



# INQUIRY INTO THE VICTORIAN ON-DEMAND WORKFORCE

Background Paper

December 2018

# Contents

<b>Foreword</b>	<b>3</b>
<b>1. Conduct of the Inquiry</b>	<b>5</b>
1.1 Inquiry introduction	5
1.2 Terms of Reference	5
1.3 How the Inquiry will gather evidence	6
1.4 Call for written submissions from interested parties	6
1.5. Other Inquiries and activity	6
<b>2. On-demand workforce</b>	<b>7</b>
2.1 Extent and scope of on-demand work	7
2.2 Prevalence and nature of on-demand work	8
2.3 Legal status of on-demand workers	10
<b>3. Impact of on-demand work</b>	<b>12</b>
3.1 Impact of on-demand work for workers, including vulnerable workers	12
3.1.1 Vulnerable workers	13
3.1.2 Young workers	13
3.1.3 Visa holders	14
3.1.4 Women	14
3.1.5 Opportunities for workers created by the on-demand economy	14
3.2 Impact on the community and consumers	15
3.3 Impact on business	16
<b>4. Regulatory landscape in Australia and internationally</b>	<b>18</b>
4.1 Fair Work Act	18
4.2 Victorian legislation	18
4.3 Other relevant federal legislation	19
4.4 Enforcement of laws with respect to on-demand workers	19
4.5 Regulatory approaches in other Australian states and internationally	20
4.5.1 Australian jurisdictions	20
4.5.2 International Labour Organization	20
4.5.3 United Kingdom	21
4.5.4 Canada	21
4.5.5 United States of America	22
<b>Attachment A</b>	<b>23</b>
Current inquiries and other activity	23
Past inquiry reports	23
<b>Attachment B</b>	<b>24</b>
Fair Work Act	24
Victorian legislation	24
Other relevant federal legislation	26
<b>Endnotes</b>	<b>27</b>

# Foreword

I thank the Victorian Government for asking me to Chair this Inquiry into this significant and perpetually evolving dimension of our labour market.

The emergence and uptake of platforms that digitally connect workers to consumers and businesses has opened up choice and flexibility to all. In some sectors, whole new workforces have been created that may be procured by end users at the tap of a screen. We have a plethora of options available to us: new and more efficient ways of promoting and accessing services and apparent transparency about availability, quality and price.

While it may feel like hordes of people are now providing their services via digital platforms, the scarce data that exists on this topic suggests only a tiny proportion of those working in the labour market are in the on-demand economy.

There are many hypotheses about the uptake and impact of these workers: who they are, why they are working in this way, whether it is their 'only job', what they are paid etc. We hear very different stories:

The fairytale is workers unshackled from unilaterally imposed work rules and hours and controlling bosses, leveraging their high work performance to access work where and when they want it, perhaps to supplement other income streams.

The nightmare is one where vulnerable workers, unable to secure work in the 'traditional' labour market, are ruthlessly exploited by platforms that rip them off and eject them at a hint of negative consumer feedback.

At the heart of these scenarios and all those in between is the prevailing question about the nature of the arrangements that cover these workers, and whether they are lawful. If workers are indeed running their own businesses with all the autonomy and opportunity that offers, then perhaps all is well.

But what if workers are employees, misclassified as 'independent contractors', and are not receiving statutory minimum rates of pay or superannuation or properly meeting health and safety or insurance and workers' or accident compensation requirements?

This would mean they are operating under unlawful models in competition with enterprises that are complying with the law and meeting a range of regulatory requirements and costs not being incurred by the on-demand sector. It may also deprive the community and workers of remedies that are intended to be available to them under a range of legal frameworks when things go wrong.

And how is this question resolved where ambiguity exists about the status of a worker? Only a court can determine this question, by considering the totality of the relationship and assessing its true nature.

We have witnessed a recent case study of the system in action: Foodora's platform facilitated the delivery of food to consumers from restaurants and cafes. The platform's non-employment workplace arrangements had been the subject of concerns since it began operating in Australia in about 2015. Proceedings were commenced by the Fair Work Ombudsman and unions in 2018 challenging some of the company's arrangements and asserting that workers were employees. The company continued to operate under the Foodora brand until being placed into administration in August 2018. The Australian Tax Office also formed the view that Foodora's workers had been mischaracterised as independent contractors resulting in unpaid tax. The majority of Foodora's directors reportedly reside overseas and it appears that there are no significant assets that may be drawn on to meet liabilities. In settlement of these claims Foodora agreed to pay about \$3 million in unpaid taxes and unpaid earnings to workers who were found to be employees.

Are we happy that the laws and the regulators are equipped to advise and assist the community on the application of the law to on-demand work arrangements and respond to disputes or concerns in a timely and efficient way?

This Inquiry will shed some light on the nature, extent and impact of on-demand work in Victoria and the arrangements governing that work.

The on-demand economy has become embedded in our lives at the same time as the key labour market has been experiencing other shifts: record low wage growth, record numbers of visa workers with temporary work rights, apparent growing non-compliance with minimum wage rates, particularly in some sectors, flattening union membership and reduced uptake of agreement making.

*This Inquiry will shed some light on the nature, extent and impact of on-demand work in Victoria and the arrangements governing that work.*

The sector, if it can be called that, operates across many different industries, professions and regions. There is no single model that facilitates on-demand work. Indeed, it is challenging to even agree on a definition, such is the diversity of the work and the arrangements and the pace at which we see new entrants, revised models and, in some cases, participants existing the market.

I want to hear from the full range of people participating in the sector: businesses, consumers and of course workers themselves. The Inquiry will seek out evidence about the impact upon those outside the sector, such as businesses providing services under 'traditional' arrangements. Experts and academics can assist the Inquiry through identifying and carrying out research about systems and trends in Victoria and beyond.

To obtain credible evidence on matters pertinent to our terms of reference, the Inquiry will seek information in a range of ways. This includes the traditional approach of seeking written submissions from the public. This background paper is designed to assist people to frame their submissions.

The Inquiry will also speak directly with people, procuring research and inviting less formal 'submissions' in a manner which encourages people to share their own experiences of the on-demand economy.

I will seek out the full range of experiences and data to assist me to form conclusions. I intend to consider the evidence before me and craft recommendations that are pragmatic, targeted and balance the interests of business, workers, consumers and the community. Any regulatory intervention should focus on areas of demonstrated need, be practically enforceable and able to be efficiently implemented.

The Inquiry is expected to deliver a final report to the Victorian Government in late 2019 and is seeking submissions from workers, unions, businesses and academics. The closing date for making a written submission is 6 February 2019. Submissions can be emailed to: [ondemandInquiry@ecodev.vic.gov.au](mailto:ondemandInquiry@ecodev.vic.gov.au).



Ms Natalie James  
20 December 2018

# 1. Conduct of the Inquiry

## 1.1 Inquiry introduction

On 22 September 2018, the former Minister for Industrial Relations, the Hon. Natalie Hutchins MP announced an Inquiry into the On-Demand Workforce in Victoria (Inquiry). The Terms of Reference for the Inquiry were released on 29 October 2018.

Ms Natalie James has been appointed to chair the Inquiry. Ms James was the former Commonwealth Fair Work Ombudsman. Prior to that appointment she served as Chief Counsel, Workplace Relations in the Commonwealth Department of Employment and Workplace Relations.

The Inquiry will report to the Minister for Industrial Relations in late 2019.

## 1.2 Terms of Reference

The Terms of Reference for the Inquiry are as follows:

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

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

### 1.3 How the Inquiry will gather evidence

The Inquiry seeks information from all people able to provide evidence relevant to the Terms of Reference. The on-demand sector incorporates a diverse range of workers, consumers and platforms.

The Inquiry wants to hear from the full range of participants. We understand that there is great complexity and breadth of the issues arising from this evolving sector. Assessing its impact on Victorian workers, businesses, consumers and the community is not a straightforward process.

We will use multiple channels and approaches to ensure we capture the full range of information and perspectives relevant to the Terms of Reference and that we are accessible to all who are able to assist us in exploring them.

We are seeking formal written submissions, as well as supporting research, creating easy and accessible ways for individuals to tell us what they know. We will also speak with people individually and in groups through a program of targeted consultations.

The Inquiry website, [vic.gov.au/on-demandinquiry](http://vic.gov.au/on-demandinquiry), will be updated periodically with further information.

### 1.4 Call for written submissions from interested parties

The Inquiry invites written submissions from interested parties who can provide evidence, examples or case studies which address the Terms of Reference.

This Background Paper aims to provide an overview of material that may be relevant to the issues raised by the Terms of Reference to assist those preparing submissions. It includes suggested questions and issues for participants to consider when framing submissions.

The questions are prompts which indicate key areas of interest to the Inquiry. Different people will be able to offer different information and perspectives informed by their experience and expertise. Submitters are not expected to address each and every point of interest and of course may provide information outside of the questions asked.

We encourage individual workers, businesses and consumers to tell us about their own experience. We seek the views of experts, academics, representatives of workers and businesses and regulators to provide advice about the sector more generally, particularly its broader characteristics and impact.

Written submissions should be provided to the Inquiry Secretariat no later than 6 February 2019.

Submissions should be provided to the Inquiry by email in Microsoft Word format to [ondemandinquiry@ecodev.vic.gov.au](mailto:ondemandinquiry@ecodev.vic.gov.au).

In the interests of transparency, we intend to publish submissions on the Inquiry website. However, we acknowledge there may be reasons submitters wish to remain anonymous or to provide us with some information confidentially. We will not publish information if we receive such a request unless and until we have obtained the agreement of the submitter. The Inquiry reserves the right not to publish on its website material that is offensive, potentially defamatory, or clearly out of scope for the Inquiry.

### 1.5. Other Inquiries and activity

Much has been written about the on-demand economy in Australia and overseas. The Inquiry will draw upon a wide range of source materials, including evidence to and findings of previous inquiries and reports, available statistical data survey material, academic research and international resources. Some of this material is identified in Attachment A. Interested persons and organisations may wish to have regard to this material in preparing submissions.

## 2. On-demand workforce

### 2.1 Extent and scope of on-demand work

The Terms of Reference require the Inquiry to focus on the 'on-demand' economy.

The practice of workers being available 'on demand' – as needed by a business – is not new. Labour hire arrangements, casual work and independent contracting are longstanding features of our labour market.

What is new is the capacity for technology to facilitate the matching of available workers with those who are seeking services, and the emergence of technology driven businesses existing solely for this purpose.

That is the focus of this Inquiry – to explore the nature, scope, extent and impact of digitally driven matching of workers to work in Victoria.

