REPORT ON PROCEEDINGS BEFORE

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

INQUIRY INTO THE IMPACT OF TECHNOLOGICAL AND OTHER CHANGE ON THE FUTURE OF WORK AND WORKERS IN NEW SOUTH WALES

CORRECTED

At Macquarie Room, Parliament House, Sydney, on Monday 16 November 2020

The Committee met at 9:30.

PRESENT

The Hon. Daniel Mookhey (Chair)

The Hon. Mark Banasiak
The Hon. Wes Fang
The Hon. Courtney Houssos
The Hon. Shayne Mallard
The Hon. Natasha Maclaren-Jones
The Hon. Adam Searle
Mr David Shoebridge

The CHAIR: Welcome to the second hearing of the Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales. Before we commence I acknowledge the Gadigal people, who are the traditional custodians of this land. I would also like to pay my respects to the Elders, past present and emerging, of the Eora nation and extend that respect to other Aboriginals present.

Today the Committee will hear from a number of stakeholders, including the New South Wales branch of the Australian Road Transport Industrial Organisation, the Transport Workers' Union, HungryPanda and the Australian Industry Group. We will also hear from representatives of the State Insurance Regulatory Authority, icare and SafeWork NSW. I thank everyone for making the time to give evidence to this important inquiry. Before we commence I would like to make some brief comments about the procedures for today's hearing. Today's hearing is being broadcast live via the Parliament's website. A transcript of today's hearing will be placed on the Committee's website when it becomes available.

In accordance with broadcasting guidelines, media representatives are reminded that they must take responsibility for what they publish about the Committee's proceedings. While parliamentary privilege applies to witnesses giving evidence today it does not apply to what eyewitnesses say outside of their evidence at the hearing. I therefore urge witnesses to be careful about comments you may make to the media or to others after you complete your evidence. Committee hearings are not intended to provide a forum for people to make adverse reflections about others under the protection of parliamentary privilege. In that regard it is important that witnesses focus on the issues raised by the inquiry's terms of reference and avoid naming individuals unnecessarily.

All witnesses have a right to procedural fairness according to the procedural fairness resolution adopted by the Legislative Council in 2018. If witnesses are unable to answer a question today and want more time to respond, they can take the question on notice. Written answers to questions taken on notice are to be provided within 21 days. If witnesses wish to hand up documents, they should do so through the Committee staff. In terms of the audibility of the hearing today, I remind both Committee members and witnesses to speak into the microphone. For those with hearing difficulties who are present, please note that the room is fitted with induction loops compatible with hearing aid systems that have telecoil receivers. Finally, could everyone please turn their mobile phones to silent for the duration of the hearing. I now welcome our first witness.

HUGH McMASTER, Secretary and Treasurer, Australian Road Transport Industrial Organisation New South Wales Branch, sworn and examined

The CHAIR: Would you like to start by making a short statement? If so, can you please keep it to no more than a couple of minutes.

Mr McMASTER: Certainly. I will take our submission as read but stress the following. The Australian Road Transport Industrial Organisation [ARTIO] NSW's interests in this inquiry are confined to the food delivery and any other area of road freight transport where the platform business model has the potential to be developed. Although gig workers in the transport industry are not covered by our industrial laws, they are, in our view, entitled to minimum standards of remuneration and conditions, just like other transport workers.

Task-based or gig work is not new. It can be rewarding provided that the person undertaking the task has the market power to be well remunerated. However, 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.

Yet the New South Wales Parliament has passed legislation over the past 120 years to enable minimum protections to be provided to employees and contract carriers. ARTIO NSW's view is it can either do likewise for gig workers, should it choose to do so, or it can provide national leadership. If it chooses to do so, the policy and legislative framework needs to define gig work to capture the manner in which work is performed, generated and remunerated and also capture any party with a commercial stake in the operation of the gig economy and define their rights and obligations.

I also want to briefly highlight issues raised in some other submissions. The submissions from the Transport Workers' Union [TWU] and the International Transport Workers' Federation [ITWF] also support the development of the policy and regulatory framework to protect gig workers. However, their submissions go further. Survey results from the TWU's raise a wide range of concerns. ITWF raises important issues around the role of artificial intelligence and the lack of any proper accountability to gig workers for the way in which these technologies are used to monitor their performance. It also cites progress in a range of countries in Europe and the Americas to put protections in place. In ARTIO NSW's opinion, these issues deserve close scrutiny by this Committee.

SafeWork NSW acknowledges that as a regulatory agency it is "open to investigating how workplace health and safety laws might better accommodate the issues associated with new ways of working." Such candour is welcome and the Committee should recommend that it act promptly to resolve this deficiency. Finally, ARTIO NSW notes that the Opposition has introduced a bill into Parliament to amend New South Wales workplace health and safety laws. As a matter of principle, this initiative has ARTIO NSW's support.

The Hon. ADAM SEARLE: I am happy to ask questions. You make the point that gig workers lack a lot of the protections that employees have, for example, or even others engaged in the transport industry are able to get through Chapter 6. I think it is your submission that that is a function of the regulatory frameworks not being kept up to speed with new developments in the economy.

Mr McMASTER: Yes.

The Hon. ADAM SEARLE: So, in the view of your organisation, what would be the best way of addressing that imbalance in market power you describe in your submission? What other sort of measures should be looked at? What should be that regulatory framework? Should it be an extension of Chapter 6, or is there something over and above that that needs to be done as well?

Mr McMASTER: If it is the wish of the New South Wales Parliament to instigate reform, it seems to me that the Industrial Relations Act is the appropriate piece of legislation in which to put legislative provisions to cover gig workers. It may well require Chapter 7, I do not know, but it certainly requires a legislative framework which provides a similar range of protections and a similar range of rights to contract carriers, but also needs to recognise that the gig workers are more independent in their contracting relationships. They can choose to do particular gigs for particular platform providers so it needs to recognise that. It also needs to recognise that the fluidity of the working relationship—the hours worked, et cetera, et cetera—is a lot different from the type of contract carrier covered by Chapter 6 who is usually tied to one principal contractor and who will often have a truck or a van or a bicycle in that principal contractor's colours. They just do work for that one organisation.

The other thing I think that the legislation needs to ensure is that those workers can join a union, they can collectively bargain and the union can do so on their behalf. The manner in which that can be determined is obviously a bit more complex than in a contract carrier-principal contractor situation or an employer-employee situation, but it should be possible to ensure that such arrangements can be put in place. They are, in our view, basic industrial rights that should extend to those workers.

The Hon. ADAM SEARLE: Yes. In the twenty-first century, the idea that workers should not have even a minimum rate of pay would be pretty extraordinary.

Mr McMASTER: That is right. That is why we say in our submission that 120 years ago or so, legislation introducing minimum industrial rights was introduced into this place. The challenge for parliaments is that as new innovation—which we welcome—is implemented by businesses, new relationships emerge. It is up to parliaments to acknowledge that and to ensure that longstanding minimum conditions are brought up to date to cover those new relationships. The other thing I should say, going back to your first question, is it is important also to ensure that any stakeholder who has a commercial stake in the platform company has rights and obligations. I stress particularly the obligations, because that is where things fall short at the moment with the market power imbalance. In other words, if a platform company wants to artificially construct some business model or some commercial relationship, the legislation has to cover such artificiality. In other words, it has to be very broad-ranging in terms of its purpose and intent.

The Hon. ADAM SEARLE: We have had submissions from SafeWork NSW that it thinks the legislation is perfectly fine and that there are no problems and that everybody in the gig area is, in fact, covered by work health and safety responsibilities. Does your organisation have any view about that or about how well work health and safety laws are being enforced in the gig part of the economy?

Mr McMASTER: In the area of enforcement, it is awful. I am not sure how often my wife has come home to me and said, "I almost hit another gig worker who was riding in the dark, riding in dark clothes and riding a bicycle without adequate lighting." I have witnessed it myself. There are no basic workplace health and safety standards in that particular industry. The legislation may say there should be. The legislation may say they are covered, and I suspect they are because of the broad-ranging nature of the Work Health and Safety Act. But enforcement appears non-existent. From recent media reports, I understand that there have been fatalities and it has taken SafeWork NSW a number of days before they were even aware of them.

The other issue, too, around this is that gig workers share the road, and the road is normally an area covered by road law rather than workplace health and safety law. Part of what I think this Committee needs to consider—and it is a vexed issue in the industry too—is how you have two complementary sets of legislation that are broadly similar: one covering on-road work and one covering off-road work, including on the side of the road. If a gig worker has a flat tyre and they are off the road, changing that tyre—covered by the Workplace Health and Safety Act. Once they are back pedalling on tarmac—on bitumen—they are covered by road law. That is also a complexity that the Committee needs to consider, in my view—or in our view, I should say.

Mr DAVID SHOEBRIDGE: Mr McMaster, it is nice to see you again. Thank you for coming. Could I ask you about workers compensation entitlements? Because there is often a debate about whether these arrangements are deemed employment for the Workers Compensation Act, there is a real dispute about whether workers compensation entitlements apply to drivers and bicycle couriers and delivery people. What is your view of what we should do about workers compensation?

Mr McMASTER: Our association's view is that the deeming provisions should apply to any transport worker. They should particularly apply to any worker who is doing dangerous work. 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. It should not be too difficult to structure a set of workers compensation arrangements for gig workers. Perhaps you can design a premium structure that is based on each individual gig—say, there is a nominal amount that is charged on the gig, which is attributable either to the business that wants the work done or the platform provider. That creates a pool to provide the protection to ensure that the gig workers will be compensated for any injury and, should they be involved in a fatal accident—as those two workers were, sadly, in September—then their loved ones get the benefit of that workers compensation arrangement.

Mr DAVID SHOEBRIDGE: So your view of the structure would be each of the contracting entities—whether it is Ola or Uber Eats or whatever—should contribute based upon either the distance travelled or the amount that they pay in respect of the individual workers?

Mr McMASTER: We are not wedded to how a payment is determined. It could be per task.

Mr DAVID SHOEBRIDGE: It could be a proportion of the fee paid.

Mr McMASTER: Correct. It could be a proportion of the fee paid. The most important thing, I think, is that the arrangement is simple—

Mr DAVID SHOEBRIDGE: And covers the field.

Mr McMASTER: —it is broad-ranging and it is not easy to get out of. In other words, every time the ticket is clicked to say that gig worker has just been remunerated for that work or that cafe owner has requested a delivery take place, then there is a percentage amount or a nominal amount that goes towards a workers compensation pool.

Mr DAVID SHOEBRIDGE: I had not heard that structuring before: that you basically have almost like a separate nominal insurer that covers all gig workers—

Mr McMASTER: Possibly.

Mr DAVID SHOEBRIDGE: —and then they make a claim against the single entity, rather than trying to work out which one of the various individual claims against each of the individual operators.

Mr McMASTER: It is an idea that has crossed my mind. I have been lying in bed, thinking: How would you design such a scheme?

Mr DAVID SHOEBRIDGE: The purpose of this hearing is to get those thoughts translated to us, so keep going, Mr McMaster.

The Hon. SHAYNE MALLARD: Lying in bed at night thinking about it is a worry though. You really need to leave work behind.

The CHAIR: We all lie in bed at night thinking about work, what are you talking about.

Mr DAVID SHOEBRIDGE: You have been doing it, so let us know.

Mr McMASTER: If you like, we can put in a supplementary submission that can perhaps outline the barebones of the scheme. As I say, the underlying principles are simplicity, universality and that is hard to evade or avoid.

Mr DAVID SHOEBRIDGE: I am now going to invite you to put that supplementary submission on. Could I ask you about what you do for covering downtime between gigs? I will give you an example. There may be a driver driving for both Ola and Uber, they do a gig with Ola and they drop someone off and they are then driving—

The Hon. SHAYNE MALLARD: Hovering.

Mr DAVID SHOEBRIDGE: —hovering around waiting for their next gig and whack they get hit or they hit somebody. My view is they should be covered. That is my predilection. I do not know what your view is. It may be that this pool scheme is the best way of covering that so you do not have to work out whether it is Ola or Uber who covers it, but they are covered by the scheme. That is one of the attractions I see with your scheme. Do you have thoughts about that?

Mr McMASTER: Yes. First of all they should be covered because they are at work. They may be between tasks. It is a little like a truck driver who goes into a transport yard and then waits while the truck is being loaded or unloaded. If a forklift hits that the driver and that driver is injured they are covered. It does not matter, they are at work and they are being paid. Our view is that they may not be paid—gig workers may not be paid because they have not got a gig, they are hovering, but they have turned up to work, they are intending to do further work and therefore the workers compensation scheme should cover them and it does not matter, in our view, whether it is Ola or Uber or whoever they did their last job for or are going to do the next one for, the important thing is that they are covered by the scheme.

Mr DAVID SHOEBRIDGE: If they are logged on and looking for work?

Mr McMASTER: Yes.

Mr DAVID SHOEBRIDGE: And they are in their vehicle or on their bike or in the vicinity of their bike looking for work at that time and an accident befalls them they should be covered?

Mr McMASTER: That is right.

The Hon. SHAYNE MALLARD: By the pool model.

Mr DAVID SHOEBRIDGE: By the pool model?

Mr McMASTER: Correct.

Mr DAVID SHOEBRIDGE: Which is the advantage of the pool model.

The Hon. SHAYNE MALLARD: I note in your submission you talk in general about gig workers engaged in the freight transport industry. This inquiry keeps narrowing in on the cyclists in this area but is the gig worker moving into other areas of freight from semitrailers to the little vans running around dropping off eBay things to one's house every day?

Mr McMASTER: I am not aware of any evidence of it yet. There is talk of Amazon—

The CHAIR: The Amazon flex model is operating, is it not?

Mr McMASTER: I am not sure if it is operating yet, but I note the Transport Workers Union submission refers to it and I would accept their advice.

The CHAIR: This is a scenario where Amazon put out on an online platform for people to use their own vehicles to do last mile delivery, effectively, from either a post office to a home or from a warehouse to a home or a distribution point to a person's home. It is specifically the last mile delivery aspect of it. That is what I think people are referring to when they are referring to the Amazon flex model.

Mr McMASTER: I am happy to take that on notice and I am happy to give the Committee further advice on that. As I say, I have not directly heard of it being up and running. I note the union refers to it in its submission and I take their submission as read.

The CHAIR: They are coming in to give evidence after you, so we will ask them as well.

Mr DAVID SHOEBRIDGE: They are coming after him?

The CHAIR: Yes, they are, they have been for a good 40 years. Mr McMaster, if you are going to take that on notice could you also take on notice any knowledge that you have, or your organisation might have, about the use of gig platforms to do last mile delivery for the major retailers such as Coles and Woolworths and specifically whether Coles and Woolworths are partnering with Uber to do last mile delivery of groceries?

The Hon. SHAYNE MALLARD: The chair has stolen most of my questioning line. I would also be interested in; I live up in the mountains and a fairly ordinary van comes and delivers Australia Post parcels to me. It is obviously a subcontractor. Is that an area that the gig economy may move in on? A fairly average subcontractor. They tender for that sort of job too. I do not think that is a big surprise. Can you give us some advice around that? Australia Post has a huge highly profitable parcel side, which is being driven very strongly.

Mr McMASTER: Certainly, I will investigate that.

The Hon. SHAYNE MALLARD: In overview, we are going through a major disruption in our society at the moment in terms of workplace, in terms of commercial operations, and essentially driven—the disruptor was digital when it arrived and it has changed the whole media landscape. It has changed the tax industry, I think for the good. I think you do not support that in your submission. Do you not see what is happening at the moment is a continuing rolling out of the disruption caused by digital and that we have to adapt to it and not fight it?

Mr McMASTER: Before I answer that question can I just go back to your previous question. I also understand that during the COVID-19 lockdown in Victoria that the gig companies were permitted to transport pharmaceuticals and that was a decision taken by the Andrews Government. That is something that they understood as taking place. The main point that we made in our submission is gig work involves lots of small tasks in a high-volume area of transport work. I can see the potential for the gig model to perhaps go into courier work, into what is called taxi truck work and what is also known as express freight.

The Hon. SHAYNE MALLARD: Removalists?

Mr McMASTER: In other words, where there is a lot of small consignments that go on the back of a truck or a lot of jobs being done within a driver's day because that type of work is not dissimilar to gig work in many ways. I cannot see gig companies hiring a fleet of low loaders and delivering massive wind turbines to a wind farm, that is a completely different type of work. Back to your last question. We are an employer organisation and therefore we, as a matter of principle, support a business or an industry that disrupts an established way of doing things and we also support the opportunity for businesses in that industry to adopt rapid change. The

employer associations in the road transport industry were started before motorised transport but the companies in that industry went from a horse and dray to motorised transport.

The Hon. SHAYNE MALLARD: And the unions resisted.

Mr McMASTER: Why? Because, well—

The Hon. SHAYNE MALLARD: I am only joking.

Mr McMASTER: No, no. Because they saw that as a more efficient and reliable way of doing things. Over the years as the nature and quality of trucks and truck-trailer combinations has improved—on safety grounds, on economic grounds, on environmental grounds—the industry has adopted those safer, more economically efficient, more environmentally friendly vehicles. But in doing so we did not— Change was not at the expense of workers and their conditions. That is the important point that we want to make sure that the Committee understands that going back to nineteenth century working conditions—and this is what they are—is really not appropriate in a wealthy, liberal democracy like Australia.

The Hon. SHAYNE MALLARD: So your organisation is not opposed to a competitive gig model but your submission is that there need to be minimum standards and of course safety?

Mr McMASTER: Correct. I think we say in our submission, perhaps we did not say clearly enough, we are quite comfortable with the platform companies being rewarded for their innovation and enterprise. But those companies also have very high stock market valuations. I think one of the submissions from one of the platform companies says that their combined value on the stock market is $2.16 trillion and that will have grown since with what has happened on Wall Street and various other stock markets around the world. That says that if you are a securities trader, you have a lot of confidence in that business model that it is going to deliver long-term commercial success. The value of those securities in those companies can only be at that level if those that trade in those securities have a degree of confidence that they will be profitable and that their rate of return will be high. What we are saying is just shave a bit off that rate of return, off their profitability, off the value of those securities to provide those basic employment conditions or engagement conditions to those workers.

The Hon. COURTNEY HOUSSOS: Thank you for your submission. I liked the quote where you said we are going back to nineteenth century working conditions. I think that is a very astute analysis of what we are confronting here. It was actually my colleague, Mr David Shoebridge, who last week characterised it that in effect what we have—particularly for food delivery drivers—is you have the app that is the boss and the algorithm that is the manager. That juxtaposition of nineteenth century working conditions in this really high-tech New World is the essential challenge that we are trying to grapple with but I think you have put it really well.

Obviously it is National Road Safety Week and you talked about earlier that there has been an intersection of two laws here. You have got road law and also workplace health and safety law. I wanted to ask you about the impact on safety. This is not just for workers themselves but also for the general public and that is something you would be familiar with in your industry that if this is not a safe working environment for the workers that is an issue we need to confront but it is also an issue for the broader public, isn't it? It makes it just as important that we need to be dealing with, wouldn't you agree?

Mr McMASTER: It certainly is. I think I referred earlier to the experience of my wife when she is driving and I have had similar experiences. I have almost hit gig workers driving through King Street or somewhere. These workers come from countries like Colombia and China and Brazil and Nepal and so on. They have no idea of, no experience of and no understanding of legislation that covers their rights. They have no understanding of road laws or workplace health and safety laws. Often their first language is a language other than English and that makes it difficult for them to learn. They get no training from what I understand or negligible training.

So apart from being in a precarious work environment in terms of remuneration they are in a precarious work environment in terms of conditions. But as you suggest the broader community pays a price. If you are going about your business and you accidentally hit a gig worker, and that worker is sadly killed or seriously injured, that would be on your conscience. As a society we need to ensure that the risk of that occurring is minimised as much as possible. There has of course been bipartisan support over many decades in this Parliament and parliaments elsewhere in Australia and around the world to improve road safety. All that you are alluding to is that that should be extended to gig workers as well.

The Hon. WES FANG: Mr McMaster, welcome and thank you very much for appearing today. In your opening statement you talked about the ability for workers to collectively bargain and negotiate with the employers but obviously there were difficulties. Can you expand a bit on that because I have been considering this vexed

issue myself? How would you suggest that we weigh up the difference between a worker more in line with a contractor that you are used to dealing with that may have a vehicle in a primary employer's colours but they are a contractor? So there would be some workers in the gig economy who are predominantly working for one company full-time in effect and there are others who use the flexibility provided by just coming in and out. How do you balance the needs of one of those groups with the other in negotiating with a company that is employing workers through the gig economy like the app components? Because they are going to have different issues and different wants in that negotiating process. How would you negotiate on behalf of both of those parties?

Mr McMASTER: I think you would start by saying what is the cost basis to be able to perform that work and which party incurs the cost to enable the work to be performed. They are what you might call your capital costs. Then there are your running costs so your labour, your repairs and maintenance of your vehicle or your bicycle or your motor scooter as the case may be. Then your other overheads like insurances—it is not just workers compensation, it is public liability and other insurances that are necessary—and personal protective equipment and so on and so forth. So you identify what the costs are, which is what happens with the principal contractor-contract carrier model where employer organisations like ours negotiate with the Transport Workers' Union. That is how we arrive at a rate structure. Once we know what those costs are we then say "What's the method of renumerating a driver or a rider?" The contract determination system acknowledges that a vehicle can range from a bicycle right through to a B-double and the costs per hour and per kilometre vary accordingly. It should be possible to apply that model to gig work as well.

The Hon. WES FANG: What about the issues around flexibility and guaranteed hours? I imagine that there would be potentially some desire by those who are working with more focus on a single company to have surety of work provided. The brilliance of using an app or other means for gig workers is it provides flexibility to others. How do you think that would be balanced in negotiations because it is not just about a remuneration schedule, there is, I guess, other components to a collective bargaining agreement that will see both of those parties at odds with each other within the agreement? How do you weight it, is really what I am asking? Who do you weight towards?

Mr McMASTER: If you are asking for things to be tied to one platform provider, I think the only difference is if you work exclusively for that platform provider. If you do six hours a day at work for them, whatever the amount is, that is fine. But you might do six hours work for three or four platform providers under the alternative scenario. You are still doing the same amount of work, other things being equal, your costs are the same. Therefore, your remuneration structure should be the same. I do not think it matters whether a gig worker has a commercial relationship with one platform provider or three of four.

The Hon. WES FANG: My final question on that, following on from what you have just said, is if the cost structures are the same for the worker to provide those services to X, Y or Z platforms we are basically just setting rates across the board, are we not? Is that removing the competitive advantage of using apps and the gig economy, in effect, to tap into the supply and demand aspects of work and tasks at hand?

