

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

*icare responses to Questions on Notice -
16 November 2020 hearing*

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

Questions on Notice from 16 November 2020 hearing

Pages 53 and 54 of the Transcript

Mr DAVID SHOEBRIDGE: Could you come back, if not in terms of the specific contract, but in terms of the kind of arrangements that you see at Hungry Panda and others, the efficacy of otherwise of clause 2 in schedule 1?

The CHAIR: That is a question you might be advised to take on notice.

Mr CRAIG: Yes, I might have to take it on notice.

Mr DAVID SHOEBRIDGE: I was expecting you to take it on notice. I might put the same question to

Ms DONNELLY: Absolutely. I am happy to take it on notice. Could you clarify what the question was?

Mr DAVID SHOEBRIDGE: Can you indicate the efficacy or otherwise of clause 2 in schedule 1, the deemed worker provision, in terms of covering people in the gig economy?

The CHAIR: And perhaps any suggestions for amendment that you might feel are needed as well. That might be the follow-up question.

Mr DAVID SHOEBRIDGE: To the extent that you are allowed, which we know you probably cannot.

The Hon. WES FANG: Point of order—

Ms DONNELLY: Thank you. If we are giving advice on a legislative matter there would be a phase where we would give advice and it would be Cabinet in confidence. If there is an overlap with that, then—

The CHAIR: As I just said, to the extent to which you can. That would be welcome.

Ms DONNELLY: Yes.

Mr DAVID SHOEBRIDGE: I think it is the efficacy or otherwise—

Ms DONNELLY: I have already been clear with you that our assessment is that there is uncertainty, but I am happy to go into more details.

Answer

icare is currently investigating and seeking advice regarding the efficacy or otherwise of clause 2 in Schedule 1, the deemed worker provision, in terms of covering people in the gig economy.

We expect to be able to respond to the Committee on this particular question by 15 February 2021.

Page 54 of the Transcript

The CHAIR: Are you able to provide us with a view on notice as to which platforms you have engaged with for any purpose?

Mr CRAIG: We have had claims from particular platforms that have been denied, so that gives you an example. If they have been denied on the deemed worker piece, we can clarify that.

Answer

icare's interactions and discussions are provided at **Tabs A and B**

Pages 54 and 55 of the Transcript

Mr CRAIG: Correct. We have definitely got that. We have also had a situation where platform companies have actually paid for policy for their workers, thinking that would cover them, to then realise that because they are independent it does not. This goes to your earlier point where the platform companies—some of them, at least—are actually happy to do it.

The CHAIR: Sure. I am just about to pass back to Mr Shoebridge, but I was going to ask you on notice to provide as much detail as you can about the numbers and statistics. You have said "100"; it would be useful to know over what period of time and equally the time beforehand.

Mr CRAIG: Yes, sorry. That 100 is since February 2019. I think 96 is the exact number.

The CHAIR: Yes. It would be useful if we could get it by platform, amount accepted, amount rejected, predominant reasons for rejection and any further information that you can provide us as well.

Mr CRAIG: Happy to do that.

The CHAIR: Equally, it would be useful to know the cost to icare of making these claim by claim assessments and of doing the investigations that you are required to do as a precursor to investigation. It does strike me that one cost of a relatively opaque law is that it will result in more expenditure from the operator to have to make that assessment.

Mr CRAIG: Correct.

The CHAIR: It would equally be useful to have this data from SIRA, to the extent to which you have it for all the other insurers in the marketplace. I do not believe any other vehicle platform has self-insured or is using a specialist insurer, to the best of your knowledge.

Ms DONNELLY: To the best of my knowledge, they would all be icare.

The CHAIR: I am very interested in particularly two self-insurers, which are Coles and Woolworths, given that they are starting to use more gig-style work in their operations as to whether or not anyone has made any claims against those two self-insurers.

Ms DONNELLY: Yes. We can have a look at that.

Answer

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.

Given the lack of clarity in respect to gig economy workers under the current workers compensation legislation, icare considers that it is not legally certain that the majority of gig workers are not presently covered by the existing workers compensation legislation. This has never been fully tested in court and there are reasonable legal arguments for and against, at least for some workers.

In this respect, it is difficult to provide a definitive cost of making claim by claim assessments and investigations, as each claim is investigated individually and varies according to the specifics of each claim. It is very clear in respect to some claims that there is no coverage under the current workers compensation legislation, while for others, substantial resources are expended obtaining legal opinion, investigation reports and information pertaining to contractual and financial obligations, as well as records of activities.

This does not include funds expended should the matter proceed to the Workers Compensation Commission or the courts (although the latter is yet to be tested).

In short, the ambiguity of the legislation in relation to this group of workers creates a situation where significant funds can be expended to determine the legitimacy of the claim.

Pages 57 and 58 of the Transcript

The CHAIR: Perhaps through correspondence or a question on notice, can you inform the Committee of your conclusion after you have reached a determination?

Mr CRAIG: Absolutely.

Answer

The investigation into the death of Mr Xiaojun Chen has concluded, and based on the available information, a decision has been made to decline liability for the claim.

The issue determined was whether Mr Chen was a worker under section 4 of the *Workplace Injury Management Act 1998*, or whether he was a deemed worker under clause 2 of schedule 1 of the *Workplace Injury Management Act 1998*, and whether his death resulted from an injury sustained in the course of employment as required by section 4 of the *Workers Compensation Act 1987*.

Information to support the claim was obtained from Hungry Panda and the legal representatives of Mr Chen's widow.

It was determined that at the time of his death, Mr Chen was neither a *worker* nor *deemed worker* of Hungry Panda under the workers compensation legislation based on the Independent Contractor Agreement and Independent Contractor Declaration signed by Mr Chen with Hungry Panda. In addition, statements were obtained from Hungry, which support that Mr Chen was an independent contractor.

The decision to decline liability was issued to Mr Chen's widow via her legal representatives on 12 January 2021. Information was included with that letter about how to request a review of the decision by icare, or how to lodge a dispute with the Workers Compensation Commission.

Pages 58 and 59 of the Transcript

The CHAIR: In terms of who the premium payer would be, there is an argument to say that it should be the platform or it should be the worker themselves. That is a legitimate debate. Are you able to provide us, on notice, with any guidance as to how you would apply the existing premium criteria to determine the premium to be charged to a platform, given that you use risk rating system?

Mr CRAIG: Yes, and absolutely we would have to take the question on notice, but yes.

The CHAIR: We would be very interested to know what the financial costs would be to a platform. We will leave it to you to decide which case study might be illustrative for the purposes of us determining the claim cost. We have had various people say to us that it would be cost-prohibitive. We have had other people say that it would not. It would be useful to see the view of the Nominal Insurer and icare on what a risk rating premium structure could look like for gig platforms. Is it possible for you to provide us that information on notice?

Mr CRAIG: One of the key things here would have to go to the definition of the benefits and are they the equivalent and to the question that you have just asked—

The CHAIR: Maybe for the purpose of this exercise you can assume the existing benefits under the Workers Compensation Scheme.

Dr COLQUHOUN: —just to clarify with that example, are we making the assumption that the worker only works for one gig platform?