A range of terminology is used to describe on-demand work, including 'gig' work, 'sharing' work, 'collaborative' work, 'crowdsourcing,' 'independent work' and 'freelance' work. Some have observed that the range of work performed and the variety of ways in which that work is structured and organised make it difficult to condense various explanations of this type of work into a single definition.<sup>1</sup> A comparison of some of the definitions used in the literature on on-demand work illustrates some major differences between them and a distinct lack of a shared understanding of what constitutes on-demand work.<sup>2</sup>

The European Agency for Safety and Health at Work has used the following broad definition of on-line platform work as including:

all labour provided through, on or mediated by online platforms, and [featuring] a wide array of working arrangements/relationships, such as (versions of) casual work, dependent self-employment, informal work, piecework, home work and crowdwork, in a wide range of sectors. The actual work provided can be digital or manual, in-house or outsourced, high-skilled or low-skilled, on-site or off-site, large- or small-scale, permanent or temporary, all depending on the specific situation. In order to constitute work and to be part of the online platform economy, it must, however, be provided for remuneration, thus excluding genuine 'sharing' activities.<sup>3</sup>

Other definitions of this type of work are far narrower. For example, the Productivity Commission uses the following definition of the gig economy:

[W]orkers or capital owners contract over a digital intermediary to do small tasks or short-term rentals known as 'gigs'... At present, the gig economy is mostly limited to micro-tasks, or other low- to medium-value transactions. There is little evidence of large, complex transactions occurring over these platforms, partly as information asymmetries still remain high, avenues for recourse are fewer, and many platforms use standard-form contracts. However, there are a number of platforms emerging (such as Expert360 in Australia) that match people with professional consultancy, marketing and finance skills.<sup>4</sup>

Others suggest that the on-demand economy is simply a smaller part of the wider independent workforce.<sup>5</sup> In accordance with this definition, on-demand work includes any type of short term job or task and not exclusively work gained via a digital platform.<sup>6</sup>

To compound the challenge, the scope and scale of this sector is not static. New technologies are being developed and applied by different businesses every day, across a diverse range of work in Victoria's economy.

This Inquiry wishes to assess the impact of emerging trends in the on-demand economy – to understand its scope and structure. We are seeking views on the extent to which the on-demand economy is driven by platform businesses or brokers (ordinarily understood as a person who functions as an intermediary between two or more parties) and whether that is materially distinct from existing businesses evolving to use digital platforms to more efficiently manage their workforce needs.

We will initially take a broad approach to ensure that we obtain the full picture of what might appropriately be our areas of focus.

We anticipate that those participating in the Inquiry will assist us by highlighting the extent of on-demand work in Victoria and will identify its impact in a way that enables us to narrow our focus on areas of concern which may warrant action from Governments or their institutions.

**We would welcome submissions making suggestions about definitions and appropriate areas of focus for the Inquiry, and in particular:**

- **What does 'on-demand' work encompass?**
- **What is 'new' about the platform driven on-demand work compared with traditional models of allocating labour to tasks as required?**
- **What if any distinctions exist between new technology driven entrants utilising digital platforms to deliver services as their core business and existing businesses accessing technology to more efficiently place and manage a workforce?**

## 2.2 Prevalence and nature of on-demand work

It is difficult to measure the prevalence of on-demand work due to a number of factors, including the varying definitions described at 2.1. It is not always clear whether studies and data identify workers who work exclusively in this sector or whether those workers have other paid work outside the on-demand economy (undoubtedly on-demand work activities are secondary jobs for some workers).<sup>7</sup> Some suggest that few workers rely only on on-demand work to earn an income.<sup>8</sup> Likewise, data on the prevalence of self-employed or independent contractors may obscure a growth in the on-demand economy as people move from one form of contracting to another (such as movement from taxi-driving to driving in the on-demand economy).<sup>9</sup> These issues may partially explain the fact that statistics on labour market participation in platform-based work vary across studies and countries and none are comprehensive.<sup>10</sup>

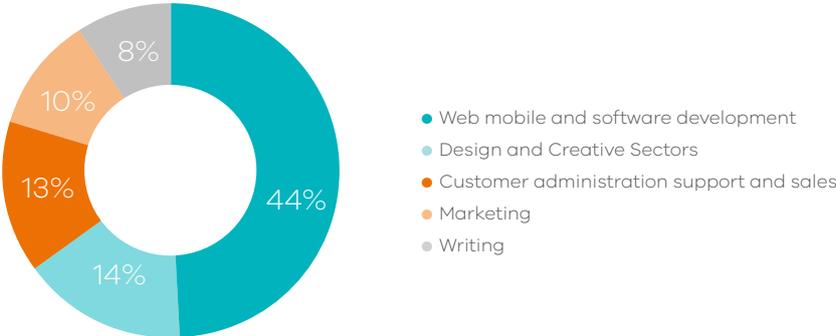
The Grattan Institute estimates that about 80,000 or 0.5% of Australians earn income through a peer to peer platform in any month.<sup>11</sup> In 2017 a study by Deloitte Access Economics found that about 1.5% of residents in New South Wales (NSW) had earned money via some type of digital platform in the 2015/16 financial year (this study was not limited to platforms that supply labour and only a small number would frequently perform platform work).<sup>12</sup> These statistics are comparable to data from a number of other jurisdictions.<sup>13</sup>

Some suggest that the on-demand sector is growing quickly.<sup>14</sup> Yet, this conclusion is not universally accepted.<sup>15</sup> However defined, the on-demand economy has grown in recent times and most analyses suggest that it will continue to grow.<sup>16</sup> There are similar issues with estimating the value of the Australian on-demand economy. The value of the on-demand economy is affected by how it is defined.<sup>17</sup> There also appears to be limited data on the value of labour services alone in the on-demand economy.

A focus of popular and academic literature has been on passenger transport drivers, food delivery riders and digital crowdworkers.<sup>18</sup> These workers are highly visible and utilised by a wide range of consumers. But the on-demand economy certainly extends beyond these areas of work, for example to care, cleaning, security and professional work.<sup>19</sup> Several platforms seek unskilled labour or work to be performed by trades persons in the transportation, maintenance and repair, courier and personal services sectors.<sup>20</sup> Barriers to entry to these markets tend to be low.<sup>21</sup>

One ride-sharing platform estimated that it has more than 20,000 active drivers in Australia each month, while other research estimates that freelance work is comprised as follows:<sup>22</sup>

**Break-down of freelance work in Australia by occupational sectors**



Source: Ai Group Thought Leader Paper on The Emergence of the Gig Economy (2016)

**The Inquiry encourages submissions that will assist us to understand:**

- **The extent to which on-demand work is being offered and utilised in Victoria;**
- **In which industries and regions it is most prevalent;**
- **The drivers behind its uptake; and**
- **Do on-demand workers have other jobs and what are the nature of those other jobs?**

We acknowledge it is difficult to address these questions at a general level, given the scope and diversity of the sector, and invite those with information at a sectorial or economy wide level to address areas within their own knowledge, experience and expertise.

The Inquiry is seeking research or data that sheds light on these issues but would also welcome examples or case studies that illustrate the experience of individuals and the perspective of workers, consumers and businesses facilitating and utilising on-demand workers.

## 2.3 Legal status of on-demand workers

The legal status of on-demand workers is significant because it is the threshold question that determines which regulatory frameworks apply across a range of areas, including wages and conditions, health and safety, workers' compensation and taxation. Australia's national workplace laws, the *Fair Work Act 2009* (Cth) (Fair Work Act) generally covers employees, conferring a range of obligations on employers to pay minimum wages and conditions.

These employment entitlements are determined by the existence of an employment relationship which is not defined in the statute but is determined by the nature of the contract and the common law. To be an employee, a worker must be engaged pursuant to a valid and enforceable contract, and it must be an employment contract.<sup>23</sup> Multi-factor indicia established by courts over many decades are applied. Some of these indicia suggest an employment relationship, while other indicia indicate that the relationship is not an employment relationship.<sup>24</sup>

Individuals performing paid work who are not employees are generally supplying services as 'independent contractors' (whether as an individual or business). There is no hard and fast rule as to how many or what combination of the indicia will establish that a worker is an employee.<sup>25</sup> Some of the key factors that have been considered relevant by courts include:

- the right or legal authority to control the worker;
- the substance of the relationship;
- if the worker is integrated into the organisation that is hiring their services;
- whether the worker is required to supply their own tools, equipment or make a substantial investment of capital;
- whether there is an opportunity to earn a profit or risk incurring a loss;
- is the worker paid to complete a task or paid wages in exchange for time that they have worked.<sup>26</sup>

While regulators and different government bodies can assist people to understand and apply the test, only a court may finally determine whether a worker is an employee or independent contractor.

Only certain limited provisions in the Fair Work Act apply to independent contractors. Independent contractors receive some protections under the *Independent Contractors Act 2006* (Cth) and competition and consumer law, although they are more heavily reliant on the common law (see further below section 4 – Current Regulatory Landscape, in Australia and Internationally).<sup>27</sup>

Many on-demand workers are classified as self-employed or independent contractors. Some are carrying out roles that have traditionally been covered by minimum entitlements, particularly, modern awards that operate under the Fair Work Act.

It is difficult to characterise the working arrangements in the on-demand economy in a general sense because of the scope and diversity of those arrangements.<sup>28</sup>

The way that work arrangements are structured varies amongst on-demand business platforms and other intermediaries in the on-demand economy. Generally, there are at least three parties involved in the arrangements – the worker, the final beneficiary of the labour and the business facilitating the 'match.'

Different formal and informal contractual arrangements may govern this 'triangular' relationship. The status of that relationship depends not just on the written agreements made by the parties but the substance of the relationship in reality. When the substance and the form do not align, disputes can only be finally resolved by a court when a particular case is brought before it. The onus is on the worker, or someone on their behalf, to put the particular facts of the case before a court, which will examine the relationship and determine the status of the worker.

For example, the Fair Work Commission (FWC) made a decision that a Foodora delivery rider's engagement was to be properly construed as that of an 'employee', as opposed to that of an 'independent contractor'.<sup>29</sup>

The Australian Taxation Office (ATO) also determined in 2018 that Foodora workers were incorrectly classified as independent contractors instead of employees. However, these decisions cannot be applied beyond the circumstances of that organisation and those workers.<sup>30</sup> This is because any decision as to the employment status of a worker or group of workers, whether by a court, tribunal or the ATO, will depend on the particular facts of the case being considered.

The on-demand economy, and indeed, even a particular platform's workforce, may be legitimately comprised of both employees and independent contractors. Two previous unsuccessful unfair dismissal applications pursued by Uber drivers in the FWC underscore the complexities involved.<sup>31</sup>

The status of workers in the on-demand economy is a fundamental issue that determines how regulatory frameworks apply to their work arrangements. The answer to this question governs rights and obligations of workers, platforms, businesses, consumers and the community. It dictates where a person might go for help and advice if something goes wrong and what remedies are available to them.

A fundamental question that the Inquiry must consider is whether and how regulators are able to resolve the question of whether the laws they are invested with enforcing on behalf of the community apply to these arrangements and the extent to which users and workers are able to understand their rights and obligations and seek assistance if something goes wrong.

**The Inquiry therefore seeks submissions about the following:**

- **How are on-demand workers recruited and engaged to perform work?**
- **Why and how are these arrangements being put in place?**
- **What is the nature of the negotiations over the arrangements between platforms, workers and consumers?**
- **Is the reality of the relationship consistent with the form of the arrangement?**
- **To what extent do businesses engaging on-demand workers inquire into their working conditions or legal status?**
- **Does an on-demand worker control the manner and the location in which they perform the service or work?**
- **How are on-demand workers paid, assessed and how might they lose the right to seek work via the platform?**
- **Are on-demand workers free to provide the same services to multiple clients?**
- **What do on-demand workers do if they have a dispute or concern about their work and are they sufficiently supported in resolving disputes?**

## 3. Impact of on-demand work

The changes being driven by digital technologies in advanced industrial economies have been described as forming an integral part of ‘the fourth industrial revolution’.<sup>32</sup> Digital advances offer unprecedented economic opportunities. A critical question is whether existing regulatory frameworks are fit for purpose to facilitate these opportunities in a way that balances the interests of workers alongside those of consumers and business.

It is hard to dispute the view that the emergence of the on-demand economy has led to many changes for the Victorian community. The Inquiry will seek to identify what those changes have been, who they affect and in what way.