Mr McMASTER: I cannot see why you still cannot use an app. It may well be that you allow for some sort of premium if you like to be paid to the worker to work at times of the day or night when demand is higher. It may well be that you, perhaps, have a peak rate, a shoulder period rate and a quiet period rate. I am not wedded to that concept but that is something that could be considered and, therefore, there is still some sort of, if you like, incentive to maybe on a Friday night, between say 5.00 p.m. and 9.00 p.m. that may be a peak period and it probably is. You may well say, "Let's add a 20 per cent premium to the basic costs structure, plus a reasonable profit margin, to induce gig workers to go out and work".

But if it is, say, 8.00 a.m. to 11.00 a.m. on a Sunday when the demand for gig workers is likely to be low"—and I am talking food deliveries now—"maybe if you exclude the profit margin or something like that." In other words you will do the work at cost or the profit margin is very, very thin. I am not sure. I can say envisage the possibility of that being a fair and equitable means to trying to balance the aggregate demand for the service from the community with the need to encourage gig workers to go out and supply on an aggregate basis that work.

The Hon. WES FANG: I understand all those points. I guess my observation of that would be that what we have now effectively done is regulate the gig economy to the point where it is now just another workplace and the flexibility has almost evaporated. It is the flexibility that is appealing to the consumer, the worker and the company. The minute that that is lost I think the appeal is somewhat lost. I guess that is the balance that we need to look at. Thank you very much for your insights into this.

Mr DAVID SHOEBRIDGE: It seems to me that there are a number of options going forward. One is to change the relationship of someone working in the gig economy to a de facto employee. The other is to create a kind of new status. As I understand you, you support the new status model. Is that right?

Mr McMASTER: Based on my understanding of the way this part of the industry works, we would think that a new status is probably the way to go. Perhaps I will start from it this way. The legislation will be contentious and will be contested and the legislative framework, I think, has to be as watertight as possible to ensure that protections are in place. That I think is the most important thing that this committee would need to consider and legislators will need to consider. I suspect that would be more likely to be achieved by recognising that the nature of the work that gig workers do, the nature of the relationships they have and the fact that this is a new area of work lends itself to a new area of legislation.

Mr DAVID SHOEBRIDGE: I will explore with you the rights of the worker that should be protected, entrenched or created. It seems to me that we can tick workers compensation rates?

Mr McMASTER: Yes.

Mr DAVID SHOEBRIDGE: What about minimum remuneration rates? Should there be a guarantee of minimum remuneration?

Mr McMASTER: I think so. I mean I think that any transport worker should be rewarded for their labour at a rate that is equivalent to the relevant award rate in the Road Transport and Distribution Award which would cover gig workers if they were employees. The hourly rate that applies in that award should equate to the labour cost of a gig worker.

Mr DAVID SHOEBRIDGE: And if that means that delivery costs slightly rise, is that something society should expect to pay in order to treat the workforce with dignity?

Mr McMASTER: Correct, because if that same worker was an employee, that is what society does now. So all I am suggesting is extending that basic minimum remuneration—and we are talking about labour only at this stage and not the rest of the costs that a gig worker faces—to gig workers.

Mr DAVID SHOEBRIDGE: What about the ability to contest dismissal, which often in this environment means being excluded from the app and excluded from work? Should there be a remedy to contest that? In which case, do we look at putting it effectively into an unfair dismissal path, State or Federal?

Mr McMASTER: Yes, there should be. Again, as workers, they are entitled to know why they were dismissed. It should not be just, "Well, I had a flat tyre and that is why when I made the delivery the food was cold and the customer was not happy," or, "The customer did not like me because I had a beer," or something. Gig workers are entitled to protection. They need to be perhaps warned for poor performance, and if performance is generally poor then—

Mr DAVID SHOEBRIDGE: There should be a role for legitimate management action.

Mr McMASTER: Correct, there should be.

Mr DAVID SHOEBRIDGE: But it needs to be able to be tested in some kind of independent tribunal.

Mr McMASTER: Correct. There should be—

The Hon. WES FANG: Who is giving the evidence here?

The CHAIR: This is fine. Please just focus on the witness and the questioner.

Mr McMASTER: Thank you. Just because they are gig workers their rights and obligations should be no different from other types of contractors in the industry or employees.

Mr DAVID SHOEBRIDGE: It is a little bit more complicated in this space, though, isn't it? Because sometimes the punishment can be done based upon an algorithm, and you can get much less attractive jobs and much less attractive work, and it is hard to look under the bonnet to understand how that has happened. Have you had any late-night thoughts about how to deal with that?

Mr McMASTER: Well, beyond the platform providers being accountable for how they allocate work, that it is very difficult, but there has to be some sort of accountability there. I do not even know if there is a role for trade practices law or not. I am amazed at what we have talked about in terms of having a reform structure or leadership structure in place within the remit of industrial law, but there has to be—the platform companies cannot be poacher and gamekeeper, so to speak. It may be a poor analogy, but we have to have some sort of accountability and this. I can take it on board and give it some further thought if you wish.

Mr DAVID SHOEBRIDGE: One of the options that has been raised in informal discussions with my office is there being an industry ombudsman to which these various operators have to have various reporting about the manner in which their algorithm operates, so that we have a degree of transparency. That may be confidential

reporting, because they are all anxious about their competitors knowing, but a kind of transparency with an industry ombudsman who can then check the algorithms against a set of standards to make sure that the way work is allocated is done in a safe and fair manner.

Mr McMASTER: I will take that on notice, but that may well be a way of bringing them to account. Another possibility is a code of practice, but something that is—

Mr DAVID SHOEBRIDGE: Enforceable?

Mr McMASTER: The code is usually something that is self-regulatory rather than regulatory, and there is a need for some sort of regulatory or quasi-regulatory oversight here.

The CHAIR: Has independent contracting has been common in road freight and the transport industry for a long time?

Mr McMASTER: Yes, it has.

The CHAIR: Does it go back around 120 years to the time of trolleys and trainmen?

Mr McMASTER: It goes back a long time, yes.

The CHAIR: Part of the reason—to really simplify things—is in the transport industry, demand is highly variable but capital costs are very high.

Mr McMASTER: Correct.

The CHAIR: As a result, the transport industry has responded by effectively dispersing the costs of acquiring equipment to everybody who participates.

Mr McMASTER: Yes, there is some truth to that.

The CHAIR: And independent contractors, particularly in road freight, tend to debt finance the acquisition of their equipment.

Mr McMASTER: Correct.

The CHAIR: And for a truck that can be hundreds of thousands of dollars.

Mr McMASTER: It can.

The CHAIR: And it is not uncommon for independent contractors to mortgage their homes to be able to finance their vehicles.

Mr McMASTER: That is correct.

The CHAIR: And as a result, their ability to shoulder that debt load depends on stable and predictable income.

Mr McMASTER: Correct.

The CHAIR: That is why 40 years ago New South Wales established chapter 6.

Mr McMASTER: Yes.

The CHAIR: The extent to which this is a new problem, are there are parallels with the transport industry's history?

Mr McMASTER: Correct, and that is one of the points that we make in our submission. This is the same songbook, if you like, but the only difference is we are talking about a new way of working and a new set of working relationships.

The CHAIR: I was going to ask you about what would distinguish gig-style work from other forms of independent contracting in the transport industry. You made the point that chapter 6, as it is currently designed, envisaged that there effectively be one principal and one contractor, and the contractor would effectively work for one principal at a time. Is that common practice in the transport industry?

Mr McMASTER: Correct.

The CHAIR: But what is different with the gig economy is that you can have one contractor working for multiple principals at the same time, is that correct?

Mr McMASTER: Correct.

The CHAIR: The other thing that distinguishes it, which was raised last week by the Hon. Natasha Maclaren-Jones when she was asking about what would distinguish these types of independent contracting relationships, is that independent contractors in the gig economy have no ability to bargain with their platform, is that correct?

Mr McMASTER: Correct.

The CHAIR: It is distinguished from a *Yellow Pages*-style circumstance because they are effectively told what they will earn via the algorithm. They have no element of input whatsoever into the pricing of their services, is that correct?

Mr McMASTER: Correct.

The CHAIR: As a result, their income is dictated to by a process that they cannot control. Would you agree with that?

Mr McMASTER: Correct.

The CHAIR: Picking up on some of the questions that Mr David Shoebridge was asking regarding what should become the minimum rights and entitlements of any system that would be provided. Would you agree that there is a role for third-party oversight, be it an ombudsman or a tribunal?

Mr McMASTER: As far as remuneration and conditions are concerned, a body similar to the NSW Industrial Relations Commission, the Fair Work Commission or even the old Road Safety Remuneration Tribunal would be appropriate. It probably needs to have oversight by decision-makers like commissioners who have some understanding of the industry, but I see a tribunal as the best mechanism to determine remuneration and conditions for gig workers.

The CHAIR: Mr Shoebridge put to you a scenario under which we would effectively create a pool structure for the payment of workers compensation through something akin to a Nominal Insurer. Do you recall the questioning?

Mr McMASTER: Yes, I do.

The CHAIR: Is there any reason why we cannot use that model for other entitlements and not just workers compensation? Is there any reason why we cannot also use that for safety training, education, leave remuneration and other methods?

Mr McMASTER: As far as safety training goes, I agree that you could use that model there. As far as things like leave is concerned, you could either provide it through that mechanism or you could include it in the remuneration structure that is determined by the independent tribunal, in a way similar to what happens with contract carriers at the moment and their remuneration structure.

The CHAIR: Basically it would operate like a portable entitlements scheme, would it not?

Mr McMASTER: Yes, it would.

The CHAIR: Arguably, is there a benefit to gig companies in that they do not have to store a person's leave entitlements on their balance sheet but rather can transfer it to a central institution?

Mr McMASTER: Correct.

The CHAIR: Just finally, I think Mr Shoebridge asked you a question about—I have forgotten completely what I was going to ask you.

Mr DAVID SHOEBRIDGE: It was a very good question.

The CHAIR: It was very good. It being 10.30 a.m., your cross-examination has come to an end. Mr McMaster, I am aware that you took some questions on notice and that you volunteered to provide us with a further supplementary submission. We look forward to reading that within 21 days, if you do not mind.

Mr McMASTER: Yes, certainly.

The CHAIR: Mr McMaster, I also note that you overcame some health difficulties to be with us this morning. We very much appreciate the efforts and the lengths you have gone to in order to appear this morning.

Mr McMASTER: Thank you.

The CHAIR: As you deal with your health and your course of treatment, we wish you the very best.

Mr McMASTER: Thank you very much.

(The witness withdrew.)

JACK BOUTROS, National Campaigner, Transport Workers' Union, sworn and examined

RICHARD OLSEN, Secretary, NSW Branch, Transport Workers' Union, sworn and examined

MICHAEL KAINE, National Secretary, Transport Workers' Union, sworn and examined

The CHAIR: Welcome to the next session. With us are representatives from the Transport Workers' Union. Would any of you like to make a short opening statement?

Mr OLSEN: Yes, I would, thank you, if I may. Thank you to the Chair and good morning to the Committee members. My name is Richard Olsen. I am the Secretary of the New South Wales branch of the Transport Workers' Union [TWU]. I am joined today by Michael Kaine, the National Secretary of the Transport Workers' Union, and Jack Boutros, the TWU gig economy official. From the outset, I would like to thank the New South Wales Government for taking the very important step to establish this inquiry. We welcome the opportunity to contribute to this hearing today.

In September of this year we were rocked by the deaths of two food delivery workers in Sydney and a third in Melbourne. All three worked through the pandemic, providing a crucial service to Australians, which helped us to stay safe during the pandemic. These workers provided this crucial service at a great risk to themselves, whilst being grossly undervalued. They earnt below minimum wages and did not have access to many of the often-taken-for-granted rights we come to expect for any worker in Australia. None of these workers were provided with workers compensation, safety training or basic protective personal equipment. All three workers left behind children, spouses, brothers, sisters, aunts and uncles, friends and communities. It is too late to bring them back but it is not too late to prevent the deaths of others. I would like to express my condolences to the families and I pray that no family would need to endure such tragedy.

We do not know how many more gig workers have died this year working in the transport sector. We do not know whether the deaths of these workers could have been prevented. But we are here today to tell you that after three years of speaking to transport workers in the gig economy this is what we know. The transport sector has been hit by two waves of the gig economy: the first being rideshare and the second being food delivery. We have since seen the most mature, exploitative and unsafe forms of gig work in any sector. I would like to table two snapshots of surveys, which we provide to the Committee for consideration, if I may.

The CHAIR: Thank you.

Mr OLSEN: The surveys were compiled by the TWU for this inquiry and were based on the responses of 450 rideshare and food delivery workers. These surveys show the deep decay which gig economy workers face in the transport industry. For example, they show both rideshare and food delivery workers are grossly underpaid, earning around $10 to $12 per hour after costs. Both are engaged in some of the most dangerous work in Australia: one-third of workers being seriously hurt or injured in food delivery; the same number being involved in car accidents or sexual and physical assault in rideshare; and both experiencing harsh, unfair treatment without access to any independent resolution processes. People routinely have their livelihoods stripped away with no rights of appeal and with very little notice. Both do not have complete flexibility of their own businesses. They are performance-managed with algorithms, dependent on one or two companies for their work, cannot develop their own clientele, brand or businesses and have no power to determine or negotiate their own terms and conditions.

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. Amazon is a global giant, a company worth 115 per cent of Australia's GDP with the power to radically transform our economy and our society. In February this year Amazon brought its Uber-style parcel delivery service to Australia called Amazon Flex. We have already seen Amazon Flex workers underpaid, forced to work under unsustainable work pressures and provided no basic protection or safety training. The story of Amazon Flex workers will be that of rideshare and food delivery workers, just on a larger scale. 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.

It is important to recognise that these companies are not creating new jobs. These companies are replacing fair-paid jobs with underpaid counterfeits. While doing so, they undermine State revenue by circumventing an obligation to payroll tax, superannuation, not to mention repatriating profits abroad and evading their tax obligations. We must act. We must act to ensure that this is not the future for working Australians or our economy. The key issue is that in Australia outdated industrial laws are not up to the task of protecting workers now or into the future. We have laws which provide rights to workers on the basis of archaic distinctions between employees

and contractors. Meanwhile workers in dependent arrangements who might not be classified as an employee are provided no rights or protections. This has created the space for deep decay in which we are seeing in the transport sector of the gig economy tens of thousands of workers being paid systematically below the minimum wage and the body bags piling up on our roads.

To be clear the issue is not whether you classify a worker as a contractor or an employee. The TWU has represented contractors for 120 years. Twenty thousand of our members are owner-drivers who are classified as contractors and enjoy flexibility arrangements with fair and substantial work rights and entitlements. We recognise workers and business values the flexibility and they can contribute positively to our economy and society. This is not the story in the gig economy—not in rights and not in food delivery and you will not be restoring parcel delivery either, once Amazon Flex has taken hold.

We are not here to oppose technological invasion or the growth of a new sector. We are here to advocate for a future where we can ensure that such innovation does not cost workers' livelihoods or their lives. We need to ensure that all workers, regardless of employment status, are able to access fair rights and entitlements. We need to ensure that the tribunal is able to provide rights and entitlements to workers as work continues to change and evolve. We need to ensure that contracting is not a Trojan horse to create new a new working poor in New South Wales and Australia. In fact, Liberal and Labor governments in New South Wales have led the way in doing that for decades. Both parties have helped develop and shape Chapter 6 of the New South Wales Industrial Relations Act, which provides rights and entitlements to various categories of transport workers classed as independent contractors. Chapter 6 is not perfect but it provides a tried and tested road map to a future of work which is fair for all workers.

Technological change presents the New South Wales and the Australian economy with a crucial opportunity to build a fairer, sustainable and generally innovative economy. The inquiry presents an opportunity for Australian policymakers to get an innovation in the future of work rights and realise that these benefits are for all Australians. I thank you so much for your time.

The CHAIR: Thank you, Mr Olsen. Do you mind tabling that opening statements that you just made?

Mr OLSEN: Sure.

Document tabled.

The Hon. ADAM SEARLE: Thank you, Mr Olsen, for your very comprehensive submission put forward by the union. Can I take you to page 28 of your submission, paragraph 61 in particular? We have heard from the gig economy companies or the platforms who, in supporting the way in which they do business say, "Well, it's actually good for workers because workers can choose when to work and when not to work and they have a high degree of flexibility and choice." But we have also heard from some of the workers concerned who say, "If we decline work, we get punished." Can you tell us about some of the union's experiences through your members and people you have advocated for about whether these workers really do have agency and control over the work they perform?

Mr OLSEN: It is not our experience that they have too much choice at all. We have had well over 20 of those people being taken off the app because they have refused work. They do not have the choice at all and if they are not available at the time which is required by Amazon Flex, they have been taken off the apps in particular. As I say, we have experienced well over 20. There is a maximum time period as well in which they are allowed to work. They are given either four to 8 hour blocks in which they are allocated and if they are not ready, willing and available then, again they are taken off the app as a punishment. We have had substantial numbers of people coming to us as we have ventured into the site of the Amazon Flex businesses, to give an example where that has occurred. So we do not think there is much flexibility at all. There is a great degree of control and it is not fair to say that you can just rock up whenever you think you are available to work.

The Hon. ADAM SEARLE: And when they accept the work, they cannot subcontract to other people. They have to do it themselves.

Mr OLSEN: Yes. That is my understanding.

The Hon. ADAM SEARLE: And what about the issue of branding? Some of them work for more than one platform. Do they have to have brandings from each agency or each platform company they work for?

Mr OLSEN: I am not aware.

The CHAIR: Mr Kaine, I think you were trying to get the microphone in response to the earlier question too.

Mr KAINE: Yes. Just on that particular matter. Let me go to Mr Boutros and then I will come back.

Mr BOUTROS: In terms of your question on branding, look, there are some companies which do require workers to wear certain jackets or at the very least be provided a pack upon startup. Take Deliveroo, for example, where a worker is provided a raincoat and a bag. Both are branded. It is expected that they wear that although they have in recent months kind of relaxed those kind of requirements, given their intention to kind of avoid an employment classification which we could look to a branded uniform is one of the indicators of employment status.

Mr KAINE: I think one of the core considerations underpinning your question is that these new tech companies have very successfully built up a flexibility mythology. It is mythological because of the reasons Mr Olsen has set out and it is very deliberate. In your hearings so far you may have come across—and if you have not, it might be worth probing a little deeper—that many of these companies have what are known as reclassification risk teams. These are teams within these companies whose sole purpose is to ensure that every step, every process, every operational decision made by the company does not push workers any closer towards the employment model. This is the key indicator of avoidance.

One of the avoidance mechanisms is the mythology of flexibility. We have seen how successfully they have used the mythology of flexibility in knocking over a very important law in California called AB 5, which I am sure you are all aware of by now, which took the approach of deeming these type of workers as employees. Now, we have a problem with that approach, which I will come to if you interested in hearing it.

The Hon. ADAM SEARLE: Yes, please.

Mr KAINE: But before I do, the mythology of flexibility has been so successful that those companies were able to spend around $500 million together to put a law on the books that was voted on concurrently with the presidential ticket and get that law knocked over because, as I said, they had created this notion that workers must be independent contractors, must be free from—and putting "free" in inverted commas—the constraints of the employee model to be truly able to have the flexibility that they require to live their lives. Now this, respectfully, is all hokum. It is a complete smoke and mirrors trick by these companies.

But the answer is not to suggest that we should abandon the notion of flexibility. The answer is to embrace the notion of flexibility, but flexibility in how we assign and ascribe rights to these workers. It is an inflexible approach, in fact, to deem them all employees, as the California Legislature attempted to do in the best of faith. It is a flexible approach to do what this State Parliament has done for 40-plus years: The parallel that Mr Olsen raised with Chapter 6. That is to put in place a standing body that has the power to but need not inquire into particular forms of work, establish what would be the appropriate rights and conditions to attach to that work and then put them in place as enforceable obligations; or, to receive a mutually agreed set of conditions between, say, a union on behalf of a collective of those workers and the company which is calibrated to the business model of the company but which both parties agree provides appropriate protections and allow the tribunal to give it a stamp of approval.

This is true flexibility and it is also true protection for workers and the State because what it means is that any business model that is full of malpractice now is in danger of being knocked over by the standing body and any company that thinks that it wants to come into this jurisdiction and put in place terms and conditions which are below the standard or which rob the State from its revenue runs the risk of putting in place a business model that can be knocked over by that standing body. Now this is flexibility of regulation, not in flexibility of regulation, and it is a pathway—a proven pathway—for us to get to your question, which is to address this mythology of flexibility.

The Hon. ADAM SEARLE: My next question really goes to the issue of health and safety. We have had submissions from SafeWork NSW, which says the legislation is fine and it goes far enough to encapsulate the responsibilities that should be undertaken by platform companies. I am looking at your submission at page 38, from paragraph 108 and following, about the tragic deaths of those gig workers. If you have any knowledge, do you know whether or not either of those workers were given a death benefit to their family under the workers compensation arrangements for New South Wales?

Mr KAINE: We know this is a very distressing story. It is the type of story that is needed to move the community. Members of this Parliament, many of them already, have been moved by these stories. Indeed, now they are grappling, principally in this Committee, about what the answer is. But distressing it is. These workers' families are now left destitute. For example we know that 80 per cent of work done in food delivery is done by temporary visa holders. The complications, tragedy and despair that has resulted as a consequence of these two recent New South Wales deaths—three deaths across the country—are of course impossible to put into words.

If there was something that could make matters worse, it is that the law has been left behind to such an extent that they are offered nothing to help them get through what is the most difficult part of their life, to help them reset their families and to help deal with the community dislocation that will result from losing someone in such sudden circumstances—nothing, because the law has been left behind. No, it is not at all clear that the law is able to jump into the breach here. In fact, what we are being told is that these families will get nothing because these workers have been classified as independent contractors. That is not a situation that can persist.

The Hon. ADAM SEARLE: We had some evidence on the first day of the hearing from some workers in similar lines of work who gave evidence that they had little to no safety equipment or training. When your unions had interactions with Safe Work around these issues, do you have any sense that Safe Work has any kind of enforcement plan for the gig economy?

Mr KAINE: No. The question of what is supposed to be, in our ambition across the country and in this Parliament, a proactive set of laws that is supposed to trigger modification of company behaviour before someone gets killed, that is the intention of our workplace health and safety laws. That has been our intention in a very rich history, particularly in this State for over 100 years. The fact of the matter is that those workplace health and safety laws, I must say, because of the good work of many people in this Parliament, some are in this room, have on paper caught up to some degree. That is, there are obligations on these companies. The reasons that they are not working in the health and safety space are twofold. The first is that there is no enforcement, or there is very little enforcement. We have to get across that. There are two aspects to that enforcement. The first is State-sponsored enforcement and making sure that there is a focus on those in control of business undertakings, because, again, the enforcement mentality has not caught up.

