

# Submission to Inquiry into the Victorian on-demand workforce

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1. In preparing this submission, I am aware that the Inquiry has in front of it the report I made to the Queensland Parliament into the operation of the workers compensation system in that state.<sup>1</sup> This submission canvasses some of the ground in that much lengthier report, but also addresses some broader issues relating to the regulation of on-demand work and workers that are not canvassed in that report.

2. In particular, I recommend that on-demand workers not only receive unambiguous workers compensation coverage but also be entitled to the same minimum standards as apply to more conventionally defined employees, and I propose an administrative mechanism for enabling that to occur.

*Background: 'Not there' employment, control and on-demand work*

3. In recent decades, as well as seeking to reduce risk and cost, many large firms have sought to achieve 'distancing' through what may be called "'not there' employment"—a method of corporate organisation whereby firms can avoid accountability for misbehaviour by affiliates or subsidiaries by denying responsibility. The term 'not there' employment is deliberately ironic: of course workers are experiencing the employment relationship, so in that sense it is very much 'there'; but it is also a device by which large corporations can say 'we are not there'. So it is not necessarily employment that is 'not there', it is the lead corporation.<sup>2</sup> At least, that is how it is meant to be in the eye of the intended beholder.

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<sup>1</sup> D. Peetz, "The Operation of the Queensland Workers' Compensation Scheme." Report of the Second Five Yearly Review of the Scheme, (Brisbane: Parliament of Queensland, June 2018).

<sup>2</sup> 'Not there' is the adjective, and 'employment' the noun. If employment disappeared, the resultant system might be called "'not there' contacting' or something similar, instead of "'not there" employment', but that is not the overall trend. In practice, in some corporations pursuing this model the employees at the bottom of the food chain will indeed be contractors, rather than employees, but for consistency the generic term "'not there" employment' is used, even when this is the case, to describe the overall model.

4. As a theoretical model of firm behaviour, this has some similarities to the ‘flexible firm’ model of Atkinson,<sup>3</sup> but focuses additionally on capital, accountability and transaction costs. ‘Not there’ employment facilitates a higher rate of non-compliance with labour laws. Many corporations are seeking to make greater use of ‘flexible’ labour, and they engage in ‘not there’ employment to minimise costs and risk and to avoid responsibility for some of the labour costs they would otherwise incur and for possible breaches of the law. They typically contract to others who in turn hire employees (or who subcontract to others, who in turn hire employees). So part of their workforce is ‘flexibly’ deployed. But they also retain an internal labour market for their ‘core’ employees. This bit, then, is what Atkinson referred to as the ‘flexible firm’ model in the 1980s.<sup>4</sup> The details have changed a bit since then, but the central idea—many firms simultaneously operating an internal labour market-based core and a periphery participating in an external labour market—remains true.

5. So ‘not there’ employment is the process by which centres of capital (we might call these ‘lead firms’ or ‘core capital’) fragment what would otherwise be corporate structures in ways that maintain high control, minimise labour costs and risk, maximise centralised profits and minimise accountability for externalities. Thus, ‘not there’ employment is the key feature of an emerging “‘not there’ capitalism”, in which the concentration of capital within product markets grows.<sup>5</sup>

6. More precisely, the key methods of ‘not there’ employment are: control is retained by a central entity (for example, the ‘lead firms’ in supply chains); production is undertaken within smaller entities (the ‘dependent firms’, we might call them ‘peripheral capital’) which are formally separated from the lead firms; core and dependent firms are linked by contract; and labour is ostensibly and directly controlled by the peripheral capital in dependent firms. That labour may be classed as ‘employees’ or as ‘contractors’, according to the context.

7. The manifestations of this phenomenon vary between sectors and industries. In the public sector, the urge to minimise accountability is manifested as privatisation, or contractual relationships (such as ‘public-private partnerships’) made opaque through contracts that are ‘commercial in confidence’. In the private sector, variations between industries may occur according to the nature of the product in that industry, the degree of competition, the share of costs represented by labour costs, the geographic scale of production, the nature of labour and labour organisation including exposure to secondary labour markets, occupational norms, and the ideology and strategy of employers, amongst other factors. Franchising has grown in retailing; labour hire in mining; outsourcing in the public sector; second jobs in manufacturing; spin-offs in communications; casualisation in education and training; global supply chains send jobs internationally to low-paid, often

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<sup>3</sup> J. Atkinson, "Manpower Strategies for Flexible Organisations." *Personnel Management* (1984) (pp. 28-31); "Flexibility, Uncertainty and Manpower Management." IMS Report No 89, (Brighton, UK: Institute for Manpower Studies, 1985). There is more about this model in A. Pollert, "The Flexible Firm: Fixation or Fact?" *Work, Employment and Society* 2, no. 3 (1988) (pp. 281-316). A graphical representation of the model is there at p284.

<sup>4</sup> Atkinson, "Manpower Strategies."; "Flexibility."

