



# Proposal for legal protections of on-demand gig workers in the road transport industry

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## Executive Summary

In Australia and other countries, on demand, digitally-mediated, gig work in the road transport industry is currently not being adequately regulated. A sizeable and growing workforce of delivery-riders/drivers, freight deliverers and ride-share drivers within this gig workforce are receiving substandard pay and conditions due to a lack of minimum standards for these workers. During the writing of this paper, there were five deaths of RT on demand delivery riders in two months. In Australia for more than a decade, wealthy and powerful global tech-companies have evaded employment protection regulation by engaging vulnerable workers (digitally through apps and platforms) as contractors. Until recently, policy debate concerning these tech companies has centred on whether these businesses can be regulated. However, in recent times the focus of debate has shifted to how, not if, these business operations should be regulated to protect the public interest (Nossar 2020:17). This paper presents the reasons for, a roadmap to, and proposals about effective regulation of businesses controlling digitally-mediated, gig economy arrangements in the road transport industry. Indeed the federal government can no longer ignore unregulated work in the gig economy which has created an underclass of exploited workers who have no choice but to accept low rates, unpaid work and an unsafe and unhealthy work environment (Bonyhady 2020). Furthermore, this exploitation of gig workers has flow on effects to contract workers and other workers in the road transport industry engaged by conventional means and is creating unfair competition for traditional transport businesses. National governments have taken a laissez-faire approach to the regulation of this gig work and have been complicit in the exploitation of road transport gig workers. None of this would be possible without their complicity, disadvantaging workers and endangering the sustainability of the transit systems those governments are supposed to fund and oversee (Srinivasan, 2019:115). Governments and Parliaments must start leading with effective regulation of the gig economy rather than following the market with ineffective and piecemeal measures (Koslowski 2019).

In light of current tribunal decisions on the work status of road transport gig workers and other factors, this Report endorses a 'beyond employment' approach (Johnstone et al 2012) to overcome the obstacle to more effective regulation of the contractor designation of these gig workers. Consequently, this Report proposes that there should be a new, federal, standard-setting body for the Australian road transport industry which would provide for minimum rates and safe conditions for all workers regardless of their formal work status associated with road transport including road transport gig workers operating within digitally mediated business arrangements.

## Introduction

In Australia at present, on demand, digitally-mediated gig work in the road transport industry is not adequately regulated. Section 1 of this Report describes the exploitative working conditions of on demand road transport (RT) workers in Australia (including five recent deaths of vulnerable RT delivery riders), and Section 2 explains why they have been found to fall outside of the protections of the *Fair Work Act 2009* (Cth) and other legislation, including state-based workers' compensation laws. Although the conditions under which they work demonstrate a high level of vulnerability, and very few of the markers of any true entrepreneurship, these on demand workers have been characterised as 'independent contractors' for the purposes of our system of labour laws. The newness of the means of engaging on demand workers has – so far – blinded regulators to their needs as vulnerable workers. However, while work mediated through a digital platform may be a 21st century phenomenon, 'on demand' work is by no means new. It is no different in essence from the work of labourers who gathered each day at the notorious Hungry Mile on the docklands in Sydney in the early 20th century (now redeveloped as Barangaroo), hoping to be selected for a day's work loading and unloading ships. Those who missed out went home hungry. Their struggle to establish fixed rates of pay, and then weekly wages and secure employment, was a major challenge for the early trade unions, achieved only through harsh periods of industrial action (Bennett 1994).

Like the workers on the Hungry Mile, today's digital on demand workers also need legal protections to ensure that they enjoy decent working conditions. Those protections need not, however, be identical to the protections afforded to employees. As we outline in Section 2, our present conception of 'employment' does not reliably encompass app-mediated on-demand work, because that conception was developed to suit patterns of work established for a different geography of work, where workers attended at the employer's place of business to provide exclusive service. This does not, however, mean that we cannot regulate to provide appropriate labour market protections for on demand workers. As we shall also see in Section 2, specialist regulatory regimes have been devised to deal with non-employed work in the transport sector in the past. It is possible to also devise suitable regulation to meet the needs of today's RT on demand workers. In Section 3 of this Report, we therefore recommend a robust 'alternative' regulatory scheme which protects safe working conditions, adequate remuneration, income security, job security, collective bargaining and adequate dispute resolution and enforcement. For reasons detailed in this Report we argue that the federal Parliament should enact an industry-specific scheme of legislation which establishes a standard-setting tribunal for the road transport industry.

# 1 The need for regulation: Unfair and unsafe terms and conditions of work in the on- demand road transport industry

## Introduction

This Section 1 of the paper examines pay and safety of work in the digitally-mediated on-demand sector of the road transport industry including food delivery, freight delivery and ride-sharing sub-sectors. It identifies a range of unacceptably exploitative conditions to which these on-demand road transport workers are subject. Indeed a whole, new sub-class of exploited workers in the gig economy has emerged in Australia and other countries around the world (Bonyhady 2020) and road transport on-demand workers have been at the forefront of this phenomena.

A 2019 Report found that over 7 per cent of persons in Australia surveyed are currently working or offering to work through digital platforms (McDonald et al 2019). There are two main forms of work in the digital platform gig economy: (i) crowd work, and (ii) work on demand via apps or digital platforms. In the road transport industry, the main concern is work on demand via apps, where the performance of traditional working activities is channelled through apps managed by firms that set minimum quality standards of service and select and manage the gig workforce (Peetz 2019: 169). The main form that this digitally-mediated, on demand work has taken in the road transport industry to date has been ride-share driving and delivery-rider/driving work. However, digitally-mediated work has more recently also emerged in the freight delivery sector.

The vast majority of these workers are designated as contractors by their work providers so do not receive any of the entitlements enjoyed by employees, including award rates of pay, paid sick leave entitlements or superannuation. They also have no right to collectively bargain (see Srinivasan 2019: 114). In addition, many of these workers are migrants who also may not be entitled to social security payments or the JobKeeper wages subsidy payments if they cease work due to a downturn in business.