The enforcement mentality needs to go to the top of those complex contract networks, those complex supply chains, and make sure that behaviour is modified. Secondly, there has been a fall away in the statutory role and the political legitimacy that had in previous decades been given to unions as express regulators under health and safety regulation, with the capacity and lots of power to go out there and be a police cop on the beat. Unions in this context have had the right to collectively bring together those workers so that they can put up their hand and be able to point out when something is wrong. Those are concerns. The other piece of this debacle, where express WHS laws are not working, is that these companies act as if no law applies to them. That is how they are acting. They are marching through our society. It is a wrecking ball. It is ripping away public revenue and it is ripping away people's lives. They say that, why? Because they are not employers; they are independent contractors. And by logical extension they assert that that means that workplace health and safety laws do not apply to them, even though they do. It is only kicking and screaming with too few resources that we are having to do this, after people are dead, and that is not good enough.

Mr DAVID SHOEBRIDGE: Thank you all for your detailed submission and for your work both State and Federal. I will go through a couple of aspects of these relationships. The first one is workers compensation rights. What is your position in terms of workers compensation rights for gig employees? How should they be imposed, created or enforced?

Mr KAINE: The key thing is to look at dependency, and that is why we think that a number of these considerations are tied to a potential logical solution, which is to have a body that is able to inquire into particular forms of work. These types of works, they are iterations, they are types of digital platforms. They will continue to evolve and they are evolving on a daily basis. We need to have a system that is flexible enough. If you were to have a standing body that was to identify a class of gig workers like, for example, food delivery riders riding bicycles who clearly have very little capital input into the work that they do and who are clearly entirely dependent for their workflows, then they could be characterised as workers that have a level of dependency that should trigger workers compensation laws. In other words, it is how dependent they are, but we have to be careful about writing down prescriptions, because that is what these big companies want.

Mr DAVID SHOEBRIDGE: There needs to be a kind of open roping-in process, is that right?

Mr KAINE: Yes, that is exactly right.

Mr DAVID SHOEBRIDGE: Available to a regulator or similar?

Mr KAINE: That is exactly right.

Mr DAVID SHOEBRIDGE: At the hearings last week Ola said that it was effectively supportive of there being workers compensation coverage for their delivery drivers, provided everybody was covered. I assume that ubiquitous coverage is what you would be supporting?

Mr KAINE: It just makes absolute sense if you are going to have sustainability in a market.

Mr DAVID SHOEBRIDGE: Did you hear Mr McMaster's evidence just before you came in, from the Australian Road Transport Industrial Organisation?

Mr KAINE: No, we did not.

Mr DAVID SHOEBRIDGE: His position was, and I might ask if you want to consider this on notice, that in terms of all of those delivery workers, whether they are bike couriers, Ola drivers, Uber drivers, Deliveroo bike riders, that a contribution should be made from each of those gigs that they do into a workers compensation pool, which then provides coverage across the board for those drivers or riders as they move from gig to gig. What do you say to that pooled-base approach, so that you get ubiquitous coverage?

Mr KAINE: As a principle, that is one of the ideas that has been put forward that is worthy of examination.

Mr DAVID SHOEBRIDGE: Did you want to look at that on notice and come back to us?

Mr KAINE: Certainly, we will do that. There are some countervailing considerations that need to be put, particularly because the click-the-ticket approach, when it has been tried in the United States, has really resulted in that money being taken from the gig workers themselves, thereby further driving down their rates, which is why a holistic approach is required. But the actual concept is something that we will consider.

Mr DAVID SHOEBRIDGE: And the concept of it being universal is one of the most essential parts of it, I assume?

Mr KAINE: Yes, it is.

Mr DAVID SHOEBRIDGE: Yes, because otherwise you will get rogue operators trying to game the system, which is why you talk about the need to have a roping-in mechanism. Is that right?

Mr KAINE: That is exactly right, yes.

Mr DAVID SHOEBRIDGE: I suppose that applies in anything we do in this space. It needs to be flexible, because this is a global industry that is trying to get around existing statutory norms.

Mr KAINE: Exactly.

Mr DAVID SHOEBRIDGE: Could I ask about the ability to challenge being removed from a platform or being punished under an algorithm, so that you no longer get any lucrative jobs? Have you thought about what kind of mechanism would be appropriate for somebody in that situation to challenge the decision? Is it an unfair dismissal kind of application? What is it?

Mr KAINE: If we take the chapter six capacity, that is designed to provide certainty of contract, so you do have the capacity to go to a tribunal and challenge. But the very first thing that needs to be done is that there has to be the capacity for the system to be able to acknowledge the challenge; that is, the fundamental, practical concern of, for example, having a termination notice issued to you by an algorithm is that you have no capacity to say anything because it is an algorithm. So, there is a practical barrier, but then there is the justice concern. That, we say, would be assisted by a tribunal.

Mr DAVID SHOEBRIDGE: From that, do I assume that you cannot just rely upon those individual challenges? There needs to be some kind of systemic transparency put in place so that someone can look into the algorithms and see how work is allocated or withdrawn. Is that part of what is needed—a kind of systemic transparency?

Mr KAINE: Absolutely, otherwise what we have got is work that is secret and therefore can be issued in any way.

Mr DAVID SHOEBRIDGE: Do you have a specific structure in mind that would facilitate that transparency? I said it to Mr McMaster and I will put it to you: People have informally raised with me the concept of there being an ombudsman where the individual operators have an obligation to provide the transparency about their allocation of work and the algorithms that they apply, but on a confidential basis, because often that can be seen as commercially sensitive information—that there be a public authority that can, against some statutory criteria based on fairness, test those algorithms.

Mr KAINE: We have no problem in principle with having that statutory support. However, we do not think there is a need to reinvent the wheel here. The most tried and trusted discipline on companies has been the capacity of workers to be able to gather together and put in place with the company terms and conditions, including about how work is allocated and how disciplinary matters are dealt with, to be actioned collectively. That has

been the tried and trusted method and we think that is the first port of call. There might be a fallback position that is that kind of statutory support.

Mr DAVID SHOEBRIDGE: I can see how that is essential in terms of individual workers challenging what is happening to them with that gross disparity—collective representation at that point. But in terms of testing and getting transparency on the algorithms and the allocation of work, how do you see that being tested? Having some kind of mechanism that we will get agreement on—that the union movement has a role in testing the algorithms.

Mr KAINE: I think, Mr Shoebridge, the way we think about it is the other way around. Our history of representing non-standard workers—particularly owner-drivers in road transport—is that you build from the bottom up the terms and conditions, including their rates, that are required to provide their business with at least cost recovery. And then, you go from there. So, you build up those components and you have a system in place which ensures they are paid, and then the algorithm becomes a secondary consideration. The algorithm can then—the business should have the flexibility to figure out how that works and any unfairness in that should be tested. But the fundamental proposition is that you build the terms and conditions first.

Mr DAVID SHOEBRIDGE: I am 100 per cent with you in terms of building the rates, the remuneration, the minimum hours and the safe work procedures. All of that needs to be built and I can see how it is essential that we have collective representation and unions engaged in that. Once you do that, though—you have got that in place. If it is then being allocated and determined in accordance with an algorithm that you cannot see and you cannot test, how do we regulate that? How do we test that if we do not have something like—and I am not wedded to this mechanism—an ombudsman or a statutory office that has a transparent review of that? Otherwise it is all black box. I am asking how we are going to get into that black box.

Mr KAINE: It makes perfect sense.

The Hon. COURTNEY HOUSSOS: Can I just ask a follow-up on that specific question? That is something we have heard some different testimony around. I notice you talk about it coming out of your survey that there is a real lack of transparency over that black box—that algorithm. Are you able to provide us with any feedback about what the factors in the algorithm are? Have you received feedback as part of your survey or elsewhere? I mean, obviously they are different on different platforms, but that would be very helpful for us.

Mr KAINE: We will take that on notice and come back to you.

The Hon. SHAYNE MALLARD: Thank you for coming today and for your submission. I am really interested in the surveys you have provided us with, and this dashboard is very helpful for politicians. Dashboards are always good.

Mr DAVID SHOEBRIDGE: We all love a dashboard.

The Hon. SHAYNE MALLARD: I might not have found it in the submission, but can you give me some background to the preparation of the survey—how many people were surveyed and the method you used—just to help substantiate the results?

Mr BOUTROS: It was an online survey. We had 450 respondents: 250 rideshare drivers and 200 food delivery workers. We compiled them online.

The Hon. SHAYNE MALLARD: We heard from—I see you have got the logo here, actually—the Rideshare Driver Network. I think they were here last time. There were trying to set up that organisation and they cannot get access to the names of the gig workers because of alleged privacy issues with the platforms. How did you access the 200 or 450 online people?

Mr BOUTROS: A lot of our lists have been built by on-the-ground work with people literally on corner blocks speaking to workers.

The Hon. SHAYNE MALLARD: Intercepts?

Mr BOUTROS: Yes.

The Hon. SHAYNE MALLARD: Okay. That is not a bad sample and the surveys are very interesting. I am not shocked by the surveys, though. I do not think those results are really surprising; they are just reinforcers. The one thing I did note was that in the food delivery area 79.3 per cent of the gig workers were visa holders. They are very vulnerable people. That is a really important source of income for them. My partner has a hospitality business that was totally flattened by COVID. Five of our 30 staff got JobKeeper. The other 25—they were all part-time waiters and chefs—were all on visas. That is a typical employment market in hospitality. In fact, it is

very hard to get workers in hospitality. They were all thrown out; obviously we tried to look after them. They went straight into the gig area, doing delivery. It really did save them at a very difficult time. You are aware of that?

Mr KAINE: Aware that it saved them?

The Hon. SHAYNE MALLARD: Well, so many people got thrown out of work because of COVID. I am talking about hospitality workers particularly. They moved across to food delivery, which of course took off under COVID. And so, there was a role there. I am seeing the side of exploitation and safety issues, but 79 per cent of them in this survey are visa holders. It is very hard for visa holders to get work.

Mr KAINE: I do not think the 79 per cent is a function of COVID.

The Hon. SHAYNE MALLARD: Right. When did you do this survey?

Mr BOUTROS: The last couple of months, but I will note that these results are pretty consistent with other surveys we have run in previous years.

Mr KAINE: The point you make is probably correct. I do not know that it takes us much further, but it is probably correct; there has been a shift of people to do whatever they can. I guess that is kind of our point, that the "whatever you can" at this point is just so below community expectations but promoted as so in line with a fresh new economy.

The Hon. SHAYNE MALLARD: I accept that. What I am getting at here is that the gig economy, particularly the food delivery area—that figure is right now 80 per cent—is really important for visa holders in terms of their limited opportunities to get any income, set aside COVID and JobKeeper. It does have a role. Setting aside exploitation and safety—I think we are on a common issue there about trying to raise that—but you cannot ignore that that is an important area of employment for visa holders.

Mr KAINE: I think we accept that this type of work—rideshare, food delivery et cetera—is something that the community wants now and expects, and will be into the future. Therefore, it will be a source of employment. The question is: What type of employment?

The Hon. SHAYNE MALLARD: My engagement with the so-called community is that they want to see young people on visas being able to earn some money and have the flexibility while they visit Australia. Every time Menulog comes to my door they give you the background of the person. I am always fascinated by what countries they come from and what their story is.

The Hon. WES FANG: I don't care. I just want my food.

The Hon. SHAYNE MALLARD: You just want your food, yes. What I am saying is, that is an important part of the employment mix: the people who hold visas.

Mr KAINE: You are right. They are the most vulnerable. They do have the conditionality that surrounds it. Of course, if we take care of them and get that standard right then we are clearly going to be doing the right thing.

The Hon. SHAYNE MALLARD: I agree with that as well. You talked about independent contractors. The tragedy of the cyclists who were killed—any workplace death is tragic—we have had evidence that they got some support but no structured formal support and no payment to the family, no compensation. Are there other independent contractors—I think one of you said in that evidence a minute ago "that is so-called independent contractors; that is why they are not getting these benefits that common, decent Australians think they should have". Are there other independent contractors—defined independent contractors—who do get those benefits, death benefits and so forth? For example, truck contractors—you are from the Transport Workers Union—truck drivers who are contractors: Do they have a death benefit arrangement?

Mr KAINE: It is hit and miss. Chapter 6 in New South Wales provides a level of support that is unique in Australia. If you are an independent contractor truck driver in New South Wales you have the support of that system. Within that system you have rates and terms and conditions that build in appropriate protections. The issue we have here is that the neatest fit in terms of workers comp is an employee fit. Then there are some other potential avenues of squeezing into workers compensation benefits, but that is done through testing the law. When you test the law in terms of employee and independent contractors and then they know, that is hit and miss. We are talking about an archaic—some would say arcane—law now, the result of which the application of the test results—either you fall on the employee side of the line and you get everything or you fall on the independent contractor side of the line, and even if you just fall on that side of the line you get nothing. Overcoming the "get nothing" onus is the difficulty we have with our workers compensation systems as well.

The Hon. SHAYNE MALLARD: We heard that there have been test cases. Uber fell on the side of its contractors in five cases, and Foodora fell on the side of their employees on one—and then they just nicked out of the country. That is what we have heard.

Mr KAINE: That is exactly right. It is an imperfect system, but it is the only tool we have at the moment. As an advocate for workers, the blunt legal tool we have is to every time try and squeeze these workers into the box of an employee. When we win, the business model is unviable for them.

The Hon. SHAYNE MALLARD: The campaign you are doing now in terms of the gig workers is really not a new campaign for you guys at all. It is a revisitation of a campaign that has been going on for some time regarding subcontractors—because your industry is full of subcontractors. My uncle was a subcontractor semitrailer driver of his own truck. That is largely the model of the industry, is it not?

Mr KAINE: For 120 years we have been representing independent contractors—since before mechanisation. In the 1950s what occurred was an imbalance between precisely this. Companies realised they could push work out to independent contractors and avoid employee entitlements. New South Wales has put in place chapter 6 to level the field. We are in the same situation here. We need a new flexible set of laws—perhaps that goes beyond the transport economy—that is able to deal with that circumstance.

The CHAIR: Mr Fang has flagged that he has one question that arises from Mr Mallard's line of questioning.

The Hon. WES FANG: I have been listening to your evidence. I am a straight shooter, and I take it you guys are straight shooters as well. Is your opposition to this not basically that, as it disrupts a lot of other industries, it is just disrupting your business model?

Mr KAINE: As a union?

The Hon. WES FANG: As a union.

Mr KAINE: Certainly it is disrupting our business model—there is no doubt about that—because our business model is about making sure that people do not die. It is about making sure that people have the capacity to earn what is just and as deemed appropriate in our community. I think the strength of the territory that we are on is that the disruption of our business model is the disruption of our community; is the collapse of State revenue as employee receipts in respect of payroll tax et cetera as workers compensation systems collapse. The disruption to our business model is the disruption to the economy of the entire State of New South Wales. Yes, it is disrupting it, but I think that is beside the point.

The Hon. WES FANG: Great answer, but I guess what I was more focused on was that the loss of influence and membership that goes along with the gig economy really does threaten what it is that the unions are seeking to maintain with regard to, I guess, control and—

The Hon. COURTNEY HOUSSOS: Are you serious, Wes?

The Hon. WES FANG: —negotiation around workers—

The CHAIR: Perhaps, Mr Fang, you might wish to rephrase your question in a way that does not contain explicit argument.

The Hon. WES FANG: Thank you, Chair, for your guidance. How else might it affect your business model, other than the social aspects, and how are you looking to attract workers who are employed through the gig economy model?

Mr KAINE: I think we have said on a number of occasions now that what we have done is represent this type of non-standard form of worker for about 120 years. It is not new to us. Our mission is to make the lives of transport workers better—that is our mission. What we have done over the last 120 years is we have tried to support systems that support workers. When those systems fail, we have done what we could to have those systems amended. That is all we are doing here. I think that if one were to trace the bipartisan support that this Parliament has provided to the efforts of the Transport Workers Union since the 1960s, it would be difficult, I think, to maintain the suggestion that our motivations have been anything but the purest motivations to support workers. I think you can find that the Coalition supported amendments and enhancements and expansions of chapter 6 right back to 1992. So this is bipartisan. I understand that perhaps you feel compelled to ask that question, and I do not object to that. I just think we want to make it very clear that our motivations here are to save lives, to make workers' lives better and to support the State, and to ensure that what is happening now, which is that the law is being left behind and the institutions that we have built up over decades are threatened and are under threat because of this new model, are very quickly addressed.

The Hon. MARK BANASIAK: I draw your attention to your survey on safety concerns with rideshare drivers. In previous inquiries into point-to-point, I guess the counterargument—when put to the Government about safety concerns with rideshare drivers, they say that with the app you know the driver and you know the passenger, whereas that knowing of who you are picking up or knowing who your driver is in a taxi does not exist. Given that you are having very similar instances of safety concerns in both models, would you agree that sort of comment by the Government is a bit of a misnomer?

Mr KAINE: Would you mind having a go at that question again? I have not quite caught on to the question.

The Hon. MARK BANASIAK: In previous inquiries the Government, when they are trying to push back against a need for more improved safety requirements for rideshare drivers—like cameras in their cars—have said, "Well, with the app the passenger and the driver know each other, essentially," and that is why they do not want to push for cameras in cars. Given your data that you have here, would you agree that that is a bit of a misnomer because you have the same level of safety concerns happening in both platforms?

Mr KAINE: Yes, I think any security measure that assists is something that we would absolutely—and always have advocated for. As we know, it is about opportunity and it is about the community attitude to this type of work and this type of worker. We have to get to a position where respect is put back in—community respect. Part of it is it is good to know who they are. Part of it is it is good to be able to see on a camera. Part of it is we need to flip on its head the community attitude in some quarters to this type of service. We do that by making sure that it is valued and that the people who do the service can do it proudly and well supported.

The CHAIR: You agree that a driver is at risk from a passenger regardless of whether they know their name prior to them entering the vehicle?

Mr KAINE: Absolutely.

The Hon. COURTNEY HOUSSOS: Thanks for your time and your very substantive submission. Your survey goes a long way towards unpicking some of these myths that you talked about earlier, Mr Kaine. I particularly want to talk about two statistics from your survey that stood out for me, which are that across both platforms you have a huge majority—86 per cent of food delivery and 77 per cent of rideshare drivers—where it is the main source of income so, in effect, this is how they are pursuing their income; and 62 per cent of rideshare drivers are 45 years and older and 61 per cent of food delivery workers are between 25 and 34. These are your peak income-making years and yet you are being paid, on average, $10 or $12 an hour. What kind of effect does that have, when you are not getting superannuation and you have no access to workers compensation? How can these people plan their lives, buy a home or expect to have children when they are being paid such small amounts of pay?

Mr KAINE: This is the cusp of the issue. Of course, the effects are devastating. You quite rightly point to the notion that again is part of that myth-busting, and that is it is simply not the case, in our experience, that the vast bulk of this work is people who choose to do a bit of a side gig to supplement whatever else they do, either as a student or anything else. I have even heard it suggested by some companies that people enjoy doing it just to get out of the house for a few minutes. This is not what our evidence tells us. Our evidence tells us that a very high percentage of these workers rely on this income and the terms and conditions are, in a sense, just them keeping the wheels going round and it is a downward spiral for them and their families.

I think that if that does not move some members of this house, then what should move them is the more extended consequences of your question. If there is no superannuation, if there is no requirement to pay payroll tax, if there is no requirement for workers compensation systems to apply and for companies to contribute to those systems, then the very institutions that we built up to support our community are under threat. They are under threat now, and this evidence is evidence of that threat. It is the human cost and it is the community cost now and into the future that we are dealing with.

The Hon. COURTNEY HOUSSOS: I totally agree with you there, Mr Kaine. I noticed that you said—or your survey found—that one in three workers are injured at work. That seems remarkably high to me. How does that compare with workers either that you represent in other areas or that perhaps you might be aware of within the broader economy?

Mr KAINE: Of course, in transport we have the horrific situation that workplace deaths are 10 times higher than in any other industry. We see that trend continuing at an even more intense level in these so-called new forms of work. This is a dangerous industry, full stop; of course it is. Its danger is also imposed on the community, of course, because these workers interact with the general community every day in the course of their work. If we do not get the safety recipe right for these workers, then it is other Australians and other New South

Wales citizens that are dying. There are around 300 Australians that die each year in transport accidents. Around 60 of those are the worker themselves, and the rest are part of our general community. This is a devastating industry at the best of times. When pressure exists like this, we are in fatal territory.

The CHAIR: Mr Mallard made reference to five Fair Work Commission cases to do with the classification of Uber workers and one to do with Foodora. It is the case, is it not, that the Transport Workers' Union was a part of that litigation?

Mr KAINE: The Foodora litigation, yes.

The CHAIR: You succeeded in the Foodora litigation. That is correct?

Mr KAINE: That is exactly right.

The CHAIR: The Foodora litigation deemed Foodora workers to be employees for the purpose of the Fair Work Act. That is correct?

Mr KAINE: Yes.

The CHAIR: As a result, Foodora shut operations and left.

Mr KAINE: Yes.

The CHAIR: It is the case that there is no settled jurisprudence in the Federal sphere as to whether a worker is, in general, an employee or an independent contractor; rather, it turns on a platform-by-platform assessment. That is correct?

Mr KAINE: That is correct.

The CHAIR: Do you agree that there is a preference that, if the union was to achieve its ideal system, ideally that should be struck at a national level so it is consistent across all States?

Mr KAINE: That is absolutely correct.

The CHAIR: Do you also agree that in the absence of any meaningful actions from the Federal Government, or any Federal government, there is a role for the States here?

Mr KAINE: Yes, Mr Mookhey.

The CHAIR: You participated in the Victorian Government's on-demand task force?

Mr KAINE: Yes.

The CHAIR: You made a similar submission to that which you made to us to Ms James' inquiry?

Mr KAINE: Yes, I did.

The CHAIR: You are aware that the Victorian Government is considering its response to that inquiry?

Mr KAINE: Yes.

The CHAIR: You also would distinguish what the power of the Victorian Government would be from the New South Wales Government, given that New South Wales has not formally referred all its industrial relations powers?

Mr KAINE: Yes.

The CHAIR: We might forward you the transcript of Mr Charlie Heuston's evidence from the Department of Premier and Cabinet, in which he alluded to whether he thought that there were some constitutional issues to do with the State Government acting, particularly whether the intention of the Government at the time it exempted chapter 6 from the Independent Contractors Act was to cover the field, and whether that would bar State governments from acting any further—or, at least, that there is a question. If you could respond to that on notice, that would be useful.

Mr KAINE: Yes, I will do that.

The CHAIR: You made some allusions to a desire to reach, effectively, an agreement with each platform and then have that recognised by a tribunal-style structure. Did I understand your evidence correctly?

Mr KAINE: Yes.

The CHAIR: You have been in conversation with certain platforms, have you not?

Mr KAINE: Yes, we have.

The CHAIR: Which platforms have you been in dialogue with?

Mr KAINE: Mr Boutros, might help me here. Unsuccessfully with Deliveroo, more successfully with DoorDash, infantly with Ola. What else?

Mr OLSEN: Yes, those.

Mr KAINE: And Drive Yello.

The CHAIR: Equally, Ola did say when they came last week that they were close to alignment if not in agreement with you. Is it the case that some of the objections that the platforms have raised to concluding any such agreement is the absence of a definition of what a minimum standard would be?