<sup>5</sup> A. Leigh and A. Triggs, "A Few Big Firms." *The Monthly*, 17 May 2017; J. Van Reenen, "Research: The Rise of Superstar Firms Has Been Better for Investors Than for Employees." *Harvard Business Review*, 11 May 2017; Data Team, "Corporate Concentration." *Economist*, 24 May 2016; D. Autor et al., "Concentrating on the Fall of the Labor Share." *American Economic Review* 107, no. 5 (2017) (pp. 180-85).

dangerous workplaces in a number of industries. While casualised employment was common in the late 19th century, much peripheral labour then was directly hired by the responsible employer;<sup>6</sup> under ‘not there employment’ a growing part of the responsibility for hiring peripheral labour rests with dependent firms or peripheral capital.

8. The employment contract is open-ended, and it is impossible to put into it every aspect of what an employee must do. That problem is multiplied many times over when moving from an employment contract to a contract for service. So, for example, a firm can more closely supervise employees than contractors, it can manage uncertainty better, it can minimise the risk of opportunistic behaviour, and it need not waste time and money renegotiating contracts with them when they turn up for work each day. The transaction costs in controlling workers through an employment relationship are lower than the transaction costs of alternatives, such as drawing up and implementing contracts with them as independent contractors.<sup>7</sup> Contracting is a way of reducing costs and risk, increasing profits and avoiding accountability, but it is not effective for maintaining control, so large firms often use a combination that involves contracting out to others (I call them ‘mid contractors’) who in turn often (not always) hire employees. For most owners of capital, and for most CEOs, the corporation is the most efficient form of economic organisation and it most efficiently operates through employing people.

9. Even when firms contract out part of their operations, the people who end up doing the work are often still employees, because that is the most efficient way for a firm to run its business. For example, when a mining company gets what are known in the industry as ‘contractors’ in to work in a mine, they are usually employees of a contracting firm that supplies just the workers (a ‘labour hire’ firm) or both workers and equipment. They work on the mine site, but are employees – hired on a casual basis and at much lower cost to the mines.

10. Through global value chains, an organisation can control a very large number of workers, while having very few as employees within its own organisations. The rest may be employees in contracting forms. There are 750,000 people who are part of Apple’s global value chain, but only 63,000 of them are employed directly by Apple itself. Another, growing, example is franchises: a large organisation may contract out business to many franchisees, but they in turn hire employees to work in the stores. Franchising is a way by which the owners of capital (at the top or peak of the hierarchy) contract out to “franchisees” who run the outlets (fast food, retail, etc.), rather than the large firms running them themselves. But most of the people who work in the outlets are employees—of the franchisees, rather than the capital at the top of the hierarchy. The franchisors still control the product, but franchisees have responsibility for employment. The franchisees are also small businesses, and so less likely to comply with labour regulations than large firms.<sup>8</sup> Hence the franchisors

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<sup>6</sup> J. Lee and C. Fahey, "A Boom for Whom? Some Developments in the Australian Labour Market, 1870-1891." *Labour History - A Journal of Labour and Social History* 50 (1986) (pp. 1-27).

<sup>7</sup> O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (New York: Free Press, 1975); R. Coase, "The Nature of the Firm." *Economica* 4 (1937) (pp. 386-405).

<sup>8</sup> D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge: Harvard University Press, 2014). H. Bhorat, R. Kanbur, and N. Mayet, "Estimating the Causal Effect of Enforcement on Minimum Wage Compliance: The Case of South Africa." *Review of Development Economics* 16, no. 4 (2012) (pp. 608-23); T.H. Gindling and K. Terrell, "Minimum Wages, Globalization, and Poverty in Honduras." *World Development* 38, no. 6 (2010) (pp. 908-18); E. Strobl and F. Walsh, "Minimum Wages and Compliance: The Case of Trinidad and

gain the financial benefit from franchisees' low-cost way of operating. This model cuts costs and transfers risk down the chain – which means jobs are more insecure. Franchising has been growing in importance, and employment in franchisees as a share of total employment has likewise grown.<sup>9</sup>

11. The rise of new business models like that of Uber, with its use of contract 'on demand' labour rather than employees, exists alongside the continuing importance of employment. That seeming paradox is explained by the need for capital to both control worker behaviour and minimise costs. Capital uses the employment relationship to exercise control, but it separately finds new ways of exercising control while minimising costs through on-demand platforms. The availability of electronic control and surveillance through many platforms makes this possible, as do the rating systems in many platforms, which minimise the costs of monitoring quality.

12. So, despite the organisational advantages of employment, a number of organisations have sought to adopt the Uber platform model of on-demand work, because virtual platforms provide a new, cheap way of control that may replace the need for the employment relationship. On-demand apps have already formed the basis for business models in cleaning, food delivery, goods delivery, babysitting, education, wine, car washing, laundry, lawn services, domestic work, accounting and law, they are becoming increasingly important in aged and disability support services, and apps have recently been released in hospitality.<sup>10</sup> Meanwhile, however, many US firms following the Uber model have failed,<sup>11</sup> with one author arguing:

... they provide crummy jobs that most people only want to do as a very last resort. These platforms show their workforce no allegiance or loyalty, and they engender none in return.<sup>12</sup>

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Tobago\*." *Economic Development and Cultural Change* 51, no. 2 (2003) (pp. 427-50); J. Buultjens, "Labour Market Deregulation: Does Small Business Care?" *International Journal of Employment Studies* 2, no. 1 (1994) (pp. 132-57).