### 3.1 Impact of on-demand work for workers, including vulnerable workers

The capacity of on-demand workers to earn sufficient and fair remuneration is a key concern to some.<sup>33</sup> Some research suggests that earnings for ride share workers in Australia is below the minimum wage that applies to employees under the Fair Work Act.<sup>34</sup> For instance, a recent survey by the Transport Workers Union (TWU) of 1000 drivers across rideshare platforms in October 2018 found that drivers report earning on average only \$16 per hour.<sup>35</sup> The Productivity Commission has suggested that the benefits of the on-demand economy for workers may be enhanced with regular income support payments for workers, to moderate otherwise irregular earnings.<sup>36</sup>

Concerns have also been expressed about the capacity of on-demand workers to negotiate better wages and conditions. The apparent structure of many work arrangements does not encourage negotiations, collective bargaining or representation by unions or other advisers. The Productivity Commission suggests that the on-demand economy has the potential to cause a major shift in employment relations.<sup>37</sup>

On-demand platforms allow employers to select at will from a pool of workers who often rely on positive ratings for continued work. These factors may be important for the success of platforms that rely on utilising a large pool of labour at a relatively low cost<sup>38</sup> and may also contribute to workers accepting low wages and inferior conditions.

Other dynamics that may impact on remuneration of these workers include: low union representation; market dominance by certain platforms;<sup>39</sup> terms and conditions in some agreements that favour platforms;<sup>40</sup> and the movement of risk onto workers as a result of contracting engagement models.<sup>41</sup>

There is conflicting information as to how or whether workers compensation insurance is provided by platform businesses for the benefit of workers or whether workers are being required to obtain their own public liability insurance (to cover injury to a third party).<sup>42</sup> There are a number of potential consequences of inadequate coverage of workers compensation for individual workers, governments and the labour market more generally.

The Inquiry seeks to obtain a more complete understanding of the application of existing workers compensation, health and safety and transport accident compensation legislation with respect to on-demand workers in the light of any uncertainties that may arise if, for instance, it is not clear who is the employer of an on-demand worker.

### 3.1.1 Vulnerable workers

The Terms of Reference require an examination of the capacity of existing legal and regulatory frameworks to protect the rights of vulnerable workers. The Inquiry will examine the extent to which vulnerable workers are represented in the on-demand economy, and the impact of on-demand work for them.

Workers may be more vulnerable for a range of reasons related to their inherent characteristics such as their gender, visa status, background, age, education or disability. Their location may also contribute to a precarious situation – some regions have high unemployment making it harder to find and retain work.

Vulnerable workers tend to be over represented in precarious forms of work.<sup>43</sup> On-demand work does not necessarily deliver the security of ongoing work or income.<sup>44</sup> Vulnerable workers may have only limited awareness of their legal rights or how to enforce them.<sup>45</sup> It has been suggested that investment in workers' skills in the on-demand economy is essential to assist them remain competitive in the dynamic and rapidly changing environment, including training and retraining of older workers.

### 3.1.2 Young workers

It can be challenging for young people to enter the workforce. As new entrants they may not have post-school qualifications and often start in low skilled, award reliant types of work.

In Australia, in 2017, youth unemployment between the ages 15 – 24 was above 12%.<sup>46</sup>

It has been estimated that since the Global Financial Crisis (GFC) in 2008, youth unemployment rates have increased more significantly than the rate of unemployment for adults.<sup>47</sup> The unemployment rate for younger workers has not yet returned to the pre-GFC levels<sup>48</sup> and the numbers of young people between the ages of 20 to 24 who are neither in employment, education or training arguably remain at pre-GFC levels.<sup>49</sup> In addition, youth under-employment is a significant public policy concern, with many young workers willing and available to work additional hours but unable to gain additional work.<sup>50</sup>

Research suggests entry level job opportunities for young people are increasingly casual, temporary or part-time.<sup>51</sup> Young workers arguably are less able to access either meaningful or stable work, they are susceptible to irregular work patterns (in part this is considered to be due to growth in the services sectors of the economy) and are vulnerable to losing their jobs.<sup>52</sup>

Young people are also considered to be at high risk of exploitation while at work, such as being underpaid, because they are often uncertain about their rights or entitlements or perhaps not prepared to make a complaint if they believe that something is not right.<sup>53</sup> In February 2017, young workers made up approximately 15% of the workforce but generated 25% of complaints to the Fair Work Ombudsman (FWO).<sup>54</sup> Unsurprisingly, the national workplace regulator identifies young workers as vulnerable workers and therefore a priority for its compliance activities.<sup>55</sup> For many young workers their experience of the labour market is all too often precarious.<sup>56</sup>

Recent research has also found that young people are quite likely to engage with platform businesses and make up a fairly large percentage of the on-demand workforce.<sup>57</sup> Yet if as is suggested by some, young workers are likely to be isolated, it may be more difficult for those workers to understand exactly what their legal entitlements might be<sup>58</sup> or to pursue better conditions.<sup>59</sup>

### 3.1.3 Visa holders

In 2015, some reports suggest that there were approximately 1.4 million visa holders with temporary work rights attached to those visas in Australia, though all visa holders may not take up the option to work.<sup>60</sup> Workers with temporary work visas are subject to a number of conditions on their work, such as where they work and how often they may work. They are vulnerable on a number of levels – their English language skills may not be high, and they are less likely to be familiar with Australian work laws and wage rates. They are also subject to exploitation by unscrupulous employers who threaten to report them to the Department of Immigration in relation to their visa conditions if they do not accept sub-minimum wages.<sup>61</sup>

There is a significant body of evidence that demonstrates that working holiday visa holders are subject to exploitation in the labour market.<sup>62</sup> Between 2014 and 2017, visa workers make up 1 in 5 complaints to the FWO yet they represent only 6% of the labour market.<sup>63</sup> The proportion of visa workers who make up FWO's complaints has grown steadily over the last five years, from 10% in 2012/13.<sup>64</sup>

In a survey of over 200 workers working in the on-demand food delivery industry, the majority were found to be from culturally and linguistically diverse backgrounds and working under Working Holiday Maker visas.<sup>65</sup> The survey results also suggested that when engaged as independent contractors and with limited rights under employment law, working with language barriers under a temporary visa exacerbated the potential for exploitation.<sup>66</sup>

### 3.1.4 Women

Women comprise around 46.9% of the Australian workforce<sup>67</sup> but often experience inequality at work. The incidence of the gender pay gap in Australia persists at about 14.6% and the gender-based superannuation gap tends to confirm that on average women retire with 42% less in superannuation funds than men.<sup>68</sup> Insecure and independent work may worsen the financial security of women.<sup>69</sup> Relevantly, research has found that there is evidence of a gender pay gap in the on-demand economy.<sup>70</sup>

### 3.1.5 Opportunities for workers created by the on-demand economy

There are also a number of positives for workers in the on-demand economy that deserve consideration. As mentioned above, because barriers to gaining on-line platform work tend to be low, workers may more easily be able to gain work, as individuals can create a profile and start looking for work immediately.<sup>71</sup> Notably, for some vulnerable workers, many rideshare drivers are from regions with high rates of unemployment.<sup>72</sup>

Digital platforms may provide workers with flexibility about when and where to work and what kind of work they wish to perform.<sup>73</sup> For instance, Uber surveyed 1,700 drivers in September 2018 and found that flexibility to choose one's own hours, to supplement existing income or to make money while looking for full-time or part-time work was the main motivation to work for Uber.<sup>74</sup> This flexibility may be critical for people who find it difficult to otherwise access the labour market due to factors such as caring responsibilities or disabilities.<sup>75</sup> It may also provide a more easily accessible supplementary income source for different life stages, such as for students or retirees.<sup>76</sup> Some research suggests that women often benefit from flexible work arrangements that contribute to closing the workforce participation gap<sup>77</sup> and on-demand work may provide women workers with work flexibility.<sup>78</sup> Some workers have emphasised a desire to work from home,<sup>79</sup> especially given the cost of child care arrangements and other disincentives to work outside of the home.<sup>80</sup> The Inquiry will endeavour to assess the extent to which any of the potential risks and/or benefits for vulnerable workers are found in the evidence.

The impact of on-demand work on workers is multi-dimensional and complex. In considering the question of 'impact' the Inquiry wants to hear about the experience of individual on-demand workers, but also seeks to understand the broader impact of the emergence of on-demand work on both the on-demand cohort and also workers in 'traditional' arrangements. We encourage information from individual workers as well as those in a position to speak to broader trends.

- What and how are on-demand workers paid?
- Why do workers engage in on-demand work?
- How often do workers participate in on-demand work as opposed to 'traditional' arrangements?
- What differences do people experience between working under on-demand arrangements and 'traditional' arrangements? Does this vary between metropolitan, regional and rural locations?
- What training or development opportunities are available to on-demand workers?
- How and where do on-demand workers raise issues or concerns about their workplace arrangements?
- How confident do they feel to do this?
- What happens when on-demand workers are unable to work due to physical or psychological injury or illness?
- How are workplace injuries addressed for on-demand workers?
- To what extent is superannuation provided?
- How do on-demand workers ensure their tax liabilities are met?
- What impact has the growth of on-demand work had on those working under 'traditional' arrangements?

### 3.2 Impact on the community and consumers

The on-demand economy has generated greater choice, creating new options for consumers and enhancing the accessibility and speed of obtaining services. There are no doubt many other direct and indirect impacts of these new offerings.

Safety, quality of service and the broader impact on revenue and labour markets have all been identified as potential areas of impact. Some raise concerns that service quality may be low or that safety considerations may be compromised.<sup>81</sup>

Contributing to these concerns is ambiguity including about how safety, licencing, consumer protection, industry standards, and tax frameworks apply to these services. So too are there concerns about the skills and qualifications of those providing the services. The on-demand economy may facilitate people to provide services without the licence, trade or professional qualifications that are usually required.<sup>82</sup> In some instances a business platform may be responsible for compliance if it controls advertising about how a service might be delivered and implies that background checks and feedback ensure that the service is safe. If this is the case then the business platform may be responsible for ensuring that any such checks are in fact rigorous and reliable.<sup>83</sup> Where the on-demand economy extends to the provision of caring and domestic work, there may be questions about the impact on standards of professional care.<sup>84</sup> In the case of transport and delivery services, questions have been raised about road safety and insurance coverage and the impact on the transport accident scheme.

If the status of workers is not clear, it is possible that tax is not being remitted appropriately with respect to the workers, especially if they are not correctly classified.<sup>85</sup> This could result in workers or businesses having outstanding tax liabilities and/or a loss of tax revenue. By way of example, the ATO has recently stated that the mischaracterisation of workers as independent

contractors by Foodora resulted in about \$2 million in lost revenue. The impact on tax revenue as a consequence of the misclassification of independent contractors is of concern to the ATO, as is the equitable treatment of all tax payers.<sup>86</sup> Similarly, Revenue NSW has stated that this mischaracterisation arguably resulted in lost revenue of a further \$550,000.<sup>87</sup> There may be similar implications for Victoria's tax revenue.