## How the oligopoly power of businesses controlling digital platforms/apps has undermined legal protections

An apparently vast financial backing of businesses controlling digital platforms and phone apps has seen the emergence of a business model for these operations centred upon rapid expansion of the consumer users for the particular online digital platform in a race for oligopoly dominance of the relevant online market (Nossar 2020: 18). This business model also involves the willingness of large digital platform/app businesses involved in the delivery of road transport services (such as Uber) to operate at a massive loss or at best with only razor thin profits (Sage and Sharma 2019; Nossar 2020). These commercial operations provide alternative forms of capital gains for the entrepreneurs and venture capitalists funding or controlling the business such as increased share values.



Additionally, venture capitalists and entrepreneurs value the accumulation of massive pools of data obtained from the users of the platforms/apps (Nossar 2020). Their consumer base is also used as leverage to undermine existing legal standards including those that provide minimum pay and conditions for workers (Nossar 2020; Pollman and Barry 2016). More specifically, the business model (and the lack of an effective governmental response) has empowered the oligopoly of platform/app controllers to impose terms and conditions on their workforce of vulnerable workers on the basis that those workers are contractors operating outside the legal protections of legislated employment protection regimes such as the *Fair Work Act 2009* (Cth). This has produced inadequate pay and unsafe conditions of work for the vulnerable ridesharing and delivery riding/driving workforce which we will turn to below in more detail.

## Rideshare driving work

The Australian Taxation Office estimated in 2017 that 100,000 individuals have received a payment for a ride-sharing service since the Australian Taxation Office started collecting data in August 2015. Uber alone engages more than 60,000 drivers in Australia (Patty and Bonyhady 2020). There are 1 million Australians registered as Uber users (Khadem 2017; Smith 2019). The participation rate in this digital platform work is set to significantly grow as more precarious work turns digital (Srinivasan 2019: 123).

In the case of Uber, the true nature of its relationship with its drivers emerges from the terms of standard Uber-driver agreements (Nossar 2020: 96, 98). A number of legal decisions around the world concerning the status of Uber rideshare drivers suggest that Uber's various local entities use the same or very similar terms in their contracts with rideshare drivers.<sup>1</sup> The authors obtained a copy of the contract used by the organisation behind Uber, Rasier Pacific V.O.F, an unlimited partnership established in the Netherlands, and its Australian drivers.<sup>2</sup> Our observations reflect the terms of that contract, which we shall refer to as the Uber Contract.

### The Uber Contract

Several clauses of the Uber Contract disclaim any employment relationship between Uber and the drivers. First, the contract declares at the outset that Uber is not providing transportation services, nor acting as the driver's agent in the provision of transportation services. The Uber Contract is drafted to characterise the drivers as purchasers of a communications tool (the 'app') under a commercial contract which gives them no guarantee of any work, no certainty of income, and no job security.

The Contract claims that Uber is offering nothing other than access to a communications tool. (We consider the legitimacy of these clauses disclaiming any employment or other work relationship below.)

It is apparent that those who drafted the Uber Contract anticipated the risk that a court or tribunal might see through these contractual assertions by including a clause purporting to require that any driver found to be an employee must indemnify Uber for any costs (including legal penalties) that Uber incurs as a consequence of being found to be an employer. This clause is unenforceable in Australia and in the United Kingdom, because in common law jurisdictions parties cannot contract out of the statutory obligations arising from an employment relationship. Unfortunately, drivers without legal advice may nevertheless be dissuaded from pursuing claims, believing that the clause would be effective to cast all of the costs of any

action back upon themselves. It is not uncommon for clauses to be added to contracts for their 'in terrorem' effect, even when the drafters recognise they are unenforceable.

Notwithstanding that the Uber Contract denies that Uber is in the passenger transport business, it includes many terms that purport to deal with matters relevant to the provision of transport services and with drivers' entitlements to charge for their driving services.

According to its terms, all the expenses and risks of operating as an Uber driver fall on the driver. The driver is required to provide and maintain a late model vehicle and all relevant insurances, and must also provide the necessary telecommunications devices, and meet the substantial cost of the data package required to use the global positioning system essential to the app. As the contract itself warns (in clause 2.6.2), these devices use a lot of data.

Although Uber's commitment under the contract is to permit the driver to use its app to connect with potential customers, it does not guarantee that the app will always work, and warns that it may be 'unavailable at any time and for any reason' (clause 9.3).

All of the power to determine the profitability of driving work remains with Uber. The contract reserves to Uber the right to set maximum fares. Drivers are permitted to negotiate lower fares with riders if they wish (cl 4.1), but will still have to pay Uber its percentage-based commission (of 25 per cent) on the full fare stipulated by Uber, and not the lower negotiated fare.

Uber is entitled to change maximum fares at any time without notice (clause 4.2), and it can also change its own percentage commission at any time without notice (clause 4.4). The contract stipulates that a driver who continues to drive after a fare cut agrees that they will be taken to have accepted the fare reduction. This essentially means that a driver's only means of objecting to fare reductions or commission increases is to stop driving, and hence cease earning.

Uber even reserves a right to change any of the terms in the contract, at its own discretion, at any time (clause 14.1).

The Uber platform uses a rating tool to enable riders to 'rate' their experience with a driver after each trip. Drivers' access to the app can be 'deactivated' if drivers' ratings from rideshare users fall below a level acceptable to Uber, and drivers have no right to any warning or opportunity to respond to the poor rating. In *Oze-Igiehon v Rasier Operations BV* (2016) the West Australian District Court found that the Uber Contract did not require Uber to provide any warnings or reasons before blocking a rideshare driver from using the app.

This aspect of the contract demonstrates that Uber is concerned to protect its own brand reputation. Uber is well aware that riders perceive that they are contracting directly with Uber, not with any specific driver, and will punish Uber for consistently poor experiences by ceasing to use the app. In claiming a right to block drivers with unacceptable ratings, Uber is implicitly acknowledging that the customer is doing business directly with Uber, and it is inconsequential to the rider which driver performs the work. This belies the contractual assertion that Uber is not in the passenger transport business.

If drivers do wish to contest a decision to block them from the app (or bring any other dispute under the Contract), an arbitration clause requires them to arbitrate the matter, at their own expense, in the Netherlands. This particular clause was found to be unconscionable in Canada : see *Heller v Uber Technologies Inc and Rasier Operations BV* (2019: [74]). The

Court refused to accept that the clause ousted the Canadian court's jurisdiction to hear the complaint.