<sup>9</sup> L. Frazer, S. Weaven, and A. Grace, "Franchising Australia 2014." (Brisbane: Griffith University, 2014).

<sup>10</sup> S. Hill, "Good Riddance, Gig Economy: Uber, Ayn Rand and the Awesome Collapse of Silicon Valley's Dream of Destroying Your Job." Salon, 2016.

[https://www.salon.com/2016/03/27/good\\_riddance\\_gig\\_economy\\_uber\\_ayn\\_rand\\_and\\_the\\_awesome\\_collapse\\_of\\_silicon\\_valleys\\_dream\\_of\\_destroying\\_your\\_job/](https://www.salon.com/2016/03/27/good_riddance_gig_economy_uber_ayn_rand_and_the_awesome_collapse_of_silicon_valleys_dream_of_destroying_your_job/); A. Fitzpatrick, "Udemy Thinks It's Cracked the Future of Online Education." *Time*, 12 February 2016, <http://time.com/4215787/udemy-dennis-yang/>; L. Gartry, "'Uber for Hospitality' App Hopes to Shake up on-Demand Job Market." ABC News, Australian Broadcasting Corporation, 2017. <http://www.abc.net.au/news/2017-04-06/uber-for-hospitality-app-connects-workers/8419530>; M. Hamstra, "The Uber-ization of Staffing." Restaurant Hospitality, 2017. <http://www.restaurant-hospitality.com/technology/uber-ization-staffing>. <https://www.ability8.com.au/> L. Merrillees, "Is 'Uber for Babysitters' App Gobi the Future of Childcare or a Step Too Far?" ABC News, Australian Broadcasting Corporation, 2017. <http://www.abc.net.au/news/2017-11-05/uber-for-babysitters-future-of-childcare-or-step-too-far/9063068>; J. Healy, A. Pekarek, and D. Nicholson, "Gig Economy Businesses Like Uber and Airtasker Need to Evolve to Survive." *The Conversation*, 4 July 2017, <https://theconversation.com/gig-economy-businesses-like-uber-and-airtasker-need-to-evolve-to-survive-79199>.

<sup>11</sup> Hill, "Good Riddance, Gig Economy."

<sup>12</sup> Ibid.

13. In effect, there is a major labour supply problem that many of these firms have been unable to reconcile. Uber itself has never made a profit.<sup>13</sup> Despite the low wages, its prices are too low, and its financiers are waiting for a return on their investment. It might appear that it aims to drive competitors (taxis) out of business and grow its market share and prices over the long run. Yet if it does that, other platform-based ride services (such as Lyft) would step in and out-compete it. Showing strong growth, not strong profits, appears to be the indicator Uber uses to demonstrate to venture capitalists that it promises long-term profit that justifies their investment. Perhaps it is hoping to hold on until driverless cars are available, in which case it would no longer have to worry about payments to drivers, but unless it hires those cars from owners it would face huge capital costs that it has so far avoided. More likely, it seeks to transform (and partly monopolise) the entire local surface transport sector,<sup>14</sup> though the truth of its motivations is unknowable. Increasing market shares for dominant firms appears to be an emerging trend in product markets, especially those with a heavy technology component. Dominant firms now appear to embody a lower labour share in income than other firms. Increasing concentration in product markets within industries is associated with greater declines in the labour share in those industries.<sup>15</sup> So there would be nothing unexpected about a strategy of seeking to grow market share, and the implications of that for other firms' labour shares would be significant.

14. The biggest challenge to the employment relationship is through on-demand work in what is often termed the 'platform economy'. As mentioned, this is because virtual platforms provide a new, cheap way of control that may replace the need for the employment relationship. However, there are still limits to the use of cost cutting and of platform control. The gig economy will probably grow, but it will likely not overtake the employment relationship.

#### *Independent contractors*

15. Importance has recently been attached to the role of 'independent contractors' in place of employees. 'Independent contractors' may be subject to protection through workplace health and safety legislation, for example in Australia and some other countries, but are not entitled to other employee benefits such as minimum wages or workers compensation. There is considerable international evidence that workplace health and safety outcomes are poorer for contractors than for employees.<sup>16</sup> Indeed, a related effect arises with labour hire workers: workplace health and safety outcomes are poorer for labour hire

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<sup>13</sup> Y. Smith, "Uber Is Headed for a Crash." *Intelligencer*, New York Magazine, 2018. <http://nymag.com/intelligencer/2018/12/will-uber-survive-the-next-decade.html>.

<sup>14</sup> S. Salinas, "Uber and Lyft Are Racing to Own Every Mode of Transportation—They're Getting Close." *MSNBC Tech*, 9 June 2018.

<sup>15</sup> Autor et al., "Concentrating on the Fall of the Labor Share."