The CHAIR: I am actually open to any views that you might have as to how that factor should be accounted for. I think the idea would be what would happen if one worker is working for one platform or multiple platforms and what would change in both scenarios would actually probably be more illustrative. You are right to say that that is an issue that is at the fore of our minds, that a person is capable of doing work for multiple people at the same time and how that would be impacted. You did take on notice, I think, that both organisations did a response to Mr McMaster's suggestion, which was to effectively establish a pool system that everyone would pay into. Basically, if icare were to accept to take the same question on notice that SIRA has and if you could provide us advice as to what a premium structure would look like for an insurer that all platforms would pay

Ms DONNELLY: Just a couple of things. That might take a little longer than 21 days—

The CHAIR: Take your time.

Ms DONNELLY: —understanding that you have a longer timeframe ...

The CHAIR: I would welcome any suggestions or commentary or papers or explanations that you might have for that scheme and how it might potentially be used to address the objectives of this inquiry. That would be useful. Both organisations.

Answer

icare is aware that the State Insurance and Regulatory Authority (SIRA) is currently undertaking work in this space and has offered its full assistance.

icare™

UBER

The Gig Economy

What does it mean for us?

Date: June 2019

There is ambiguity in the classification of gig workers that may leave injured workers with little or no support to return to work

- The gig economy is built on platforms that aggregate opportunities or ‘gigs’ and match them with people wanting to work. The aggregators have not created new industries or ways of working, rather they have technology enabled existing constructs.
- The emergence of these aggregators has shone a light on existing challenges that persist with the use of the ‘independent contractor’ classification. Many gig economy workers are classified as independent contractors which renders them ineligible for workers compensation under the current legislation (unless they have set themselves up as a PTY LTD company).
- Many unions and some regulators believe gig economy workers should be classified as employees. However, the Fairwork Ombudsman recently ruled that Uber drivers are not employees. This applied only to Uber and only for Fairwork entitlements, the debate as to what security and entitlements gig workers should be eligible for is ongoing.
- Care is required when considering the independent contractor classification. The classification exists to empower individuals to operate themselves as a business, with all the flexibility that affords.
- For higher earners this is an advantage, providing flexibility to manage their own risks. For lower earners this is a disadvantage as they lack the resources to manage their risks and are left vulnerable, exposed and without support.
- Platforms are developing basic personal injury and income protection propositions for their workers. However these have limits and offer significantly less support than a fully fledged workers compensation scheme, such as icare.
- A solution is required to ensure vulnerable workers are protected and supported while higher earning independent contractors can continue to be empowered to self manage.
- Ultimately determining the classification of gig workers is not our decision to make and will be resolved by SIRA or the courts, until then gig workers will remain ineligible for workers compensation. However, we can ensure we advocate for vulnerable workers collaborating to provide perspectives and information as required.
- Queensland is moving to protect vulnerable workers by having platforms pay workers insurance premiums, this excludes labour hire agreements and firms using contractors. The proposed solution will protect the vulnerable without impacting the empowered.
- We should review our products to understand their suitability for gig workers, to be prepared if NSW makes a similar move.



1. The Gig Economy

2. What does it mean for us?

What is the gig economy and where is it going?

The 'gig' economy is built on technology platforms that connect people who want to work with people who need a service

Example gig aggregation platforms



The gig economy relies on a series of platforms that aggregate opportunities or 'gigs' and offer them up for people to fulfil.

In theory any service is available through these platforms, however in practice they are predominantly:

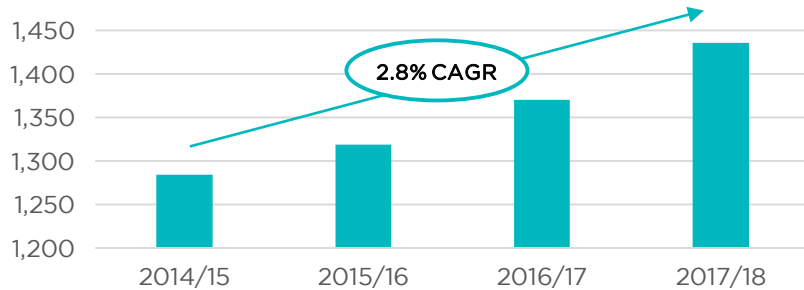
- Rideshare and point to point transport
- Food delivery and courier services
- Task hire - tradespeople, handymen, cleaners, assistants, pet sitters and odd jobs
- Professional services and freelancers

The aggregators have not created new industries, jobs or even ways of working. In reality Uber is a progression of taxi services, Airtasker is an evolution of the Yellow Pages and Expert 360 is a progression of recruitment agencies.

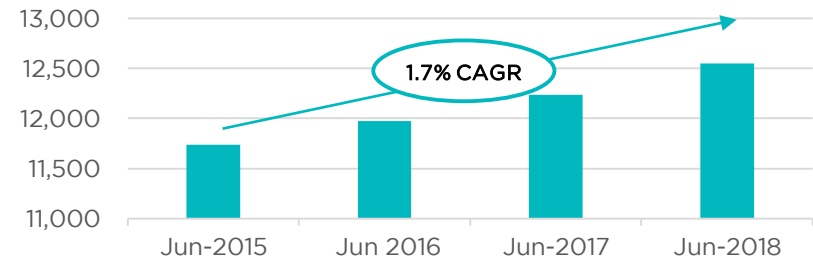
Aggregators have technology enabled existing industries; making resourcing more efficient for the consumer and lead generation less onerous for the supplier.

Evidence suggests gig economy participants may be growing however the shift is not significant

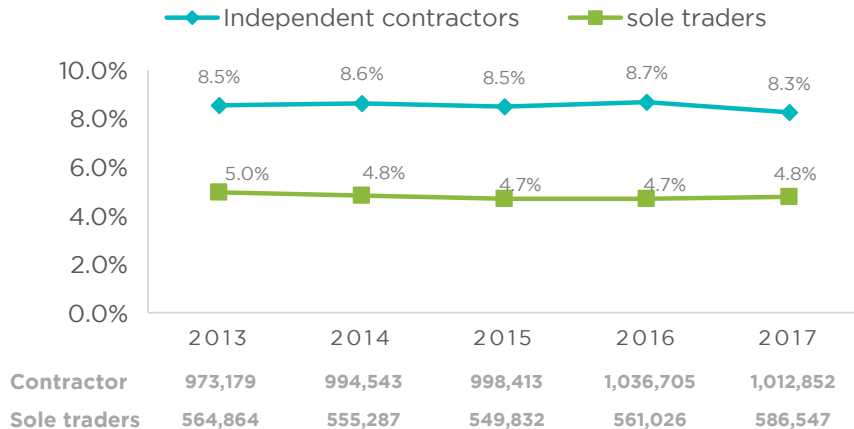
Count of Non-Employing ABNs
ABS Business Count, 000s