**The uptake of consumers accessing services via the on-demand sector demonstrates that the choices and convenience offered have high value to many. The Inquiry invites submissions from consumers, the community and regulators about matters such as:**

- **Why do consumers access services offered on-demand?**
- **What are the benefits that they experience?**
- **What do consumers do if the services are not of an acceptable quality and how successful are they in remedying the consequences of sub-standard services being delivered?**
- **What options do third parties have if they suffer harm in the course of on-demand services being provided?**
- **How are on-demand workers and businesses assessing and meeting their obligations under tax, workers' compensation, health and safety and consumer protection laws?**
- **What are the options available to consumers and regulators if they are not?**
- **Does the way in which on-demand work is carried out create any risks to the safety of Victorians, either directly as users of the services or indirectly?**

### 3.3 Impact on business

The Productivity Commission has suggested that digital technologies will provide businesses with new tools to increase demand for their products or services, for instance, as consumers are able to review the quality of those products and services. This vital information can be used by business to improve their offerings. At the same time businesses will be able to make improvements to the supply side of their business by for instance lowering their costs with better utilisation of a source of workers who work flexibly.<sup>88</sup> On-demand platforms may assist businesses reduce recruitment<sup>89</sup> and staff costs.<sup>90</sup> It is estimated that the time it takes a business to hire a contractor from a talent market place is around 31 days faster than via more traditional recruitment avenues.<sup>91</sup> Further, businesses may also find that a 'gig' or task-based approach to organising work in the on-demand economy may reduce under-utilisation of work resources.<sup>92</sup> Businesses may thus be able to more easily scale up or down resources for different projects, enabling supplementation of different work skills and gain the capacity to readily draw on new ideas or ways of thinking.<sup>93</sup> Specialist skills or knowledge can be sourced from a global pool of talent, or indeed from anywhere in Australia, providing businesses with access to a wider range of skilled workers.<sup>94</sup> It has also been noted that businesses can expand their customer base without significant investments being made by using on-demand services, provided that they can manage the logistics associated with using the on-demand workforce.<sup>95</sup>

The Terms of Reference require an examination of the impact of on-demand services on businesses operating in metropolitan, regional or rural settings. This will include implications of the emergence of on-demand work for those engaging a workforce using traditional employment models. These businesses are required to comply with a range of regulatory obligations that on-demand businesses may not necessarily be complying with. If the legal status of workers is not as they have been characterised, are on-demand arrangements obtaining unfair advantages over those who engage their workforces directly (the notion that the playing field is not level)?

The recent FWC Foodora decision is apposite. In that case, Commissioner Cambridge found that Foodora avoided many of the responsibilities and obligations that it would ordinarily have as an employer, such as public liability insurance, workers' compensation insurance, statutory superannuation, licensing work and health and safety.<sup>96</sup> Commissioner Cambridge noted:

Contracting and contracting out of work, are legitimate practices which are essential components of business and commercial activity in a modern industrialised economy. However, if the machinery that facilitates contracting out also provides considerable potential for the lowering, avoidance, and/or obfuscation of legal rights, responsibilities, or statutory and regulatory standards, as a matter of public interest, these arrangements should be subject to stringent scrutiny. Further, if as part of any analysis involving the correct characterisation that should be given to a particular relationship, an apparent violation of the law, or statutory or regulatory standards is identified, as a matter of public interest, any characterisation of the relationship which would avoid or minimise the likelihood of such violation should be preferred.<sup>97</sup>

**Businesses are both providers and users of on-demand services. They are also competitors of those providing these services. The Inquiry is seeking feedback from businesses about their experience of the on-demand economy, including:**

- What is the experience of businesses accessing on-demand services? Does this vary between metropolitan, regional and rural locations?
- What differences do businesses experience between accessing workers or services via on-demand arrangements and 'traditional' arrangements?
- What benefits or challenges do they encounter?
- What sort of arrangements are in place between businesses and on-demand workers or platforms?
- How are the arrangements between businesses and on-demand workers or platforms negotiated?
- How do businesses raise issues or concerns about the services provided by on-demand workers and what response to they receive?

## 4. Regulatory Landscape in Australia and Internationally

Legal entitlements and obligations for work carried out under employment relationships is primarily set out in the Fair Work Act. Victoria has referred almost all of its industrial relations powers to the Commonwealth since 1996. This means that subject to a number of limited exceptions, Victorian workers and businesses are covered by federal industrial relations laws.<sup>98</sup> There are also a number of Victorian acts which regulate matters relevant to workers and businesses (a number of those are outlined below). In addition, a range of other regulatory frameworks are relevant including Federal and State tax regimes, consumer protection laws and Immigration laws. A summary of the key pieces of legislation is provided at Attachment B.

### 4.1 Fair Work Act

The Fair Work Act is the principal source of employment rights and conditions for Victorian employees and provides some very limited protections to independent contractors in certain circumstances. Important features include:

- the National Employment Standards (NES);
- Modern Awards, incorporating minimum wages;
- unfair dismissal laws;
- bargaining rights seek to facilitate good faith bargaining at the enterprise level;<sup>99</sup>
- protections from adverse action;
- protections against sham contracting; and
- provisions deeming textile clothing and footwear outworkers to be employees in certain instances.<sup>100</sup>

### 4.2 Victorian legislation

A number of state laws provide workplace rights and entitlements for Victorian workers that may be of relevance to the on-demand workforce which operate concurrently and consistently with those provided in the Fair Work Act.<sup>101</sup>

Some laws apply only to employees such as the *Long Service Leave Act 2018 (Vic)*;

Other laws have extended protections and entitlements that apply to both employees and independent contractors to some extent, such as health and safety and workers' compensation and payroll tax laws – see Attachment B for details.

Other Victorian laws of relevance to the Inquiry include the *Education and Training Reform Act 2006 (Vic)* and *Transport Accident Act 1986 (Vic)*.

### 4.3 Other relevant federal legislation

In addition to the Fair Work Act, the other federal laws that regulate the engagement of workers in Victoria may also be of relevance to the on-demand workforce and economy. For example, consumer protection laws, tax and superannuation frameworks and discrimination laws. Of particular note (as previously mentioned) is the *Independent Contractors Act 2006* (Cth).

### 4.4 Enforcement of laws with respect to on-demand workers

The capacity and capability of people in or affected by the on-demand economy to resolve disputes and access remedies is highly relevant to this Inquiry. If people cannot work out what the rules are, apply them and seek remedies under them, it undermines the integrity of the legal framework.

The community looks to regulators, authorities, advisers and representative groups such as unions to assist them understand and apply the rules.

The Inquiry wants to hear from those who are able to advise us about the experience and capacity of people operating in or accessing the on-demand economy to seek assistance, raise disputes and have them resolved.

This is particularly important for vulnerable workers and consumers.<sup>102</sup> Uncertainty about the legal status of some on-demand workers is a threshold question which impacts on regulators' capacity to respond and address these issues.

This is illustrated by the inconsistent decisions handed down by the FWC when considering the legal status of on-demand workers working for or with different business platforms.<sup>103</sup> The experience of Foodora demonstrates that while regulators (the ATO and the FWO) have taken action, this action has been slow and questions remain as to how effective that action was after Foodora ceased its operations in Australia.

The Inquiry seeks to understand more about whether regulators have the resources and capability to apply and enforce the law to on-demand work. A key challenge in addressing these issues is that Victoria may have limited capacity to regulate in areas where Federal legislation applies.

**The Inquiry seeks feedback about:**

- **What are the existing mechanisms available and approaches adopted for determining the application of the law to on-demand workers? Are they adequate? Who provides support and assistance to people with a concern or dispute arising from on-demand work from workers, businesses or consumers or the community?**
- **What role are community groups and unions playing and do they have the resources and infrastructure they need to effectively represent on-demand workers?**
- **How many inquiries and complaints do regulators receive with respect to on-demand work and how do they resolve them?**
- **What challenges exist for regulators in applying and enforcing the law with respect to on-demand work? Do they have the resources and infrastructure they need to effectively deal with disputes?**

## 4.5 Regulatory approaches in other Australian states and internationally

### 4.5.1 Australian jurisdictions

No jurisdiction in Australia has sought to specifically regulate on-demand workers.

The final report of the Senate Select Committee on the Future of Work and Workers recommended that workplace laws should be altered so that regardless of their legal status or classification, all workers ought to be provided with workplace rights and entitlements in areas including workplace health and safety, superannuation, sham contracting and the ability to collectively negotiate terms and conditions of work.<sup>104</sup> This type of regulatory approach is evident in Australia's national occupational health and safety schemes, which protect people who are performing work, regardless of their employment status. A similar approach is evident in Victoria's labour hire licensing scheme. This scheme provides protections to defined 'workers' performing work in and as part of the relevant business or undertaking, regardless of their classification as 'employees' or 'independent contractors'.<sup>105</sup>

It is possible that a further push for similar protections might occur in the future. The Federal Opposition's policy for the on-demand workforce seeks to ensure that workers obtain outcomes equivalent to prevailing industry standards.<sup>106</sup>

Recently, the TWU has proposed that workers in the on-demand economy should be entitled to bargain collectively to establish minimum pay and conditions. As part of the TWU's proposals, contractors would be allowed to apply to the FWC to obtain industry specific standards if they are classified as dependent contractors. Under the proposed model, the FWC would be conferred with necessary powers to determine the status of workers by reference to their work patterns and the extent of dependency of independent contractors on certain business models.<sup>107</sup>

### 4.5.2 International Labour Organization

The International Labour Organization (ILO) is a specialised agency of the United Nations that makes its conventions through tripartite negotiations between business, government and unions. ILO conventions set out internationally recognised standards, which inform domestic law and policy and stakeholder expectations. ILO conventions must be incorporated into domestic law to be binding in Australia. ILO standards may be a useful reference point when legislation and administrative policy are being developed.<sup>108</sup> These standards are also relevant as far as member states (and jurisdictions within those states) are to report on the extent that their national law and practice gives effect to applicable ILO treaty obligations. Several ILO Conventions and Recommendations may be of relevance to this Inquiry, including:

- *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87), provides that workers and employers have the right to form and join trade unions or associations;<sup>109</sup>
- *Right to Organise and the Collective Bargaining Convention, 1949* (No. 98) provides, among other things, for workers to be free to associate collectively;<sup>110</sup>
- *Discrimination in Employment and Occupation Convention, 1958* (No. 111) principally provides for the elimination of discrimination in employment and occupation on the basis of protected attributes such as a persons' race, sex, colour, religion, political opinion, national extraction or social origin;<sup>111</sup>
- *Termination of Employment Convention 1982* (No. 158) prohibits unlawful dismissals;<sup>112</sup>

- *ILO Declaration on Fundamental Principles and Rights at Work, 1998*, commonly known as the ILO Declaration, is a non-judicial, “soft law” instrument that is comprised of a number of ‘core’ ILO Conventions which seek to ensure that basic human and labour rights are universally recognised and protected (whether or not a state has ratified the relevant convention). The four core principles are derived from the underlying conventions and the obligations they impose regarding: the elimination of forced or compulsory labour; the abolition of child labour; freedom from discrimination in employment and occupation; and freedom of association and the right to collective bargaining;<sup>113</sup> and
- *ILO Recommendation 198 regarding the Employment Relationship (2006)*, proposes that states should adopt measures to combat disguised employment relationships.<sup>114</sup>

### 4.5.3 United Kingdom

Employment legislation in the United Kingdom (UK) has a category of employment status called ‘worker’ that is distinct from the employment status of ‘employee’. In the UK all ‘employees’ are ‘workers’, but not all ‘workers’ are ‘employees’. Some of the characteristics of a ‘worker’ include: the existence of a contract or other arrangement to complete work or services personally and for a reward; the payment of money or a benefit in kind; a limited capacity to subcontract the performance of the contract; and an obligation on the employer to provide work for the duration of the contract.<sup>115</sup> Such ‘workers’ receive some rights afforded to employees, such as: the national minimum wage; provisions for rest breaks; and protections from matters including unlawful discrimination and whistleblowing.<sup>116</sup> However, ‘workers’ do not receive ‘employee’ entitlements such as: sick pay; parental leave entitlements, and protection from unfair dismissal.<sup>117</sup>

In the UK the Employment Tribunal found in 2016 that Uber drivers were ‘employees’ for the purposes of the *Employment Rights Act 1996* (UK), the *Working Time Regulations 1998* (UK) and the *National Minimum Wage Act* (UK).<sup>118</sup> This meant that the drivers were entitled to minimum wages, holidays and other benefits under British employment legislation.<sup>119</sup> Uber had argued that the relationship was one where it worked for drivers, providing them access to clients.<sup>120</sup> This argument was not accepted. The Tribunal held that Uber ran a transportation business, with the drivers providing the labour through which it delivered its services.<sup>121</sup> The extent to which this decision may be of relevance in Australia is not certain.<sup>122</sup> In UK legislation the term ‘worker’ has a broader definition than the common law meaning of the term ‘employee’.<sup>123</sup> A finding that a person is a ‘worker’ for the purposes of UK legislation does not necessarily mean that the person would be regarded as an employee in Australia.