<sup>16</sup> M. Quinlan, "The Effects of Non-Standard Forms of Employment on Worker Health and Safety." *Conditions of Work and Employment Series No. 67*, (Geneva: International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, December 2015). In assessing this relationship, one has to be conscious of the data source: sometimes risk-related premiums mean that there is an incentive to under-report injuries, and the effect of this incentive may vary according to the power relationships involved. See Peetz, "The Operation of the Queensland Workers' Compensation Scheme." 71-73.

workers—often referred to as ‘temporary agency workers’ in the literature—than for conventional employees.<sup>17</sup>

16. In many cases controversy arises as to whether particular people should be classed as employees rather than independent contractors under employment law, and therefore be treated as such for purposes of workers compensation, minimum hourly wages and other entitlements under employment law. Criteria (or ‘indicia’) have been developed by tribunals, the courts and even the taxation authorities to determine whether persons are employees or independent contractors. When firms portray people who are clearly employees as independent contractors, and thereby withhold from them one or more of their employee entitlements (such as minimum hourly wages, leave or superannuation), they may be prosecuted for engaging in what is termed ‘sham contracting’ in Australia.

17. Often the indicia lead to ambiguous outcomes, at least in the eyes of lawyers, so cases contesting whether particular people are employees or independent contractors still end up before the tribunals or courts.

18. One recent development in case law occurred in the California Supreme Court. It broadened the meaning of ‘employee’ there, redefining the test used in determining whether a worker was an employee or independent contractor by replacing an assessment against various indicia with an ‘ABC test’. Under the ABC test, a worker is assumed to be an employee unless the employer can prove *all* of three criteria:

- (1) The worker is free from direction and control in the performance of the service, both under the contract of hire and in fact; and
- (2) The worker’s services must be performed either
  - (i) outside the usual course of the employer’s business or
  - ii) outside all the employer’s places of business (for example, a firm engaging seamstresses to make clothing could not call them independent contractors);and
- (3) The worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service being provided.<sup>18</sup>

19. The ABC test brings more workers under the definition of ‘employee’ than do most other indicia. It has the advantage of covering most groups of workers who would be thought as being under the ‘employ’ of a more powerful organisation. The ABC test now applies in three US states for aspects of workers’ compensation or unemployment insurance. However, law in these states does not normally set precedent in other countries. Still, an option available to policy makers is to legislate the ABC test or some variant of it.<sup>19</sup> It would have

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<sup>17</sup> Quinlan, "The Effects of Non-Standard Forms of Employment "; A. Forsyth, "Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report." (Melbourne: Industrial Relations Victoria, Department of Economic Development, Jobs, Transport & Resources, 2016).

<sup>18</sup> Dynamex Operations West, Inc. v. Superior Court, discussed in M.S. Kun and K.D. Sullivan, "California Supreme Court Adopts ‘Abc Test’ for Independent Contractors." Wage and Hour Defense Blog, Epstein Becker Green, 2018. <https://www.wagehourblog.com/>; T. Lebowitz, "California’s Top Court Creates New Test for Independent Contractor Vs. Employee, Re-Interprets 102-Year Old Definition." Who is my employee?, Baker Hostetler LLP, 2018. <https://whosmyemployee.com/>.

<sup>19</sup> An example of a variant is that applied by Justice Bromberg in Australia, though this is probably less likely to see people defined as independent contractors, rather than employees, than the ABC

the advantage of bringing within the scope of employment law a wider group of workers who could be seen to be vulnerable to exploitation by more powerful organisations, those engaging in “not there” employment’.

### *On-demand workers*

20. Technology is often seen as fundamentally changing workplace relations through the ‘platform economy’, the ‘gig economy’ or ‘freelancing’. These terms are often used interchangeably, as if to indicate that the growth of the ‘gig economy’ is synonymous with a new way in which workers relate to employers, ‘freelancing’. The term ‘freelancing’ is used very loosely and often in multiple ways, and so some large estimates of the freelancing workforce are made. For example, the Freelancers Union, a lobby group (not a trade union) in whose interest it is to maximise the number of ‘freelancers’, defined them as including employees who at any time in the previous year had held a fixed-term job or a second job as a contractor, and so it claimed that ‘freelancers’ made up 34 per cent of the US workforce.<sup>20</sup> Using a different definition, Kitching estimated freelancers at just 6 per cent of the UK workforce.<sup>21</sup> ‘Freelancer’ is such a poorly defined and overly misused concept that I do not refer to it in the remainder of this submission.

21. To get a clearer understanding of the ‘platform economy’, it is useful to consider the distinction by Valerio De Stefano:

The gig-economy is usually understood to include chiefly two forms of work: “crowdwork” and “work on-demand via apps”... The first term is usually referred to working activities that imply completing a series of tasks through online platforms... “Work on-demand via apps”, instead, is a form of work in which the execution of traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, is channelled through apps managed by firms that also intervene in setting minimum quality standards of service and in the selection and management of the workforce.<sup>22</sup>

22. In the rest of this submission, the focus is mostly on the second of those two groups, that is on-demand workers.

23. The issue of whether on-demand workers are employees or independent contractors has been tested in courts, tribunals and administrative bodies in a number of jurisdictions.