Mr KAINE: Absolutely, some of these platforms want very much to be doing the right thing and have said they will put their hand up to be part of an effort to get there. But, of course minimum standards are critical.

The CHAIR: Is it the case that they have also said that the absence of a system to recognise such an agreement said that they do not have certainty for the business model?

Mr KAINE: They have.

The CHAIR: Last question, is it the case that the absence of any regulatory response from any government is actually impeding participants in the marketplace from resolving these issues themselves?

Mr KAINE: Good actors are good actors. They want to act and they need that support.

The CHAIR: Mr Searle, do you have a question? You did flag that you had one.

The Hon. ADAM SEARLE: Just briefly, you talk about the problem of telematics, which is in relation to the issue of surveillance in the workplace and the problems for worker privacy from these apps that the workers must download to interact with these digital platforms. If we do not have enough time I am happy for you to take it on notice about how the workplace surveillance legislation needs to be changed to take account of the evolving technology being locked in some very old technological notions.

Mr KAINE: Thank you, Mr Searle, we will take that on notice.

The Hon. SHAYNE MALLARD: I do think we could spend a whole day on surveillance. I want to talk about surveillance as well.

The Hon. ADAM SEARLE: We might invite you back for that.

The Hon. SHAYNE MALLARD: That will be next year.

The CHAIR: You have taken it on notice, we appreciate that. It might be the case that the Committee is likely to hold specific hearings on workplace surveillance matters and you may receive an invitation to return to give evidence specifically on that given that you did make a lengthy submission on it and you have had extensive exposure to a lot of this in conjunction with artificial intelligence as well. We might invite you back. I note that you have taken a few questions on notice. You will have 21 days to return those answers to the Committee staff. The Committee staff will be in touch with you. We thank you for the time you have taken to provide evidence and the forthright way in which you have answered questions, equally your very extensive submission, which has been of help to the Committee.

(The witnesses withdrew.)

(Short adjournment)

The CHAIR: The next set of witnesses were to be from HungryPanda but they have failed to attend and they have not given any explanation. The Committee will now adjourn until 1.45 p.m. and will resume with witness from the Australian Industry Group. The Committee intends to discuss its response to HungryPanda's non-attendance and decide a future time for HungryPanda to appear at this inquiry.

(Luncheon adjournment)

MARK GOODSELL, Head, NSW Australian Industry Group, affirmed and examined

STEPHEN SMITH, Head, National Workplace Relations Policy, Australian Industry Group, affirmed and examined

The CHAIR: Good afternoon. I invite either or both of you to make a short opening statement.

Mr SMITH: The Australian Industry Group welcomes the opportunity to appear at the hearing today. We filed a detailed submission to assist the Committee to understand our views. The gig economy digitisation and automation is delivering huge benefits. As with all previous ways of new technology through history, digital transformation should not be seen as inherently negative to the workforce, the workplace or society. Digital technologies will enable businesses to innovate, grow, improve their productivity and remain competitive in an increasingly global marketplace. Australia has a long and positive history of business and industry successfully adopting and adapting new technologies. The digital economy is forming completely new jobs and new markets and this is, of course, good for Australian workers.

Platform work provides flexibility that is often not available with conventional forms of employment. It often suits people who would like to be in the workforce but may have difficulty finding the flexibility they need to meet their personal circumstances. Individuals who wish to work flexibly around other commitments, such as study, recreation, family commitments and other forms of paid employment often find the experience of working via online platforms a useful and convenient way of supplementing their income.

As all the statistics show, most platform workers engage in platform work to supplement their income not as the sole source of income. Platform work has been particularly important during the pandemic. For example, many restaurants would not have survived without platform delivery services. Many thousands of workers have continued to earn an income in circumstances where they have been stood down from their regular jobs. In relation to workplace laws, the submission that we made recently to the Victorian Government in response to the Victorian inquiry into on-demand work is attached to the submission to the current inquiry.

That submission sets out our views on workplace laws as they relate to platform businesses and workers. I would highlight a couple of points. Firstly, we believe any reforms to workplace laws that apply to platform workers need to be led by the Commonwealth. It would not be in anyone's interests for legislative or other changes to be introduced by any one State when all the major platform businesses operate nationally and when we have a national workplace relations system. Secondly, the common law approach to defining an independent contractor needs to be maintained. The common law is much better equipped to assess the substance of particular relationships than any statutory definition could.

Any one size fits all definition would prevent the circumstances of individual cases being fully considered and would disrupt a very large number of existing contractual arrangements that are legitimate under common law. Thirdly, it would not be possible or desirable to align work status across workplace laws. There are specific definitions within income tax and superannuation legislation which are fine for the purposes for which they are directed but it would not be workable more broadly. The fourth point is New South Wales businesses have clear obligations under New South Wales work health and safety legislation to provide safe workplaces to their workers, including those engaged as independent contractors.

Those provisions clearly identify the work health and safety obligations of businesses to any workers they engage in whatever way they engage them. One aspect of the Victorian inquiry we were particularly pleased about was the adoption of an important proposal that Ai Group put forward to ensure that measures designed to improve workers' safety and welfare are not disincentivised because of the potential impact on arguments about work status. To reduce any disincentives to platform businesses improving the working arrangements of independent contractors, we propose that the definition of independent contractor in the Fair Work Act be amended to make it clear that the provision of benefits to a worker by a Principal should not be taken into account when determining work status, where those benefits are of a certain type that we set out in our proposal, including safety systems, safety equipment, training and accident insurance.

We urge the Committee to make a similar recommendation as an outcome of this inquiry. Finally, any discussion about the future of work would not be complete without mention of working from home arrangements. The future of work will undoubtedly involve a much larger proportion of workers working from home than has traditionally been the case. As Australia's workplace relations system has shown, it is capable of responding to working from home arrangements. For example, earlier this year, Ai Group, the Australian Chamber of Commerce and Industry [ACCI], the Australian Council of Trade Unions [ACTU] and the Australian Services Union [ASU] agreed to various temporary changes to the Federal clerks award. Late last week, the Fair Work Commission

extended those arrangements until the end of March by agreement between the Ai Group, the ASU and the other parties. We are happy to answer any questions that the Committee may have. Thank you.

The CHAIR: Thank you, Mr Smith, for your statement. Would you be able to table it?

Mr SMITH: Yes, certainly.

The CHAIR: That would be most appreciated.

The Hon. COURTNEY HOUSSOS: Thank you very much for your time, Mr Smith and Mr Goodsell. I will just start where you finished which is working from home. Can you just explain what the changes were to the clerks award? I understand they were mutually agreed but can you just explain what they were?

Mr SMITH: Yes, there were a number of changes. The most significant one was an ability for day workers—by agreement with their employers—to start as early as 6.00 a.m. and finish as late as originally it was 11.00 p.m. but more recently that was reduced to 10.00 p.m. without penalty payments applying. It is only for working from home and only by agreement.

The Hon. COURTNEY HOUSSOS: That certainly would have helped working parents at home who were trying to juggle homeschooling and their work commitments?

Mr SMITH: That was the rationale for it. In March when we reached that agreement there were so many parents working from home trying to look after their kids. The reason the unions were prepared to agree was that this provided flexibility for employees that they may wish to access. It only applied by agreement so there was no disadvantage to anyone.

The Hon. COURTNEY HOUSSOS: Sounds like a great idea. I am a passionate supporter of flexible work generally and I was just wondering if there are any other insights you can provide to the Committee about how flexible work was working that you are aware of at the moment?

Mr SMITH: Flexibility is absolutely critical in the workplace and we strongly support there being a flexible labour market with the various categories of employment as well as independent contracting. There are a lot of arguments about flexibility in the workforce and a lot of myths as well. For example, on the issue of casual employment flexibility people often allege that there has been an increase in casual employment whereas the facts show that between 1998 and this year the level of casual work in the workforce has not increased one bit. In fact, since COVID-19 hit, the level of casual employment in the workforce has decreased quite markedly—and tragically of course—because 500,000 casuals have lost their jobs. The issue of flexibility in the workforce is going to be exceptionally important as we recover from the crisis not only with various forms of employment but also the benefits that gig work can offer as a way of supplementing income.

The Hon. COURTNEY HOUSSOS: I should just clarify that I am a huge supporter of flexible work but I do think there should be a fair set of minimum wages and conditions associated with it. In your opening statement and in your submission, you said that statistics show most people use gig economy work to supplement their income. Where are those statistics from?

Mr SMITH: I would be happy to take that on notice. Various research articles have shown that. The evidence of Uber, for example, all the surveys appear to show that the vast majority of gig workers are supplementing their income rather than having their entire income provided by specific sources.

The Hon. COURTNEY HOUSSOS: The reason I ask is that the previous witness was the Transport Workers' Union who provided us with a survey they had done of 450 rideshare and food delivery workers across the board. It showed in both categories that for 77 per cent of rideshare drivers and 86 per cent of food delivery drivers it was their main source of income. If you can provide that on notice it would be very helpful for us.

Mr SMITH: Certainly.

The Hon. COURTNEY HOUSSOS: That is all from me.

The CHAIR: I am happy to take the next round. Firstly Mr Smith, thank you for the extensive preparation that the Ai Group has put in—also to you Mr Goodsell. It is thoroughly appreciated by the Committee. Secondly, thank you for also being the first submitters to have detailed responses to Ms James' gig inquiry in Victoria as well. It was very helpful for us to be able to understand your positions on those aspects of the debate. I will leave the pure industrial relations questions until last as I know Mr Shoebridge and Mr Searle will want to talk about that. I will ask you about some of the competitive neutrality issues to do with business and competition with the gig economy, if you do not mind? I will start with payroll tax. I assume you agree the tax should be

neutral on its face and not be providing any unfair advantage or disadvantage to any particular business enterprise over another?

Mr GOODSELL: Well neutrality is one of the principles of good tax design generally, yes.

The CHAIR: Do you think we have that principle properly reflective with payroll tax as it comes to the gig economy and gig platforms currently?

Mr GOODSELL: I think the problems with the payroll tax go broader than one particular sector. I think the structure of payroll tax is probably inappropriate. I know in the submission we drew attention to the comments of the NSW Productivity Commissioner. Indeed, I think the other tax inquiries have pointed to the fact that the way that payroll tax has developed, it is not a particularly efficient tax anymore and primarily because of the threshold which divides between those businesses that pay it and those businesses that do not and that threshold creates a distortion. I think the Henry tax review had a proposal for a way forward to do away with payroll tax and have, I think, it was a business cash flow tax.

The CHAIR: Cash flow tax.

Mr GOODSELL: With labour as a non-deductible, as I recall. We supported that kind of approach to getting around the sort of continuing creeping problem with payroll tax. So it is not really an issue about the gig economy. The gig economy is probably an example of the fact that payroll tax, in its current form, is an unsatisfactory tax.

The CHAIR: Business NSW made the point that it would like payroll tax abolished but if it is to stay they would like it to be applied properly. Is that broadly speaking the view of the Australian Industry Group?

Mr GOODSELL: Our view is that it is probably best dealt with in the way the Henry tax review dealt with it.

The CHAIR: Replacement with the BCF.

Mr GOODSELL: The fact that there is a threshold you end up with these unholy discussions all the time about whether the threshold should be increased and that just makes winners out of some people and losers out of others. It is better off if it is converted into something else that is more consistent with particularly the move would be able to be processed through the BAS process. That would be our position on payroll tax.

The CHAIR: On notice would you come back to the Committee with a detailed view on whether the contractor provisions of the NSW payroll tax are fit for purpose when it comes to the gig economy, that is, the argument being that those contractor provisions, which effectively group a set of entities for the purposes of deciding whether they are above the threshold, were designed prior to the emergence of digital platforms so they are not fit for purpose of, sort of, properly assessing whether a digital platform is should be grouped for the objectives of the payroll tax and, as a result, that is the loophole which means that digital platforms are not liable, and whether that is fair and equitable are particularly the points that we would seek the AIG's feedback on? If you have any particular views as to how that contractor provisions should be reformed, if you believe that they should, would also be really helpful. Is it possible for you to take that on notice?

Mr GOODSELL: Yes, I can.

The CHAIR: The Hon. Adam Searle do you want to ask questions. I just want to go to accident compensation.

The CHAIR: Yes, go to accident compensation and I will consider my questions. Does the Government want to ask questions or are you happy for me to go onto workers compensation

The Hon. Natasha MACLAREN-JONES: I have a couple but I can slot them in whenever.

The CHAIR: I turn to the issue of workers compensation. In principle do you think a person who is performing labour in a gig economy is entitled to it regardless of classification? Or do you think their entitlement should turn on whether they are a contractor or an employee?

Mr GOODSELL: A basic position would apply the existing test and turn on the employment contract of service. As you would be very well aware, Chair, workers compensation in this State has got its other problems at the moment and it is quasi welfare scheme in a sense, it is no fault, and wherever you draw the boundaries there are always these difficulties. There are other alternatives which are taken advantage of for accident compensation by people who are in contracting arrangements. I think provided people, workers, however you describe them know where they stand in relation to that then that is the most important thing that people are not misled into

thinking that they have cover if they do not. But we would be reluctant to support a restructuring of the workers compensation scheme as it is currently processed.

The CHAIR: One of the rather sad case studies that the Committee has heard is about two riders for two different platforms, both who sadly died in the same week, whilst they were on trip. Their families are without benefit at this point in time from anyone. Their platforms did not have any insurance policies that covered them. In respect to one case there was not any insurance that covered them. They had no recourse to workers compensation as best as we can see. Do you understand that that might create the perception that there is an injustice being perpetuated against those workers?

Mr GOODSELL: Yes, I clearly see that a perception could arise if people have a very superficial view about what work is and if people are working for a gig platform and they must be somehow equivalent to an employee. I can understand the anguish that that would give rise. There are a lot of people out there who are not covered by the workers compensation scheme. The important thing is that they understand where they stand before they enter those contracts and make the appropriate arrangements and decisions. People take risks all the time in their commercial arrangements, including operating without insurance and then subsequently regretting it. I think the most important thing is that people understand upfront the nature of the arrangements that they are entering into.

In the last couple of years I have had experience of a member company tell me they are having trouble getting employees to work on Friday and Saturday nights because they were making the decision to drive, a third income, using ride-share platforms, because they were actually making more doing that than they were earning in overtime under the award system with workers compensation cover and all the other benefits on Friday and Saturday nights in those peak periods. So people are making those decisions. The important thing is that they are making those decisions in full knowledge of what they are exposing themselves to. It does not preclude, as it as in other areas, people having alternative ways of obtaining suitable insurance cover.

The CHAIR: Before I move on, I want your views on two propositions that have been put to the Committee on this question. The first is not to include gig workers into the general workers compensation scheme but to effectively create sort of another version of it by establishing a body similar to the Nominal Insurer and asking gig companies to pay into that on a pooled basis and then workers would make a claim against that entity. Such a proposition would not involve general employers or non-gig companies employers having to pay into the premium pool; it would be extract purely from gig companies. To be fair, this proposition has been advanced equally by some of the gig companies themselves because it is designed to designed to deal with this problem of a person working for multiple platforms at the same time which does distinguish gig companies from other employers or other principles as well. What would your feedback to that be?

Mr Smith, I take the point you made in your submission that you have a view that to the extent that the requirement to have such coverage is required, or to the extent to which any gig companies wishes to provide such coverage that should not impact on any multi-factor test by a court as to employment status as well.

Mr SMITH: Yes.

The CHAIR: I invite comment on both those propositions as to whether you would establish a separate version of a workers compensation scheme for gig companies and equally if not, whether we should mandate that gig companies have a certain level of insurance for a class for their workers subject to Mr Smith's concerns or otherwise?

Mr SMITH: I will just make a couple of comments and then Mr Goodsell might supplement those. In terms of this issue of should a gig platform decide to offer insurance—obviously Uber and a number of others do offer insurance to their drivers and riders—the point that we have strongly made, and others have put forward this same view, is that should not impact on status. We have not suggested that there should be a mandatory insurance scheme. As Mr Goodsell said, perhaps the issue is that people need to be aware of what the arrangements are when they choose to work for different platforms, because a number of the platforms do offer insurance and some do not, so there should be visibility about that but certainly there should not be any disincentive to offering that because of arguments about status. We think if that issue was clarified and the definition of "independent contractor" in the Fair Work Act was amended to make it very clear that the provision of accident insurance is not a consideration for the purposes of the multi-factor test, that would operate to encourage gig platforms to offer that type of insurance.

The CHAIR: I invite feedback on the proposition that there should be a discrete system of compensation for gig company workers and platforms?

Mr GOODSELL: Without notice it is difficult to offer a fully informed view. In terms of the principles of assessing something like that, the agreeability of a proposal to the industry would be an important part, particularly so they can understand the nature of the risk that they are being asked to take on. When you have those kind of structures you always end up with disputes at the boundaries. In workers compensation we have a different system for there, a different scheme for the coal industry, for example, in this State. That is fine except that the boundaries can be very grey so you have to be cautious that you have got a process to effectively deal with those boundary arguments and not create incentives for people to be in one scheme or the other where that is not in the public interest.

There are a couple of principles you would have to think through very carefully to make sure that that did not solve one problem and create others. The primary issue would be, as I said, the view of the industry that is undertaking that new structure, and then fully understanding what it would mean, and make sure that the risk that they are undertaking because the workers compensation system, even though it is no fault, because it is largely driven off the employment contract, there is a some sense of control of the risk by the employer in most workplaces. Of course, there are arguments about how full that is. But the further you get away from that normal employment relationship the weaker is that sense of control over the risk. When you have got gig economy workers you can think of examples where the nature of the risk is largely controlled by the worker rather than the other entity.

The CHAIR: Your point is valid. You would have to distinguish return to work obligations as well when there is not a permanent employment contract. I think the proposition is that you would want to mimic it precisely or exactly rather the concept that there be a pooled insurance structure for the industry that workers can make a claim against, as opposed to having to effectively turn on which particular platform was determining their conditions at the time they were injured, is probably the point as well. I take your point about the boundaries.

The Hon. NATASHA MACLAREN-JONES: On page three of your submission you say that the major platform businesses are endeavouring to work lawfully. Does that mean that you believe that there are some that are not? I am not asking you necessarily to name them.

Mr SMITH: We interact with a number of major platform businesses and they are very interested in making sure they can not only comply with the law but also they are interested in best practice approaches. The types of businesses that choose to join the Australian Industry Group are obviously very interested not only in ensuring that they meet their own obligations but also are involved in policy discussions and so on about these issues. We do not have any visibility over the smaller operators that may or may not be complying with the law.

The Hon. NATASHA MACLAREN-JONES: Is it fair to say that you believe there could be some that are not, whether it is intentional or not?

Mr SMITH: I could not venture a view. We really do not have any information about that.

The Hon. NATASHA MACLAREN-JONES: Can something more be done to ensure that there are no operators out there who would be operating unlawfully, assuming that they are doing it more because they are unaware?

Mr SMITH: I certainly think there is a role for enhanced education in the industry, more information and resources to be provided. Certainly more could be done to inform platforms about their obligations and that could be a key focus of the committee's recommendations.

The Hon. NATASHA MACLAREN-JONES: Since you have raised "recommendations" I want to ask about recommendation No. 4 that you made to the Victorian inquiry which talked about costings, particularly the need for looking at the economic benefits of platform businesses, job creation and also barriers for the expansion of platforms. I am wondering whether you have heard anything back. I am mindful that their inquiry is still ongoing. Are you aware of any work that has been done in this space? Obviously jurisdictions should not necessarily duplicate everything but are you aware of any costing analysis that has been done in Australia or overseas in relation to this matter?

Mr SMITH: Not specifically. As you can see, we provided this response to the Victorian Government very recently. We also provided a copy of this submission to Attorney General Porter given that essential recommendation of the Australian Industry Group is that, consistent with Natalie James' recommendations, is this is really an issue that should be looked at federally, not on a State basis. We have not yet had a response, but that is not surprising given how recently we have made this recommendation. Some of the major platform businesses have carried out research into those areas. We are happy to take that question on notice. But the central point we were making here is that with various calls for costing t are often narrowly framed and we think that the community receives enormous benefits from what has happened in this space of gig platforms and that that community benefit

needs to be measured and taken into account in any of these costings. We are happy to see what research we might be able to provide the committee.

The Hon. NATASHA MACLAREN-JONES: That would be great. My final question is in relation to automation. We are seeing that obviously it is an area that is growing and it is impacting on some workers with the changing nature of how jobs are done. What more can be done to support the upskilling and reskilling of employees who are finding their jobs are being impacted?

Mr SMITH: I am sure Mr Goodsell will have an answer.

Mr GOODSELL: It is a good question and it is trend that has been going for some time. Pure automation is not a new thing, it has been happening for a long time. The latest trends are the automation of what we traditionally call white collar workers as opposed to mechanical work so the effects of automation are probably more broadly being felt now. We are strong advocates of the education system through school years and then into tertiary education in its various forms being more closely integrated with work so that people understand what the opportunities for work are.

Technology destroys jobs but it also creates jobs. Where a lot of problems occur is that the pace of thinking, the pace of change in the eco-system does not keep up with the pace of changes in the market. That is particularly a problem with vocational education and, to some degree, even higher education. So I think the simplest answer to your question is to make sure that there is a real-time engagement between the world of work and the world of education. And that point, I think, was made in the curriculum review in New South Wales. We ended up with an artificial dichotomy built into the education system where it was doing a lot of teaching, but people were learning a lot of things that were not necessarily linked to what their post-school destination would be unless they were going to study a very specialised area at university. So that is probably the most important issue.

The CHAIR: Mr Searle?

The Hon. ADAM SEARLE: Nothing from me.

The Hon. WES FANG: I have one brief question. This morning we heard from representatives of the Transport Workers' Union. They were quite critical of the way that the gig economy workers are not represented by unions and do not have the collective bargaining power. Would you be able to paint a picture about the flexibility, the ways of employment and about how you would expect the gig economy would operate if unions were involved with the workforce and with negotiating the conditions with employers, or should I say the gig economy organisations?

Mr SMITH: Yes, I guess we would challenge the view that the TWU put forward—that there is not any effective representation. As we are all aware, the TWU devotes enormous resources to this space. I listened to Mr Kaine's evidence, and he was putting forward that view about how important this is to the TWU. So the TWU has been able to effectively represent gig workers, as is quite clear. But in terms of the representation of independent contractors, one of the points that we make in our submission to the Victorian inquiry is that there is a mechanism under the Competition and Consumer Act 2010 for the Australian Competition and Consumer Commission to grant exemptions to independent contractors to bargain collectively. There are a lot of those 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. Separate to that, the TWU is a large national organisation with a lot of resources that clearly spends a lot of time consulting with platform workers and encouraging them to join the TWU. Some have joined and some have chosen not to join, and that is freedom of association at work.

The Hon. WES FANG: Would you expect that there would be a better or worse outcome for the consumer with union involvement in the gig economy?