### 4.5.4 Canada

Some Canadian provinces have created a category of worker that is called a ‘dependent contractor’. This includes British Columbia and Ontario. In British Columbia the indicia used to determine whether a worker is a dependent contractor include factors such as: the extent to which the worker performs work for one principal; the extent of control that the principal exercises; the degree of risk for loss that the worker undertakes; and the extent to which the work performed is an integrated function of the principal’s business.<sup>124</sup> Dependent contractors are entitled to notice of termination and may be provided with compensation for any failure to provide notice and/or wrongful dismissal. Some Canadian provinces have laws that permit dependent contractors to access the same bargaining rights and processes provided to employees, including to participate in collective bargaining.<sup>125</sup>

#### 4.5.5 United States of America

There are minimal legal protections for temporary and insecure workers in the US.<sup>126</sup> In the United States most federal labour law is structured around the existence of an employment relationship.<sup>127</sup> As a result, for example, independent contractors do not receive protections from discrimination under the *Age Discrimination in Employment Act 1967*,<sup>128</sup> or *Title VII of the Civil Rights Act 1964*.<sup>129</sup> This being so, certain existing laws have been creatively utilised to regulate the on-demand economy. For instance, in 2018 the New York City Council approved a 12-month limitation on the issue of new licences for rideshare services such as 'Uber' and 'Lyft' and also allowed the city to establish minimum pay rates for drivers. Taxi driver representatives in Australia have called for a similar regulatory response.<sup>130</sup> Though this law may be subject to further legal challenge (and at the time of writing it is subject to a stay order), the City of Seattle previously passed legislation that would enable for hire vehicle drivers (who are independent contractors) to collectively bargain.<sup>131</sup> In Washington courts have recently determined that the Washington Law Against Discrimination applies to independent contractors.<sup>132</sup>

The concept of joint employment is also recognised in the US and may be of relevance in an on-demand context where a platform business and end user client may determine a worker's conditions. In the US, if two employers are found to jointly determine the wages and conditions of a worker, then both may be attributed with responsibility for employing the relevant worker.<sup>133</sup>

There has been litigation and other enforcement of entitlements in the US that have supported the classification of on-demand workers as 'employees'.<sup>134</sup> The Labor Commissioner of the State of California (a body similar to the FWO in Australia) has previously ruled that an Uber driver was an employee.<sup>135</sup> The Labor Commissioner applied a similar multifactor test to that which applies in Australia and focused on factors including that Uber had all "necessary control" in obtaining clients and obtaining driver workers to serve its clients.<sup>136</sup> The New York Unemployment Insurance Appeal Board has upheld a Department of Labor decision that three Uber drivers were employees.<sup>137</sup> Similarly, the California Unemployment Insurance Appeals Board has previously determined that an Uber driver was eligible to obtain unemployment insurance benefits.<sup>138</sup> However, a number of other States in the US have found that Uber drivers were not employees.<sup>139</sup> For example, the District Court of Appeal in Florida applied a multifactor test similar to that used by the Labor Commissioner of the State of California and found that an Uber driver was not an employee for the purpose of redeployment assistance.<sup>140</sup>

**The Inquiry encourages feedback on what if any regulatory intervention might be appropriate and available with respect to on-demand workers. In particular, it seeks views about how to best balance business, workers, consumer and community interests:**

- What has been learnt about the impact of regulatory interventions in the on-demand economy from other jurisdictions?
- What principles should be applied in considering what if any regulatory intervention might be appropriate with respect to on-demand work?
- What alternative approaches to the status quo might be applied?
- To what extent are these approaches open to the Victorian Government? If not, how might they be implemented?
- What activities or organisations/persons might be an appropriate focus for a regulatory intervention? For workers, industries, businesses?
- Is Victoria's current treatment of on-demand workers consistent with Australia's obligations under international law, such as International Labour Organization conventions?

# Attachment A

## Current inquiries and other activity

- The University of Western Australia, *Project: Worker Experience in the Food Delivery Gig Economy*, [uwa.edu.au/Projects/Worker-Experience-in-the-Food-Delivery-Gig-Economy](http://uwa.edu.au/Projects/Worker-Experience-in-the-Food-Delivery-Gig-Economy).

## Past inquiry reports

- Australian Government, Select Committee on the Future of Work and Workers, *Hope is not a Strategy – Our Shared Responsibility for the Future of Work and Workers*, tabled September 2018.
- Australian Government, Consultation on a *Digital Economy Strategy 2018*, [industry.gov.au/strategies-for-the-future/participating-in-the-digital-economy](http://industry.gov.au/strategies-for-the-future/participating-in-the-digital-economy)
- Parliament of Australia, Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, 2017. The final report has a chapter on the gig economy which explores the extent of sham contracting for on-demand workers.
- Australian Government, Productivity Commission, *Digital Disruption: What do Governments Need to do?* released June 2016.
- Parliament of Australia, Education and Employment References Committee, *The Feasibility of, and Options for, Creating a National Long Service Standard, and the Portability of Long Service and Other Entitlements*, 2016.
- Australian Government, Senate Education and Employment References Committee, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 2016.
- Australian Government, Productivity Commission, *Inquiry into the Workplace Relations Framework*, 2015. The final report included an examination of matters such as sham contracting and migrant workers.
- Australian Government, Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program*, 2016, [fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports](http://fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports).
- Western Australian Government, *Review of the State Industrial Relations System*, [commerce.wa.gov.au/labour-relations/ministerial-review-state-industrial-relations-system](http://commerce.wa.gov.au/labour-relations/ministerial-review-state-industrial-relations-system). The Report has a section on the gig economy.
- QLD Government, *Five Year Review of QLD's workers' compensation scheme 2018*, [worksafe.qld.gov.au/laws-and-compliance/workers-compensation-laws/laws-and-legislation/five-year-review-of-queenslands-workers-compensation-scheme-2018](http://worksafe.qld.gov.au/laws-and-compliance/workers-compensation-laws/laws-and-legislation/five-year-review-of-queenslands-workers-compensation-scheme-2018). The Final Report considers the application of workers' compensation laws to on-demand workers.

# Attachment B

## Fair Work Act

The Fair Work Act is the principal source of employment rights and conditions for Victorian employees and provides some very limited protections to independent contractors in certain circumstances. Important features include:

- the National Employment Standards (NES) provide minimum conditions on hours of work, certain types of leave entitlements and notice of termination. For the most part, the NES do not apply to independent contractors, other than outworkers who are deemed to be employees for certain purposes in the Fair Work Act;
- Modern Awards are industry or occupational-based instruments which set out conditions relating to matters such as wages, penalty rates and other allowances and protection from unfair dismissal in certain circumstances. Modern Awards do not apply to independent contractors (other than outworkers in the textile clothing and footwear industry);
- unfair dismissal laws confer protections on some employees who have been unfairly dismissed, but do not apply to independent contractors;
- bargaining rights seek to facilitate good faith bargaining at the enterprise level. If on-demand workers are classified as independent contractors, then they will not be entitled to the benefit of the bargaining framework in the Fair Work Act. However, some agreements permit contractors to be extended the same wages and conditions as employees.<sup>141</sup>
- protections from adverse action (such as terminating or varying a contractual engagement for a prohibited reason) with respect to conduct by employers and certain conduct of principal contractors against employees or independent contractors who hold or exercise workplace rights; and
- protections against sham contracting, which arise when an employer misrepresents that an employment relationship is an independent contracting relationship.

## Victorian legislation

A number of state laws provide workplace rights and entitlements for Victorian workers that may be of relevance to the on-demand workforce. These sources of rights and entitlements operate concurrently and consistently with those provided in the Fair Work Act.<sup>142</sup>

Some laws apply only to employees including:

- The *Long Service Leave Act 2018* (Vic) which provides for paid long service leave for employees based on the employee's period of continuous service with an employer. Independent contractors are not entitled to long service leave under this statute.

Other laws have extended protections and entitlements to both employees and independent contractors including:

- The *Long Service Benefits Portability Act 2018* (Vic) which provides portability of long service leave benefits in the community services, security and contract cleaning industries. Under this statute, long service leave or benefits will be conferred on a worker (employee or contractor) no matter the number of employers or persons who engage that worker;

- The *Equal Opportunity Act 2010* (Vic) which prohibits discrimination based on a range of attributes such as sex, disability, race, age and sexual orientation by an employer or principal contractor against employees or independent contractors;
- The *Occupational Health and Safety Act 2004* (Vic) which imposes health and safety duties on employers in respect of their employees and contractors. An employer must also ensure that persons other than employees of the employer are not exposed to risks to their health and safety arising from the conduct of the employer's undertaking. This legislation also imposes duties on persons who manage or control a workplace in respect of that workplace, and on employees and self-employed persons and contractors in respect of the health and safety of other persons;
- The *Owner Drivers and Forestry Contractors Act 2005* (Vic) provides for the regulation of the relationship between persons who contract to transport goods in a vehicle, or harvest forest products using motorised equipment, supplied by them and persons who hire them. It does so in a variety of ways, including by: providing certain contractual rights for owner operators in the transport and forestry sectors, allowing negotiating agents to be appointed and providing a dispute-resolution mechanism;
- The *Workplace Injury, Rehabilitation and Compensation Act 2013* (Vic) and the *Accident Compensation Act 1985* (Vic) provide an entitlement to compensation for injuries and illness arising out of or in the course of work, to 'workers,' which is defined to include employees under the common law and also persons deemed to be 'workers' under the legislation (see Schedule 1 of the *Workplace Injury, Rehabilitation and Compensation Act 2013* (Vic) and the *Accident Compensation Act 1985* (Vic));
- The *Working with Children Act 2005* (Vic) ensures that any person (subject to a few exceptions with respect to police officers for example) who is to work with or for children is subject to a screening process. The screening process examines serious criminal charges, offences, professional conduct determinations and findings related to the safety of children. That Act covers both employees and independent contractors. The *Child Employment Act 2003* (Vic) has a broad definition of employment and requires a permit to be obtained prior to employing a child under 15 years of age.
- The *Outworkers (Improved Protection) Act 2003* (Vic) continues to operate consistently with relevant provisions in the Fair Work Act that apply to outworkers. The Victorian Act also enables outworkers to recoup remuneration from entities in a relevant supply chain whether or not any of those entities are a party to a contract with the outworker;
- The *Labour Hire Licensing Act 2018* (Vic) establishes the Victorian labour hire licensing scheme. The scheme seeks to protect vulnerable workers from exploitation and regulate the provision of labour hire services. Compliance obligations for labour hire providers and users, including those relating to licensing, are not anticipated to commence before early 2019.
- The *Payroll Tax Act 2007* (Vic) imposes payroll tax on wages and benefits when certain wage thresholds are exceeded. Employers are liable to pay this tax. Payments to certain contractors in some circumstances may be taken to be wages and so attract payroll tax obligations.<sup>143</sup>

Other laws of relevance to the Inquiry include:

- The *Education and Training Reform Act 2006* (Vic), which deals with, among other things, the terms of engagement for trainees and apprentices and accreditation and regulatory requirements for training providers;
- The *Transport Accident Act 1986* (Vic) established the Transport Accident Commission (TAC) and a compensation scheme for persons who are injured or die as a result of transport accidents. A central feature of the TAC compensation scheme is the no-fault benefits scheme that provides cover for all Victorians regardless of who is at fault. The other key feature of the scheme is that persons who are able to prove that a party is at fault can seek further compensation under the common law. The TAC compensation scheme aims to reduce the incidence and cost of transport accidents.