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text. *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)*, (2011) 214 FCR 82, discussed in A. Stewart et al., *Creighton & Stewart's Labour Law*, 5th edition ed. (Sydney: Federation Press, 2016). Other cases cited there were *FWO v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, *Fenwick v World of Maths* [2012] FMCA 131; *FWO v Metro Northern Enterprises Pty Ltd* [2013] FCCA 216; *Predl v DMC Plastering Pty Ltd* [2014] FCCA 1066

<sup>20</sup> Freelancers Union and Elance-oDesk, “Freelancing in America: A National Survey of the New Workforce.” (2013).

<sup>21</sup> J. Kitching, “Exploring the UK Freelance Workforce in 2015.” (London: Association of Independent Professionals and the Self-Employed, 2016); i. Kitching’s data indicate that the estimate would more than double if a broader occupational definition of freelancers were used.

<sup>22</sup> V. De Stefano, “The Rise of the «Just-in-Time Workforce»: On-Demand Work, Crowdwork and Labour Protection in the «Gig-Economy».” *Conditions of Work and Employment Series No. 71*, (Geneva: International Labour Office, 2016); 1.

The end result has been far from conclusive. On the one hand, a number of cases have led to on-demand workers being classed as employees. The London Central Employment Tribunal ruled two Uber drivers were ‘workers’, not self-employed.<sup>23</sup> Uber lost in the Court of Appeal, but has since appealed to the UK Supreme Court.<sup>24</sup> The Employment Tribunal also ruled a bike courier was an employee.<sup>25</sup> The Central Arbitration Committee, a body that resolves worker disputes, also ruled a bike courier for a blood firm was an employee.<sup>26</sup> In New York City, a state administrative law judge ruled that three Uber drivers were employees.<sup>27</sup> An employment tribunal case in the UK found that minicab drivers for Addison Lee were employees, not contractors.<sup>28</sup> The UK Court of Appeal dismissed an appeal against a decision that a plumbing firm’s workers were employees and not self-employed.<sup>29</sup> Recently, the European Court of Justice ruled that Uber was a transportation company, not a technology company, raising questions about whether its workers would be treated as employees.<sup>30</sup> A French court ruled that Uber drivers were under a relationship of subordination that amounted to a work contract.<sup>31</sup> A case brought by Australia’s Fair Work Ombudsman alleging Foodora workers were employees not contractors was cut short when the company announced it was leaving Australia and the local offshoot went into voluntary administration, enabling the international firm to avoid its employment-related liabilities.<sup>32</sup>

24. On the other hand, other cases have led to on-demand workers being classed as non-employees. In north London, the Central Arbitration Committee ruled Deliveroo’s drivers were self-employed contractors.<sup>33</sup> A US District Court judge issued a temporary restraining order on a 2015 Seattle law that would have treated Uber drivers as employees in allowing

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<sup>23</sup> G. Gall, "Is Uber Ruling the Beginning of the End for Bogus Self-Employment?" *The Conversation*, 5 November 2016.

<sup>24</sup> R. Booth, "Uk Government Delays Possible Reforms to Gig Economy Practices." *Guardian*, 6 December 2017; N. Bernal, "Uber Heads for Supreme Court after Losing Appeal on Worker Rights." *Telegraph*, 19 December 2018, <https://www.telegraph.co.uk/technology/2018/12/19/uber-heads-supreme-court-losing-appeal-worker-rights/>.

<sup>25</sup> BBC, "Bike Courier Wins 'Gig' Economy Employment Rights Case." *BBC News*, 7 January 2017.

<sup>26</sup> B. Chapman, "Gig Economy Ruling: Couriers Carrying Blood for Nhs Win Right to Collective Bargaining." *Independent*, 1 March 2018, <https://www.independent.co.uk/news/business/news/nhs-gig-economy-couriers-blood-transfusions-union-recognition-the-doctors-laboratory-a8235446.html>.

<sup>27</sup> M. Hamilton, "Judge Finds Nyc Uber Drivers to Be Employees; Upstate Impact Debated." *Timesunion*, 12 September 2016, <http://www.timesunion.com/allwcm/article/Judge-finds-NYC-Uber-drivers-to-be-employees-11220139.php>.

<sup>28</sup> R. Booth, "Addison Lee Wrongly Classed Drivers as Self-Employed, Tribunal Rules." *Guardian*, 26 December 2017.

<sup>29</sup> J. Grierson and R. Davies, "Pimlico Plumbers Loses Appeal against Selfemployed Status." *Guardian*, 11 February 2017.

<sup>30</sup> Z. Aleem, "Europe’s Top Court Just Said Uber Isn’t a Tech Company — It’s a Cab Company." *Vox*, 20 December 2017, <https://www.vox.com/world/2017/12/20/16800476/uber-eu-europe-taxi-regulation>.

<sup>31</sup> L. Kayali, "French Court: Uber and Drivers Tied by ‘Work Contract.'" *Politico*, 11 January 2019, <https://www.politico.eu/article/french-court-uber-and-drivers-tied-by-work-contract/>.

<sup>32</sup> Workplace Express, "Fwo Drops Foodora Test Case." *Workplace Express*, 3 September 2018, [https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&nav=10&selkey=57119](https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=57119).