Australian Employment
ABS Employment Count, 000s



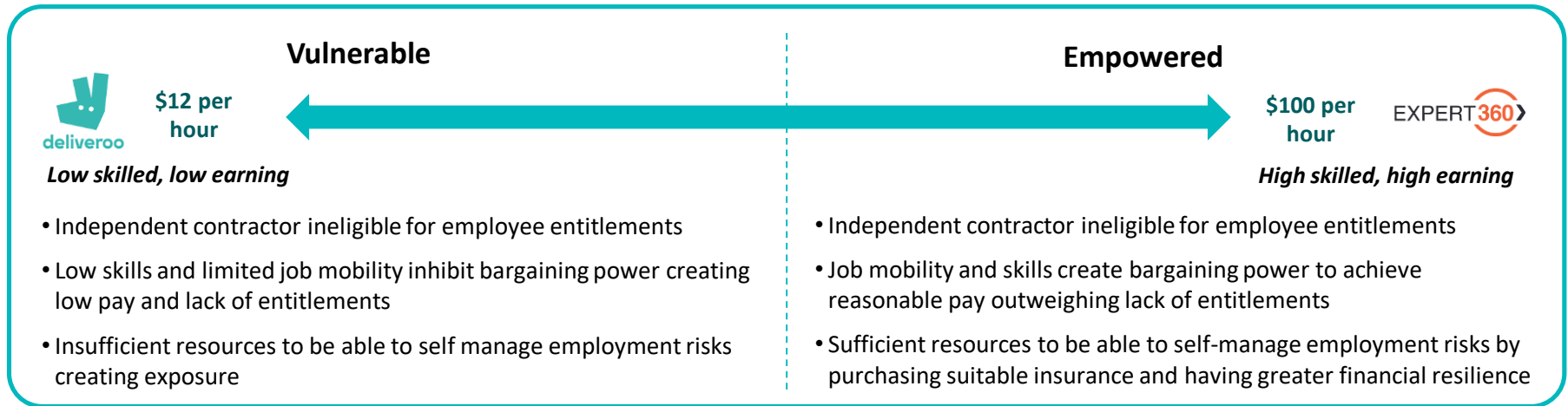
% of Contractors and Sole Traders
Australian Census



- The number of 'Non-Employing' ABNs (a proxy for sole traders with no employees) has grown faster than overall employment, with a key driver being transport (rideshare legalised in 2015), suggesting participation in peer-to-peer platforms is growing
- In comparison to overall employment the shift is yet to be significant, research has found that only 0.5% (80k) of the adult population work on peer-to-peer platforms more than once a month (Uber, Airtasker etc)
- Multiple sources state that the number of independent contractors has not grown and there has been no significant shift in the nature of work in the last decade
- Some platforms have released reports that appear to have inflated the prevalence of freelancing to suit their own agenda

Apparent exposure of low paid independent contractors is reviving a debate around worker classification and entitlements

The Vulnerable to Empowered Continuum



- ‘Gig’ workers are predominantly classified as ‘independent contractors’ which means they are ineligible for employment entitlements such as minimum wage, paid leave, workers compensation and more
- At the upper end of the earning spectrum this is not an issue, however at the lower end it can create exposure and exploitation
- Low earning independent contractors is not a new phenomenon; taxi drivers, handymen, cleaners and other similar roles have historically been independent contractors or sole traders
- Currently the classification debate for low earning independent contractors continues to play out and there isn’t a clear precedent
- For example, the Transport Workers Union is pushing for minimum pay and conditions for Uber drivers. Fairwork ruled in June 2019 that Uber drivers are not employees and not entitled to a range of entitlements including sick pay, superannuation and annual leave. In Nov 2018 Fairwork also ruled that Foodora was required to pay unfair dismissal damages to a rider that was deemed to be an employee.
- Fairwork rulings do not necessarily dictate eligibility for workers compensation, this can be determined by SIRA

Some platforms are moving to provide cover but it falls short of comprehensive workers insurance and the debate is ongoing

Independent Contractor Insurance Initiatives



Airtasker have agreed with Unions NSW that they will roll out an “affordable and flexible” insurance scheme similar to workers compensation. This will be optional and paid for by the worker, the exact coverage is yet to be determined however a review of their third party liability insurance, which is limited, suggests it may not be as comprehensive as the icare scheme.



Uber introduced insurance for drivers and delivery riders for daily payments up to \$150 or lump sums up to \$400,000 for injuries caused by accidents during trips on the app. The policy was developed to fit with Australian law and is intended to kick start the company’s push to reform laws so it can introduce benefits for independent contractor but without being labelled an “employer”.



Deliveroo provides ‘income protection’ insurance for it’s riders which is similar to personal injury insurance however has limits of 30 days average income, £7,500 a year for medical costs with an additional £2,000 for dental costs and £50,000 lump sum injury payment. These limits are significantly lower than many workers compensation policies. However, in NSW Deliveroo has an icare policy.

- Growing pressure and threat of regulation appears to be driving recognition among the platforms that some form of personal injury / income protection insurance proposition is required
- Although the coverage limits appear restricted, they represent some progress as historically independent contractors engaged in these types of work were not covered unless they had insured themselves
- Unions NSW claim the cover provided is farcical and continue to push for gig economy workers to receive employment entitlements including workers compensation



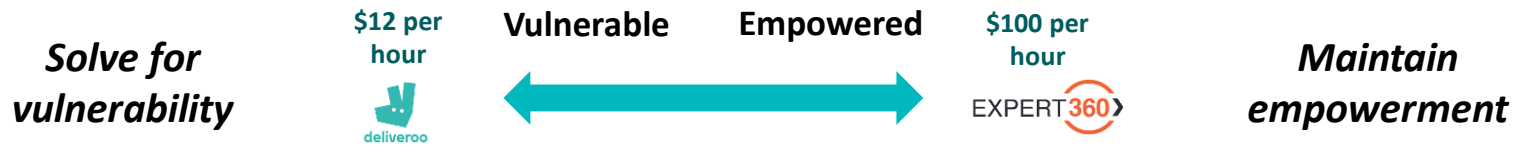
1. The Gig Economy

2. What does it mean for us?

What is our exposure and how should we respond?

Our principle concern is that low earning vulnerable workers could be exposed with little or no support to return to work

Vulnerable to Empowered Continuum



- Currently gig workers are predominantly classified as 'Independent Contractors' meaning they are ineligible for workers compensation and no premium is collected for them.
- Many independent contractors have the resources to obtain their own insurances, such as income protection and private health insurance, covering their personal workers compensation risks (and more). We must be careful not to remove this flexibility when providing support for vulnerable workers.
- An issue exists at the low earning end of the spectrum where workers receive low pay, do not have the resources to manage their own risks effectively, are vulnerable and arguably at risk of exploitation (a risk that has existed historically).
- The compensation provided by platforms is severely limited in comparison to the icare scheme (if it is provided at all) leaving some vulnerable workers exposed to personal injury risks with limited or no support.
- While these workers are classified as Independent Contractors we do not have a legislative liability for them. This may change if a precedent is set to treat them as 'deemed workers'.
- In this scenario premiums will be collected. In any case, we estimate the liability for low earners is small, top down estimation suggests they would be less than 0.2% of claims cost (see appendix). To date we have received one 'gig worker' claim in 2017, which was rejected.