Mr SMITH: We think every worker should have the right to associate with either a union or not—in the same way businesses should have the right to join Ai Group. We are a registered organisation under the Fair Work (Registered Organisations) Act 2009, exactly the same as the TWU is. So it is all about freedom of choice and freedom of association. The TWU provides services. If people want to access those services, there is absolutely nothing that is stopping them joining the TWU or any other union at the moment.

The Hon. WES FANG: Thank you very much.

The CHAIR: I might turn to some of the industrial relations issues that are raised in your submission, if that is possible. I will start with the status of the Ai Group. You are equally registered under the New South Wales Industrial Relations Act 1996?

Mr SMITH: Yes. In fact, we have registration certificate No. 1A from 1902, so we are registered under that Act.

The CHAIR: I am glad to see such pride in such registration. I congratulate you for having form 1A for over 100 years now. I think you are a respondent to some of the contract determinations under chapter 6.

Mr SMITH: We are, yes. We do have an involvement in chapter 6 proceedings.

The CHAIR: And you are aware that chapter 6 is exempted from the Commonwealth Independent Contractors Act 2006?

Mr SMITH: Yes.

The CHAIR: And do you have views about the suitability of chapter 6 and its potential use with respect to the gig economy? At two levels: firstly, have you ever obtained any advice as to whether chapter 6 applies to the gig economy?

Mr SMITH: We have not, but our view is that chapter 6 has the scope set out in chapter 6 and that that would not generally apply to gig businesses.

The CHAIR: Why do you say that you do not think that it would apply to gig businesses?

Mr SMITH: It applies within its scope—

The CHAIR: For a contract for carriage.

Mr SMITH: —so the circumstances would need to be looked at in each particular case, but we have not contemplated it applying to the sort of gig businesses that are prominent in this inquiry.

The CHAIR: I accept that you have not had the opportunity to consider that but perhaps on notice if we could ask you to come back with a view as to whether or not you think, particularly the gig work that has been done in the road freight space—I am talking about Amazon Flex—would qualify as a contract for carriage for the purpose of chapter 6 as well. That is one proposition that the Australian Road Transport Industrial Organisation advanced effectively this morning as well. Equally, it did make the point that there are aspects of Uber's work, particularly freight transport—it did make the point that there is an argument to say that food is a good for the purposes of a contract of carriage and, therefore, chapter 6 would apply under the existing definition. Any specific views or feedback on that would be most welcome. In general, do you think there is a role for chapter 6 here or not?

Mr SMITH: We do not, for the reason that when you look at those contract determinations, they have not been particularly effective. There is a high level of noncompliance. There is a lot of complexity associated with it. I think a good comparison is to look at what happened with the Road Safety Remuneration Tribunal [RSRT]. When that tribunal was set up, it operated for a couple of years, spent a huge amount of time developing a form of instrument that was not unlike the contract determinations under chapter 6. And what ended up happening was it was abolished because the very instruments that it had developed to, purportedly, protect drivers was going to lead to a very large number of owner-drivers losing work. There was a huge outcry from owner-drivers about the instruments that it had developed. The legislation went through both Houses of Parliament in the same day to abolish the RSRT. It was a failed experiment and I think there are a lot of parallels with the chapter 6 process. It is very inflexible, very complicated and it is the last thing the gig economy needs in the way of regulation.

The CHAIR: But you accept that it has operated in New South Wales for more than 40 years now.

Mr SMITH: It has, and we are not arguing for its abolition. We are just saying it should not be extended beyond its current parameters.

The CHAIR: Fair enough. In that context, am I right in inferring that you are opposed to the codification of common-law tests for the purposes of work classification?

Mr SMITH: We are not opposed to information being provided about the common-law tests around who is an independent contractor versus who is an employee. There are lots of those materials that are circulated anyway by the Fair Work Ombudsman, the Australian Building and Construction Commission, the tax office and lots of other bodies. But what we are opposed to is a statutory definition of "independent contractor" because, as we have said in our submission to the Victorian inquiry, once you do that—you look at where most independent contractors are. They are in the construction industry—by far the biggest group—and they are designers, they are IT professionals. There would be enormous disruption.

Wherever you draw that line, it is going to cause lots of problems. So the common-law tests have been very flexible. They can be applied to gig workers, and have been applied. If you look at the Foodora circumstances, for example, Foodora was held to be an organisation that employed employees. In all of the cases so far Uber is an organisation that engages independent contractors but there is a case before the full Federal Court this month looking at Uber drivers. The common law tests are there and are being applied. *Hollis v Vabu Pty Ltd* showed that these tests can be applied to a bicycle courier. In that case the courier was held to be an employee.

The CHAIR: You will forgive me, Mr Smith, every time I hear *Hollis v Vabu* my body shakes because I did a paper on that when I was in law school. That is a long time ago now but anyway thank you for reminding me of that. The point is that the model that effectively you are aiming for would require a person to be in a dispute every time. Incidentally the argument has been made by gig companies too that leaving it to common law and leaving it to courts creates tremendous uncertainty for them and their business models as well and they are always at risk of reclassification and they always must assess any aspect of innovation of their model as to whether it is going to create a reclassification risk. A view that they are advancing is that it is an inadequate position for them and that they would prefer legal certainty. I accept your point that they do not have a right to disturb other people's independent contracting arrangements, which I infer from your answer has been operating in other industries for a while now, but do you see that there are two aspects here that might be needed: A clearer test, but also a much more accessible system for people to actually access their rights?

Mr SMITH: We do not accept that because anyone that wishes to challenge their status as an independent contractor is able to go and have that status determined and they can seek to have that status determined through—you know, if they want to argue that they are an employee, then they can use the Fair Work Acts to argue that and there are also remedies under the independent contractor legislation and of course here in New South Wales there is Chapter 6. But we do not accept that there is a need for anything more for the reasons that we have set out in that Victorian submission.

The CHAIR: On the broader issue of dispute resolution, the other aspect of the gig companies which distinguishes them from the other form of contracting arrangements is that other forms of contractors have the ability to negotiate about pricing of their services and equally to access dispute tribunals. The evidence that we have had already makes it clear that that aspect of independent contracting is not available to gig workers. Even if you accept that they should be independent contractors, they have no meaningful ability to negotiate on price let alone to be able to contest a decision by a platform to terminate their contracts. I mean, we have seen contracts in which gig platforms list courts in the Netherlands as the court of dispute for anything that arises in New South Wales. Do you think that is adequate on both counts?

Mr SMITH: Well, we do not accept that there is not a mechanism for these matters to be contested. You know, take the bargaining power of the independent contractors. There are mechanisms, as I explained before, under the Competition and Consumer Act for independent contractors to group together to negotiate pricing without offending the Competition and Consumer Act. The TWU is able to apply for an exemption and has done on many occasions to represent owner-drivers. In terms of disputes about matters relating to the terms of commercial contracts, there are remedies available for that.

The CHAIR: So to the extent to which a contract says that a dispute in New South Wales should be heard in a court in the Netherlands, that is not objectionable?

Mr SMITH: Whether that is the only place that that dispute can be determined would need to be looked at in the circumstances, but we would be surprised if there is not any mechanism for an independent contractor to challenge a contract. For example, the unfair contracts jurisdiction in the Independent Contractors Act, we cannot see why that would not apply to an independent contractor in Australia.

The Hon. ADAM SEARLE: Just on that, isn't a lot of this largely theoretical? I mean, rideshare drivers or food delivery drivers, these people are not really independent business people. They are dependent on these platforms for getting the work. They do not have, really, the right to decline because they are sanctioned or have their accounts deactivated. We hear that rideshare workers, on average, are earning—according to a TWU survey—$12.35 an hour and 85 per cent of drivers have said that their income has actually gone backwards. For food delivery drivers their average hourly rate is less than $11. Nearly 90 per cent of them have also indicated that their income is going backwards. I mean, there is no legal minimum rate of pay. There is no mechanism, really, by which they can practically bargain and they have no right to decide what to charge for their services. This is all one-way traffic in favour of the platform companies that requires intervention, would you not agree? Like, why is there not an overwhelming case for intervention here?

Mr SMITH: To the extent that the individuals have no bargaining power, then that is a factor that the courts would look at. I am sure that many of those platforms would take the view that in many cases that is not

correct. But the multi-indicia approach to looking at the definition of independent contractor looks at all of those issues in working out what is the character of the relationship. Uber were held at to be on one side of the line and the Fair Work Ombudsman [FWO] inquiry outcome and Foodora riders on the other side of the line in the FWO's views that they put before the court in that matter. You know, we do not accept that there is a need for increased regulation of genuine independent contractors in this space.

The Hon. ADAM SEARLE: I guess this is the nub of at least part of this inquiry—whether these are genuine independent contract relationships. I mean, we have been hearing from the riders and drivers themselves who have told us quite compellingly that they do not have any control over how they perform their work. For most of them, the overwhelming majority, it is their primary source of income so it is not just like they are students or they are doing this on a part-time basis. This is their main form of income and they simply do not have the bargaining power and the income they are earning is just appalling. These are not independent contract relationships. They might be dressed up that way but the law is very difficult. As you say, different tribunals have found that different arrangements fall on different sides.

Mr SMITH: One thing that is surprising about that TWU survey is why is the outcome so different to other more independent research? I would have thought the Committee would be wise to obtain copies of all the surrounding documentation around that survey. What notice was sent out with that survey? Who did that survey go to?

The Hon. ADAM SEARLE: Can I put this to you? If you are taking issue with the conclusions, where is your research?

The Hon. WES FANG: Point of order—

The Hon. ADAM SEARLE: No. I am just asking the question.

The Hon. WES FANG: Point of order: That is more of a debating point, I think. First, the witness did not paint the evidence that way. Second—

The Hon. ADAM SEARLE: I will rephrase my question. Do you have any other research that you have done that paints a different contrary picture to what has been advocated by the TWU?

Mr SMITH: What we will do is take on notice that issue.

The Hon. ADAM SEARLE: Thank you.

Mr SMITH: Because we have actually seen other research. We have not done it ourselves but I have seen other research that paints a very different picture, which we are happy to provide to the Committee.

The CHAIR: But you are aware of the research that Ms James did as part of her inquiry, are you not?

Mr SMITH: We are and we are on the public record as expressing some disquiet about the methodology of that survey because that—

The CHAIR: That was a Swinburne University survey?

Mr SMITH: Yes. That survey concluded that there was this extremely high proportion of workers working in the gig economy compared to other research. There are some earlier surveys that show that only about half of 1 per cent of workers in Australia are gig economy workers, which is an extremely different figure to the one that was the conclusion of that inquiry. One of the things that we were concerned about was the self-selection approach of the sample.

The CHAIR: Any feedback on that on notice would be most useful. In the same vein, basically three pieces of research have been put before this Committee as to what gig economy workers are earning and, for that matter, how many people are working in the gig economy. There is a TWU survey, which you could probably characterise as being on the low end, there is Ms James's inquiry, which finds about $15 to $16 for 39 per cent of workers on average, from memory. Do you have any feedback on that? Equally, Ola made reference to, and I believe Uber introduced it in its submission, the 2018 AlphaBeta study, which finds it at $21. That is not too much above the minimum wage as well. We are working on it being within that range of $12 to $21 depending on whose survey methodology and definitions you like, but there does not seem to be much dispute that that is where the range is falling. Any specific feedback that AIG would have on methodology and any additional research that you might have would be most welcomed by Committee members in that respect. I would like to put two propositions to you to take on notice. You would have paid attention to the debate that they were having in California?

Mr SMITH: Yes.

The CHAIR: And you would have seen that proposition 22 succeeded two weeks ago?

Mr SMITH: Yes. I do not know all of the details, but I am aware of that.

The CHAIR: In proposition 22 passing, a law was replaced by another. Do you accept that that was what the mechanism was in California?

Mr SMITH: I would have to take that on notice.

The CHAIR: Because the version that the legislature there passed, which was effectively to classify people or to deem them as employees, was replaced by a proposition that was advanced heavily by the gig companies, specifically Lyft and Uber, to provide them with independent contracting status, but with a minimum income guarantee on a per-trip basis, as well as access to accident compensation schemes and access to various forms of leave entitlements, albeit a lot more minimal than the law it replaced. Either way, it was a proposition that was similar to the debate that we are having here as to whether or not we should have minimum income guarantees. It seems like the gig companies, at least the major ones, favour it, but their view is that it should be decided on a trip basis, not an hourly basis, that is probably the main difference between the two California propositions. Any feedback you have on that would be most useful as well. I think that was it from me. Mr Smith, did you travel from Melbourne to be here?

Mr SMITH: No, I did not. I am based in Sydney.

The CHAIR: Sorry, I thought you might have been based in Melbourne. If so, I was going to give you extra praise for coming, but we appreciate your time.

The Hon. WES FANG: Give him some praise anyway.

The CHAIR: Mr Smith, I will give you some praise anyway for reminding me of *Hollis vs Vabu Pty Ltd*. I will walk away, read my essay and see how I went. Thank you very much for your attendance today. Mr Goodsell, thank you for your attendance today. You have taken multiple questions on notice. You will have 21 days to provide answers to the Committee. I will also put you on notice that we might extend another invitation to the Australian Industry Group to come to speak specifically about the issues of workplace surveillance at a later hearing date as well. Just be on notice that you might be in receipt of another invitation and for you to direct whichever policy officer who might be appropriate to respond in that respect.

Mr SMITH: Great, thank you.

Mr GOODSELL: Thank you.

(The witnesses withdrew.)

SKYE BUATAVA, Director, Research and Evaluation, SafeWork NSW, affirmed and examined

PETER DUNPHY, Executive Director, Compliance and Dispute Resolution, SafeWork NSW, affirmed and examined

The CHAIR: We welcome our next representatives from SafeWork NSW. I invite either or both of you to make a short opening statement.

Mr DUNPHY: I will make the opening statement. Thank you for the invitation to give evidence to the Committee. We appreciate the opportunity to discuss the employment issues with you. As the State's work health and safety regulator, SafeWork NSW seeks to better understand changes in work practices and technological innovations to ensure that we are prepared for the workplace issues in the future. We are always looking at how we need to adapt to a new landscape as we engage with businesses, workers and the wider community to reduce work-related fatalities, serious injuries and illnesses. SafeWork NSW engages with gig economy businesses as part of its regulatory functions to provide guidance on best practice work health and safety, to monitor and enforce compliance with the Work Health and Safety Act and to investigate matters relating to the industry sector where appropriate.

In engaging with companies, it is the view of SafeWork NSW that persons providing on demand services and gig economy workers are captured within the current Work Health and Safety Act. This is based on the extremely broad definition of worker in the model work health and safety laws, which is applied as law in New South Wales. Through our compliance and enforcement work, we promote safety in the gig economy. For example, we have worked with food delivery companies regarding their induction programs, safety policies and work practices to improve safety for their drivers and other persons. We are aware of the recent fatalities of two food delivery workers and we extend our condolences to the families affected by those tragedies. Motor vehicle accident matters are under the jurisdiction of the NSW Police Force. However, these matters are also currently the subject of preliminary investigations by SafeWork NSW.

Through the Centre for Work Health and Safety we also conduct research into current and emerging work health and safety issues. Projects underway or under development include the work health and safety roles and responsibilities in the gig economy, focusing specifically on the food delivery services; artificial intelligence in the workplace, concerning ethics and trust; and robotics in work health and safety. These projects will enable the development of proactive evidence-based prevention activities, potentially including policy and regulatory changes, compliance activities and enforcement decisions and interventions to promote safety in the gig economy. We welcome the opportunity to meet with the Committee and we are happy to provide details of SafeWork NSW's role in the administration of work health and safety legislation in regard to the changing nature of work in New South Wales.

The CHAIR: Mr Dunphy, thank you very much for your opening statement. I will kick off with the questioning. Mr Dunphy, we have established previously in budget estimates hearings SafeWork NSW's clear view that New South Wales workplace health and safety laws apply to gig economy companies and digital platforms. Do you recall that?

Mr DUNPHY: That is right, yes.

The CHAIR: And do you still hold that view?

Mr DUNPHY: We do, yes.

The CHAIR: And that is predominantly because you say a digital platform can be a person in control of a business undertaking, is that correct?

Mr DUNPHY: That is right, yes. Under the work health and safety legislation that we operate in, the big change when we moved from the occupational health and safety Act to the Work Health and Safety Act in 2011 was adoption of the national model legislation. Part of that adoption and part of the model that was developed was really designed to broaden out the scope of not just employers and employees, but it also changed that definition of employers to a much broader and expansive definition of a person conducting a business or undertaking. Also, the definition of employee was changed to worker, which is very expensive and very broad in capturing many different types of work. It really is designed to anticipate all sorts of other work arrangements that may not have been anticipated when the legislation was written.

The CHAIR: Indeed. Therefore, the general duty to provide a safe workplace and eliminate risk applies to gig companies and digital platforms?

Mr DUNPHY: That is correct, yes.

The CHAIR: And equally the requirement to notify the regulator of a workplace death would apply, would it not?

Mr DUNPHY: That is correct, yes.

The CHAIR: Can we now turn to the two deaths that have recently featured in the public debate? Let us start with the issue to do with Mr Xiaojun Chen and the platform for which he was riding at the time, HungryPanda. Are you aware of that incident?

Mr DUNPHY: I am aware, yes.

The CHAIR: Did you see the evidence that was given by Mr Chen's widow at this inquiry last week, by any chance, or read the transcript?

Mr DUNPHY: I have not. I have looked at the transcript generally.

The CHAIR: Sure. But you are aware of the incident, are you not?

Mr DUNPHY: Yes.

The CHAIR: When was SafeWork NSW notified of that death?

Mr DUNPHY: We received the notification on 1 October.

The CHAIR: Was that a Friday or a Thursday?

Mr DUNPHY: I do not recall what 1 October is, but I could probably check on my—

The CHAIR: Who did you receive the notification from?

Mr DUNPHY: That one was notified through the Transport Workers' Union.

The CHAIR: So, not HungryPanda directly?

Mr DUNPHY: No, it was not.

The CHAIR: Did you ascertain why HungryPanda did not notify you?

Mr DUNPHY: No, and that is the subject of an investigation. That is one of the matters that we are looking at, at present.

The CHAIR: That was, I believe, four to five days after the death took place.

Mr DUNPHY: From what I understand, the incident occurred on 29 September and the date we received the notification was 1 October.

The CHAIR: So, maybe two days.

Mr DUNPHY: Yes.

The CHAIR: But from the union and not the person controlling the business or undertaking?

Mr DUNPHY: That is correct, yes.

The Hon. COURTNEY HOUSSOS: Have you ever been contacted by HungryPanda in relation to this matter?

Mr DUNPHY: As soon as we became aware of it, we contacted HungryPanda and we have been engaged with HungryPanda since then.

The Hon. COURTNEY HOUSSOS: But they never initiated any conversations?

Mr DUNPHY: They did not, no.

The CHAIR: Can you explain the status of your investigation?

Mr DUNPHY: Other than that it is in its initial stages—with all investigations, I am not really able to talk about the details of the investigation. The matter is currently being investigated.

The CHAIR: Sure. Do you have a timeline for when you will be making—when at least the preliminary phases of your investigation will be complete?

Mr DUNPHY: Yes. We always aim to do investigations within 12 months. Statutory limitations allow us up to two years, but our aim is to certainly do an investigation within 12 months. In terms of a preliminary investigation, if we make earlier findings we will provide that information as well.

The CHAIR: Thank you. Did SafeWork NSW take any steps to ascertain whether any other worker at HungryPanda was at risk?

Mr DUNPHY: Yes. As soon as we became aware of that—and HungryPanda was not a platform that we were familiar with. We have actually now made all endeavours to identify through HungryPanda the extent of their operations in New South Wales and to gather information about any notifications that they should be providing.

The CHAIR: What is the scope of their operations in New South Wales?

Mr DUNPHY: That is what part of the investigation is at the moment—to establish that.

The CHAIR: In the immediate aftermath of this tragic incident did you find any reason why HungryPanda should be issued with any prohibition orders, infringement orders or notices to improve?

Mr DUNPHY: They have been issued with a notice and that is a notice to gather further information. Once we have assessed that information we will obviously make further decisions, but that is a decision for the investigating inspector.

The CHAIR: Can you alleviate the concerns of the Committee that there might be other workers currently at risk at HungryPanda?

Mr DUNPHY: We certainly have taken all action to get as much information from HungryPanda as we can. We will follow up any further information we have in relation to any other notifications or any other incidents that we are aware of.

The CHAIR: Is it usual that when you are notified of a death, you would immediately dispatch an inspector to a workplace?

Mr DUNPHY: It depends on the nature of the incident. It depends on the location and it also depends on the response. Normally for a road accident we would rely on information from the police. We do not have inspectors who can go out and investigate a traffic accident, but we would gather that information through New South Wales police.

The CHAIR: Have you, in respect to this incident?

Mr DUNPHY: It is a matter under investigation. We are liaising with police on it.

The CHAIR: Okay. Can we turn to the other death that took place around that time: Mr Fredy? Are you aware of this particular incident?

Mr DUNPHY: Yes, I am aware.

The CHAIR: Equally, can you tell us when the incident took place and when SafeWork NSW was notified?

Mr DUNPHY: Yes, sure. The incident occurred on 24 September. We understand the tragic death of Mr Fredy was on 27 November.

The CHAIR: Sorry, can you repeat those two dates?

Mr DUNPHY: The first date was 24 September; that was the date of the incident. We understand that the deceased died a few days after the incident, on 27 September. We were notified on 29 September of the incident by the platform, which was Uber. We were then also notified on 1 October by the Transport Workers' Union.

The CHAIR: Can you describe the status of your investigation? I believe Uber Eats was the discrete platform that this person was working for—or was it Uber?

Mr DUNPHY: Uber Eats is what I understand, although they reported it as Portier Pacific Pty Ltd, which is the trading company. That was the organisation or the party name that was the notifier of the incident, which trades as Uber Eats. So, we were notified of it, yes.

The CHAIR: Can you describe the status of your investigation?

Mr DUNPHY: It is in its very early stages and we are still gathering information. Again, because it is a matter that is under investigation, I cannot really go into further details at this point.

The CHAIR: Have you issued a notice to gather information?

Mr DUNPHY: Yes, we have issued a notice and we are gathering further information in relation to it.

The CHAIR: When did you issue that notice?

Mr DUNPHY: I do not have the date, but I believe it would have been shortly after the notification arrived.

The CHAIR: Have you issued any prohibition orders, infringement orders or notices to improve?

Mr DUNPHY: Not at this point, because it is under investigation at present.

The CHAIR: The same question that I asked about HungryPanda I will ask about Uber Eats. Is there any information you can provide the Committee to alleviate any concerns about whether or not there are other workers at continuous risk?

Mr DUNPHY: Yes. We have been working with Uber Eats for some time now. We have been working closely with them on their business systems, their work health and safety systems and the information in terms of incident notification. We have been working very closely with them since 2017 in terms of ensuring that they have good onboarding systems and that they have appropriate systems in place.