<sup>33</sup> S. Butler, "Deliveroo Wins Right Not to Give Riders Minimum Wage or Holiday Pay." *Guardian*, 15 November 2017.



them to join a union.<sup>34</sup> A Philadelphia court decision found that an Uber driver was a contractor under federal and state law, the Court commenting that Uber and Lyft ‘present a novel form of business that did not exist at all ten years ago’ and adding ‘With time, these businesses may give rise to new conceptions of employment status’.<sup>35</sup> Although the California Labor Commission had earlier concluded an individual Uber driver was an employee,<sup>36</sup> that decision did not survive appeal. Australia’s Fair Work Commission (FWC), in deciding an application for unfair dismissal, determined that a driver for Uber was not an employee,<sup>37</sup> but the Deputy President observed it might be that notions about what was necessary for an employment relationship to be established ‘are outmoded in some senses and are no longer reflective of our current economic circumstances’.<sup>38</sup> A later FWC case, again relying on the indicia approach, found an unrepresented Uber driver was not an employee for unfair dismissal purposes.<sup>39</sup>

25. Amongst mainstream employers, organisational control of employees’ working time has become less important over recent decades than organisational control of the product employees generate for the employer, yet control of working time remains one of the indicia used to determine whether someone is an employee or a contractor. The Philadelphia US District Court decision acknowledged that Uber could: terminate a driver’s access to the Uber App; deactivate a driver for cancelling trips, failing its background check policy, falling short of the required 4.7-star driver rating, or soliciting payments outside of the Uber App; make deductions against a driver’s earnings; and limit the number of consecutive hours that a driver may work. Yet against the more traditional indicia, Uber was not an employer and its drivers were independent contractors.<sup>40</sup>

26. Perhaps the best indication of who holds power in the relationship between Uber and its drivers lies in the pay the drivers receive. The rates of pay and conditions many on-demand and crowdworkers receive are low and often would be illegal were they treated as employees,<sup>41</sup> and for some at least the means by which they are classified as contractors rather than employees appears to have an element of contrivance about it. Thus, for

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<sup>34</sup> L.J. Hanley, "Inside Uber's Latest Move to Exploit Its Drivers and Hide Behind the Court." *Huffington Post*, 6 April 2017.

<sup>35</sup> *Razak v. Uber Technologies Inc.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:16-cv-00573, p25.

<sup>36</sup> J. Carswell-Doherty, "Are Uber Drivers Independent Contractors or Employees?" F&G Blog, Foulsham and Geddes, 2016. <http://www.fglaw.com.au/are-uber-drivers-employees/>.

<sup>37</sup> *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 (21 December 2017)

<sup>38</sup> [2017] FWC 6610 (21 December 2017), at [66]

<sup>39</sup> *Pallage v Rasier Pacific* [2018] FWC 2579 (11 May 2018).

<sup>40</sup> *Razak v. Uber Technologies Inc.*, pp27-8.

<sup>41</sup> For on-demand workers, see Chartered Institute of Personnel and Development, "To Gig or Not to Gig? Stories from the Modern Economy." (London: CIPD, March 2017). In this study, median earnings for transport or delivery was £6 per hour, and for short-term jobs was £7 per hour, below the then living wage of £7.20 per hour and the minimum wage for 21-24 year olds of £6.95 per hour. In a separate survey, in the BIES survey, only 36 per cent of those who disclosed earnings received less than £7.50 per hour but 85 per cent of those who were involved in gig work from one to three times a week in the gig economy had earned less than £5,000 from their work in the preceding 12 months: K. Lapanjuuri, R. Wishart, and P. Cornick, "The Characteristics of Those in the Gig Economy." (London: Department for Business, Energy & Industrial Strategy, 2018). Comparable problems exist with crowdwork, e.g. Unions NSW, "Innovation or Exploitation: Busting the Airtasker Myth." (Sydney: Unions NSW, 2016).

example, Uber's declaration that it is not in the business of passenger transport, it is merely a technology company acting as a client to drivers,<sup>42</sup> appears to defy common-sense understandings of what Uber does — why would it be competing with taxi companies and testing driverless cars if it was not involved in transport? — and designed to enable a particular definition of its workers.<sup>43</sup>

27. That said, if *relative* pay in the on-demand sector is low, a large differential might not be permanent. There may be flow-on effects that affect many other workers. If firms that provide sub-standard pay and conditions out-compete those providing standard pay and conditions, then the latter group will be forced to match the former or go out of business (leading to greater non-compliance with laws). If the latter go out of business, the former group would be able to raise prices as its market share increases.

28. The distinction between workers who do 'crowdwork' and those who do 'work on-demand via apps' is important from both an analytical and policy perspective. Most of the policy possibilities focus on extending coverage to those who do 'work on-demand via apps'. This is because of the greater difficulties in providing coverage for crowdwork, when much crowdwork is undertaken across borders internationally. For example, an American app may facilitate an Indian crowdworker performing work for a client organisation or individual in, say, the UK one hour and Spain the next. By contrast, for those platform workers doing work on-demand via apps, the worker and the client are located near each other, regardless of where the app is owned, and this occurs through multiple uses of the app.