In summary, the terms of the Uber Contract allow Uber to control maximum fares, vary fares without consulting drivers, and subtract Uber's own commission before payments are made to drivers. Furthermore, if an Uber driver's ratings (under the tool used by the Uber app to collect the views of customers) falls below an acceptable standard, Uber 'blocks' the driver from using the app (essentially dismissing the driver). There does not appear to be any mechanism available to drivers to contest either the ratings or the blocking. In any event drivers can be provided with seven days' notice of termination 'for any reason or no reason at all' (Riley 2017a: 63-66).

### **Consequences of this Uber Contract for drivers**

A major survey of over 1,100 Ride-Share Drivers found that drivers working for Uber and other ride share companies were earning well below \$16 per hour before costs (RideShare Drivers Co-operative and Transport Workers' Union 2018). Another more recent survey found that that ride share drivers earned just over \$12 an hour once costs were taken into account (Ride Share Network and Transport Workers Union 2020). This gives rise to an incentive for those low paid drivers to engage in hazardous practices so that they can get more work done faster at a lower cost. Some ride-share drivers were driving long hours across multiple on-demand operators to make ends meet. This leads to the hazardous practice of driving whilst fatigued and the risk of falling asleep at the wheel (Holland-McNair 2020).

According to the same major survey, over 60% of ride-share drivers say they cannot save enough to provide themselves with superannuation and annual leave. In the survey there were 969 reports of harassment and assault; 10 per cent of drivers say they were physically assaulted and 6 per cent of drivers say they were sexually assaulted (RideShare Drivers Co-operative and Transport Workers' Union 2018). These abuses of pay and safety standards in digitally-mediated, gig economy arrangements within the road transport industry reinforce the need for improved regulation of digitally-mediated, road transport industry arrangements.

### **Delivery riding/driving work**

Digitally-mediated delivery riding/driving work consists of work undertaken by workers who use bicycles, small motor scooters, e-bikes, motorcycles and cars to transport food within Australian cities and are engaged through a phone app or platform by businesses who use the app or platform to manage the delivery riders (see Rouse 2019). During the recent COVID-19 pandemic this work has expanded into the delivery of pharmaceutical products. The media and empirical surveys have uncovered extreme exploitation of gig workers in this delivery industry (Karp 2019).

Most delivery riders/drivers are paid per delivery. Some work providers pay a flat rate per delivery while others pay a 'dynamic' per delivery rate based on distance and time travelled. (Bright and Fitzgerald 2018). Pay can be as low as the equivalent of \$6.67-10.50 per hour (Bright and Fitzgerald 2018; Karp 2019). Almost all of these workers do not negotiate higher pay rates but are paid the rate set by the standard contract provided at the time of their engagement (On-Demand Workers Australia and the Transport Workers Union 2018). One Uber Eats worker stated there was no scope to bargain for higher pay. They are in the 'economically irrational' position of being 'free' to bargain with customers and restaurants to be paid a lower rate (Patty 2019). The vast majority of delivery riders have experienced a

decrease in pay over time and other frequently detrimental changes to the rules of their engagement (including rostering) with little or no consultation with workers (Delivery Riders Alliance and the TWU 2020; Bright and Fitzgerald:2018).

Delivery riders can also experience long waiting times at restaurants between jobs when riders must be ready to work but receive no pay for waiting time (Bright and Fitzgerald: 2018).

A survey of food delivery riders by the Transport Workers' Union and the Victoria Trades Hall council found they are being paid up to \$322 a week less compared with minimum rates of pay and superannuation in the relevant award (The Road Transport and Distribution Award 2020) covering road transport employees (Karp 2019). This is clearly a significantly vulnerable, mainly migrant workforce with only one in ten of the riders surveyed being Australian citizens. The riders were largely temporary visa holders such as international students, or people on working holidays or bridging visas. Sixty per cent of the riders said it was not possible to negotiate a pay rise.

### **Safety issues**

One-quarter of the surveyed couriers had been in an accident with one out of eight sustaining injuries such as concussions, knee injuries, broken bones or dislocations (Karp 2019). In addition, a Transport Workers Union survey of 160 Deliveroo, Uber Eats and Foodora riders found 46.5 per cent of these riders had been injured at work, or knew someone that had been injured at work (Johnson 2019).

Two Sydney food delivery riders (Dede Fredy who worked for UberEats and, Xiaojun Chen, who worked for Hungry Panda, a delivery co targeting Australia's Chinese community) were killed in road accidents in late September 2020 (Bonyhady and Rabe 2020). In November, three more riders were killed in separate incidents (Bonyhady and Chung 2020: 8). Prior to that four UberEats riders have been killed on the job since 2017 (Kelly 2019).

Decades of studies have shown that safety is closely linked to pay in the road transport industry (Belzer 2011; Belzer 2018; Belzer and Sedo 2018; Faulkner and Belzer 2019; Hensher and Battellino 1990; Kudo and Belzer 2019; Quinlan and Wright 2008; Rodríguez Targa and Belzer 2006). As with other road transport workers, low pay leads to poor safety conditions for delivery riders (Marin-Guzman 2019). Food delivery riders routinely take risks on the road and engage in hazardous practices to meet unreasonable deadlines, endangering their own safety as well as the safety of pedestrians and other users of the public roads. Hazardous practices include riding on footpaths, weaving through traffic and pedestrians, failing to obey traffic lights, riding without lights at night and using a mobile phone whilst riding (Rouse 2019; Johnson 2019; Marin-Guzman 2019). The threat of termination of engagement for working too slowly can also contribute to poor safety for these workers. One delivery rider, Diego Franco, had his work contract terminated by Deliveroo because his deliveries were taking significantly longer to reach customers than expected (Bonyhady 2020).

### **COVID-19 and food delivery work**

COVID 19 changed the size and shape of the on-demand labour market in the road transport industry and created new entrants that are not adequately prepared for the health and safety risks. This is especially the case in the food delivery sector. Prior to the pandemic, around 4 million Australians consumers had a food delivery app. After the pandemic struck this rose to 8.9 million (Radio National 2020). As a result, there is more food delivery work to be done and

this has led to a flood of new workers into the sector. Many have joined the sector because of a lack of more secure work options in the Coronavirus recession. Some new entrants are inexperienced cyclists and do not cycle safely on the road. The pandemic has heightened the safety risks and intensified exploitation in the sector, reinforcing the need to establish improved legal protections for this workforce.