The CHAIR: But there are no specific changes that you have requested in the wake of this incident?

Mr DUNPHY: That could result from the outcome of the investigation and there could be further notices. But at this stage, as I said, it is under investigation. I cannot really provide any further information at this point in terms of the investigation.

The CHAIR: Are you operating on the same time line? That is, do you hope to have the investigation completed within 12 months?

Mr DUNPHY: That is correct.

The CHAIR: Fair enough. Finally, can you give statistics on how many other notifications, reports and complaints you have received about gig economy companies? What are the nature of those complaints? Equally, what actions have SafeWork NSW taken in response?

Mr DUNPHY: In terms of the notifications we have received, over the last three years there have been 24 notifications that have been provided. That is up until, I think, July this year. There were 19 this year. There were certainly a lot less—four, I think—in 2018 and one in 2017. So, we are aware of an increase in the number of notifications. Having said that, our overall notifications that we receive every year is in the vicinity of about 8,000, so you have to put it in the context of that notification of all industries and all serious incidents that occur in New South Wales. Certainly, in terms of the industry, we have been working with them. In terms of working with some of the delivery platforms, we have had an inspector who has been working for some time now to improve the systems of work, improve the onboarding arrangements and improve the general systems of work for the organisations. That has been a common approach, in terms of the notifications to follow up and make sure that these delivery platforms are aware of their obligations and aware of what they need to do. We have been working closely with them to do that.

We have also identified, as part of that process, some further work that we need to do to ensure that the platforms and all the players—whether it is the platform, whether it is the workers or whether it is the clients—that there is really clear understanding of obligations and responsibilities in terms of the work health and safety legislation and coordination of those. As you would be aware, in the legislation one person or one entity can have more than one duty, and they have got to coordinate those duties across the various parties. We are about to have a roundtable of all of the industry and also representatives from the unions. It will also include the co-regulators to do further work in terms of really ensuring that people understand what their obligations are and also how they can be effectively coordinated across groups. I think some of the issues that we find is that confusion or misunderstanding about how those obligations operate and also some practicalities about how to implement those obligations. We are working on that at the moment.

The other thing that we have been doing, in terms of an organisation, is that since 2016 we developed the *Work Health and Safety Roadmap for NSW*. We identified then through our horizon-scanning the changing nature of work—that the gig economy was an important feature that we needed to focus on. We built that in as a part of the *Work Health and Safety Roadmap*, which was launched in 2016. One of the actions that we took as part of the

road map was to also recommend the establishment of a Centre for Work Health and Safety that could do research into emerging issues. The Centre for Work Health and Safety, which my colleague Ms Buatava is the director of, was established in 2017. Work has been commissioned to look in particular at this issue and to focus on what are effective interventions. That work is underway, and we will factor that into our future interventions as well.

The Hon. COURTNEY HOUSSOS: When is that going to be finished?

Mr DUNPHY: The research?

The Hon. COURTNEY HOUSSOS: Yes.

Mr DUNPHY: I will pass to my colleague Ms Buatava.

Ms BUATAVA: The Centre for Work Health and Safety, as Mr Dunphy mentioned, was established in December 2017. We actually have quite a breadth of different projects ongoing at the moment looking at the future of work. It is a difficult question to answer about which bit you are referring to will conclude. Did you want me to talk you through, at a high level, some of the work that we have got going on pertaining to the future of work?

The Hon. COURTNEY HOUSSOS: That is okay. Mr Dunphy said this specific piece of work will inform you going forward. Was there something to do with gig workers?

Ms BUATAVA: There is some gig economy work going on at the moment, looking specifically at food delivery workers. We commenced this piece in February 2020. In addition to the New South Wales Government, our partners are Macquarie University and Behavioural Insights Australia. This work commenced in February and is due to conclude, I believe, in October of next year. Following the commencement of these proceedings last Monday, we have expedited the first two reports to make them available to this Committee. Essentially it is a four-phased piece of work. The first two phases have now concluded; they were really an understanding phase. Phase one looked at the perceptions and was trying to understand the food delivery workers. Phase two looked at the food delivery platforms. Both of those reports have now been concluded. What we did is undertook a very varied participatory approach to make sure that we had a really balanced understanding from both the food delivery worker and the food delivery platforms' perspective as it relates to work health and safety.

The Hon. COURTNEY HOUSSOS: As part of your phase two into platforms, did you get any access to the algorithms that the companies are using?

Ms BUATAVA: No, we did not look specifically at the algorithms. That was not pertinent to the questions that we were asked.

The CHAIR: What was the output of those two pieces of work?

Ms BUATAVA: We have two reports that have actually been made publicly available now on the Centre for Work Health and Safety website.

The CHAIR: They were made public last week, were they not?

Ms BUATAVA: On Friday. We actually rushed them through on Friday.

The CHAIR: I appreciate it.

Ms BUATAVA: They were not due to be delivered for a couple of weeks, but we have a wonderful team that has pulled together to get that ready for the Committee. There are some high-level findings I am happy to share with the Committee.

The CHAIR: Yes, I might just—Mr Banasiak has a follow-up question before we get too far away from that line of questioning. But can I just ask you to formally table those studies?

Ms BUATAVA: Of course. I do not have paper copies, but we will make sure that we send through the electronic versions.

The CHAIR: Great. Mr Banasiak wants to clarify a point.

The Hon. MARK BANASIAK: Mr Dunphy, this roundtable that you were having: Was that specifically for the food delivery gig economy or was it all, including rideshare as well?

Mr DUNPHY: No, it is for the food delivery economies or platforms. The purpose of that is we want to really focus on the issues that we are aware of, in terms of the notifications that I referred to, which were around delivery drivers.

The Hon. MARK BANASIAK: There is no intention to broaden that out to look at the other safety issues that surround rideshare?

Mr DUNPHY: No, not at this point. As a work health and safety regulator, everything that people do is work, and we do try to focus on the areas where we are not the lead agency. For shared delivery drivers the point-to-point regulator is the lead regulator. We would rely on its lead in terms of any interventions that were done in that space. But certainly we would work closely with it on that.

The Hon. ADAM SEARLE: Just on the work that you say you have done with various gig economy platforms, we have heard evidence from the riders themselves that after being onboarded or engaged they receive little to no work health and safety training, are given no safety equipment and that safety was not really even spoken about. There seems to be a pretty fundamental disconnect between the experience of the workers themselves, as expressed to this inquiry, and what you have just described about yourself as the regulator working with these platforms. What exactly is it that you have been doing with these platforms, and why is that not getting through to the workforce—or why has it not been implemented? It is like they are telling you one thing but something very different is happening in reality. What are you doing to ensure that there is a real safety culture in these organisations?

Mr DUNPHY: There are a couple of things. One of the reasons that we commissioned the research was really to understand what the issues were for workers. Phase one, which Ms Buatava just spoke about, was really designed because we did want to actually get the perspectives from workers as well to really understand what their issues were. That has identified a number of areas that we will focus on. Phase two also looked at the platforms and the issues identified through them. From that, what we do intend to do is that phase three of the research will actually look at evidence-based intervention. We are very keen then to understand, from what we know about the issues with the workers, what is working. It sounds simple, but because of the nature of the work it is quite complex—that a worker under the work health and safety legislation can be a subcontractor 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 as well. I think we have identified that there is a need to really clarify how those duties work together and how it is applied in the legislation. We are not saying, having dealt with the platforms, that all the issues have been resolved. We certainly have been working with them to improve their systems, their onboarding and all of those, but we recognise there is still more work to be done.

The Hon. ADAM SEARLE: Should we be satisfied—although you cannot talk about the details—that in relation to your investigation involving the two fatalities you will be looking at their systems?

Mr DUNPHY: We will be, yes. The area of interest that we look at is the systems of work, including the training, the onboarding and the coordination of any personal equipment, but also the management of the particular hazards and the hierarchy of hazard controls—how that has been carried out and been coordinated—and the coordination of the requirements across both the platform operator, the operator and also the clients, which would be the restaurant.

The Hon. COURTNEY HOUSSOS: In terms of the onboarding, can you tell us which platforms you have done that with? You said you have done some work on their induction programs.

Mr DUNPHY: I think primarily—and I do not have the full list—we started with Uber Eats as one of the major providers. We have been looking at all of the major providers—Deliveroo, as well, and Menulog I think are the others. I think there are some other players that we have also been engaged with.

The Hon. COURTNEY HOUSSOS: Can you provide them to us, on notice?

Mr DUNPHY: We can provide you with them on notice, yes. As we get notified of incidents and we become aware of providers, we have actually taken the step of working to engage with them to make sure we are satisfied that they have systems in place. So we have been working with them on that, yes.

The Hon. COURTNEY HOUSSOS: You said that the onboarding does involve arrangements around personal protective equipment [PPE]. What kind of PPE is that?

Mr DUNPHY: In terms of the onboarding, it depends on the provider. Again, it depends on the relationship. If a person has been engaged as a contractor then the platform will sell the equipment to the contractor and that has provided a standard body of equipment, which includes reflective bags. It includes high-visibility items and illumination items for their bicycles. So there is a package of materials. It is different, I think, for each operator, which we have been looking at.

The Hon. COURTNEY HOUSSOS: Do you have a best-practice guide for what they should be producing?

Mr DUNPHY: No, we do rely on the road safety rules in terms of what is required for bicyclists and scooters and motorbikes in terms of what sort of illumination they are required to have. We would rely on the Centre for Road Safety in terms of the advice in terms of what they should be doing. Having said that, part of the reason to have the roundtable is also to identify if there are any gaps there and whether we need to do any further work to share that information or clarify those requirements.

The Hon. SHAYNE MALLARD: They are clearly not getting the reflective protective clothing, though. Everywhere you go, you see them in black. I am a cyclist, so I want cycling safety aside from the gig economy. They are clearly not getting protective gear or advice to get protective gear. Even the bicycles are black. I went out at lunchtime and purposely looked at some in Redfern. They are very dangerous for them. Our roads are not safe enough for cycling, as you know. Infrastructure is not there, though we are rolling it out. So that is not coming through.

Mr DUNPHY: No. In terms of on-road safety, there are requirements under the road safety legislation for them to adhere, and there are penalties under the—

The Hon. SHAYNE MALLARD: Yes, I know. But we do not expect the police to blitz the gig economy workers. We expect the employer or the contractor to be making sure that they have got the safety equipment that they should have and the advice about safety equipment they should have. We do not want to roll the police out doing that; they have plenty of other things to be doing and there is a lot of resentment about police action on cyclists in this city.

Mr DUNPHY: Yes.

The Hon. SHAYNE MALLARD: But the needs to be another authority getting involved in this.

Mr DUNPHY: That is one of the reasons why our next step is to work out, through the interventions, what is the most practical way to actually provide advice and interventions, particularly around the PPE. PPE is probably the last resort in terms of work health and safety as a risk management tool. There are other things that people need to focus on first, but certainly we get that point and it is something that we will be—

The Hon. SHAYNE MALLARD: Also—sorry—Deliveroo, which I used to use, was found to be employing its workers and it left Australia.

The CHAIR: That was Foodora.

The Hon. SHAYNE MALLARD: I beg your pardon, it was Foodora. I recall its workers being in almost corporate gear: highly reflective and very appropriate for the environment they were working in. Is that one of the tests? I know the tests are multiple at the Federal level. Is it one of the tests in terms of defining them as an employee? Therefore, is there not a problem that the reluctance to provide high-visibility safety gear to gig workers is because it might trip the wire to becoming employees and cause issues?

Mr DUNPHY: Yes. It does sort of land on whether one of the workers is deemed to be an employee of the platform or whether they are a contractor. If they are a contractor, and particularly if they are contracting to multiple platforms, then they would be deemed to be an independent contractor. Under the legislation, that also deems them to be a person conducting a business or undertaking [PCBU]. Then, in the work health and safety regulation, there is an obligation to provide personal protective equipment. But the personal protective equipment that is required to be provided by the person conducting the business or undertaking is only where they direct the carrying out of work. They must provide that personal protective equipment to the workers or the workplace unless the personal protective equipment is provided by another PCBU. If they say, "Well, you're an independent contractor and you're providing the PPE," there is no obligation for them to provide it in those circumstances.

The Hon. SHAYNE MALLARD: Given their earnings are so low—the union gave us some research on that earlier today, which is worth having a look at—the last thing they want to do is spend money on not inexpensive clothing and helmets and, indeed, the bicycles. I think they hire those, but there is a hole here. There is a problem here.

Mr DUNPHY: That is one of the reasons why we do want to bring the parties together to really get some clarity around what is the best way forward and what is the most practical way forward to coordinate that in terms of the providers. The other thing is that these workers who are deemed to be independent contractors are not necessarily just working for one platform; they are working for multiple platforms. How do you coordinate the provision of PPE in those circumstances? For us it is about trying to get some clarity and some practicality about how you would coordinate that and how you would do it.

The CHAIR: Mr Dunphy, just before we go back to the Hon. Courtney Houssos, you made reference to whether a person is controlling the work or controlling the task.

Mr DUNPHY: Directing the carrying out of the work, yes.

The CHAIR: Have you obtained any legal advice on whether food delivery companies are directing or controlling the work under that definition, given that they are the ones who are directing where a rider needs to go to pick up food and where they need to go to deliver it?

Mr DUNPHY: Our position would be that they are directing the carrying out of the work. But that provision also allows them to rely on—if another PCBU has provided the equipment then they do not need to provide it. An independent contractor is also a worker, but they are also deemed to be a PCBU in those circumstances.

The CHAIR: But accepting that there is that caveat, which might result in some complexity in its practical execution, in the view of SafeWork NSW a platform is directing the work and therefore the obligation does arise to provide that equipment as a result. Is that an unreasonable interpretation?

Mr DUNPHY: That is right, unless—

The CHAIR: Subject to another PCBU having already provided that equipment.

Mr DUNPHY: Yes, that is right.

The CHAIR: Is there a requirement for a platform to be knowledgeable about whether another PCBU has provided that equipment?

Mr DUNPHY: There are general obligations at the beginning of the work health and safety legislation how you coordinate that, because it is recognised that multiple parties can have the same duty.

The CHAIR: Yes, because it is not uncommon in workplace health and safety law.

Mr DUNPHY: No. Safe Work Australia has identified that as an area where there is need for more regulatory or legislative clarity around how the laws apply to those obligations.

The CHAIR: To crudely put this into a real-world context, is Uber Eats required to check whether a person riding on their platform has been provided with equipment for Deliveroo or vice versa?

Mr DUNPHY: No, not for the other platforms. They would be required to ensure that the contractors that they are working with have got equipment or PPE, but they would also be required to ensure that the other systems of work are appropriate as well.

The CHAIR: It is not like Uber Eats can come to you as the regulator and say, "Look, we just assumed that Deliveroo had provided them the equipment."

Mr DUNPHY: No. If they are engaging people, they would need to be able to demonstrate that they had a system in place.

The CHAIR: Because the duty belongs to them?

Mr DUNPHY: Yes, that is right. They cannot contract out that duty and say it is somebody else's.

The CHAIR: Or assume that someone else has fulfilled it.

Mr DUNPHY: No, that is right.

The Hon. COURTNEY HOUSSOS: I want to come back to the part of your testimony where you said you were not familiar with the platform of HungryPanda before you were notified of the tragic death of Mr Chen. What activity are you now undertaking to find platforms that are providing work? Are you doing any proactive work to identify these platforms before you get notified?

Mr DUNPHY: One of the things, as you know, with the changing nature of work is it can change weekly in terms of new parties, so there is a constant need for us to monitor this. 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. Part of the roundtable is also about trying to make sure that we have a network within the industry sector so that we are aware of all the players and we are engaging with them regularly.

The CHAIR: Can I just turn to two other matters quickly, unless other Committee members want to jump in?

The Hon. SHAYNE MALLARD: I have one other question about the Boland review.

The CHAIR: We will get to the Boland review. Ms Buatava, we have not forgotten that you want to provide us with some general information about your studies either, we will get to that too. SafeWork NSW is predominantly funded through a premium levy on employers, is it not?

Mr DUNPHY: That is correct. Primarily. We are also funded through fees for licenses and other commercial—

The CHAIR: But overwhelmingly your funding comes from that premium levy, does it not?

Mr DUNPHY: —That is correct, yes.

The CHAIR: And that is a levy that is imposed on people who pay into the workers compensation scheme, is that correct?

Mr DUNPHY: That is correct, yes.

The CHAIR: And the rationale for that is to recover the cost of enforcement from people who are enforcing and regulating, not the taxpayer at large, would you agree?

Mr DUNPHY: That is right. It is designed for the people who are creating the risk to be paying for the system.

The CHAIR: To the extent to which you are undertaking enforcement obligations for the gig economy, that would only be cost recovered from the gig economy to the extent to which they pay premiums towards the workers compensation system, is that correct?

Mr DUNPHY: That is right, yes, correct.

The CHAIR: So far the evidence that we have is that none of them provide any input into the premium pool for the New South Wales workers compensation system, do you have any evidence to the contrary?

Mr DUNPHY: Yes. So, all of them would have employers—

The CHAIR: Other than for their direct employees, not necessarily the people who are working on their platforms.

Mr DUNPHY: —That is right. I do not know all of the platforms, whether they do employ directly some of the delivery workers. I think Domino's pizza might be an example of one who engages the drivers directly, but generally you are right they would not necessarily be deemed to be employees and necessarily covered under the workers compensation.

The CHAIR: Right now, effectively, your enforcement activities for the gig economy are being paid for by other employers?

Mr DUNPHY: We do not apportion our efforts to who pays.

The CHAIR: That is not an unreasonable conclusion for this Committee to draw?

Mr DUNPHY: Certainly we receive an amount through the workers comp operational fund and that is used for our compliance purposes, yes.

The CHAIR: Forgive me if I am wrong here, but to the extent to which there are a few agencies who have recourse to that fund and I believe SafeWork NSW, for valid and sound reasons are the biggest claimants on it, is that correct?

Mr DUNPHY: That is correct. Well, I believe so.

The CHAIR: I think overwhelmingly, from what we have learned through other inquiries, you are. No one begrudges you that position because your work is very important. But, right now the funding mechanism for your work depends on employers' premiums for which the main people whose risks you are managing are not contributing, is that an unreasonable conclusion?

Mr DUNPHY: That is probably a fair explanation, yes.

The Hon. SHAYNE MALLARD: In your submission you referenced the 2018 Boland review. You have to assume that not all of us have a strong trade union background, as our chair does.

The CHAIR: If you work very hard you can get one.

The Hon. SHAYNE MALLARD: Some of us are not obsessed. Would you give an overview of the Boland review and headline recommendations and how they can relate to the gig economy.

Mr DUNPHY: The Boland review was the first major review since the introduction of the work, health and safety national model legislation. There was originally a panel, the Crompton review, which identified and developed the original work health and safety model, which all jurisdictions—except Western Australia and Victoria, I think Western Australia is in the process of implementing and Victoria is yet to—in the State and Commonwealth have adopted the model legislation. The model legislation is designed around an Act, a model regulation and then also model codes of practice.

The Hon. SHAYNE MALLARD: We had national laws and each State Parliament passed mirroring laws.

Mr DUNPHY: Yes, that is right. Each one passed their own. The legislation was historically based on Robbins legislation, which is the UK legislation, which is designed about codified common law and putting in place general duties in the legislation. Traditionally that has been general duties for employers and employees to be carrying out work. When the new legislation was introduced the duty for employers was very extensively broadened to the concept of a person conducting a business or an undertaking, which brought into play really any sort of activity whether for fee or not or profit or not would be captured under those provisions. It was a very broad expansion and that was really designed specifically for this purpose.

There was a recognition that the nature of work has changed significantly and employer/employee relationships are only one component of the types of arrangements that can be in place. It was designed to do that. That was introduced. The other change was that previously the obligations were on employees. The obligation now, the general duty, is on what is called "workers" and that has been extensively broadened out to include employees, subcontractors and contractors, employees of subcontractors and contractors, volunteers, students doing work experience, outworkers, it is a very broad duty now.

The Hon. SHAYNE MALLARD: The Boland review recommended these changes, is that we you are saying?

Mr DUNPHY: I am saying that the Crompton review did that and now we move to the Boland review. With the Boland review the legislation had been in place since 2011. At the national level it was always agreed that there would be a review to make sure that the new provisions were working effectively and whether there was a need for any changes to the nature of the duties. The Boland review looked at all of the provisions and there was extensive public consultation nationally in terms of people raising any concerns they had with the operation of the model legislation. The Boland review has made some minor changes and suggested recommendations to change the legislation, which the jurisdictions are adopting.

In terms of the gig economy the Boland review confirmed that the changes that were made to the national model legislation are fit for purpose essentially in that they have broadened out the duties. They have provided a good framework for anticipating future changes in legislation. What the Boland review recommended and identified is that while the Act, the regulations and the code seems to be a good framework for the changing nature of work there is still an opportunity to make some further changes to the legislation and there is an opportunity to provide advice around how those provisions apply, particularly the coordination of duties between duty holders. There was a recommendation to provide further advice in relation to the general principles and the general requirements for duty holders under the Act. Safe Work Australia is in the process now of providing some further advice on that.

The Hon. SHAYNE MALLARD: That could feed into reforms adopted nationally that could address some of the issues we are talking about?

Mr DUNPHY: Yes. I think the way the legislation is designed, its principal base is the Act, which is probably the best framework you can have to allow for everything you can ever anticipate in the future because it is very broad general duties, it is the codification of common law duties, essentially. That provides you with a lot of scope. There is always devil in the detail and then there is always a need to provide stakeholders and actors in the system with greater clarity of what compliance looks like and that is down to the codes where we can provide that clarity and practical advice and there is probably more scope there where we can provide more practical advice either around guidance material or codes of practice.

The Hon. SHAYNE MALLARD: The chair asked a question of the trade union earlier today about in an ideal world you have these reforms at a national level so it is uniform. They agree with that but then said if the

national scheme cannot get it done then the State should. Your view would be a national approach to these issues is the way to go and hopes this Committee's report will actually feed into that process.

Mr DUNPHY: I think the other thing with this is that it is important to try to get consistency across jurisdictions because the other thing, from a regulators point of view that we recognise is that the more you have different changes in each jurisdiction the more complicated it gets for the platforms to be able to comply and the greater chance of messages getting mixed up and people misunderstanding their obligations. To have a nationally agreed approach is certainly the Rolls Royce in terms of a solution and certainly at Safe Work Australia we are working towards trying to achieve that, but recognising if that is not practical we will also look at what we can do at the State level as well.

The CHAIR: But the State Minister retains the power to make a regulation, does he not?

Mr DUNPHY: Absolutely, yes. That is correct. We can make legislation. There is an intergovernmental agreement as part of the national model legislation that before we make any changes unilaterally at the State-level, we do need to first take that to the national body.

The CHAIR: Sure. It is the case is it not that Victoria is yet to agree to the uniform system?