#### *Policy for workers compensation coverage of on-demand workers*

29. An example of what is possible in labour regulation, and the complexities of it, for on-demand workers is in the area of workers' compensation. Some of the options (not all good options) that are available to policy-makers here include:

- relying on the taxation-based definition of 'worker' to determine workers' compensation coverage;
- creating a new definition of worker or a new class of employed person such as 'dependent contractor';
- redefining the coverage of workers' compensation laws and responsibilities to be similar to those under workplace health and safety legislation, relating to persons conducting a business or undertaking (PCBU) and workers;
- redefining the coverage of workers' compensation laws and responsibilities to encompass those who work under agency arrangements, and require payment of premiums by the intermediaries or agencies based on the income of the agency workers;
- redefining the coverage of workers' compensation laws and responsibilities to encompass those who work under agency arrangements, but require payment of premiums by those who hire them; or
- passing the buck — giving regulators the power to 'deem' certain classes of people to be 'workers' for workers' compensation legislation and/or certain classes of organisation to be 'employers' for such purposes.

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<sup>42</sup> T. Brant, "Uber to European Court: We're Not a Transportation Company." *PCMag*, 29 November 2016, <https://www.pcmag.com/news/349940/uber-to-european-court-were-not-a-transportation-company>.

<sup>43</sup> e.g. Caspar, "Sydneyiders Have Spoken – and They Choose Ridesharing!" Uber Newsroom, 2015. <https://www.uber.com/en-AU/newsroom/sydney-has-spoken/>.

30. In this context, the development of the technologies that enable the development of on-demand platform work, and more importantly enable the platform intermediaries to command a portion of the payment to the worker (Airtasker, for example, takes 15 per cent), also provide an opportunity for regulatory intervention. If payment can be deducted for the intermediary, it can also be deducted for other purposes.

31. In my report to the Queensland government on the operation of the workers compensation system there,<sup>44</sup> I recommended that the coverage of the workers compensation legislation should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and would apply where at least two parties were in the state at the time the work was undertaken. I also recommended that intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income received by the intermediaries or agencies. That premium would be based on risk experience in that industry for that type of firm. There were also recommendations on rehabilitation of on-demand workers and an information campaign associated with new arrangements.

32. Detailed exposition for the reasons for those recommendations can be found in chapter 10 of that report. In brief, however, I took the view that we could be waiting a very long time for the question of whether on-demand workers are employees for the purpose of workers compensation to be determined by the courts, and even then it would be unclear whether the outcome would be favourable to, or disadvantageous of, on-demand workers. There was a need for certainty that could be better provided by statute than by case law.

33. Moreover, it was difficult, in making a report to a State Parliament, to recommend that the Parliament redefine the criteria that determine whether particular individuals are employees, when those matters are fundamentally for determination by the Federal Parliament, which has responsibility for the Fair Work Act. However, as workers compensation is clearly a state responsibility, it was feasible and desirable for the State Parliament to amend the workers compensation legislation in a way that would ensure that on-demand workers had access to the same workers' compensation entitlements as other, traditionally-defined employees.

34. To some extent, then, the solution I recommended was one that reflected the federal nature of Australia's constitution. To some extent, it circumvented the question of whether on-demand workers should be treated as employees by proposing that they should be entitled to the same rights and responsibilities as employees in relation to the specific matter on which I was reporting, that is workers' compensation, and devising a mechanism that enabled that to occur. The same recommendations are made in relation to Victorian workers.

#### *Minimum wages and other conditions of employment for on-demand workers*

35. Various people have called for a set of protections, including in some cases a minimum wage, to apply to all workers predominantly dependent on one organisation for

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<sup>44</sup> Peetz, "The Operation of the Queensland Workers' Compensation Scheme." chapter 10.

earnings, regardless of whether they are employees or contractors.<sup>45</sup> Perhaps in an ideal world, on-demand workers would be classed as employees and entitled to the rights of employees through that mechanism. However, as mentioned we may be waiting a long time for that issue to be resolved by the courts and there is no guarantee what the outcome would be.

36. So, legislating to ensure that all workers (or at least, those who are not clearly running their own independent business) are entitled to the same minimum standards, including a minimum wage, would appear to be the best way of ensuring that occurs. Clearly stating this entitlement through legislation would avoid waiting years for the matter to be resolved through the courts. It would not avoid court determination altogether — there will always be disputation at the margin — but it would largely settle the question as to whether most on-demand workers are entitled to the same protections as traditionally-defined employees.

37. The difficulty with a minimum wage rate is that payments for many contractors are based on completion of the task rather than the time it takes. This means that there may be a gap between the principle of applying a minimum condition of employment, and the practicality of a workable method of implementation.

38. New York City sought to deal with this issue for drivers for ‘rideshare’ firms (Uber, Lyft and the like) by using a standardised ‘utilisation rate’ to convert piece rates to hourly pay.<sup>46</sup> This was immediately challenged by Lyft, but not by Uber, probably because both saw the former would be disadvantaged in competition with the latter due to Lyft’s lower utilisation rate. For Uber, removing competition may be more important here than obtaining the cheapest possible labour.