## Other relevant federal legislation

In addition to the Fair Work Act, the following federal laws that regulate the engagement of workers in Victoria may also be of relevance to the on-demand workforce and economy:

- the *Competition and Consumer Act 2010* (Cth) (which extends to individual consumers and also businesses too) is directed at a very broad range of matters including: prohibiting misleading and deceptive conduct; invalidating unfair terms in standard form consumer contracts; providing statutory consumer guarantees for goods and services; and providing a product safety regime. There are substantial penalties for those businesses who breach competition and consumer laws.<sup>144</sup> The Act also prohibits employers from misleading prospective employees about the availability, nature, terms and conditions, or other aspects of a position for which they are applying. This statute also applies to standard form contractors for the supply of services by or to a consumer or a 'small business'.<sup>145</sup> A 'small business' standard form contract is a contract that has been created by one party, where the other party to that contract has little or no opportunity to negotiate the terms of the relevant contract.<sup>146</sup> A Court can only determine if a term is unfair for it to be void and not bind either party to that contract.<sup>147</sup> It appears that these provisions may apply to contractors who are engaged by business platforms.<sup>148</sup> The *Fair Trading Act 2012* (Vic) extends the application of this federal legislation in Victoria.<sup>149</sup> If on-demand workers are classified as independent contractors then they may be prevented from pressing collective demands by provisions in part IV of the *Competition and Consumer Act, 2010*<sup>150</sup> Only if approval is granted by the Australian Competition and Consumer Commission, may contractors in this category bargain collectively,<sup>151</sup>
- the *Independent Contractors Act 2006* (Cth) provides some avenues of redress for contractors that may be subjected to harsh or unfair contract arrangements. That statute also limits the ability of state laws to provide certain minimum rights and entitlements for contractors covered by federal laws;
- the *Migration Act 1958* (Cth) imposes restrictions and visa requirements on non-citizens who seek to work in Australia. The statute creates offences for employers who employ workers in breach of the requirements of the statute or visa limitations;
- the *Superannuation Guarantee (Administration) Act 1992* (Cth) and the *Superannuation Guarantee (Charge) Act 1992* (Cth) require employers to make minimum contributions on behalf of employees and deem certain contract workers to be 'employees'<sup>152</sup>; and
- the *Tax Administration Act 1953* (Cth) requires the deduction of income tax from the earnings of employees. There are different arrangements for contractors (such as the personal services income test) which is used to ensure that only contractors who are genuinely running their own business obtain more favourable tax treatment.<sup>153</sup>
- Commonwealth anti-discrimination laws (*Age Discrimination Act 2004* (Cth), *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth) and *Disability Discrimination Act 1992* (Cth)) prohibit direct and indirect discrimination against both employees and contractors in certain circumstances. These laws also prohibit discrimination in areas of public life such as employment, education, accommodation, and the provision of goods and services, on the basis of specified attributes (such as sex, race and age).<sup>154</sup>

# Endnotes

- 1 Jeremias Prassl and Martin Risak, 'Uber, Taskrabbit, & Co: platforms as employers? Rethinking the legal analysis of crowdwork' (2016) 37 *Comparative Labor Law and Policy Journal* 619, 621-624; Eurofound, Employment and working conditions of selected types of platform work (Research Report, Eurofound, 2018), 9.
- 2 Eurofound, above n 1, 9.
- 3 European Agency for Safety and Health at Work, *Protecting Workers in the Online Platform Economy: An Overview of Regulatory and Policy Developments in the EU* (2017) [osha.europa.eu/en/tools-and-publications/publications/summary-regulating-occupational-safety-and-health-impact](https://osha.europa.eu/en/tools-and-publications/publications/summary-regulating-occupational-safety-and-health-impact), 2.
- 4 Productivity Commission, *Digital Disruption: What do governments need to do?* (2016) 149, [pc.gov.au/research/completed/digital-disruption/digital-disruption-research-paper.pdf](https://www.pc.gov.au/research/completed/digital-disruption/digital-disruption-research-paper.pdf).
- 5 Susan Lund, James Manyika, Jacques Bughin, Kelsey Robinson, Jan Mischke and Deepa Mahajan, 'Independent Work Choice: Necessity in the Gig Economy' (McKinsey Global Institute, 2016). Though McKinsey Global Institute referred to it as the 'gig economy' and considered the central characteristics of independent work rather than legal classifications, and platform facilitated work is a part of this independent workforce. See also Eurofound, above n1, 9.
- 6 Eurofound, above n1, 9.
- 7 Paul Oyer, 'The Independent Workforce in America' (Stanford University Graduate School of Business, 2016) [s3-us-west-1.amazonaws.com/adquiro-content-prod/documents/paul\\_oyer\\_the\\_independent\\_workforce\\_in\\_america.pdf](https://s3-us-west-1.amazonaws.com/adquiro-content-prod/documents/paul_oyer_the_independent_workforce_in_america.pdf); Sharon De Silva, *Gender and the Gig Economy: New ways of working for women with the same old problems?*, Research project currently being undertaken as a Minor Thesis (LLM) in the Melbourne Law School, University of Melbourne (2018).
- 8 Eurofound, above n1, 9.
- 9 Michael Leigh Cowling and Mark Wooden, 'Self-employment and independent workers' in Melbourne Institute Applied Economic & Social Research, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 16* (2018) 97 and 98; De Silva, above n 7.
- 10 Australian Bureau of Statistics, *Catalogue 6150.0.55.003 Labour Account Australia, Quarterly Experimental Estimates, September 2018* (online) 11 December 2018: the Australian Bureau of Statistics (ABS) published data and stated that: "The number of jobs that were filled in Australia increased by 0.3 per cent in the September quarter of 2018, with around half of the increase being secondary jobs ... Nearly one third (30 per cent) of the increase in secondary jobs this quarter was in the administrative and support services, with the next largest contribution coming from accommodation and food services industry (29 per cent). Accommodation and food services is the fourth largest industry in the economy in terms of secondary jobs. Only administrative and support services, health care and social assistance, and education and training industries have more secondary jobs than the accommodation and food services industry". This ABS data release does not identify or distinguish if the increase in secondary jobs was gained via a 'platform business.' It may be possible to reasonably infer that a portion of the increase in secondary jobs can be attributed to an increase in 'on-demand work', but robust data on the prevalence of 'on-demand work' is not available from this data release [abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6150.0.55.003 Explanatory%20Notes%20September%202018?OpenDocument](https://abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6150.0.55.003%20Explanatory%20Notes%20September%202018?OpenDocument).
- 11 Productivity Commission, *Digital Disruption*, above n 4.
- 12 Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28 *The Economic and Labour Relations Review* 420, 423.
- 13 Such figures are comparable to data from the United States of America (US), Europe and in the United Kingdom. A 2016 US study used banking activity to conclude that about 0.5% of Americans engage in on-demand work through platforms: see Stewart and Stanford, above n 12, 423. A 2017 United Kingdom survey estimated that there are approximately 1.1 million on-demand workers in that jurisdiction: see Brhmie Balam, Josie Warden & Fabian Wallace-Stephens, *Good Gigs: A Fairer Future for the UK's Gig Economy* (2017) [thersa.org/globalassets/pdfs/reports/rsa\\_good-gigs-fairer-gig-economy-report.pdf](https://thersa.org/globalassets/pdfs/reports/rsa_good-gigs-fairer-gig-economy-report.pdf). A European survey in 2018 found that approximately 10% of adults had participated in on-demand work on at least one occasion, while less than 8% had performed on-demand work with some regularity: see Annarosa Pesole et al, *JRC Science for Policy Report: Platform Workers in Europe: Evidence from the COLLEEM Survey* (2018) European Commission [publications.jrc.ec.europa.eu/repository/bitstream/JRC112157/jrc112157\\_pubsy\\_platform\\_workers\\_in\\_europe\\_science\\_for\\_policy.pdf](https://publications.jrc.ec.europa.eu/repository/bitstream/JRC112157/jrc112157_pubsy_platform_workers_in_europe_science_for_policy.pdf).
- 14 Organisation for Economic Co-operation and Development, 'New Forms of Work in the Digital Economy' (Organisation for Economic Co-operation and Development, 13 June 2016), 22.
- 15 Cowling and Wooden, above n 9, 96; Eryk Bagshaw, 'The gig economy is a myth, survey finds,' *The Sydney Morning Herald* (online) 30 July 2018 [smh.com.au/business/the-economy/the-gig-economy-is-a-myth-survey-finds-20180730-p4zufo.html](https://www.smh.com.au/business/the-economy/the-gig-economy-is-a-myth-survey-finds-20180730-p4zufo.html).
- 16 Oyer, above n 7.
- 17 A 2015 study concluded that the Australian on-demand economy (internet and digital economy) contributed about \$79 billion to gross domestic product in 2013 – 2014 (5.1 percent to gross domestic product): Deloitte Access Economics, 'The Connected Continent II – How Digital Technology is Transforming the Australian Economy' (2015) 11 and 45; see also Deloitte Access Economics, *Review of the collaborative economy in NSW* (2015), 15 [finance.nsw.gov.au/sites/default/files/Deloitte\\_Report\\_Review\\_Collaborative\\_Economy.pdf](https://www.finance.nsw.gov.au/sites/default/files/Deloitte_Report_Review_Collaborative_Economy.pdf). In 2013, the Economist reported that the