Mr DUNPHY: That is correct which is why in Victoria it has been a bit more problematic because they have still got the older legislation which focuses more on the employer-employee obligations.

The CHAIR: But we should distinguish our legal set-up from Victoria on that basis, is that correct?

Mr DUNPHY: Absolutely, yes.

The CHAIR: Where is Western Australia in terms of the actual rollout because for a time period they refused to sign up to the national—

Mr DUNPHY: They did. My understanding is that they have agreed to it and they are now in the process of trying to get through their Parliament.

The CHAIR: But they are yet to join the national framework? Because that is my understanding too.

Mr DUNPHY: That is right, yes.

The CHAIR: The Government has committed to doing it.

Mr DUNPHY: They have committed to it but they are going through the process of getting those changes Parliament.

The CHAIR: And the Western Australian Government which opposed it was the previous Government not the current Government—to the joining of the national laws—is my understanding.

Mr DUNPHY: I cannot recall who was in at the time but each jurisdiction has certainly gone through a process of at some point agreeing or not agreeing and then adopting it.

The Hon. SHAYNE MALLARD: I would potentially question the relevance.

The CHAIR: Just to further tease out Mr Mallard's line of questioning. Is Safe Work Australia currently proposing any activity in this respect?

Mr DUNPHY: It is. It is working with all the jurisdictions on developing some guidance around how the duties actually apply to delivery workers and delivery platforms.

The CHAIR: This guidance is to the existing obligations on how the model laws apply, is that correct?

Mr DUNPHY: That is correct, yes.

The CHAIR: But is Safe Work Australia leading any work to develop a model regulation?

Mr DUNPHY: No, not at this point.

The CHAIR: Is there any talk of a model regulation being developed at a Commonwealth level?

Mr DUNPHY: No, there was no recommendation to make model regulations in this space but there was a recommendation of the Boland inquiry to provide further guidance.

The CHAIR: How long does it usually take Safe Work Australia and other intergovernmental bodies to develop a regulation and how long does it usually take for Ministers to agree and roll it out?

Mr DUNPHY: I think it depends on the priority of the issue. If it is an urgent matter it can move—

The CHAIR: Fast.

Mr DUNPHY: —fast. If it is a machinery matter that needs to be done that can take some longer time. I probably have never really thought about how long it has taken but it depends on the priority of matters.

The CHAIR: The Boland review was handed down in 2018, yes?

Mr DUNPHY: That is correct from my understanding, yes.

The CHAIR: But the intergovernmental processes to do with Boland are still ongoing. Is that correct?

Mr DUNPHY: That is right. There still is work that is being done.

The CHAIR: So in general in respect to other workplace risks in New South Wales, the regulator and this particular Government has at various points decided there is a case for New South Wales to lead and implement its own regulations ahead of other jurisdictions, is that correct?

Mr DUNPHY: There is nothing to stop jurisdictions from doing that other than you do need to consult at a national level. Certainly there is the ability to do that. You have to weigh up the benefits of doing something inconsistent with other jurisdictions and we are talking about national-international platforms and whether that would cause problems so they are things you would need to weigh up.

The CHAIR: Is this an unfair description? Ministers of this Government, all governments, of both political persuasions assess the risk to their jurisdiction and make a decision accordingly as to whether or not they need to act unilaterally.

Mr DUNPHY: I am not really in the political sphere but I understand that is always open to the Parliament.

The CHAIR: One factor that might distinguish the New South Wales context from others is that we have had more people dying in these industries than other jurisdictions. In fact, we have had one person in Melbourne in the last three months and none in Queensland, who are the most comparable States to ours. We have had at least two here. Is that fair?

Mr DUNPHY: The problem with the small numbers, though I hate to say it because they are tragic and everyone is an individual, is that with fatalities it is sometimes hard to compare those small numbers and whether the trends are comparable—

The CHAIR: Sure, that is fair.

Mr DUNPHY: —in terms of whether they reflect the underlying risk.

The CHAIR: But some of these platforms only work in New South Wales and not other jurisdictions, do you agree? I don't believe HungryPanda's in Tasmania, for example.

Mr DUNPHY: I do not know whether they work in all jurisdictions. Certainly a lot of them work more effectively in built up environments. Many of them target the more built up environments where the business model works effectively.

The CHAIR: Turning to another matter, under the Work Health and Safety Act workers have the right to form work safety groups don't they?

Mr DUNPHY: That is correct, yes.

The CHAIR: Can you describe how a worker would go about forming such a group, particularly in the context of the gig economy?

Mr DUNPHY: So you can request to have a health and safety representative so if one person asks for it then an employer needs to organise for a health and safety representative to be appointed. If a health and safety representative asks for a committee to be formed then the person conducting a business or undertaking [PCBU] has to make arrangements to consult with the workers on work groups and representation both for health and safety representation and also committees. So there is a process for identifying who the health and safety representative represents in terms of those groups.

The CHAIR: How many attempts have there been to form work safety groups in gig economy companies which you have engaged?

Mr DUNPHY: There is only one I am aware of but there could be more. I do not have those figures at hand but I know there was one because I think it went to the Industrial Relations Commission [IRC]. It was one

matter which we were involved in and we were asked to assist. It was not resolved and then it was resolved through the IRC. I think that was Uber Eats, if I am correct.

The CHAIR: Was it Deliveroo?

Mr DUNPHY: Maybe. I might be confusing the platform but there was one matter. Certainly I can provide that and confirm that.

The CHAIR: We had evidence that there was an attempt to form a worker safety group at Deliveroo last week and an application was made to appoint an health and safety representative [HSR] and then to form a committee which then triggered the election process. But that election process is unresolved and that is the dispute that has either required the involvement of you or the IRC. Are you in a position to provide us with any evidence about whether, firstly, what we were told is correct and, secondly, what SafeWork NSW's role is in the process?

Mr DUNPHY: Under the legislation if there is a dispute you can call on the assistance of an inspector to assist if there is no agreement between the PCBU and the workers in terms of the arrangements. An inspector can then come in and help facilitate. If again the inspector cannot get agreement between the parties, there is the final option of getting the decision from the IRC. I believe that the matter I was referring to was resolved a number of months ago so it might be a different platform.

The CHAIR: Yes, we might not be talking about the same incident.

Mr DUNPHY: But I am happy to provide any details.

The CHAIR: On notice, are you able to provide as much information as you can about the Uber Eats matter? Equally can you provide on notice any information you have about the Deliveroo matter? We might be able to forward you the evidence as well from one of those workers.

Mr DUNPHY: I am happy to have a look at that and see what we can provide.

The CHAIR: Fair enough. Ms Buatava, you were wanting to provide us with some additional information and the headline summaries of your research. I think now would probably be a good opportunity.

Ms BUATAVA: Sure. Further to what Mr Dunphy was saying earlier, we have some research on the gig economy. Generally the Centre for Work Health and Safety has quite a number of projects looking at the changing nature of work really with two remits. One is to insure the prevention of harm and the other is to ensure that we are a prepared regulator in future. So we have, for example, a number of pieces of work looking at artificial intelligence. We are looking at robotics or collaborative robots and the interaction between people and robots in the future.

We have quite an array of work looking to the future, including ensuring how SafeWork is a prepared regulator. I know we are running out of time but I would encourage you out of session to look at the Centre for Work Health and Safety website which has all of that information available publicly and that is certainly our remit. In line with our remit, it is not about producing a publication. We are really trying to do research that brings together the worker, the industry, academia and government. But then to work together on practical, tangible things that actually affect workplace health and safety. We are not looking for kudos for a technical report—just to reiterate that. Ergo the gig economy that I mentioned earlier, we have been liaising, through our partners Behavioural Insights Australia, Macquarie University and the Centre for Work Health and Safety.

We have been working in partnership with initially the platform and the workers in the first instance. You get a good understanding of that work, health and safety environment and how it can prevent harm, what does it look like there? We will then move into the second part of that research which will start to again work with all of the industry on how do we address it, not just from the regulator's perspective but from the platform's perspective and from the worker's perspective.

The research we are referring to specifically has actually taken quite a participatory approach and I believe the reason we have rushed through the reports is because we believe it is a very balanced approach. I have heard quite a few times through the testimony over the hearing that the evidence base is poor. I will note, this is focussing very much on work, health and safety though, not industrial relations but I believe that work, health and safety gets watered down a little bit when we join the two, not to say that they are not inter-related. As it relates to the way that we have undertaken the research, not only have we done a nationwide survey in four different languages, but also we have done some seme-structured interviews with food delivery workers to corroborate. We have also had researchers who have observed areas where there is a lot of food deliver worker activity.

We have had a look at the really vocal—and there is quite a few social media networks with a lot of commentary from food delivery workers. I think one has 14,000-odd members on there. I think there are seven or so of different networks of a mean of 4,000-odd memberships. We also had some of our researchers undertake some first-hand experience so not only register with a food delivery platform but also undertake some work or a shift with a food delivery platform. In addition, we have engaged with the platforms and conducted 11 semi structured interviews in that guise. The report and the findings from both of those two pieces of work have now been placed onto our website and, as mentioned before, will be tabled out of session. I am happy to talk about the higher level, I think the key focus though from my perspective is that I feel we have very balanced information about the understanding of work, health and safety, what are the key work, health and safety areas of concern to now take us into phase three and four which is intended to work on solutions together with the entire industry and then also to test the efficacy of those solutions.

The CHAIR: I look forward to reading your report. Given we have three minutes I might go to questions. Mr Dunphy, just moving aside from the food and ride-share aspects of the gig economy work, have you had an engagement with the Mable platform by any chance?

Mr DUNPHY: Not myself personally but I can certainly check.

The CHAIR: Would you?

Mr DUNPHY: Yes.

The CHAIR: The Mable platform sources gig economy workers to provide either predominantly assistance to disabled people with benefits under the NDIS and equally Aged Care in-home support. On our first hearing day it was said that it proposes special risks in that workers are being intermediated into people's homes, particularly high-risk and high-need people under the NDIS and in Aged Care. Are you able to provide the committee any information as to any SafeWork engagement? You might need to do this on notice.

Mr DUNPHY: Yes.

The CHAIR: Will you tell us what SafeWork NSW is doing in terms of the work at home aspects of workplace risk, be it Mable or others? Will you include incidentally any thinking you have got in respect to the special risk of domestic violence now that we have seen a big shift towards people working from home in response to the pandemic?

Mr DUNPHY: In terms of Mable, I will need to take that on notice and I will provide the committee with any information we have got in terms of that. I know though that we have been doings lots of work with the NDIS certainly in the provision of services. It would not surprise me if work has been done that related to that so I will find out. Certainly working from home during the COVID period, in particular, there has been a huge change in the way people have been arranging their work. We have been providing a significant amount of guidance around working from home and advice which is on our website around arrangements and what people need to do. We also recognise that it was unusual period in that people were ordered or had to work from home at very short notice and that they may not necessarily have all of the assessments and things in place. We have provided very practical advice around what people needed to do during that period.

SafeWork also has a lot of advice on working from home and it has been an ongoing area of advice for a number of years now in terms of what employers and workers need to do to ensure safety while people are working from home. We continue to monitor that space and continue to recognise that, particularly we know during the COVID period, mental health has been an issue and musculoskeletal disorders. We are also conscious of making sure people are working ergonomically while working at home. We do also recognise the risk of domestic violence so we do work with our other counterparts in terms of providing advice and assistance to employers about providing flexibility, particularly where working from home may put workers at greater risk in those circumstances. We are continuing to work on those and continuing to provide further advice in that space.

The CHAIR: On notice, are you able to provide samples or the actual guidance that you have been providing to people perhaps in the reverse order that you described, that is, starting from the advice you issued during pandemic and all the factor that a person conducting a business or undertaking [PCBU] or a worker should be taking into account when working from home?

Mr DUNPHY: Yes.

The CHAIR: And then the general advice that you have providing for a number of years it would be very useful?

Mr DUNPHY: Yes.

The CHAIR: We appreciate the time you have made available to the committee. We also appreciate the fact that you did change your diary to suit adjustments as well which we also appreciate. You have taken some questions on notice. You will have 21 days to provide answers to the committee.

(The witnesses withdrew.)

(Short adjournment)

CARMEL DONNELLY, Chief Executive, State Insurance Regulatory Authority, affirmed and examined

PETRINA CASEY, Director, Health Policy, Prevention and Supervision, State Insurance Regulatory Authority, affirmed and examined

DARREN PARKER, Executive Director, Workers and Home Building Compensation Regulation, State Insurance Regulatory Authority, affirmed and examined

CHRIS COLQUHOUN, Chief Medical Officer, icare, affirmed and examined

ROB CRAIG, Interim Group Executive, Personal Injury, icare, affirmed and examined

The CHAIR: I thank the representatives of the State Insurance Regulatory Authority and icare for your attendance this afternoon. We are currently experiencing some broadcasting issues so Hansard will use a backup audio recording. Consequently, the Committee will take your evidence but the transcript will need to be certified as being correct and accurate prior to being published. Are all witnesses happy with that?

Ms DONNELLY: Yes.

Mr CRAIG: That is fine.

The CHAIR: I will also ask Committee members to record their questions on their iPhones and then we can provide that record centrally. This is the can-do spirit of the New South Wales Parliament.

Ms DONNELLY: Mr Chair, noting the can-do spirit, can I seek some reassurance that the same protections will apply in terms of members taking recordings on their iPhones: They will treat that as if it was the transcript and it is not going to be played somewhere on the radio?

The CHAIR: Can I say that any person who is recording a hearing is technically allowed to do so as long as it is a public hearing. I think we could all commit that we would only provide the record to Hansard if it is requested, otherwise we will destroy the records. Is that fine, given that there will be separate audio recordings in some form taken? It is not in-camera evidence.

The Hon. WES FANG: In effect there is no issue, not that I believe anybody is going to use it.

The CHAIR: For the purposes of giving evidence there is technically no distinction between this and a broadcast hearing.

Ms DONNELLY: That is a good point. I am just thinking on my feet. That makes sense.

The CHAIR: We will proceed on the basis that the predominant purpose of the recording is to assist Hansard and nothing further. It is also a public hearing. Thank you for your patience. After all that, I am now advised that we are back on air. So, I invite each organisation to make a short opening statement.

Ms DONNELLY: I am going to give an opening statement briefly. I do not believe that my colleagues will. I would like to welcome the inquiry and acknowledge that it is a very important topic, which is relevant to both [inaudible] and mandatory personal insurance in New South Wales, and as icare as the operator and provider of that mandatory insurance. The State Insurance Regulatory Authority's [SIRA] submission covered some relevant matters, but clearly there is a broad range of questions that we have tried to anticipate: obviously workers compensation and the gig economy, mentally healthy workplaces, the improvement of workforce participation for people with disability—as we mentioned in our submission—and obviously the impact of COVID. But I would like to commence by offering further information, if it would assist the Committee, noting that this is a long-running and quite exploratory inquiry. We are open to taking some matters on notice, even things that might take us more than the traditional 21 days if that will assist the Committee.

The CHAIR: Thank you, Ms Donnelly. Would representatives from icare like to make an opening statement?

Mr CRAIG: We are happy to be working with SIRA on this, and in a similar way because of the long-running and quite complex nature of [inaudible] on the research or other aspects that may be required to actually understand the issues.

The CHAIR: Thank you. I note at the outset that icare representatives made themselves available at relatively short notice, and we appreciate the time sacrifice that they have made. Of course, we always appreciate

representatives from SIRA, but I specifically note that icare came at the Committee's request at relatively short notice.

Mr CRAIG: And happy to be here.

The CHAIR: Thank you very much. I will start with some questions to do with some of the case studies that have arisen in the Committee's hearings, and these questions are directed more to icare than SIRA at this point in time, although I imagine that we will explore some of the legal issues with SIRA as well. Are you aware of the case of two gig economy workers who were engaged in food delivery recently dying on the job?

Mr CRAIG: Yes, we have awareness of the issues.

The CHAIR: And are you specifically aware of the incident to do with a worker who was riding for HungryPanda?

Mr CRAIG: Yes.

The CHAIR: And you are equally aware of one who was riding for Uber Eats?

Mr CRAIG: Mr Fredy, I believe?

The CHAIR: Yes, Mr Fredy.

Mr CRAIG: I do not have as much information on that one, but certainly on the first one I do.

The CHAIR: Could you outline what information icare has, and address specifically two questions: Whether or not a claim has been received for that worker and whether you are in a position to provide any preliminary advice or assessment as to whether or not this claim would be valid under existing workers compensation laws?

Mr CRAIG: For Mr Chen, I can confirm that a claim has been received. I got notification at 3.15 p.m. today that a claim had been lodged by the widow's solicitor. A claim being lodged allows us to investigate a situation to see whether or not we can accept liability for that claim. My understanding overall is that it is likely that this as a self-employed sole trader they are outside the workers compensation legislation and therefore would not be covered. We need to do the investigation to understand that, and now that we have the claim we absolutely can and will do that.

The CHAIR: Before I hand to my colleague I might ask you some questions of detail to unpack that sequence, if that is okay?

Mr CRAIG: Certainly.

The CHAIR: You say that you have to decide liability, do you have the ability to decide that on a provisional basis and then on a final basis?

Mr CRAIG: That is correct.

The CHAIR: And your assessment of a provisional liability will turn effectively on the eligibility to make a claim, is that what you are saying?

Mr CRAIG: In this instance, I believe that will be the case.

The CHAIR: And when you say because this person looks like they were a self-employed sole trader, you are saying that under the definition of the existing workers compensation legislation that would preclude them from making a claim?

Mr CRAIG: Yes, correct.

The CHAIR: So it is not like icare is exercising discretion here.

Mr CRAIG: Correct. We have no discretion. We have to apply the legislation and the rules et cetera, so there is no discretion on these at all.

The CHAIR: Is it possible that there are any grounds, compassionate or otherwise, in which it is possible for icare to make a decision to accept any liability or make any payment whatsoever?

Mr CRAIG: I believe not.

The CHAIR: I want to understand what the consequences of that would be. If this person's claim was eligible, what with the family be entitled to?

Mr CRAIG: I am sorry—I understand the question but I do not know the answer to the question.

The CHAIR: A person who is eligible who dies at work, what are they entitled to claim from the workers compensation scheme? So a death benefit, if a person makes a claim—

Mr DAVID SHOEBRIDGE: What are their relatives entitled to?

Mr CRAIG: I do not know the quantum of the death benefit, I am sorry.

The CHAIR: Does SIRA know?

Ms DONNELLY: Absolutely. They would be entitled to a death benefit—which is over $800,000—in a lump sum and reasonable funeral expenses up to $15,000. I do not know if Mr Parker wants to add to that. In these particular tragic events, the workers who were killed were working on New South Wales roads, so they would also have eligibility for a CTP claim.

The CHAIR: I believe we will get to that, Ms Donnelly. Mr Parker, just to confirm: A person who dies at work, who is covered by workers compensation legislation, is entitled to $800,000 death benefit and reasonable funeral expenses to the value of $15,000.

Mr PARKER: Yes, that is correct: $834,200; the funeral expenses, as you mentioned, Mr Mookhey; and also reasonable expenses relating to the transporting of the deceased.

The CHAIR: Would you agree that the benefit that would be provided is not insignificant?

Ms DONNELLY: No, it is actually one of the more generous benefits across jurisdictions.

The CHAIR: Mr Shoebridge, do you want to take over the questioning?

Mr DAVID SHOEBRIDGE: Yes. Mr Craig, the question of whether or not someone is covered by workers compensation and they are a worker, including a deemed worker, is not as straightforward as just saying, "gig workers out" or "gig workers in". It is on a case-by-case basis, is it not?

Mr CRAIG: Correct.

Mr DAVID SHOEBRIDGE: On what basis are you saying that it is your initial assumption that this worker will not be covered?

Mr CRAIG: There are a couple of things. I think there has been another example with this particular company where they have looked at the contract that exists between the worker and the company. So there has been a little bit of work done on that, but it has not been done on this particular case.

Mr DAVID SHOEBRIDGE: Are you saying there has been at least one other claim made in relation to HungryPanda?

Mr CRAIG: There has been some research done to try to understand it.

Mr DAVID SHOEBRIDGE: Alright.

The CHAIR: Sorry—of this specific company or in general?

Mr CRAIG: No, on this specific company.

Mr DAVID SHOEBRIDGE: What are the indicia that are relevant in your initial view—it is wrong to call it "an assessment"—that this may well not be covered?

Mr CRAIG: The nature of the working relationship that exists between the worker, as it were, and the platform company.

Mr DAVID SHOEBRIDGE: I have to say that just "the nature of the relationship" is not a particularly informative response—

Mr CRAIG: Yes.

Mr DAVID SHOEBRIDGE: —because the nature of the relationship could be positive or negative. What are the aspects of the relationship that you say suggest that they are not a worker or a deemed worker?

Dr COLQUHOUN: Perhaps I can jump in there, just bringing up some previous case law which I believe the Chair is well across historically: *Hollis v Vabu Pty Ltd* and also *Stevens v Brodribb Sawmilling Co. Pty Ltd*. I believe there are a number of factors or indicia, Mr Shoebridge, that are required to be assessed to

understand the relationship on a case-by-case basis to try to determine whether or not a worker is a deemed worker under the Workers Compensation Act 1987.

Mr DAVID SHOEBRIDGE: I understand the basic employment law about the indicia of control and the like. But I suppose I was asking you, in light of the deemed worker provisions in the Workers Compensation Act in particular, whether you have considered those.

Dr COLQUHOUN: Mr Shoebridge, maybe I can take that one as well. We were notified of this claim being lodged approximately one hour ago. So we have not had a chance to actually investigate further.

Mr DAVID SHOEBRIDGE: Dr Colquhoun, I am not asking you to have had that assessment in one hour since having had this claim, but I think Mr Craig indicated that he had looked at the nature of the relationship, or somebody in icare had looked at the nature of the relationship with HungryPanda earlier, and I am asking you whether or not you looked at the deemed worker provisions.

Mr CRAIG: We have not looked at this thoroughly and we will look at this thoroughly as part of the investigation.

Mr DAVID SHOEBRIDGE: I think SIRA deals with this to some extent in its submission. They talk about the engagement and contractual arrangements of each gig economy business model varying and needing to look at the specific characteristics of the arrangements on a case-by-case basis. Can you add any detail to that? What are the kind of circumstances that either entitle or disentitle somebody in the gig economy?

Ms DONNELLY: I will make a few comments and see if either of my colleagues want to add. We most certainly do expect that every single claim would be assessed individually on its merits and encourage people to make a claim, not to rule themselves out. Obviously a lot of this turns on whether or not a person is an employee or an independent contractor, in reference to the '98 Act, as we call it—Workplace Injury Management and Workers Compensation Act 1998—and some of the Committee members are extraordinarily familiar with that. Some of the features are around the contract of service; around the type of legal relationship; the right and the degree of control, for instance, over the employee—whether or not the employee is subject to directions; factors like the mode of remuneration; whether or not they provide their own equipment; and there are a number of other factors. I do not know if my colleagues would like to add anything further. Clearly it is complex.