Employers around the world encourage workers to self-isolate, but this is not an option for some gig workers even though they have direct contact with members of the public. There is a major risk that workers who do not have access to sick leave entitlements might not report COVID-19 symptoms (Smyth 2020). The Victorian government has highlighted that insecure work (of which gig work is a prominent sub-set) is an important factor leading to 9 out of 10 people who catch COVID-19 continuing to work rather than self-isolate (Smyth 2020). Such occurrences have turned the spotlight on gig economy workers such as delivery riders. Indeed, significant health risks to delivery riders and those members of the public that receive their food deliveries have emerged during the pandemic. In the COVID-19 pandemic food delivery riders are faced with the dilemma whether to work whilst sick and possibly spread the virus or self-isolate and not be paid at all (Amin 2020; Smyth 2020). In April 2020, an Uber Eats Rider continued to deliver food after trying to get a COVID-19 test (Hanrahan 2020). As one delivery rider put the ethical dilemma they face: Do they continue to work so they can earn money or do they stop work so they don't infect other people but not earn any income? (Amin 2020). This highlights that contract labour with its lack of leave entitlements can also become a major public health issue, serving as a stark reminder of the "interconnection between occupational and public health" (Gregson and Quinlan 2020: 10). It also highlights that sick leave entitlements are not just "nice to have" but a social necessity for all workers who supply only their own labour regardless of their work status.

Uber and other food delivery companies have initiated 'no contact' delivery where workers can leave orders at the door and financial assistance for up to 14 days for its workers who are diagnosed with COVID-19 (Hanrahan 2020). However, contactless deliveries depend on customer co-operation which is frequently lacking due to some public ignorance about the health risks. Furthermore, food delivery riders claim that not enough is being done to protect them from COVID-19. A particular concern is that not enough personal protective equipment (PPE) such as disposable gloves, hand sanitisers and facemasks is being provided to delivery riders (Amin 2020). A recent survey found that 51% of food delivery riders were not provided with sufficient basic PPE (Delivery Riders Alliance and Transport Workers Union 2020).

## On-demand freight delivery work

In the road transport industry, digitally-mediated, on-demand work is due to expand beyond ride-share and food delivery into road freight delivery. Uber freight is currently operating in overseas jurisdictions and intends to expand into Australian trucking shortly. Amazon Flex commenced in Australia in February 2020 (Amazon Commercial Services Pty Ltd 2020). It uses an app to engage a fleet of owner drivers but asserts that State-based owner driver laws in NSW and Victoria 'operate separately and do not form part of the contract with [the owner driver]' (Workplace Express 2020a). (This assertion is unlikely to be correct if it is taken to mean that the arrangement is not subject to owner-driver laws especially in relation to the Victorian legislation which has recently been amended to make explicit that digital arrangements between large tech companies and owner drivers are covered) (see Schofield-Georgeson and Rawling 2020).

The lack of national minimum standards for RT contractor drivers who are engaged by traditional means that drivers frequently have to accept pay rates and conditions dictated to them or forego work. There has consequently been a steady decline in pay rates in real terms over the last 30 years (Rawling, Johnstone and Nossar 2017: 308-309; Thornthwaite and O'Neill 2016: 16). Low rates for some contractor drivers have placed downward pressure on the pay of employee drivers. The rise of digital on-demand work intensified this downward trend already evident in the road transport industry.

### The flow on effects of all three forms of on demand road transport industry work

It is clear from the analysis of terms and conditions of work in the on-demand sector that these digitally-mediated, gig economy arrangements should be better regulated because they have further exacerbated exploitation of workers and competition within the road transport industry. The current gap in legislative regulation is now more evident due to the expansion of these 'gig' economy arrangements, placing further downward pressure on rates and safety across the road transport industry. There is no doubt that entry of digitally mediated gig economy arrangements into the transport industry has adversely affected the wages and conditions of workers engaged by conventional means. As Srinivasan explains: 'With Uber, almost anybody can drive. As new unregistered drivers flood in, they increase competition, threatening wages and the availability of work. As a result, many registered and unionized taxi drivers have seen their wages drop and their hours increase.' (Srinivasan 2019: 114). Without governmental intervention this downward pressure is set to intensify.

## 2 An evaluation of existing forms of regulation

As has been outlined above, on-demand gig workers in the road transport industry require minimum terms and conditions/standards that cannot be undercut, to guard against the outcomes of low pay, poor conditions of work, poor safety at work, the lack of consultation and dispute resolution mechanisms and arbitrary dismissal by work providers. These outcomes are a direct consequence of inadequate government regulation of on-demand gig work; currently there is no system of legislative regulation in Australia that provides for adequate legal protections for RT gig workers. This Section 2 of this Report analyses existing systems (and one prior system) of legislative regulation to determine whether or not any of those systems could, if amended, adequately protect these RT gig workers or whether those systems might provide a model that could be adapted for future federal legislative regulation of RT on-demand work. We begin by explaining why the Fair Work system has been found not to cover this workforce, and we follow by considering state-based schemes dealing with road transport work.

### Why does the *Fair Work Act* not deal adequately with the rights and entitlements of on demand road transport workers?

The *Fair Work Act 2009* (Cth) relies on the common law multifactorial or ‘multiple indicia’ test (set out by the High Court of Australia in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986 : 24, 36-37) and *Hollis v Vabu Pty Ltd* (2001)) for determining the employment status of the class of workers who enjoy most benefits under the Act. The National Employment Standards and modern awards cover only employees and not independent contractors, so it is only employees who can rely on the safety net of minimum wages, working hours, leave provisions and other protective conditions of employment provided by the Act. Likewise, only employees may collectively bargain to make an enterprise agreement under the Act. The unfair dismissal protections are also available only to employees, so only workers who fall within the common law definition of employment enjoy protection from capricious termination of their work contracts under the *Fair Work Act* Pt 3-2. While a wider range of workers can claim protections for relevant ‘workplace rights’ under the General Protections in *Fair Work Act* Pt 3-1 which purport to cover independent contractors, the *Fair Work Act* creates fewer rights for non-employed workers. Even the right against adverse action in *Fair Work Act* s 341(1)(c)(ii) taken because a person has raised a complaint or inquiry in relation to their employment applies only to employees.