- value of the global sharing economy was estimated at about \$26 billion: *The Economist*, 'The rise of the sharing economy', *The Economist* (online), 9 March 2013 [economist.com/leaders/2013/03/09/the-rise-of-the-sharing-economy](http://economist.com/leaders/2013/03/09/the-rise-of-the-sharing-economy); Productivity Commission, above n 11, 149.
- 18 Frances Flanagan, 'Theorising the gig economy and home-based service work' (2018) *Journal of Industrial Relations*, 3; Stanford, Jim, 'The Resurgence of Gig Work: Historical and Theoretical Perspectives' (2017) 27 *The Economic and Labour Relations Review* 314.
- 19 Flanagan, above n 18, 3.
- 20 Productivity Commission, above n 11.
- 21 Kate Minter, *Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales* (2018) 28 *The Economic and Labour Relations Review* 438, 454 and 442.
- 22 Jim Minifie and Trent Wiltshire, *Peer-to-Peer Pressure: Policy for the sharing economy* (Grattan Institute, 2016), 8; Ai Group, *The Emergence of the Gig Economy* (2016) 4, [cdn.aigroup.com.au/Reports/2016/Gig\\_Economy\\_August\\_2016.pdf](http://cdn.aigroup.com.au/Reports/2016/Gig_Economy_August_2016.pdf).
- 23 Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal, *Creighton & Stewart's Labour Law* (The Federation Press, 6th ed, 2016), 205.
- 24 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1955) 93 CLR 561; see also *Hollis v Vabu* (2001) 207 CLR 21, 40; Stewart, Forsyth, Irving, Johnstone and McCrystal, above n 23, 205.
- 25 Stewart, Forsyth, Irving, Johnstone and McCrystal, above n 23, 206.
- 26 Stewart, Forsyth, Irving, Johnstone and McCrystal, above n 23, 206.
- 27 Productivity Commission, Digital Disruption, above n 4.
- 28 Prassl and Risak, above n1, 627-634.
- 29 *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.
- 30 Workplace Express, 'ATO's Foodora report could be ticking bomb: Academic' Workplace Express (online), 9 November 2018 [workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&nav=10&selkey=57329&utm\\_source=instant+email&utm\\_medium=email&utm\\_campaign=subscriber+email&utm\\_content=article+headline&utm\\_term=ATO%27s%20Foodora%20report%20could%20be%20ticking%20bomb%3A%20Academic](http://workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=57329&utm_source=instant+email&utm_medium=email&utm_campaign=subscriber+email&utm_content=article+headline&utm_term=ATO%27s%20Foodora%20report%20could%20be%20ticking%20bomb%3A%20Academic).
- 31 *Mr Michail Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579.
- 32 Deloitte, *Deloitte Millennial Survey 2018* (2018) [deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-2018-millennial-survey-report.pdf](http://deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-2018-millennial-survey-report.pdf), 22.
- 33 Janine Berg, 'Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers' (2016) 37 *Comparative Labor Law & Policy Journal* 543, 558.
- 34 Stewart and Stanford, above n 12, 423; Workforce, 'Offered Chocolates after assault: rideshare drivers speak out,' *Workforce* (online) 24 October 2018 [thomsonreuters.com.au/pf/cpdnews/pdf/wor1821263.pdf](http://thomsonreuters.com.au/pf/cpdnews/pdf/wor1821263.pdf).
- 35 Workforce, above n 34.
- 36 See Parliament of Australia, Senate Education and Employment References Committee, *Corporate Avoidance of the Fair Work Act 2009*, 2017, Chapter 8, [8.30]; Stewart and Stanford, above n 12, 431-432.
- 37 Stewart and Stanford, above n 12, 431-432.
- 38 Berg, above n 33, 568.
- 39 Prassl and Risak, above n1, 625-627.
- 40 Prassl and Risak, above n1, 625-627.
- 41 Berg, above n 33, 565.
- 42 See Senate Education and Employment References Committee, above n 36, [8.31] – [8.32].
- 43 Stewart and Stanford, above n 12, 428-429; Australian Government, Workplace Gender Equity Agency, Gender Pay Gap Statistics, September 2015 [wega.gov.au/sites/default/files/Gender\\_Pay\\_Gap\\_Factsheet.pdf](http://wega.gov.au/sites/default/files/Gender_Pay_Gap_Factsheet.pdf).
- 44 Antonio Aloisi, 'Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of on-Demand/Gig Economy Platforms' (2016) 37 *Comparative Labour Law and Policy Journal* 653, 664.
- 45 Stewart and Stanford, above n 12, 428-429.
- 46 QUT Business School, Submission No 7 to the Senate Inquiry into the Future of Work and Workers, Commonwealth Senate Inquiry into the Future of Work and Workers, January 2018, 6.
- 47 P.N. Junankar, *The Impact of the Global financial Crisis on Youth Labour Markets* (Discussion paper series, Institute for the Study of Labor, 2014) [researchgate.net/publication/277630226\\_The\\_impact\\_of\\_the\\_Global\\_Financial\\_Crisis\\_on\\_youth\\_unemployment](http://researchgate.net/publication/277630226_The_impact_of_the_Global_Financial_Crisis_on_youth_unemployment); Usman Chohan, 'Young People Worldwide fear a lack of economic opportunities – it's easy to see why,' *The Conversation* (online), 13 September 2016 [theconversation.com/young-people-worldwide-fear-a-lack-of-economic-opportunities-its-easy-to-see-why-65248](http://theconversation.com/young-people-worldwide-fear-a-lack-of-economic-opportunities-its-easy-to-see-why-65248); Centre for Multicultural Youth, Submission to the Senate Inquiry into the Future of Work and Workers, Commonwealth Senate, Inquiry into the Future of Work and Workers,
- 48 Junankar, above n 47; Chohan, above n 47.

- 49 Choban, above n 47.
- 50 Zoya Dhillon and Natasha Cassidy, *Labour Market Outcomes for Younger People*, (Reserve Bank of Australia, Bulletin, 21 June 2018) [rba.gov.au/publications/bulletin/2018/jun/labour-market-outcomes-for-younger-people.html](http://rba.gov.au/publications/bulletin/2018/jun/labour-market-outcomes-for-younger-people.html), 2.
- 51 QUT Business School, above n 46.
- 52 QUT Business School, above n 46, 6.
- 53 Fair Work Ombudsman, Annual Report, (Annual Report, Fair Work Ombudsman, 2013/2014) <fair-work-ombudsman-annual-report-2013-14.pdf>, 29; Fair Work Ombudsman, 'Fair Work Ombudsman Out to Smash Myths Relating to young workers', (Media Release, 13 February 2017). [fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/february-2017/20170213-young-worker-myths-release](http://fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/february-2017/20170213-young-worker-myths-release)
- 54 Zoya Dhillon and Natasha Cassidy, *Labour Market Outcomes for Younger People*, (Reserve Bank of Australia, Bulletin, 21 June 2018) [rba.gov.au/publications/bulletin/2018/jun/labour-market-outcomes-for-younger-people.html](http://rba.gov.au/publications/bulletin/2018/jun/labour-market-outcomes-for-younger-people.html)
- 55 Fair Work Ombudsman, media release, above n 53.
- 56 QUT Business School, above n 46, 6.
- 57 Parliament of Australia, *Senate Select Committee on the Future of Work and Workers: Hope is not a strategy – our shared responsibility for the future of work and workers*, (2018) [aph.gov.au/Parliamentary\\_Business/Committees/Senate/Future\\_of\\_Work\\_and\\_Workers/FutureofWork/Report](http://aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork/Report); Deloitte, above n 33, 2 and 17.
- 58 Senate Select Committee on the Future of Work and Workers, above n 57.
- 59 Senate Select Committee on the Future of Work and Workers, above n 57.
- 60 Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report of the Senate Education and and Employment References Committee, March 2016), [aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/temporary\\_work\\_visa/Report](http://aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report), 15; Department of Immigration and Border Protection, *Australia's Migration Program – temporary visa grants 2014 – 2015* [homeaffairs.gov.au/research-and-stats/files/temporary-visa-grants-2014-15.pdf](http://homeaffairs.gov.au/research-and-stats/files/temporary-visa-grants-2014-15.pdf)
- 61 Fair Work Ombudsman, A report of the Fair Work Ombudsman's Inquiry into 7-Eleven, (Fair Work Ombudsman, April 2016).
- 62 Victorian Government, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Department of Economic Development, Jobs, Transport and Resources, 2016) [economicdevelopment.vic.gov.au/\\_data/assets/pdf\\_file/0016/1390111/IRV-Inquiry-Final-Report-pdf](http://economicdevelopment.vic.gov.au/_data/assets/pdf_file/0016/1390111/IRV-Inquiry-Final-Report-pdf), 30; Natalie James, 'The changing landscape of the Australian Workplace: The Modern Adviser' (Speech delivered at the Law Institute of Victoria Workplace Relations Conference 2016, Melbourne, 28 October 2016); Fair Work Ombudsman, A report of the Fair Work Ombudsman's Inquiry into 7-Eleven, (Fair Work Ombudsman, April 2016); Senate Education and Employment References Committee, above n 60; Fair Work Ombudsman, A report on the Fair Work Ombudsman's Inquiry into the procurement arrangements of the Baiada Group in New South Wales, (Fair Work Ombudsman, June 2015).
- 63 Fair Work Ombudsman, Annual Report (Annual Report, Fair Work Ombudsman, 2016/2017) [fairwork.gov.au/annual-reports/annual-report-2016-17/02-fwo-performance-report/compliance-priorities/migrant-workers](http://fairwork.gov.au/annual-reports/annual-report-2016-17/02-fwo-performance-report/compliance-priorities/migrant-workers).
- 64 Fair Work Ombudsman, Annual Report 2013-2014, above n 53, 30.
- 65 Unions NSW, Submission to Senate Select Committee on the Future of Work and Workers, Commonwealth Senate, *Submission: The Future of Work and Workers*, 2018, 11.
- 66 Unions NSW, above n 65, 11.
- 67 Workplace Gender Equality Agency, *Gender Workplace Statistics at a Glance*, (Fact Sheet, Australian Government, 2018) [wgea.gov.au/sites/default/files/Stats\\_at\\_a\\_Glance.pdf](http://wgea.gov.au/sites/default/files/Stats_at_a_Glance.pdf).
- 68 Australian Bureau of Statistics, *Gender Indicators*, Australia (ABS, September 2017).
- 69 Workplace Gender Equality Agency, 'Unpaid Care Work and the Labour Market', (Insight Paper, Australian Government) [wgea.gov.au/sites/default/files/australian-unpaid-care-work-and-the-labour-market.pdf](http://wgea.gov.au/sites/default/files/australian-unpaid-care-work-and-the-labour-market.pdf); Sara Charlesworth and Janine Chapman, Barbara Pocock, 'Work-Family and Work-Life Pressures in Australia: Advancing Gender Equality in Good Times' (2013) 33 *International Journal of Sociology and Social Policy* 594, 605; De Silva, above n 7.
- 70 Arianne Renan and Anat Ben-David Barzilay, 'Platform Inequality: Gender in the Gig-Economy' (2017) 47 *Seton Hall Review* 393, 403; Rebecca Diamond Cody Cook, Jonahan Hall, John A. List and Paul Oyer 'The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers' (NBER Working Paper Series, Working Paper No 24732, 2018) (male Uber drivers surveyed earned 7 per cent more than female Uber drivers per hour, on average); Matt Wade, 'Even Uber Has a Gender Pay Gap', *The Sydney Morning Herald* (online), 1 July 2018.
- 71 Lund, Manyika, Bughin, Robinson, Mischke and Mahajan, above n 5, 13.
- 72 Minifie and Wiltshire, above n 22, 40.
- 73 Workforce, above n 34; Prassl and Risak, above n1, 625-627; Minifie and Wiltshire, above n 22, 39.
- 74 Workforce, above n 34, 2.
- 75 Prassl and Risak, above n1, 625-627.
- 76 Lund, Manyika, Bughin, Robinson, Mischke and Mahajan, above n 5, 13.
- 77 Victorian Government and Nouse Group, *Flexible work, good for business?* (2018) 5; Berg, above n 33, 554; Hyperwallet, *The Future of Gig Work Is Female* (2017) [hyperwallet.com/resources/ecommerce-marketplaces/the-future-of-gig-work-is-female/](http://hyperwallet.com/resources/ecommerce-marketplaces/the-future-of-gig-work-is-female/); Prassl and Risak, above n1; Gerard Valenduc and Patricia Vendramin, 'Working in the