39. The lesson is that if we are to apply minimum standards outside the employment relationship, we need to be creative as it may be difficult to draft a single, comprehensive law. It need not take long for the Parliament to decide on a principle that on-demand workers should be subject to minimum entitlements, and that these should be equivalent to other traditionally-defined workers. With the great variation in the industries and forms of on-demand work, however, working out the detailed application in each case may take much longer — and the Parliament might not be in the best position to decide that anyway.

40. The option proposed here is that the government declare an entitlement to a minimum wage, but establish a specialist body (perhaps a tribunal or board) to determine how it is to be implemented in each sector outside the traditional employment relationship, on application from interested parties who would lodge proposals on how implementation in their sector should occur. Implementation of a minimum wage on each sector therefore would not rely on new legislation being passed for that sector, just a new tribunal decision. Naturally, parties and tribunals would learn from the successful and failed experiences of other sectors and countries.

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<sup>45</sup> e.g. in A. Patty, "A 'Third Way': The Controversial Push for a New Type of Worker." *Sydney Morning Herald*, 16 February 2019.

<sup>46</sup> G. Dobush, "Lyft Claims That Nyc's New Driver Minimum Wage Makes It Even Harder to Compete with Uber." *Fortune*, 31 January 2019, <http://fortune.com/2019/01/31/lyft-uber-nyc-driver-minimum-wage-lawsuit/>.

41. This approach would recognise the limitation on what State Parliaments can do, particularly in the case of the Victorian Parliament, which has delegated responsibility for industrial matters to the federal Parliament. There is no need for the State Parliament to determine what the minimum conditions of work would be. Rather, the State Parliament would determine that on-demand workers in Victoria were entitled to minimum conditions. The simplest way for that to be expressed would be an Act that specified all workers, other than those who were demonstrably running an independent business for their own benefit, were so entitled. Legislatively specifying the ABC test, as discussed in paragraphs 18 and 19 above, would be another way of defining the group of workers who were entitled to minimum standards.

42. Except in relation to matters where there were readily available means of ensuring such entitlements were enforced — in particular, regarding workers' compensation legislation as discussed in paragraphs 31 and 32 above — the question of *implementation* would then be up to a specialist body to determine. In other words, a specialist body would be set up to make determinations as to how that particular Act were to be enforced in particular circumstances, that is regarding particular industries or forms of on-demand work.

43. That specialist body would receive submissions on the best way of calculating a minimum wage rate in relation to those particular industries or forms of on-demand work. Those submissions would come from those parties with the greatest interest in and knowledge of the particular industries or forms of on-demand work. Those submissions could focus on proposals as diverse as a utilisation rate, as used in New York City, the idea of minimum rates for particular events used by the former Road Safety Remuneration Tribunal, or whatever arrangement seemed most suited to the particular circumstances of the industries or occupations affected.

44. This specialist body would have a series of panels, each associated with one of the particular industries or forms of on-demand work being considered. It would be sensible for each panel to, in turn, comprise an equal number of representatives from labour and from capital, and an independent chair. (Thus a panel could be as small as three persons, but it could be larger.)

45. To prevent endless delays, the specialist body and its panels would have reasonable defined deadlines to work to. If a determination had not been made by the relevant deadline, the minimum wage would apply anyway and it would be open for any aggrieved party to seek remedies in Court. However, going to Court to deal with these issues would be much more expensive than dealing with matters administratively, and so there would be an incentive on all parties to come to a resolution before the deadline had passed.

46. Once a panel of the specialist body had made a determination, the entitlement(s) would apply and be enforceable at law in the industries or areas of work covered by the work of that panel.

47. The same principle could be applied to other types of minimum standards, not just minimum hourly wages.

48. For a State Parliament, the potential range of action could be limited by the federal Parliament's active role in employment law. However, it would also be open to the Inquiry to make recommendations for a national policy in this area, should the federal Parliament take a

view favouring the protection of the on-demand workforce. A national policy would avoid any potential constitutional complications. Certainly, the State Parliaments' coverage over workers compensation matters is clear. Coverage over other minimum standards affecting on-demand workers is potentially more controversial, but I would defer to experienced lawyers on that issue.

### *Recommendations*

49. Accordingly, this submission makes the following recommendations:

Recommendation 1: The coverage of workers compensation legislation should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and specify that it applied where at least two parties were in Victoria at the time the work was undertaken. This legislation would be enforceable at law from a date determined by the Parliament.

Recommendation 2: Intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay workers compensation premiums, based normally on the gross income received by the intermediaries or agencies.

Recommendation 3: Adequate arrangements for the rehabilitation of injured on-demand workers should be built into a reconfiguration of workers compensation policy.

Recommendation 4: The Parliament should pass legislation entitling a broad range of workers, other than those who are demonstrably employed in their own independent business, to the minimum standards that also apply to traditionally-defined employees.

Recommendation 5: The Parliament should pass legislation establishing a specialist body to investigate and determine the implementation of the above minimum standard to workers who are not to traditionally-defined employees. This body would be made up of representative panels who would receive submissions and make determinations on the best way of implementing the legislatively-stated standards, according to a specified schedule. Once a panel had decided on implementation in a particular industry or line of work, it would be enforceable at law.

Recommendation 6: There should be a campaign to raise awareness about changes in workers' rights that arise from implementation of these recommendations.

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