Many of the cases alleging employment status for rideshare and food delivery drivers have been unfair dismissal cases, determined by the Fair Work Commission on the threshold question of whether the worker is a national system employee and thus eligible to bring a claim. In each case, the Commission considered the specific terms of the worker’s contract of engagement because a worker’s status will be determined by their particular contract with the platform, as manifested not only in the written terms in a contract document, but in the practices adopted by the parties in performing their agreement.

In one case of a food delivery cyclist, for example, the Commission determined that the worker was engaged under an employment contract. In *Klooger v Foodora Australia Pty Ltd* (2018)

(‘*Klooger*’) a food delivery driver was found to be an employee for the purposes of an unfair dismissal complaint because the terms of his contract, as performed, indicated a sufficient level of control by the platform over his work. In most cases determined by the Commission, however, on demand road transport workers have been found to be independent contractors when applying the multifactorial test.

## Summary of case law

In Australia no case concerning an on demand transport worker has yet been determined by the Federal Court, so presently we have only decisions of the Fair Work Commission to rely upon. The Federal Court would not be bound to follow any of these determinations.

The earliest Fair Work Commission decision on an Uber Contract (see above) was decided against the worker, on the basis that the Uber Contract was not a contract for the performance of work. In *Kaseris v Rasier Pacific VOF* (2017) (‘*Kaseris*’), Uber’s characterisation of the contract as a commercial contract for the provision of telecommunications services was largely accepted (*Kaseris* 2017: [51]). Deputy President Gostencik decided that there was no ‘work for wages’ bargain in the arrangement. With respect, this finding appears to be disingenuous, because it is clear that the arrangement under which the drivers were engaged involved their commitment to provide work, and Uber’s entitlement to profit from their work. Uber’s revenue was directly related to the services provided by the drivers. Absent the peculiarity that the work was mediated through a digital platform, the arrangement could have been characterised either as direct employment (of a transport company engaging drivers or carriers to undertake the work ordered by its clients), or as a labour hire arrangement (of a labour hire agency lending its drivers to clients to undertake services).

Fortunately, later decisions of the Commission have seen through the Uber Contract’s ‘cloud of words’ (see *Cam & Sons Pty Ltd v Sargent* (1940:163)). It is now recognised that the arrangement between the Uber and the drivers are contracts under which work is performed, although in most cases, they have been found to be independent contractors, after applying the multiple indicia test. The Commission tends to cite its own decision in *Abdalla v Viewdaze Pty Ltd* (2003: 229-31) for a catalogue of the factors set out by the High Court in *Hollis v Vabu Pty Ltd*.

In *Pallage v Rasier Pacific Pty Ltd* (2018) (‘*Pallage*’) and in *Suliman v Rasier Pacific Pty Ltd* (2019) (‘*Suliman*’), the Fair Work Commission was willing to accept that the contract was one for the performance of work by the drivers for the benefit of Uber. Nevertheless, after weighing the various factors in the common law multiple indicia test, the Commission found that *Pallage* was an independent contractor (*Pallage* 2018: [35]-[54]). The determinative factors were that the driver could decide his own working hours, and could refuse to accept jobs; he provided all of his own equipment, including the vehicle, mobile phone and broadband connection; he was paid by the job, not by the hour; and he was not required to wear a uniform or place any signage in his car, so he was not an ‘emanation of the business’ of Uber (*Pallage* 2018: [46]).

A full bench of the Commission had the opportunity to consider the contract between UberEats and a food delivery driver in *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/as Uber Eats* (2020) (‘*Gupta*’). The Commission determined that Ms Gupta was engaged under a contract for work, and was paid to perform services in UberEats’ business, not her own (*Gupta* 2020: [44]). Nevertheless, the Commission found that on balance (again weighing up the factors in the multiple indicia test) she was an independent contractor. She



was found to be in control of her own working hours, she had no obligation to provide exclusive service, and she did not present as an ‘emanation’ of Uber Eats (*Gupta* 2020: [69]).

The Transport Workers’ Union assisted Ms Gupta in taking this matter to the Federal Court of Australia, challenging the FWC’s characterisation of her working relationship as ‘not employment’. The matter settled (with Uber agreeing to pay an undisclosed sum to Ms Gupta) after argument in the court proceedings. The transcript of proceedings (Federal Court Registry No NSD 566 of 2020, O/N H-1358227) reveals that members of the bench (particularly Bromberg J and White J) grilled counsel for Uber on the nature of the arrangements involved in food delivery work. Bromberg J queried whether this work might be characterised as ‘piecework’ undertaken by employees (Transcript P-24). He also asked: ‘Who would the public have perceived the worker as an emanation of, if not Uber? (Transcript P-49), indicating that the ‘organisational integration’ test for identifying an employment relationship may well capture this kind of working arrangement. White J stated in the course of question that the court operates in ‘the real world’, suggesting that he was unsatisfied by Uber’s counsel’s refusal to offer an acceptable characterisation of the relationship. In the end, however, these judicial observations have not borne any fruit in the form of a binding precedent finding that Ms Gupta was an employee. The settlement – while an important victory for the plaintiff herself – means that there is still no Federal Court decision illuminating whether the FWC’s characterisation of the workers in these cases is correct. Without such a precedent, the FWC has no reason to alter its present approach to these matters.

In the main, the FWC has found on demand transport workers to be independent contractors. The only decision finding that an on-demand transport worker was an employee is *Klooger*. The determinative factors in that case were that the worker had been given supervisory responsibilities and worked on a roster system. These factors were held to outweigh some terms in the written contract which purported to permit him to subcontract work to others (which is often a determinative factor in finding that a contract is not a contract of personal service).

So long as the Commission continues to assess work relationships against its own checklist set out in *Abdalla v Viewdaze Pty Ltd* (2003: 229-31) they are likely to continue to find that most on demand transport workers are not employees. The weighing of these factors has tended to ignore whether the workers are engaged in any genuinely entrepreneurial activity. A different conclusion might result if the Commission asked only the broader question posed by the High Court of Australia in *Hollis v Vabu Pty Ltd*: whose business does the worker serve, their own, or the putative employer’s?