- Digital Economy: Sorting the Old from the New' (European Trade Union Institute, 2016).
- 78 Prassl and Risak, above n1, 626; De Stefano, V, The Rise of the Just-in-Time Workforce: On Demand Work, Crowdwork and Labour Protection in the 'Gig-Economy (2015) [ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_443267.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_443267.pdf)
- 79 Berg, above n 33, 554.
- 80 Berg, above n 33, 554.
- 81 Minifie and Wiltshire, above n 22, 49.
- 82 Minifie and Wiltshire, above n 22, 49.
- 83 Minifie and Wiltshire, above n 22, 50.
- 84 Flanagan, above n 18, 11.
- 85 L Will and M Waite, 'Self-Employed Contractors in Australia: Incidence and Characteristics: Staff Research Paper' (Staff Research Paper, Productivity Commission, 2001) [pc.gov.au/research/supporting/self-employed/](https://www.pc.gov.au/research/supporting/self-employed/), 7.
- 86 Will and Waite, above n 85, 6.
- 87 Workplace Express, 'ATO's Foodora report could be ticking bomb: Academic,' *Workplace Express* (online) November 2018 [workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&nav=10&selkey=57329&utm\\_source=instant+email&utm\\_medium=email&utm\\_campaign=subscriber+email&utm\\_content=read+more&utm\\_term=ATO%27s%20Foodora%20report%20could%20be%20ticking%20bomb%3A%20Academic](https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=57329&utm_source=instant+email&utm_medium=email&utm_campaign=subscriber+email&utm_content=read+more&utm_term=ATO%27s%20Foodora%20report%20could%20be%20ticking%20bomb%3A%20Academic)
- 88 Productivity Commission, Digital Disruption, above n 4.
- 89 Deloitte Access Economics, *Review of the collaborative economy in NSW* (2015) 11, [finance.nsw.gov.au/sites/default/files/Deloitte\\_Report\\_Review\\_Collaborative\\_Economy.pdf](https://www.finance.nsw.gov.au/sites/default/files/Deloitte_Report_Review_Collaborative_Economy.pdf).
- 90 Deloitte, above n 89, 11.
- 91 Ai Group, *The Emergence of the Gig Economy* (2016) 12, [cdn.aigroup.com.au/Reports/2016/Gig\\_Economy\\_August\\_2016.pdf](https://www.cdn.aigroup.com.au/Reports/2016/Gig_Economy_August_2016.pdf).
- 92 Deloitte, above n 89, 11.
- 93 Ai Group, above n 91, 12.
- 94 Ai Group, above n 91, 12; Productivity Commission, Digital Disruption, above n 4, 48.
- 95 Natalie James, 'The Gig Economy: Navigating new ways to work,' 20 June 2018 [fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180620-gig-economy-op-ed](https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180620-gig-economy-op-ed).
- 96 *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 [105].
- 97 *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 [106].
- 98 *Fair Work (Commonwealth Powers) Act 2009* (Vic).
- 99 Stewart and Stanford, above n 12, 428-429.
- 100 Richard Johnstone, Igor Nossar, Anna Macklin and Michael Rawling, 'Protective Legal Regulation for Home-Based Workers in Australian Textile, Clothing and Footwear Supply Chains' (2015) 57 *Journal of Industrial Relations* 585.
- 101 *Independent Contractors Act 2006* (Cth); *Fair Work (Commonwealth Powers) Act 2009* (Vic).
- 102 Stewart and Stanford, above n 12, 421.
- 103 *Mr Michail Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.
- 104 Senate Select Committee on the Future of Work and Workers, above n 57, 92.
- 105 *Labour Hire Licensing Act 2018* (Vic), ss 7-9.
- 106 Australian Labor Party, *Labor's National Sharing Economy Principles* (2015) [billshorten.com.au/labors-national-sharing-economy-principles](https://www.billshorten.com.au/labors-national-sharing-economy-principles).
- 107 David Marin-Guzman, 'Labor pushed to give independent contractors collective rights,' *The Australian Financial Review* (online), 19 November 2018 [afr.com/news/policy/industrial-relations/labor-pushed-to-give-independent-contractors-collective-rights-20181119-h18247](https://www.afr.com/news/policy/industrial-relations/labor-pushed-to-give-independent-contractors-collective-rights-20181119-h18247)
- 108 Stewart, Forsyth, Irving, Johnstone and McCrystal, above n 23, 98.
- 109 This Convention has 155 ratifications. *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87), opened for signature (entered into force 4 July 1950).
- 110 *Right to Organise and the Collective Bargaining Convention, 1949* (No. 98), opened for signature (entered into force 18 July 1951). This convention has 166 ratifications.
- 111 *Discrimination (Employment and Occupation) Convention 1958* (No 111), opened for signature 25 June 1958, 362 UNTS (entered into force 15 June 1960) and Recommendation 1958 No.111. This convention has 175 ratifications.
- 112 Termination of Employment Convention 1982 (No. 158), opened for signature (entered into force 23 November 1985). This Convention has 36 Ratifications.
- 113 Phillip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime', (2004) *European Journal of International Law* 457, 458.
- 114 Stewart, Forsyth, Irving, Johnstone and McCrystal, above n 23, 200.
- 115 Gov.Uk, 'Get your business ready to employ staff: step by step – Employment Status (2018) [gov.uk/employment-status/employee](https://www.gov.uk/employment-status/employee)

- 116 Gov.Uk, above n, 115.
- 117 Gov.Uk, above n, 115.
- 118 Mr Y Aslam, Mr J Farrar and Others v Uber (2202551/2015 & Others) (2016) Employment Tribunals.
- 119 Stewart and Stanford, above n 12, 424.
- 120 Stewart and Stanford, above n 12, 424.
- 121 Stewart and Stanford, above n 12, 424.
- 122 Stewart and Stanford, above n 12, 424.
- 123 Gov.Uk, above n, 115.
- 124 Randy Kaardal, Q.C. and Alexander Bjornson, *The Gig Economy: Dependent Contractors, Workers Rights, and the Canadian Approach* (2018) ERR 2018 Midwinter Meeting, 9 [litigationchambers.com/lawyers/pdf/2018-02-22-paper-gig-economy-r-kaardal-qc-a-bjornson.pdf](https://litigationchambers.com/lawyers/pdf/2018-02-22-paper-gig-economy-r-kaardal-qc-a-bjornson.pdf)
- 125 Stewart and Stanford, above n 12, 428 – 429; De Silva, above n 7
- 126 Victorian Government, above n 62, 23.
- 127 See for instance: S 623 (a) Age Discrimination in Employment Act 1967, (29 USC §621); S 701 (f) Title VII of the Civil Rights Act 1964 (Pub. L 88-352); S(3)(6) Occupational Safety and Health Act of 1970 (29 USC §651); Yuki Noguchi, 'Unequal Rights: Contract Workers have Few Workplace Protections', National Public Radio (online), 26 March 2018 [npr.org/2018/03/26/593102978/unequal-rights-contract-workers-have-few-workplace-protections\\_11/12/18](https://npr.org/2018/03/26/593102978/unequal-rights-contract-workers-have-few-workplace-protections_11/12/18)
- 128 Section 623 (a) Age Discrimination in Employment Act 1967, (29 USC §621).
- 129 Section 701 (f) Title VII of the Civil Rights Act 1964 (Pub. L 88-352).
- 130 Antonette Collins, *New York caps ride-sharing licences, sparking calls for similar action in Australia* (2018) [abc.net.au/news/2018-08-09/uber-licences-capped-in-nyc-and-calls-for-similar-move-in-sydney/10092324](https://abc.net.au/news/2018-08-09/uber-licences-capped-in-nyc-and-calls-for-similar-move-in-sydney/10092324).
- 131 *Chamber of Commerce of the United States of America versus City of Seattle Department of Finance and Administrative Services; Fred Podesta, in his official capacity as Director, Finance and Administrative Services* (2018) No 17-35640, DC No 2:17-cv-00370-RSL; City of Seattle OECD, above n 14, 22; De Silva, above n 7.
- 132 Karin Jones, *Washington Court of Appeals Holds Independent Contractors are Protected from Retaliation by the Washington Law Against Discrimination*, Stoel Rives World of Employment (online), 12 August 2014 [stoelrivesworldofemployment.com/2014/08/articles/states/washington/washington-court-of-appeals-holds-independent-contractors-are-protected-from-retaliation-by-the-washington-law-against-discrimination/](https://stoelrivesworldofemployment.com/2014/08/articles/states/washington/washington-court-of-appeals-holds-independent-contractors-are-protected-from-retaliation-by-the-washington-law-against-discrimination/).
- 133 Stewart, Forsyth, Irving, Johnstone and McCrystal, above n 23, 260.
- 134 Nick LeMare, Leanne Dorricott, Rachael Cage & Anthony Forsyth *FWC says Uber driver not an Employee: Where next for the share economy* (2018) [corrs.com.au/publications/corrs-in-brief/fwc-says-uber-driver-not-an-employee-where-next-for-the-share-economy/](https://corrs.com.au/publications/corrs-in-brief/fwc-says-uber-driver-not-an-employee-where-next-for-the-share-economy/)
- 135 Le Mare, Dorricott, Cage and Forsyth, above n 135.
- 136 Le Mare, Dorricott, Cage and Forsyth, above n 135.
- 137 Le Mare, Dorricott, Cage and Forsyth, above n 135.
- 138 Le Mare, Dorricott, Cage and Forsyth, above n 135.
- 139 For a list of the relevant State jurisdictions and a discussion of other matters relevant to Uber's litigation history in the United States of America, see Kate Andrias, 'The New Labor Law' (2016) 126 *Yale Law Journal* 143.
- 140 Le Mare, Dorricott, Cage and Forsyth, above n 135.
- 141 Stewart, Forsyth, Irving, Johnstone and McCrystal, above n 23; Stewart and Stanford, above n 12, 428-429.
- 142 *Independent Contractors Act 2006* (Cth); *Fair Work (Commonwealth Powers) Act 2009* (Vic).
- 143 Payments to contractors are, in certain circumstances, taken to be wages: Payroll Tax Act 2007, Division 7, Part 3 (contains the contractor provisions, which are intended to tax payments to contractors who provide predominantly labour services and who work exclusively or primarily for one designated person in a financial year).
- 144 See further Australian Competition and Consumer Commission, *Consumer Rights*, [accc.gov.au/consumers/consumer-rights-guarantees](https://accc.gov.au/consumers/consumer-rights-guarantees); Australian Competition and Consumer Commission, *Business Rights & Protections*, [accc.gov.au/business/business-rights-protections](https://accc.gov.au/business/business-rights-protections)
- 145 *Competition and Consumer Act 2010* (Cth) Schedule 2, ss 23 – 28.
- 146 Australian Government, *Unfair Contract Terms*, Australian Competition and Consumer Commission (2018) [accc.gov.au/business/business-rights-protections/unfair-contract-terms#what-contracts-are-covered-](https://accc.gov.au/business/business-rights-protections/unfair-contract-terms#what-contracts-are-covered-)
- 147 Australian Government, *Unfair Contract Terms*, ibid.
- 148 Stewart and Stanford, above n 12, 427 and 428.
- 149 Stewart and Stanford, above n 12, 428-429.
- 150 Stewart and Stanford, above n 12, 428-429.
- 151 Stewart and Stanford, above n 12, 428
- 152 Minifie and Wiltshire, above n 22, 45.
- 153 Will and Waite, above n 85, 6 and 7
- 154 See *Racial Discrimination Act 1975*, Pt II; *Sex Discrimination Act 1984*, Pt II; *Disability Discrimination Act 1992*, Pt 2; *Age Discrimination Act 2004* (Cth), Pt 4.

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