The CHAIR: Ms Donnelly, are you describing guidance that SIRA has provided to the operator or anyone else in the marketplace as to how they should be interpreting that part of the law? What is the status of that?

Ms DONNELLY: I might see if Mr Parker can add. This is our interpretation of the law. We do not—

The CHAIR: As it applies to the gig economy or independent contracting?

Ms DONNELLY: Independent contracting. There is nothing in the legislation, which, as you would be aware, is quite old legislation, that gives clarity or probably even anticipated the gig economy.

The CHAIR: Yes.

Ms DONNELLY: So we are, in applying the law, really looking at: Is this person a worker or are they a contractor? And so these are some of the criteria. We will give guidance and our expectation, which has been communicated, is that each claim will be looked at independently. Once an insurer has made a decision, we and also, I believe, the Workers Compensation Independent Review Office will also encourage people to dispute that and try to test the provisions.

Mr DAVID SHOEBRIDGE: The Workers Compensation Act, in its various iterations, has been amended to pick up changing forms of work. It was amended to pick up outworkers, and they were expressly roped in.

Ms DONNELLY: In schedule 1, yes.

Mr DAVID SHOEBRIDGE: Yes. It was amended to pick up salespersons, canvassers and collectors. They were roped in. It was amended to pick up labour-hire service arrangements. They were roped in. It was amended to pick up a bunch of rural workers who often work on piece rates. From memory, I think it also picks up boxers and circus workers. Is the State Government considering keeping it up to date and roping in gig workers? I know you have had some sort of task force going for the past three years. When are we going to see it?

Ms DONNELLY: I cannot speak for the State Government. Obviously it is ultimately a matter for government and the Parliament, but let me talk to you about—we did anticipate that with the emergence of the gig economy there was definitely uncertainty and that this may be a growing issue. SIRA convened a roundtable

in 2017 and then several other roundtable reference group discussions through 2018, and also had input into and was part of discussions at the Safe Work Australia level, both with the review of the model work health and safety laws but also a commissioning of CSIRO Data61 to look at future of work, and Safe Work Australia remains a forum for discussion.

The amendment of schedule 1, the deemed worker, would be one of the options open, most certainly. The consultation that we have done, and I have reviewed most of the submissions to this inquiry and, indeed, what I am about to say is reflected there as well, is a question of which of the available options would be appropriate from the perspective of different stakeholders. Some of them are drawing attention to the fact that while they would want to see wellbeing, treatment, care, income support, all of the objectives of workers compensation available, they are putting the view that it should be addressed nationally or in a way that is harmonised, even if it is at State level. And certainly those are the sorts of discussions that would potentially happen at Safe Work Australia.

In terms of the deemed worker, it is certainly something that is an option that is available and a matter for government and Parliament. I think there are some stakeholder views that I am aware of that it may only shift the boundary of definition or not allow enough alignment between either jurisdictions geographically in terms of workers compensation or across other areas where these individuals are either captured or not captured in terms of regulation. But one of the other insights is that there is quite a bit of diversity amongst gig economy workers. From the consultation that SIRA has done, there are people who seem quite content with the independence and the autonomy and who do not seek workers compensation benefits.

At the other extreme—and there are many different ways that people describe this—but as I have come to understand it there is a class of worker that is working on demand, supported by a digital platform; there is a reasonable amount of control from the platform proprietor; they are effectively working on standby, so they clock on and they are on standby; and they are delivering local services in person on a demand basis on the roads. For all of us, we know that using the roads is one of the more dangerous things that most people do. That is a high-risk working environment and they are under time pressure. In some of that classification, there may be a role for using that deemed worker modification and it might be more acceptable to some stakeholders and more important for some gig economy workers than for others.

Mr DAVID SHOEBRIDGE: At least one gig operator, Ola, said that it has no resistance at all to workers compensation benefits being rolled out and covering its workforce provided it is ubiquitous. That was a pretty clear indication to me that big parts of the industry are not going to resist workers compensation benefits being rolled out to protect the workforce. Does that reflect your consultation with industry?

Ms DONNELLY: I was not able to hear Ola's evidence, so I am not able to confirm that. I certainly think that there are different views, but that drives home to me that there is complexity and there would need to be very good stakeholder consultation about what the various options are.

The CHAIR: Ms Donnelly, just on one aspect of your answer to Mr Shoebridge in which you made reference to the Gig Economy Stakeholder Reference Group, which, to be fair, you also reference in your submission.

Ms DONNELLY: Yes.

The CHAIR: Did that result in a report of any kind?

Ms DONNELLY: It did not result in a report. We set it up with terms of reference quite clearly at official level, not from the Government, but from SIRA, with our intention to get to understand the perspectives of a range of different stakeholders in that space.

The CHAIR: Can I invite you to provide us on notice with the terms of reference of the group, the attendees of the group, the number of sessions that were held with the group and any document that you have or that you might be in a position to create that accurately records the findings of the group, or at least the discussion that the group had?

Ms DONNELLY: Yes.

Mr DAVID SHOEBRIDGE: In short, the minutes.

The CHAIR: I am sure the minutes might help if you kept them, yes.

Ms DONNELLY: Of course.

The CHAIR: If you did not keep the minutes—

Ms DONNELLY: No, we did keep the minutes.

The CHAIR: Great.

Ms DONNELLY: And we have discussion papers, the membership and the dates of the meeting, so I am happy to provide that.

The CHAIR: That would be really useful if it is possible to provide us with that. Mr Shoebridge, I have a couple of questions. Is this an unfair description of the existing status quo, that the operator or other insurers in the market are effectively doing case-by-case assessment according to a relatively opaque criteria on claims that are received?

Ms DONNELLY: I think it is fair to describe that we are undertaking case-by-case assessment with criteria that have quite a bit of uncertainty.

The CHAIR: And the reason why that criteria has uncertainty, as you say, Ms Donnelly, was because it never envisaged the scenario in which it would currently apply. Is that a fair statement?

Ms DONNELLY: Well, it was before my time, but it is reasonable to say that legislation that was passed last century would not have anticipated that. To Mr Shoebridge's point, that legislation has been amended many times, but that leads to the other point that I am sure members of the Law and Justice Committee are familiar with, which is that it is now quite a complex set of two pieces of legislation. In further amendments, that might be quite narrow, so there is a need to think about whether there are further unintended consequences.

Mr DAVID SHOEBRIDGE: There is one provision in schedule 1 to the combined Acts, which says:

> (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 …

I pressed icare a couple of times to see if it had had some consideration of this deemed contractor and all I got back was reference to *Stevens vs Brodribb Sawmilling Co Pty Ltd*, which is the common law test, not the schedule 1 deemed worker test.

Ms DONNELLY: Mr Shoebridge, I will jump in there and say that with the knowledge that I have, icare only received this claim this afternoon and neither of the gentlemen appearing here would have had an opportunity to review it. It would be unacceptable to me as the regulator if they had formed a view already. I do not think that is what they were intending to say.

Mr DAVID SHOEBRIDGE: That is very nice of you, but I put to icare, not in terms of the claim they have received in the last hour, but their assessment of the arrangements involving HungryPanda that they had done prior to the reception of that claim and whether or not they considered schedule 1 or just the *Stevens vs Brodribb* general test.

Mr CRAIG: I apologise. I am sorry if in my answer I gave a misleading impression. That was the nature of the question in terms of the understanding that I have at this point. Every single item is investigated fully and thoroughly against the different components. I am not across the detail in that degree on this. I apologise.

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 HungryPanda 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 SIRA.

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.

The CHAIR: Mr Fang has raised a point of order.

The Hon. WES FANG: My point of order is that with the tag team that is being taken between the Chair and Mr Shoebridge, Hansard will struggle to capture the interactions. I ask that one person at a time ask the witnesses questions.

The CHAIR: I uphold your point of order. Mr Shoebridge should really stop interrupting me. Mr Shoebridge, have you finished?

Mr DAVID SHOEBRIDGE: No, I am going to wait until you start speaking again.

The CHAIR: Thank you, Mr Shoebridge. That is your habit. I have a question for icare. You referenced that you have had previous engagement with HungryPanda as a precursor to the inspection of this particular claim. Obviously it was not related, but you had previously done some work that has informed your view. Have you done that in respect of any other platform operator?

Mr CRAIG: If it has occurred, I do not have any information around it, so I cannot comment on any others.

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.

The CHAIR: You have anticipated my next question, which is: How many other claims have you received from people who are working for platforms?

Mr CRAIG: We have received roughly 100 claims. What I do not have—I am sorry that the short notice did not allow me to get this—is to understand the proportion of those claims that were—

The CHAIR: Upheld or denied?

Mr CRAIG: Yes. I do not know that.

Ms DONNELLY: Could I actually clarify, too, that there are platforms that are in the gig economy who have workers compensation policies that cover their employees who are clearly employees?

The CHAIR: Yes, of course.

Ms DONNELLY: There would be claims in that relationship too. They may not all be claims related to gig workers; there are ordinary administrative staff, for instance. So, that might be something that—

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.

The CHAIR: That would be useful.

The Hon. SHAYNE MALLARD: Thank you for coming in this afternoon.

Ms DONNELLY: You are welcome.

The Hon. SHAYNE MALLARD: We had SafeWork—I am not sure if you heard their evidence earlier today.

Ms DONNELLY: I heard some of it, yes.

The Hon. SHAYNE MALLARD: I was probing the Boland report and the national framework of our industrial relations laws. I got a little bit of a 101 history lesson, to update me. There is some policy work going on at that national level—the Boland report—which they said they were putting input into. Are you involved in any of that sort of policy discussion in a national framework?

Ms DONNELLY: Until relatively recently I was New South Wales' representative on Safe Work Australia. In that capacity I chaired a subgroup of the Safe Work Australia members that was the reference group for the Boland review, so I was extremely closely involved in that. It was obviously looking at the work health and safety laws. The evidence that I did hear from Mr Dunphy and from—what I understand on the work health and safety side is that the findings were generally that the person conducting a business or undertaking [PCBU] concept is broad enough. The discussion as I understand it at the national level is more about the issues that we have been talking about in terms of workers compensation and—is someone an employer or an independent contractor? That kind of uncertainty is not just occurring in New South Wales. That is more common around workers compensation. There is less harmonisation that has been progressed in workers compensation than there has been on the work health and safety side. Does that go to your question?

The Hon. SHAYNE MALLARD: Yes. Around Australia, you are saying there is less harmonisation of the—

Ms DONNELLY: Workers compensation. I would say, too, that in other policy decisions—for instance, when the National Disability Insurance Scheme was established there was a companion scheme, the National Injury Insurance Scheme, which was looking to get consistency of coverage for the more profoundly impacted people who were injured at work around the country on a no-fault basis. I participated in discussions at an official level in that exercise. Getting harmonisation of the definition of a worker and an employer was nowhere near as easy as you might think, even thinking for those more severely injured people. Just taking it up from Mr Shoebridge's point, for instance, the deemed worker amendments that have occurred over time in schedule 1 of the Workplace Injury Management and Workers Compensation Act in New South Wales—there are some similar but different modifications that have occurred in other jurisdictions. So, at the boundaries there are different definitions of a worker.

The Hon. SHAYNE MALLARD: In your submission you candidly say:

> The existing workers compensation legislation is based on a traditional employment relationship. However, this model may not be fit for purpose in the twenty-first century with the rise of technological tools and techniques …

That is pretty candid. Would your position be that—

Ms DONNELLY: I think it is clear.

The Hon. SHAYNE MALLARD: Do nothing is not an option for us?

Ms DONNELLY: Well, it is a matter for the Parliament and the Government.

The Hon. SHAYNE MALLARD: It is a policy matter.

Ms DONNELLY: That is our assessment. When we started to explore this, we were thinking, "It is an emergent issue. Let us understand who we need to be speaking with them at the various voices are telling us." We did not anticipate COVID. We have seen through COVID some strengths and weaknesses in the ways that people have adapted. But clearly food delivery is in that category that I was talking about before, of people who are on standby and are not choosing what job they are going to do. They are on the roads, which is a higher risk environment than many. That has happened.

At the same time, we have other considerations that SIRA is mindful of. There are more people working at home. That has an upside and a downside, depending on who you talk to, including our own workforce. I am the head of a PCBU, so I am consulting with people and thinking about work health and safety and what kind of leadership is needed. There are mental health considerations in terms of the relationships that people normally have at work. It is perhaps more challenging to keep that connectedness. There are also upsides, though. I certainly have seen that in returning people to work after they have had an injury, you need to have an environment that is supportive of people who have an impairment and who have a disability, whether it is temporary or permanent.

As we have talked about, traditional work would have made someone who needs to get up in the morning and have a carer assist them, and perhaps is not going to be able to use public transport and is going to need assistance—the idea of having to be in the office nine to five, or else your employer does not trust that you are actually contributing. I think we have a moment in time where we can think very differently about that, and it would be in the public interest. We would also encourage looking for the opportunities where we could get better outcomes, but we are candid about the fact that this legislation did not contemplate quite a lot of the features of our work nowadays. We listen to the stakeholders, so I think there are areas for improvement.

The Hon. SHAYNE MALLARD: My final question: Is there a mechanism for review of the legislation? Is there a statutory review? We have our own inquiries, of course, but is there a statutory review process?

The CHAIR: Careful what you wish for, otherwise we get more work.

Ms DONNELLY: There is a very, very good Committee.

The Hon. SHAYNE MALLARD: Oh, yes. I used to chair it, once.

Ms DONNELLY: Certainly there are reviews in every direction that we look. The legislation is not due for a statutory review in the same way, but every two years there is a review. Part of our role is to make sure that we are listening to stakeholders and highlighting the areas for improvement. We did not anticipate that this would become as acute as it has with COVID, but there are clearly a lot of changes that have happened in the workplace.

The Hon. SHAYNE MALLARD: Thank you. That has been very helpful.

The Hon. COURTNEY HOUSSOS: If you could just provide us on notice, Ms Donnelly, any thoughts about how we could make flexible work assist with people returning to work, that would be really helpful. I would be interested in that.

Ms DONNELLY: Yes, happy to.

Mr DAVID SHOEBRIDGE: Could I ask you to take on notice whether or not there are any useful reflections SIRA might have upon the model proposed by Mr McMaster in the evidence he gave this morning, in terms of a pool response? I am not asking you to do that now. Could you take that on notice?

Ms DONNELLY: I am happy to take it on notice. I have not had access to the transcript.

Mr DAVID SHOEBRIDGE: No, that was only this morning.

Ms DONNELLY: I am very happy to do that.

The Hon. SHAYNE MALLARD: He has designed a whole new system for you.

Ms DONNELLY: Has he?

Mr DAVID SHOEBRIDGE: To icare's presumption that the HungryPanda arrangements are excluded, I took the liberty of going through what I understood about HungryPanda's arrangements and using SIRA's "worker or contractor" tool, where you get to do a quick self-assessment. I might take you through the steps of SIRA's self-assessment. The first question is "Is it a labour hire arrangement?" We know it is not a labour hire arrangement, so I will press "no". Is it a natural person, incorporated entity or apprentice? I will click "natural person". Does the person—not the employer—subcontract or employ others? No. Does the person independently advertise their business on a commercial basis? No. Is the person entitled to annual leave, sick leave et cetera?" No. Does the person supply specialised plant and/or material to undertake the work? No. Does the person supply their own tools and equipment? Yes. Is the person required to wear a uniform or display the company's logo or business name in any other form? I think that is yes, with HungryPanda. I will press "yes". The result—do you want to guess, Mr Craig?

Mr CRAIG: No, you have the tool. I would not like to do that.

Mr DAVID SHOEBRIDGE: The result is "deemed worker". Are icare and SIRA at odds about how this works?

Mr CRAIG: No, we have to do the work.

Mr DAVID SHOEBRIDGE: I am troubled, given that I have just used the readily available tool and it has come to a quite different conclusion to the presumption that you have come with, Mr Craig. I am wondering whether icare has a predisposition to exclude gig workers because of the cost.

The Hon. WES FANG: Point of order: That presumes to assume that, one, Mr Craig would have used the calculator, as opposed to having a look at the discrete evidence, which was available to him only an hour ago; and, two, that in exclusion of all other possibilities, the tool is the overriding authority on this, which it clearly is not. I do not believe the question is in order.

The CHAIR: I will rule on the point of order. I understand the Hon. Wes Fang's point but I believe that it is not a point of order. There is no procedural bar to Mr David Shoebridge asking a question.

The Hon. SHAYNE MALLARD: It is a good debating point.

The CHAIR: Hear me out, because I am ruling. The discrete question Mr David Shoebridge has put to icare is whether there is a presumption and whether icare is at odds with the regulator. That is a valid question and Mr Craig can answer it however he sees fit.

Mr CRAIG: There is not a presumption at all and I do not feel at odds with the regulator because, in actual fact, the key way to determine this—and going through the little online tool that you have done illustrates the complexities to this—is that it all has to be thoroughly investigated. That is exactly, as I understand, what Ms Donnelly said as well.

Mr DAVID SHOEBRIDGE: I want to be clear. My question is not based upon the claim you have received in the past hour. My question is based upon your assessment of the arrangements in relation to HungryPanda that you had done prior to that. That was what troubled me.

Mr CRAIG: Yes, okay. Every claim needs to be investigated—every single one. So there is no presumption at all.

Dr COLQUHOUN: We were able to track down a blank template of the contract with HungryPanda and our legal team did pose six other questions or five other questions, which, obviously, as of an hour ago we were not able to start asking but we can now progress with that. The first one was "Did the deceased subcontract to anyone to provide the services on his behalf, and is this allowed in the contract?" Number two: "Did the deceased undertake or engage in any other business activities?" Number three: "Did the deceased have his own Australian Business Number? We assume so, as the contract indicates he was paid on submission to HungryPanda of a valid tax invoice." Number four: "Did the worker pay superannuation themselves and/or tax as well?" The final question or statement is "The contract also indicates the relationship is one of an independent contractor, not an employee. However, importantly, the termination will look at the substance of any contract and not the form."

The CHAIR: I understand that you have only received the claim in the past hour and it will take you some time. Can you give us an indication of how long you anticipate it will take to decide?

Mr CRAIG: It depends on whether and how quickly we get all the relevant information.

The CHAIR: You are required to make a decision on liability within a certain statutory period, are you not?

Mr CRAIG: Yes, the seven days; or otherwise there is a provisional ability there. We would be hoping to try and be clear within that seven days if we can get all the relevant information within that period of time.

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.

The CHAIR: Thank you. Will you be handling this claim through a scheme agent, or are you handling this directly?

Mr CRAIG: We will be handling this directly.

The CHAIR: Is that a slight departure from the norm?

Mr CRAIG: Yes, there are a couple of things about this. It is a departure in that it is quite a complex situation. Secondly, it is actually because it involves a death and deaths are just about always handled by icare.

The CHAIR: I think that is appreciated, I am sure, by the family as well. It probably will result in a faster turnaround and direct dialogue with the insurer, as opposed to their agent, which is appreciated. I will turn to a couple of other questions in the remaining time.

The Hon. SHAYNE MALLARD: We do not have any remaining time.

The CHAIR: We talked about giving the witnesses till 5.10 p.m., which they were happy to do. We have four minutes. Is that still okay with the witnesses?

Ms DONNELLY: Certainly.

The CHAIR: I will turn to two other matters. The first is for the regulator. Any sort of design of any form of accident compensation, which is akin to workers compensation, obviously involves return-to-work obligations, which is much harder to do in the absence of a formal employment arrangement. Would you agree?

Ms DONNELLY: I think, yes, anything that is workers compensation-like definitely would include assistance to help people return to work and recover at work. I think I understand the question. I think, yes, if you have an employment relationship and you have something that is built in there that has obligations on the employer to support return to work, that is beneficial.

The CHAIR: To the extent to which any reform is contemplated to provide people with accident compensation akin to workers compensation, we would have to design such a system to be mindful of the fact that return to work cannot apply in the same way because there is not a formal employment arrangement, as best we can tell.

Ms DONNELLY: Yes and no, in the sense that within the workers compensation system, to give you an example, there are people who are unable to return to work to their previous employer and the system still works to support them to return to work where they can. Secondly, I would say in the CTP scheme, because they have now come under the umbrella of SIRA and we are doing quite a lot of work around return to work and measuring return to work, we would aim to improve the outcomes for people injured on the roads in terms of return to work as well and we do not have quite the same provisions. I think ideally you would want that employment relationship, but in some cases it does not follow on; it changes over time during the claim, anyway.

The CHAIR: This question is more for icare: Any such design of an accident compensation scheme would require someone to pay premiums if it was an insurance-like relationship. You would agree?

Mr CRAIG: Agreed.

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 into and a worker would make a claim against that insurer as opposed to any other structure would be useful.

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 other thing that I would advise you of that you may want to think about, there are other probably more dramatic changes that could provide coverage. If we look at the New Zealand scheme, the Accident Compensation Corporation, which has a more universal approach so that it does not matter where you are insured you would have coverage, there is a connection to the employers, they are on risk and paying premium, but there is also an ability to fund the scheme through other sources.

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.

Ms DONNELLY: It is a very blue sky kind of question, but I think there are other options.

Mr DAVID SHOEBRIDGE: Can I just say that I think it is outside the terms of reference of the Committee. The Committee is looking at the future of work, the New Zealand scheme is a ubiquitous scheme that covers everybody in all their daily interactions regardless of whether it is work or it is not. I think it is probably outside the terms of reference of the scheme.

The CHAIR: If you are taking a point of order I am likely to reject it, because one of our terms of reference is examples of other international jurisdictions. If it is being advanced as an example I will take it.

Mr DAVID SHOEBRIDGE: If we are going to go down that path in the Committee to look at an across- the -board universal insurance scheme I think we would need different terms of reference to make that useful and we would need to engage with a whole bunch of different stakeholders to make that useful.

The CHAIR: I will simply rule that the witness has said that they will do so much as to the extent to which it supports the objectives of this inquiry. Let that be your limit in terms of what you provide.

The Hon. WES FANG: I raise the point of time.

The CHAIR: I accept that point. We thank you for your patience with our technology and your patience today. The time you have spent with us is most valuable and useful to us. You have taken some questions on notice which will be available technically within 21 days of us confirming the transcript but there are other matters which we will also indicate you might need more time on which I think the Committee will be quite relaxed about you coming back to us on. We very much appreciate your time. We appreciate the submission that SIRA put in and the late notice appearance of icare.

Mr CRAIG: In terms of process, on the questions on notice are you comfortable for us to clarify which ones we will be able to do within the 21 days versus which ones—

The CHAIR: Yes, we are pretty relaxed.

Mr CRAIG: —and we will clarify that as part of our process.

The CHAIR: Yes, you will be in dialogue with the secretariat and we accept that you are in a slightly different category because the transcript will not be immediately available to you like it has been for other witnesses. The secretariat will be absolutely clear about the timescales.

(The witnesses withdrew.)

The Committee adjourned at 17:15.