Without a Federal Court decision determining that these working arrangements are employment relationships – or some legislative intervention to define these workers as employees for the purposes of the *Fair Work Act* – on demand transport workers are likely to continue to labour in hazardous conditions and earn below the minimum wage (Commonwealth Senate, 2018: 73-81; Stanford, 2018).

## Why the case law is unlikely to change

The settlement of the Gupta proceedings in the Federal Court demonstrated that counsel on both sides of the argument, saw a risk in continuing the proceedings. The robust questioning of Uber’s counsel by the bench does not indicate that the court would have found in favour of Gupta in this case. Courts can be critical of the arguments raised by counsel, and indeed critical of the existing principles of law, but still decide cases according to prevailing authority

. This was the case in *CFMMEU v Personnel Contracting Pty Ltd* [2020] FCAFC 122, where Allsop CJ and Lee J expressed serious reservations about the credibility of an independent contracting arrangement involving an unskilled young backpacker undertaking labouring work, but still found that he was an independent contractor because they were bound by earlier authority. We will now never know whether the Federal Court would have found Ms Gupta's relationship with UberEats was one of employment. There are feasible arguments that the level of control exercised by platforms over drivers warrants a finding that they are employees, however the cases decided in the Fair Work Commission demonstrate that there are also features of the relationship that tend towards characterisation of these drivers as independent contractors, at least according to the current multiple indicia test.

In the case of drivers of motor vehicles in particular, the fact that they are required to provide and maintain their own vehicles means that these cannot be said to be 'labour only' contracts. The significance of the worker's investment in substantial capital assets is apparent in the distinction made between the couriers in *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) (the 'Tax Case') and the courier employed by the same enterprise in *Hollis v Vabu Pty Ltd* (2001). In the *Tax Case*, the workers included drivers of vans and trucks and they were held to be independent contractors because they provided expensive vehicles. In *Hollis v Vabu Pty Ltd*, a bicycle courier was held to be an employee, and one of the factors emphasized was the lack of any significant investment in a vehicle.

Perhaps more important even than the ownership of vehicles in the reasoning in the Fair Work Commission cases is that drivers were not required to commit to accepting any driving work. Cases regularly cite the lack of any 'mutuality of obligation' between the parties. This is an English concept, drawn from *Nethermere (St Neots) Ltd v Gardiner* (1984: 623). Australian law has not generally adopted the concept of 'mutuality of obligation' as one of the 'irreducible minima' of an employment relationship and does in fact recognise a form of employment – casual employment -- where there is no ongoing mutual obligation to provide shifts or attend for work.

Another factor tending towards a finding that the workers are independent contractors according to the current common law tests is that many of the platforms ostensibly permit drivers to perform other work while logged onto the app. There is no apparent prohibition on working simultaneously for rival platforms, nor indeed for taking on other kinds of work while driving (for instance, making parcel deliveries while chauffeuring riders). So the lack of any obligation of exclusive service has been held to be an obstacle to a finding of an employment relationship.

Another peculiar feature of these work arrangements is that a bloodless algorithm manages many of the human resources management decisions affecting the relationship. The platform controller delegates the supervision of work to the customer rating feature built into the app itself. The worker is 'blocked', not sacked by a human manager. For these, and possibly other reasons, it is likely that drivers taking work from the platforms will not meet the common law definition of employment as it is presently understood, because that definition is still tied to the labour engagement practices of the pre-digital industrial era. This is not a uniquely Australian problem. A special issue on *Crowdsourcing, the Gig-Economy and the Law* in (2016) 37(3) *Comparative Labor Law and Policy Journal*, contains a number of academic studies demonstrating the weakness of labour laws developed in earlier times in protecting workers undertaking digitally-sourced work.

## Why legislative amendment to the Fair Work Act definition of ‘national system employee’ may not be the best approach

Some commentators have called for the enactment in the *Fair Work Act* of an expansion of the protections in the *Fair Work Act* to cover a broader class of workers. This might occur by way of a statutory presumption of employment or inserting into the Act an expanded definition of ‘worker’ (to replace the narrower work status of ‘employee’) (Hardy and McCrystal 2020; Stewart and McCrystal 2019). These kinds of arguments have been made for many years, predating the *Fair Work Act* and the rise of on demand work assigned through digital platforms (Stewart 2002; Roles and Stewart 2012). The enactment of a broader definition in legislation is the reason that the Uber drivers in *Uber BV v Aslam* (2017) in the United Kingdom won their case. They were found to be ‘workers’ under the second limb of the *Employment Rights Act 1996* (UK) s 230(3) which defines a worker as an individual who works under ‘any other contract . . . whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual’. This definition has been informed by the seminal work of Professor Mark Freedland and others (Freedland 2003; Freedland 2006; Freedland and Kountouris 2011), seeking to extend employment rights to a wider group of workers who provide their services under personal service contracts. This definition is replicated in the *Working Time Regulations 1998*, reg 36(1) and the *National Minimum Wages Act 1998*, s 54(3), and it explains why the rideshare drivers working in that jurisdiction succeeded in their claims.

Calls for enactment of a wider definition of ‘employment’ in the *Fair Work Act* have so far been ignored by legislators, and it seems clear from the decisions of the Fair Work Commission to date, that most on demand transport workers face an uphill battle in establishing employment status for the purposes of the *Fair Work Act*. While the *Fair Work Act* continues to lack a broader definition of employment including on demand work facilitated through digital platforms, these workers remain in a poorly regulated wilderness.

The proposals to expand the coverage of the *Fair Work Act* warrant serious consideration. If such reforms result in the platform companies and their on demand RT workers being covered by the Act so that on demand workers enjoy the minimum standards and other rights provided by the Fair Work system, then the problems identified in Section 1 of this Report might be addressed.