We should support the current market inertia, advocating for vulnerable workers and collaborating to drive progress

The Journey to Remove Ambiguity



- The industry is currently demonstrating willingness to cooperate to provide a form of workers compensation for gig workers without workers being classified as employees
- The debate around classification is broader than workers compensation, currently it appears SIRA are yet to set a precedent on how to classify gig workers for workers compensation purposes
- While ambiguity continues a gap in support will remain
- Ultimately we must accept that the decision is not ours to make and that the question of classification is most likely to be resolved by SIRA or the courts, which will take time
- In the meantime, we should continue to champion effective support for gig workers to recover from injury and return to work, collaborating to provide points of view and information as required (engagement with SIRA is ongoing)

We would prefer a solution with flexible application that ensures vulnerable workers don't suffer an additional financial burden

icare preferred

	1 Do Nothing	2 Cover Liability	3 Advocate for Individuals Pay	4 Advocate for Platforms Pay
Description	Accept that current legislation renders most gig workers ineligible for workers compensation and do not cover liability unless a policy exists	Accept responsibility for gig workers and provide workers compensation despite premiums not being collected for their risks	Work with SIRA to ensure that independent contractors pay workers compensation premiums to cover their own risks	Work with SIRA to ensure that platforms pay workers compensation premiums to cover their workers' risks
Challenges	<ul style="list-style-type: none"> Vulnerable workers remain exposed 	<ul style="list-style-type: none"> Likely require blanket coverage of all independent contractors In practice impact on paying employers is limited, however in practice employers are footing the bill for non-payers 	<ul style="list-style-type: none"> Cost borne by individuals with limited resources High earners lose flexibility Current product likely unsuitable High administrative burden 	<ul style="list-style-type: none"> Difficult to determine which platforms should be liable and which should not Current product likely unsuitable
Benefits	<ul style="list-style-type: none"> Aligns with our current legislative obligations 	<ul style="list-style-type: none"> Vulnerable workers are supported 	<ul style="list-style-type: none"> Vulnerable workers are supported 	<ul style="list-style-type: none"> Vulnerable workers are supported Flexible application Cost borne by platform or end consumer of service Lower administrative burden

- Doing nothing would leave vulnerable workers exposed and covering the liability impacts on our moral responsibility to other employers to ensure they do not foot the bill, especially where the workers are technically ineligible rather than uninsured
- Where individuals are vulnerable due to limited resources, further impacting those resources to pay workers insurance solves our challenge by creating a financial burden for workers, we also remove the empowerment of others who are not vulnerable
- Platforms paying creates a higher likelihood that the cost is borne by the platform and the end consumer rather than impacting on the worker's limited financial resources, additionally it would create a lower administrative overhead for ourselves and application is flexible to better preserve the empowerment of the independent contractor classification

Workcover QLD is moving to protect gig workers, we should assess our products in preparation for NSW doing the same

Workcover QLD Gig Economy Paper Recommendations

Recommendation 10.1

The coverage of the Act should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and specify that it applied where at least two parties were in Queensland at the time the work was undertaken.

Recommendation 10.2

Intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income received by the intermediaries or agencies.

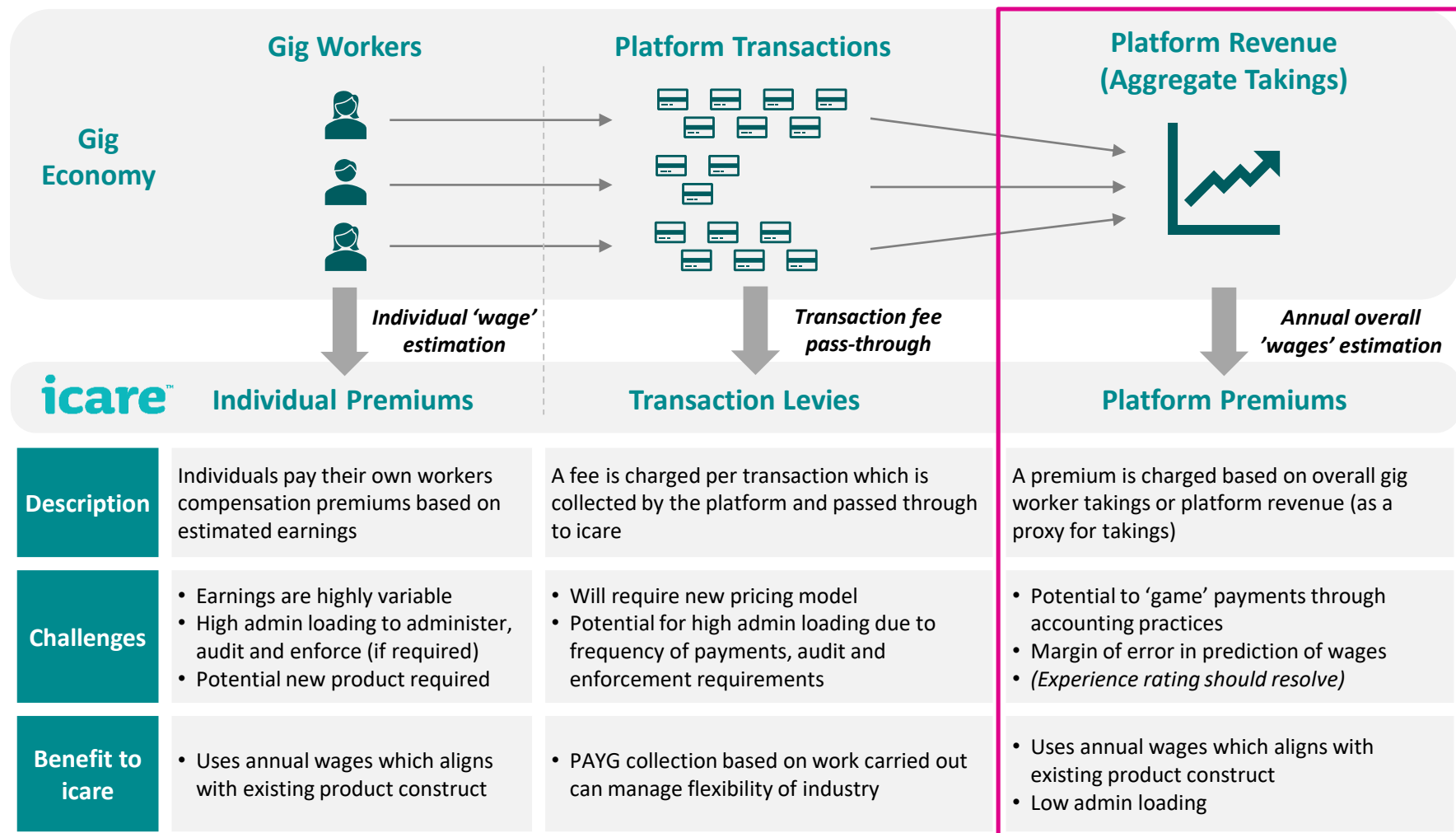
Recommendation 10.3

The Regulator should have the capacity to exempt intermediaries or agents from the obligation to rehabilitate injured workers. This would normally be done unless the Regulator considered that the agent had the capacity to perform this role. In such circumstances, injured agency workers would immediately come within the scope of WorkCover's proposed extended return to work program, referred to in recommendation 6.5.

