and injury records' after 'pooled revenue model'.

Resolved on the motion of Mr Shoebridge: That:

- a) paragraph 7.125 be amended by omitting 'introduce a workers compensation scheme which provides on-demand platform workers with income and medical benefits at an equivalent level to the benefits currently provided to employees injured in New South Wales workplaces' and inserting instead 'provide full workers compensation benefits to on-demand platform workers that are equivalent to the level of benefits currently provided to employees injured in New South Wales workplaces'.
- b) Recommendation 19 be amended by omitting: 'introduce a workers compensation scheme which provides on-demand platform workers with income and medical benefits at an equivalent level to the benefits currently provided to employees injured in New South Wales workplaces', and inserting instead:
- 'provide full workers compensation benefits to on-demand platform workers that are equivalent to the level of benefits currently provided to employees injured in New South Wales workplaces.'

Mr Searle moved: That:

- a) the draft report as amended be the report of the committee and that the committee present the report to the House;
- b) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

- c) the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- d) dissenting statements be provided to the secretariat by 5.00 pm, Tuesday 29 March 2022;
- e) the Chair will table the report on a date to be determined by the Chair in consultation with the secretariat;
- f) the Chair to advise the secretariat and members if they intend to hold a press conference, and if so, the date and time.

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Donnelly, Mr Searle, Mr Shoebridge.

Noes: Mr Amato, Mr Mallard.

Question resolved in the affirmative.

## **12. Adjournment**

The committee adjourned at 12.50 pm, *sine die*.

Lauren Evans

**Committee Clerk**

## Appendix 4 Dissenting statement

**Hon Lou Amato, Liberal Party**  
**Hon Shayne Mallard, Liberal Party**

The Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales.

The Government members oppose the direction of the report which initially had promise to examine the opportunities that technology and other changes such as the digital revolution and accompanying flexible work life arrangements presented.

The gig economy has recently emerged in many areas of traditional labour markets including hospitality, passenger and freight transport, and the nursing/carer sectors to name a few areas. The spread of the gig economy is largely driven by the attractiveness of new life work flexibility as it permeates to other areas of the economy. The report seeks to impede the emerging new labour model by applying pre digital industrial constraints on the new economy and in doing so erode the competitive advantage for the state's economy and greater independence for workers.

All members of the committee shared concern for the welfare of gig workers and the government members sought to acknowledge that and supported recommendations that strengthened protections for gig workers. However recommendation 2 establishing a whole new industrial relations tribunal overseeing gig workers is strongly opposed as an over reach designed to subvert the new labour models to the 100 year old industrial relations model and as unconstitutional.

The Government members sought to unsuccessfully include the following findings that encapsulate the differences of opinion:

1. That the gig economy is an innovate workforce development driven by the ongoing digital revolution affecting all aspects of our lives.
2. That thousands of gig workers appreciate the flexibility and opportunities that the gig economy provides.
3. The gig economy is a flexible evolving work environment that requires minimalist government or external interventions.
4. That all workers should benefit from minimum standards of remuneration and work place safety protections.

The Government members do not support recommendations 2, 3, 5, 9, 10, 11, 16 and 17 of the Select Committee's report on the grounds that the NSW Parliament's constitutional authority does not extend to such matters.

Specifically it is noted that in 2009, the State's industrial relations powers were handed over to the Commonwealth by the former Labor Government. On that basis, the NSW Parliament does not have power to legislate pay and conditions for gig economy workers, whatever their employment status.

As it currently stands, gig economy workers are regarded as independent contractors (although that status has been challenged in some courts and tribunals). Accordingly, independent contractor work relationships are regulated by the Commonwealth Independent Contractors Act 2006. The Independent Contractors Act expressly prohibits States from legislating for rights and entitlements for independent contractors, as well as denying a State tribunal powers to set rights and entitlements.

It is further noted that were gig economy workers found to be employees, rather than independent contractors, they would be subject to the Commonwealth Government's Fair Work system, and modern awards would then set their pay and conditions.