However, it is not clear that this would be the practical outcome of such reform. Firstly, there would be considerable stakeholder resistance to expanding the coverage of the Fair Work Act. There may be understandable *worker* resistance to affording the full range of employment protections to on demand workers, given that many of those protections have evolved to recognise the needs of workers who are tied, full-time, to exclusive service to a single employing entity which claims obedient and faithful service at all times. Certain individual RT ride-share drivers and other drivers at times express the view that they would prefer to retain the status of contractor (with rights and entitlements) rather than be pigeon-holed into the employee category. One survey found that only 47% of gig workers surveyed wanted to be classified as employees (Transport Workers Union 2020: p16) Also, it is clear that businesses engaging workers through digital platforms do not want their workers being designated as employees (see Adhikari 2019). Work providers such as Uber have made it part of their business model to avoid being covered by employment protection regimes such as the Fair

Work system. Given this commitment to evading employment protection regimes, it is possible that work providers would find more ingenious means to avoid the application of any statutory presumption of employment or expanded definition of worker inserted into the *Fair Work Act*.

This is why effective government action to protect gig economy workers cannot solely rely on changing the legal definition of employee in the *Fair Work Act*. This just sets up another artificial boundary that could be circumvented (Kaine 2018). By tweaking their arrangements with their workforce, gig companies could find new grounds to argue their workers are contractors, not employees (Rawling and Kaine 2018). Indeed, as is discussed more fully below, the NSW Parliament abandoned the approach of expanding employment in favour of directly regulating the contractor/principal arrangement (under Chapter 6 of the NSW *Industrial Relations Act*) because of problems with the deemed employment approach.

Finally, even if RT gig workers were brought within the Fair Work regime they would be likely to be treated as casual employees, given that they can choose when to access the digital platform and accept work. Casual employees are not entitled to key minimum standards such as paid sick leave (*Fair Work Act*, s 95). This means that on-demand workers would not necessarily receive key entitlements (such as paid sick leave) even if these reforms were implemented.

In any case, we argue that it is not necessary to squeeze the working arrangements of on demand workers in the digital economy into the industrial era's category of 'employment' in order to provide them with appropriately protective labour standards. Appropriate protections can be designed to meet the particular needs of workers undertaking this kind of work. A more effective method of ensuring that vulnerable RT gig workers are legally protected is to take a 'beyond employment' approach and institute a legislative regime that applies regardless of whether the workers are employees or contractors according to the common law definition. That is, rather than expanding the coverage of the Fair Work system, an *alternative* federal regime that explicitly applies to RT contractors including RT gig workers (as well as RT employees) might be established.

## Enterprise Agreements

Before we turn to alternative legislative regimes, regulation by enterprise agreements under the *Fair Work Act* is worthy of mention.

To be a permitted term of an enterprise agreement the term must pertain to the relationship between employers and employees. Therefore, first and foremost, enterprise agreements have been used to protect the rights and entitlements of direct employees of the employer governed by an enterprise agreement. However, to an extent, it is possible to include some provisions in an agreement to regulate contractor labour. It has long been held that a prohibition on contractor labour is not permitted agreement content (*The Queen v The Judges of the Commonwealth Industrial Court and Others: Ex Parte Cocks and Others* (1968)). But a provision about the terms upon which contractor labour are engaged (a sites rates clause) can be included in an enterprise agreement provided it has a sufficient connection to the job security of direct employees. (See for example *KL Ballantyne and National Union of Workers (Laverton Site) Agreement 2004* (2004); *National Union of Workers v Phillip Leong Stores Pty Ltd* (2014: [123])). Some agreements clauses, such as those recently used in the road transport industry, produce a highly sophisticated regulatory mechanism which harness the ability of

core employers to raise the standards of outside labour hired by third parties (see for example Toll TWU enterprise agreement 2013-2017).

Two key issues raise doubts as to whether enterprise agreement regulation of RT on demand workers can adequately protect those workers.

The first is a technical point. As we understand it, Uber and similar companies hire their *entire* driver and delivery rider workforces as contractors, so there is no workforce of direct employees to satisfy the requirement that the terms dealing with contractor labour have a *sufficient connection to the job security of direct employees*.

The second, broader, point is that even if a valid enterprise agreement clause could be crafted which applied to RT on-demand workers, such protections would have limited application in an enterprise-based system of collective bargaining. Since the decentralisation of the industrial relations system, initiated by the Keating Labor government in 1993, employers bargain at an enterprise rather than industry level for market rates and conditions above a safety net of minimum standards. Setting market rates and conditions at an enterprise, rather than industry, level enables other operators to offer their frequently non-unionised workforces the minimum safety net rates. Any employer in a competitive industry (such as the RT industry) who enters into registered enterprise agreements with market rates higher than the safety net as well as more favourable conditions (including sites rates clauses) have found it increasingly difficult to compete with operators who merely offer the minima. Consequently, as it stands currently, favourable enterprise agreement terms and conditions such as site rates clauses are isolated examples of adequate regulation. They only regulate work at a particular company. Enterprise level regulation does not flow through to workers throughout an industry but is confined to enterprises where unions have been strong enough to negotiate protective clauses. This is a particularly significant failing given that the majority of Australian workers – especially contractors - are not represented by a union in collective bargaining, or do not collectively bargain at all, including some of the weakest and most vulnerable workers (van Wanrooy, Wright and 2009; Sheldon 2008: 239-240).

## Existing models of alternative regulation

We now turn to consider other models of regulation, outside of the federal Fair Work system. Although it did not specifically apply to on-demand workers, the Road Safety Remuneration Act (RSR Act) which established the Road Safety Remuneration Tribunal (RSRT) is a best practice model of industry-specific workplace regulation which covered both RT contractor and employee drivers. However, as is discussed more fully below, the RSR Act was repealed and the RSRT abolished. Following the abolition of the RSRT there is no national scheme providing for the pay and safety of RT contractors. There are specific State schemes in New South Wales, Victoria and Western Australia, but no specific legislative systems for the protection of contractor drivers in Queensland, South Australia, the Australian Capital Territory or the Northern Territory. As is explained below, the schemes in Western Australia and Victoria do not provide an effective, pro-active mechanism for setting minimum wages and conditions. Although it also has some limitations, the NSW scheme under the *Industrial Relations Act 1996* (NSW) Chapter 6 emerges as the best *existing* model for future national regulation of on-demand RT work. The key difference between the NSW and Victorian/WA schemes is that

the NSW scheme allows for the setting of mandatory minimum rates and conditions whereas the Victorian and Western Australian models provide for recommended rates only.