- Workcover QLD is pushing for workers compensation to be extended to gig workers working on peer-to-peer platforms that are not part of a labour hire agreement or engaged by firms using contractors
- Similar to our perspective, this enables the protection of vulnerable workers while preserving the empowerment of other workers who benefit from the flexibility of being ineligible for employment entitlements
- Additionally, Workcover QLD are pushing for workers compensation premiums to be paid by the platform, not the worker
- In anticipation of changes that would protect gig workers under the legislation, we should assess our current products for suitability (product reviews and development is ongoing within the prevention and underwriting teams)

A model based on platform revenue is most preferable for icare as it requires the least effort and aligns with our existing product

Potential Gig Economy Product Constructs



icare™

APPENDIX

Gig Economy potential claims liability analysis (Low Earners)

Rideshare

	2018/19
Australia	\$ 286,300,000
Average Commission (Uber)	25%
Total takings (platform and driver)	\$ 1,145,200,000
Total driver takings	\$ 858,900,000
NSW Driver takings (GDP Method)	\$ 280,860,300

Uses estimate of total market revenue from IBIS by applying commission rate to determine total takings and relative GSP of states to assign NSW proportion

Labour / Task Hire

Airtasker	2018/19
Australia	\$100,000,000
NSW Share (GDP Method)	\$32,700,000
Commission	15%
NSW Platform Commission	\$4,905,000
NSW 'Wages'	\$ 27,795,000
80/20 Estimate	\$ 33,354,000.0

Uses total transaction value for airtasker, removes commission and assigns NSW proportion using GDP method. Airtasker was assumed 80% of the market, extrapolated Airtasker figure to market value

Food Delivery

Food Delivery	2018/19
Online Food Orders Australia	68,000,000
NSW Share (GDP Method)	22,236,000
Average & wage delivery	\$ 3
NSW 'Wages'	\$ 66,708,000

Uses finder.com.au analysis of number of food deliveries and average earnings per delivery. NSW proportion assigned using GDP method

Totals

NSW 'Gig' Wages	2017/18		
Rideshare	\$ 280,860,300		
Task Hire	\$ 33,354,000		
Food Delivery	\$ 66,708,000		
Estimate -10%	\$ 342,830,070		
Estimate	\$ 380,922,300		
Estimate +10%	\$ 419,014,530		
NSW GSP	\$ 593,275,000,000		
Gig Proportion of GSP	0.064%		
Claims frequency per \$1m wages	0.31		
Total icare claims 2017/18	76,700		
Average cost per claim 2017/18	\$ 29,217.73		
Total claims cost 2017/18	\$ 2,241,000,000		
		Frequency	Cost Per Year
Potential Claims Low	106	\$ 3,105,182	0.139%
Potential Claims High	130	\$ 3,795,223	0.169%

Uses high level icare metrics for claims frequency and average cost to assign a potential claims cost

- The method considers peer-to-peer 'gig' platforms such as Uber, Airtasker etc and does not consider Expert 360 and Freelancer type platforms which are harder to estimate and not considered vulnerable low earners. Freelancer especially has further complications as relationships are remote, work can be sourced from outside of NSW or could be carried out in NSW for clients outside of NSW.
- The method has limitations in that it is a top down estimate based on many assumptions. Additionally Airtasker 'gigs' can be fulfilled by businesses and registered tradespeople, as such it is not a perfect assessment and claims that would already be covered or are ineligible are likely to be included, inflating the figure.

The logo for icare, featuring the word "icare" in a bold, teal, sans-serif font with a trademark symbol (TM) to its upper right. The background of the entire page is a composite image: the top half shows a person's hands typing on a laptop keyboard on a wooden desk, with a coffee cup nearby; the bottom half shows a person's hands holding a document, overlaid with a semi-transparent teal rectangle containing text and a faint digital interface with various icons and lines.

Gig Economy Claims

Internal icare workers
insurance policy paper

Gig Economy Claims

Online gig employers¹:

These “digital matching services” are defined as those that (1) facilitate peer-to-peer transactions using online platforms or mobile apps (2) utilise user-based rating systems (3) offer workers flexibility in determining their hours and (4) place responsibility on workers to provide whatever tools or assets are necessary to accomplish their work.

Introduction

One of the most recognisable features of the increasingly casualised modern workforce is the ‘gig’ economy², represented in NSW by online digital platforms such as Uber, Airtasker and Deliveroo, which link workers with temporary jobs or ‘gigs’.

There are a number of complexities when adapting NSW Workers Compensation legislation to these kind of workers, including determining whether they are “deemed workers” under the legislation and calculating average weekly earnings for those who have multiple casual jobs.

In May 2017 icare made a submission to the State Insurance Regulatory Authority (SIRA) outlining our concerns about the potential future impact of the gig economy on the NSW Workers Compensation Scheme (the Scheme). At the time, icare Workers Insurance (WI) was managing its first known claim from a gig worker – a driver injured while working for Uber and not covered by a valid workers compensation policy.

Our submission advised that without a definitive legal or policy response to this emerging issue, the Scheme was very likely to see a rise in claims from uninsured gig workers whose care and support costs contributed to a growing uninsured liability for the Nominal Insurer³. This was because many online gig platforms (e.g. Uber) actively sought to avoid the cost of employee benefits, including workers compensation, by classifying their workers as independent contractors rather than employees, leaving many of these workers uninsured.

Our submission noted that while the NSW legislation underpinning the Scheme classified a broad range of non-permanent workers as “deemed workers” and held their employers responsible for insuring them against injury at work, there had been no test case in Australia to determine whether the new online job platforms could be forced to provide a range of legislated employee benefits for their workers.

There has since been a relevant case in the Australian Fair Work Commission (which found a particular Uber driver *not* to be an Uber employee) and a second case involving Foodora is pending in the Federal Court (due to be heard in July 2018). However, the applicability of the decisions in these cases is limited as they draw on national fair work legislation that is significantly different from Scheme legislation. Secondly, the contracts used by various gig platforms are not consistent, so it is quite possible that a court may find a gig worker for one platform to be a “deemed worker”, while the same court may find a gig worker for a different platform to be an independent contractor.

The inconsistencies in legislation and contractual arrangements between workers and gig platforms have led some stakeholders to call for legislative change and harmonisation of legislation between jurisdictions to ensure that injured workers employed within the expanding gig economy are not disadvantaged.

¹ Smith, Aaron. *Gig Work, Online Selling, and Home*. Sharing PEW Research Center, November 17; 2016.

² *The gig economy is represented in NSW by service providers such as Uber, Airtasker and Deliveroo – online digital platforms that link workers with temporary jobs or ‘gigs’.*

³ *The scheme covers the cost of care and support for such injured workers and WI then seeks reimbursement from the uninsured employer.*

Another key development is the creation of private sector injury insurance designed specifically for gig/on-demand workers (Airtasker, Roobyx, Uber). These various private models provide an alternative pathway to legislative change or legal action, however gig worker benefits may be substantially lower than the benefits in regulated workers compensation schemes.

WI has now received 49 claims for people injured while working for the online platforms Deliveroo, Uber, Foodora and Scooter Angels. Most of these claims are for riders for Deliveroo, which has a policy with WI; a small number of claims have been lodged with WI's Uninsured Liability Indemnity Scheme (ULIS).

This internal WI policy paper investigates:

1. Key developments in the operating environment since our 2017 submission to SIRA
2. The claims received to date by WI from gig workers
3. Policy options for WI moving forward.

1. KEY DEVELOPMENTS

1.1 Growth in the gig economy in Australia

The latest release of Australian Bureau of Statistics (ABS) data shows growth in the number of “non-employing” businesses, which suggests an increase in the number of individuals starting businesses in gig economy-focused areas like transport⁴:

- The ABS reports a 3.1 per cent increase in actively trading businesses in 2016-17. “Non-employing businesses” were driving the growth, with sole proprietors showing a 4.5 per cent increase during the period.
- The transport, postal and warehousing industry was the highest growing industry in 2016-2017, with 26.8 per cent of all business entries (a 12.1 per cent increase on the previous year). The sub-categories of “other transport support services” and “taxi and other road transport” were the primary force behind this growth.
- These figures speak to a possible growth in the number of individuals who have registered as sole traders in order to work as gig economy workers.

Despite non-employing businesses being on the rise, the ABS stats show they also had the highest exits rates in 2016-17, with 16.1 per cent.

1.2 Legal developments

1.2.1 Australian Fair Work Commission decision on Uber

In January 2018, a driver whose services agreement with an Uber partnership was terminated because of failure to maintain an adequate overall driver rating was found *not* to be an employee when he brought an unfair dismissal application to Australia’s Fair Work Commission (*Kaseris v Rasier Pacific V.O.F.*). His application was dismissed as a result.

According to the Deputy President of the Commission, the services agreement between the parties recorded that in return for payment of a service fee from the applicant driver to the respondent [Uber], the respondent provided lead-generation services and other ancillary services, such as payment, collection processing and customer support. The “work-wages bargain” was therefore missing, he said.⁵

Multiple factors must be considered to distinguish an employee from a contractor and no single factor can be regarded as decisive. The Fair Work Commission found as follows regarding various indicia⁶:

- *Control*: This favoured an independent contractor relationship because the applicant driver had complete control over the way in which he wanted to conduct the services (e.g. he was able to choose when to log in and log off, and was generally able to accept or refuse trip requests).
- *Equipment*: This weighed significantly in favour of an independent contractor relationship because the applicant driver had to provide his own car, smart phone and wireless data plan.

⁴ Smart Company <https://www.smartcompany.com.au> February 22, 2018

⁵ Mark Curran, Mondaq Australia, 9 February 2018, <http://www.mondaq.com/australia>

⁶ *ibid*

- *Uniform:* This did not support an employment relationship because the applicant driver did not and was not permitted to display any of the respondent's names, logos or colours on his vehicle and was not required to wear any uniform connecting him to Uber.
- *GST:* The fact that the applicant was expected to pay his own GST weighed in favour of an independent contractor relationship.
- *Description of relationship:* The service agreement generally classified the relationship as that of independent contractors.

The commission's Deputy President pointed to a possible deficiency in the legislation⁷: "Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied."

The commission noted that a 2017 decision in the United Kingdom, which found an Uber driver to be a worker for the purposes of the UK's Employment Rights Act, did not assist the Australian Uber driver because the UK legislation contained an expanded definition of "worker" that was broader than the definition of an employee under the Fair Work Act.⁸

Likewise, the applicability of the Fair Work Commission decision to the Scheme is limited, as the NSW Workers Compensation legislation on "deemed worker" is different to the federal legislation considered by the commission.

1.2.2 Foodora case pending in Federal Court

In 2018 Australia's Fair Work Ombudsman launched legal action against online food delivery company Foodora, alleging in documents filed in the Federal Court that the delivery service treated three of its delivery drivers as independent contractors when they were in fact employees.

The ombudsman alleged that Foodora did not pay minimum wages, penalties and superannuation to the three staff, who did not have enough control over conditions to be contractors. The ombudsman's court documents argued that the workers were not conducting their own delivery businesses because they did not advertise their work to the public, did not have a customer base or business premises, and were required by Foodora to wear a uniform.

The case was set to appear in the Federal Court in Sydney in July 2018, with Foodora facing a \$54,000 fine for every contravention of the Fair Work Act. However, prior to the hearing Foodora announced it would wind back its operations in Australia and, in a move to put the legal action on hold, placed its Australian company into voluntary administration in August 2018⁹.

1.2.3 Deliveroo in the UK

Given the multiple claims icare has received from Deliveroo in NSW, it is worth noting the progress of an ongoing legal matter in the UK relating to the employment status of Deliveroo riders.

Last year the UK's Central Arbitration Committee (CAC) ruled that a group of Deliveroo riders in parts of north London were independent contractors rather than workers. As part of this process the commission rejected an application by the Independent Workers Union of Great Britain

⁷ *ibid*

⁸ *ibid*

⁹ *Anna Patty, Sydney Morning Herald, 17 August, 2018.*

(IWGB) to represent the Deliveroo riders. However in June 2018, the UK High Court granted the union permission to challenge Deliveroo's opposition to collective bargaining for the riders, on the basis that it was a matter of human rights, not employment rights. The High Court's decision has provided a limited opportunity for the union to challenge the CAC ruling on the status of the riders.

1.3 Queensland calls for regulatory change

A newly released (July 2018) mandatory five-year review of Queensland's workers compensation system has identified growing concern that the legal structures underpinning some gig economy arrangements "provide a mechanism for platforms to shift costs and risk to workers, and for gig workers to be exploited due to the way they are being engaged"¹⁰.

The review has recommended reform of the Queensland *Workers Compensation and Rehabilitation Act 2003* so that, "Intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income reported by the intermediaries or agencies".

Queensland's Industrial Relations Minister highlighted the review's recommendations on the gig economy when stating that all recommendations in the report would be considered by the Government.

1.4 New private injury insurance for gig workers

Another development running in parallel to legal developments and calls for legislative reform is the rollout of various private sector accident and injury insurance models designed specifically for gig/on-demand workers. Some of these insurance models are paid for by the gig worker, others by the gig platforms.

1.3.1 Roobyx

The Brisbane-based insurance start-up ROOBYX, underwritten by London-based insurance market Lloyds, was launched in August 2016 and announced plans to expand to London at the end of that year.

ROOBYX offers a flexible workers insurance model (as well as other types of insurance) suited to gig or on-demand workers, which tracks a worker's earnings and charges premiums each week based on these earnings. If a worker earns nothing in a particular week, depending on their cover, they can remain insured for as little as \$1.50 plus GST for that week¹¹.

1.3.2 Airtasker

In August 2017 Airtasker introduced an opt-in personal injury insurance policy, allowing workers to direct part of their earnings on the platform towards an insurance policy offered by Roobyx. The premium was calculated weekly based on how much the Airtasker worker earned in the previous week on the platform.

From 1 April 2018, Airtasker has provided all registered Airtasker workers with some protection in the event of an accident resulting in injuries covered under the policy¹². The cover operates while the Airtasker worker is performing the task and during their direct travel to and from the

¹⁰ OHS Alerts, 2 July 2018, www.ohsalert.com.au

¹¹ Angela Castles, *Smart Company*, Friday, October 6, 2017, <https://www.smartcompany.com.au/startupsmart/news-analysis/brisbane-insurance-startup-roobyx-expands-london-protect-gig-economy-workers/>

¹² Airtasker website, <https://support.airtasker.com/hc/en-us/articles/360000852967-What-is-Personal-Accident-Cover-and-how-does-it-work-for-Taskers->

task location, and is valid regardless of the party whose negligence resulted in the accident (no-fault). Benefits are listed as:

- Accidental death or permanent disablement: Lump sum payments of up to \$100,000
- Accidental broken or fractured bone(s): Lump sum payments of up to \$6,000

Airtasker refers to this insurance as a minimum safety net: “Taskers are also encouraged to review and increase the proposed cover to a level which is in keeping with their personal work/lifestyle requirements. Likewise Taskers are encouraged to take out Income Protection insurance which is also available from Roobyx.”

1.3.3 Uber in Europe

Uber has been slowly rolling out free insurance products to its drivers and delivery workers in Europe,¹³ following a decision in the UK in 2017 that an Uber driver was a worker for the purposes of the UK’s Employment Rights Act. Uber began providing accident insurance in France and the UK, then announced that 150,000 people working with Uber services in 21 European countries would receive its Partner Protection program from 1 June 2018, which covers hospital bills for those driving or delivering food and could potentially also provide disability indemnities and survivor benefits.

Uber is paying for the insurance and working with French insurance company Axa to provide it. However, Uber still maintains that its drivers and riders are contractors, not employees.

¹³ Tech Crunch, 23 May 2018, <https://techcrunch.com/2018/05/23/uber-expands-its-accident-insurance-across-europe/>

2. CLAIMS RECEIVED TO DATE

At the time of writing WI had received 49 claims for injured gig workers, as follows:

- *Uninsured liability*: 3 claims (2 Uber workers, 1 Scooter Angels)
- *Insured claimants*: 45 claims under Deliveroo's policy with WI and 1 claim under Foodora's policy with WI.

As explained below, the response to date has generally been to:

- accept claims where the platform has a policy with icare (Deliveroo, Foodora)
- provisionally accept, then reject those uninsured claims where the contract with the platform suggests the worker is likely to be an independent contractor (Uber)
- accept those uninsured claims where the contract suggests the worker is likely to be a worker/deemed worker (possibly a Scooter Angels claim).

2.1 Uninsured Liability Indemnity Scheme (ULIS)

2.1.1 ULIS claims to date

(i) Uber driver

This driver filed a claim against Uber Australia Pty Ltd, which proceeded to the Workers Compensation Commission. The WCC found that no contractual agreement existed between the driver and Uber Australia Pty Ltd; the relationship was with [Uber partner company] Raiser Pacific¹⁴. The injured driver then filed a claim against Raiser Pacific, which is uninsured in Australia.

On the basis of Provisional Liability (PL), ULIS paid the injured driver's wages for a closed period (six weeks) and outstanding medical expenses, after which no further costs were paid. ULIS disputed liability on 1/5/18 (on the basis of probable contractor status, rather than deemed worker).

(ii) Uber Eats

Reasonable excuse was applied on 24/4/18 (awaiting Claim Form). There has been no determination at this stage if the injured worker was employed by Uber but it appears to be a similar scenario to the claim above, where the relationship was with Raiser Pacific. Attempts to follow-up with the worker by phone and email were made on 1/5/18, 16/5/18 and 29/5/18. A response received on 30/5/18 advised that the driver was currently studying and would provide further information when he had time.

The ULIS Manager notes the risk that this claimant will come back to ULIS at a later time with the assistance of a lawyer. In this case ULIS would be likely to dispute liability as for the previous claim (contractor status).

¹⁴ According to the WCC Certificate of Determination, the applicant says that he commenced employment with Uber and was "made" to sign an agreement with Raiser Pacific V.O.F. (Raiser Pacific) and Portier Pacific V.O.F. (Portier Pacific). It was the applicant's understanding that these companies were unlimited partner companies registered in the Netherlands who provided and managed Uber Services. He also understood that Uber Australia Pty Ltd was a subsidiary of Uber Technologies Inc a company also registered in The Netherlands, who acted as an agent or "solely authorised partner" for Raiser Pacific and Portier Pacific.

(iii) *Scooter Angels*

On review of the evidence there is a strong chance that the applicant will be classified as a worker/deemed worker, as Scooter Angels exercised considerable control over the applicant. The claim will be accepted provisionally (PL), allowing time to obtain further evidence and a legal opinion. It will be accepted if the legal advice supports worker/deemed worker status.

2.1.2 *Future Risk*

It is clear that the gig economy presents an increased risk for WI of exposure to uninsured claims. Consideration of the potential impact of this risk should take into account the following factors:

- Nature of the work performed is generally of a higher-than-average risk (e.g. on-road drivers, heavy manual work)
- Lack of knowledge/understanding by employers of various working relationships that require workers compensation coverage is likely to result in un-insurance
- Existing insurance products (e.g. Airtasker, Roobyx) may not prevent an entitlement to workers compensation, meaning the scheme is still exposed and workers could potentially claim both
- Employers entering into complex contracts with workers to remove their own liability (e.g. Uber, Airtasker), but not that of WI, limits WI's ability to recover from the employer
- Claims and administrative costs for uninsured liabilities are generally higher than other claims – compounded by lost premium and a low percentage of recovery
- Financial impact on employers resulting from recovery of claims costs and SIRA penalties
- Significant impact on customers (workers and employers) due to lack of certainty over coverage and entitlements, often resulting in increased litigation and adversarial relationships
- When there is lack of clarity over coverage, the claims process is often delayed many months until an injured worker consults a legal representative for guidance. This is another factor that can contribute to higher claims costs and also means that there is an existing level of exposure that is yet to be realised by the nominal insurer.

2.2 **Deliveroo Claims**

Deliveroo's policy with WI commenced on 4/10/2015, with the platform declaring 320 employees. Deliveroo's BTP (base tariff premium) is \$1.3 million; it paid \$2.1 million in premium at last renewal. The following claims for Deliveroo riders have been made under the policy:

(i) *NewCo*

20 claims with EML NewCo:

- 1 claim (17/01/18)¹⁵ was accepted and is now closed
- 4 claims (Jan-Feb 2018) were accepted and are open
- 14 claims (Feb-June 2018) are in Provisional Liability (PL)
- 1 claim (15/04/18) was rejected

(ii) *GIO*

26 claims with GIO:

- 17 claims were accepted (Dec 2016 – Dec 2017), with 12 closed and 3 open

¹⁵ *Date of injury*

- 3 claims were PL/accepted, all closed
- 6 claims were reasonably excused, 1 open

These Deliveroo claims range in size from small claims involving medical expenses only to several claims with a net cost of over \$40,000 each.

2.3 Issues

2.3.1 *Worker/Deemed worker vs independent contractor*

In May 2018 WI sought legal advice on whether the injured riders with claims against Deliveroo's policy were workers or deemed workers under the NSW legislation. Counsel advised that in most cases, there was a reasonable chance the Deliveroo riders would ultimately be found to be workers or deemed workers.

Counsel identified factors both for and against, however ultimately considered the relevant test to be "control", which gave a reasonable chance that the riders were deemed workers. Some of the critical factors in her conclusion were:

- a. the warranty given by riders at cl 9.1(a) of the Supply Agreement
- b. the requirement to wear uniforms and use branded equipment
- c. the fact that Deliveroo riders were integral to the business of Deliveroo
- d. the control by Deliveroo over fees (both those payable to the riders and those payable by them)
- e. any minimum expectations by Deliveroo as to Deliveroo riders' availability, and if these were enforced by exercising the right of termination
- f. the nature of the training in relation to standards of conduct (including in relation to work health and safety obligations) and the extent to which those were monitored or enforced by Deliveroo.

One exception highlighted by counsel was where a particular Deliveroo rider carried on a business as a delivery worker of some kind, in which case there might be a strong argument that the delivery work for Deliveroo was incidental to a business regularly carried on by the worker in his or her own name, or under a business or firm name (e.g. Deliveroo, Uber, Foodora), in which case the worker could be classified as an independent contractor.

Prior to receiving counsel's advice, WI had been informed by Deliveroo that its riders were signed up to the same (standard) contract, however later sighted at least two variations on the initial contract. This suggests that Deliveroo may be trying to make the independent contractor status of its riders more explicit in the later versions of its contracts. It also means that the legal advice received in relation to a particular group of Deliveroo rider claims may not apply for subsequent claims, depending on the contract. We are awaiting further advice about the implications of the new contracts (due August 2018).

In taking out its policy with icare it may be that Deliveroo is indemnifying the risk of personal injury for its workers, while at the same time avoiding having to provide other employee benefits (i.e. superannuation and other minimum entitlements under fair work legislation) by classifying riders as independent contractors.

WI is currently setting up a meeting with Deliveroo to discuss this issue. We believe it is important to inform Deliveroo, as our customer, that under the legislation we can only provide cover for workers or deemed workers and that where Deliveroo riders are found to be independent contractors, their claims must be rejected by WI.

2.3.2 Calculating weekly benefit entitlements

While we already receive claims for injured workers in concurrent employment, claims for gig workers are challenging because they are more likely to involve multiple employers. There are a number of complexities when adapting the Scheme model to these kind of claims, particularly in calculating weekly benefit entitlements.

Assessment of claim liability and Pre-injury Average Weekly Earnings (PIAWE) involves a detailed review of the nature of the relationships between the injured person and each “employer”. If an employment relationship is established, then PIAWE is calculated with regard to Schedule 3 of the *Workers Compensation Act 1987*, which may involve all earnings from all employers. This often takes employers in the more traditional employment setting by surprise and our concern is that gig employers may not be aware that PIAWE for their employees may also include income derived from another, or multiple, employers.

It is also likely that gig workers will dispute PIAWE where it does not include all income from all employers – the injured person is likely to have limited understanding of the nature of the relationship with the gig entity. We currently have one Deliveroo claim that has been formally escalated for review, and a second that is likely to be escalated, because the worker disagrees with the PIAWE assessed by EML. In both matters, the injured Deliveroo rider also performs services for Uber and seeks to have this Uber income included in the PIAWE assessment.

icare has sought legal advice on the method of calculation of PIAWE for Deliveroo riders and counsel had advised that PIAWE should be calculated using the sum of:

- actual earnings - actual earnings of a Deliveroo rider will be all amounts paid or payable to that driver, including “drop fees” and bonuses
- piece rates and commission, and
- the monetary value of non-pecuniary benefits.

Counsel also advised that it was arguable that:

- the administration fee charged by Deliveroo should be subtracted
- tips could be included in the PIAWE calculation
- equipment deposits should also be included.

3. POLICY OPTIONS MOVING FORWARD

3.1 Seek a response from SIRA or NSW Government

The gig economy is a sensitive issue for the NSW Government (and for governments in general) as the online gig platforms are popular with consumers yet they often operate outside existing regulation in a range of areas, including tax, OH&S, and fair work. icare has attempted in the past to publish thought leadership articles on the potential impact of the gig economy on the Scheme but has been advised that it is a complex, whole-of-government matter and not for public comment by icare.

As the Scheme Regulator, SIRA is the appropriate body to introduce regulatory measures or take legal action in relation to workers compensation for online digital platform workers.

SIRA's response to icare's 2017 submission was to establish a Gig Economy Stakeholder Reference Group (which met in November 2017, March 2018 and is due to meet again in September 2018) "to monitor the effectiveness of the workers compensation system and ensure regulation is fit for purpose in the digital age". The group includes several online platforms, the Ride-Share Drivers Association Australia, NSW Business Chamber, Roobyx, a number of government organisations (including icare) and several think tanks.

The minutes from the March 2018 meeting of the reference group include the following suggestions for how regulation could evolve to meet the needs of the future workforce and the gig economy:¹⁶.

- *Provide education and build knowledge:* A government website for gig economy could contain all relevant information for start-ups and independent contractors (similar to the small business commissioner website).
- *Define gig economy participants consistently:* Government agencies may assist by clarifying the definition of a worker and contractor and applying the definitions consistently between jurisdictions.
- *Develop workplace safety awareness:* Regulators may assist with gig economy workplace safety as the workplace has changed becoming more mobile (cars, cafes or people's homes). The intersection between common law/ liability/ safety regulation may be considered.
- *Develop anticipatory regulation:* Governments may become increasingly agile and anticipate risks while not distorting the market. Governments may obtain real-time data to inform policy.

Action taken by the reference group to date has been limited to the issuing of a "communication approach",¹⁷ which involves SIRA relaying the message to consumers, government and all stakeholders that "SIRA is talking to gig economy operations and other stakeholders about the impact of the rapidly growing gig economy on important worker protections".

SIRA has expressed its keenness to engage with icare on the gig economy and any products we might be looking at implementing. Icare advised SIRA in August 2018 that we were working on such a product pilot and that while our first priority was the Authorised Provider pilot model, the gig economy pilot would be the next one we looked to finalise.

¹⁶ Meeting Minutes 1 March 2018, SIRA, Gig Economy Stakeholder Reference Group,

¹⁷ Gig Economy Regulation, SIRA, Communications Approach, June 2018

Note that an Australian Government select committee has been inquiring into the impact of emerging technologies on work health and safety and workers compensation and was due report to Parliament by 21 June 2018.

3.2 WI to promote its current product to gig workers

A policy option suggested in our 2017 submission SIRA was for WI to take a leadership role by trying to influence gig workers not covered in case of accident or injury at work to provide for their own coverage. Because sole traders cannot insure themselves under the Scheme, the only existing option available for gig workers would be to:

- a. set up a Pty Ltd company with themselves as a working director, and
- b. take out a workers compensation policy through this Pty Ltd entity.

This option included icare running a public information campaign to persuade uninsured gig workers to take out workers compensation through the steps above.

However it is likely that this would meet with very limited success due to the time and costs associated with this pathway, as gig workers tend to be on low wages and are often young workers from a different country of origin.

3.3 Develop a new Scheme product

Another possible response (discussed with SIRA, as in 3.1 above) would be to develop a new workers insurance product providing a better fit for gig workers, including those holding multiple jobs.

Note that whether WI is permitted to develop such a non-statutory product may depend on advice from SIRA and on the founding legislation for the Nominal Insurer (*Workers Compensation Act 1987*) and icare (*State Insurance and Care Governance Act 2015*). Expert legal opinion, and consultation with SIRA would provide more insight.

It is interesting to note here that the state government insurer WorkCover Queensland (Qld) offers a non-compulsory, optional product called Workplace personal injury insurance, which covers individuals who, other than as a worker, receive remuneration or other benefit for performing work, or providing services as a contractor, a self-employed individual, a director of a company, a partner of a partnership or a trustee of a trust.

The next steps for WI in considering whether it might develop its own non-statutory workers insurance product for gig workers would be to:

- Seek legal opinion on the legislation
- Consult with SIRA
- Develop appropriate product range options
- Determine pricing, system and distribution
- Consider reinsurance and capital issue.

Prepared July 2018

Updated August 2018