### **Victorian Owner-Driver Scheme**

The *Owner Drivers and Forestry Contractors Act 2005* (Vic) (ODFC Act) regulates owner-driver arrangements including gig on demand work involving the delivery of goods. The substance of the Victorian legislation has two key aspects. First, it empowers the Minister, in consultation with an industry council, to determine recommended (as opposed to mandatory) rates of pay and costs schedules for owner drivers (Riley 2017b: 681). Secondly, the Act contains mandatory information obligations. Hirers as well as freight brokers must provide written copies of rates and costs schedules to owner drivers before entering into contracts for road transport work. After recent amendment, this obligation applies explicitly to persons who provide an online platform to engage drivers (Schofield-Georgeson and Rawling 2020). Under ODFC Act s 45, where the hirer or broker fails to provide the rates to the driver, the relevant State tribunal can order that the driver be paid the recommended rates.

This is perhaps one of the only pieces of industrial legislation in Australia explicitly regulating businesses which control online platforms or phone apps who engage RT on-demand workers.

Unfortunately, this Victorian scheme has not proved capable of rolling out minimum rates on a large scale to Victorian drivers. Drivers do not have the bargaining power to insist on the recommended rates and instead have to undertake sometimes lengthy litigation under s45 on an individual basis for rates to apply (see, in particular, Victorian Civil and Administrative Tribunal (VCAT) 2016; VCAT 2016a). In any case, such litigation has rarely succeeded in imposing the recommended rates. Furthermore, another key deficiency of the Victorian legislation is that s 45 litigation is undertaken in relation to a *particular work contract* pertaining to individual drivers which does not have the potential to produce sector-wide standards. As a result, to date, the Victorian legislation has not been an effective method of providing RT contractor workers with adequate cost recovery to avoid undue driver exploitation and owner-driver insolvencies.

### **Western Australian owner-driver scheme**

The *Owner Driver (Contracts and Disputes) Act 2007* (WA) is based on the Victorian *Owner Drivers and Forestry Contractors Act 2005* (Quinlan and Wright 2008: 75). Similar to the Victorian legislation, the WA owner-driver legislation, empowers the Minister to make a code of conduct in consultation with an industry council (named the Road Freight Transport Industry Council). Such a code of conduct has been made under the *Owner-Divers (Contracts and Disputes) (Code of Conduct) Regulations 2010* which specifies recommended rates for heavy vehicle owner drivers with a connection to Western Australia (and who are not already covered by the NSW or Victorian legislation): ss 4, 5, s26, 27). These rates are not mandatory. The code of conduct also specifies that hirers must provide information about the recommended rates to owner-drivers covered by the legislation. The Industry Council is also charged with the responsibility of promoting compliance with the guideline rates, and an owner-driver can appoint a rates negotiation agent which a hirer must recognise: ss 19, 28). The Act also includes important security of payment provisions (see in particular s 13) and an individual driver can make a claim to a WA tribunal about non-payment.

Presently, there is a lack of reliable data to indicate the impact of the WA Act (Government of Western Australia 2014). However, overall, like the Victorian Act, it appears that the WA

legislation largely consists of relatively weak, process obligations that arguably do not represent a best practice, programmatic approach to the implementation of safe rates for owner-drivers. In a competitive industry such as the RT industry, guideline rates do not effectively prevent the undercutting of driver rates in the same manner as mandatory minima clearly can, if backed up by an effective enforcement regime. Furthermore, the coverage of the WA Act is fairly limited as it only applies to certain heavy vehicle drivers and does not apply to a range of RT workers including on-demand ride-share drivers and delivery riders.

### **Best Practice Model A: Chapter 6 of the NSW *Industrial Relations Act***

By contrast with the Victorian and WA owner-driver schemes, Chapter 6 of the NSW *IR Act* currently provides an effective, mandatory scheme of sustainable minimum rates and conditions protecting the interests of a broad range of contract road transport workers engaged in the NSW short haul sector.

#### **History of Chapter 6**

It is important to briefly outline the history of the introduction of Chapter 6 in order to properly convey why Chapter 6 regulation was introduced and why it took the form of direct regulation of contracts of carriage and bailment (and the contractors that entered into those contracts) instead of a mere extension of the employment protection model.

In 1959 the NSW Parliament inserted provisions into the *Industrial Arbitration Act 1940* (NSW). Those provisions deemed certain categories of workers to be employees for the purposes of that Act and the *Long Service Leave Act 1955* (NSW) and *Annual Holidays Act 1944* (NSW). However, these amendments provoked an outburst of litigation and political lobbying and consequently failed to adequately address the issues they were designed to solve (TWU PB piece). As a result, in 1967, the Minister for Labour and Industry in the Askin Liberal government requested the Industrial Relations Commission of NSW to investigate the operation of these deeming provisions. The resulting inquiry reported to the Minister, E.A. Willis MP. Part C of that report examined truck owner drivers (TWU 2011: 5).

The report found evidence of a connection between truck owner driver rates and methods of pay and the ability of those drivers to perform their work safely. It found that the vulnerable position of truck owner-drivers in relation to those who engaged them produced poor safety practices and outcomes (Industrial Relations Commission of NSW 1970: [30.24]).

Following this report, the NSW Parliament in 1979 inserted provisions into the then *Industrial Arbitration Act* which provided for the conciliation and arbitration of industrial disputes involving truck owner-drivers. This legislative regime applied to truck owner-drivers who were vulnerable contractors. Significantly, the Willis report had concluded that responding to the vulnerable position of owner-drivers by way of deemed employment provisions was not going to fully resolve the issues involved. It therefore recommended a legislative regime that recognised owner-drivers as independent contractors, whilst providing a floor of minimum standards for those drivers.

In the early 1990s the then NSW Liberal government decided to not only maintain these owner-driver provisions but expand them in the new *Industrial Relations Act 1991* (Chapter 6, ss 678-685). Amongst other things, the expansion of the provisions involved extending the scheme to ensure that the scheme encompassed owner-drivers who used motor vehicles and bicycles in addition to truck owner drivers. In 1996, the Carr Labor government carried over the owner-driver provisions into Chapter 6 of the new *Industrial Relations Act 1996*. Chapter

6 was specifically exempted from the federal takeover of independent contractor regulation by the *Independent Contracts Act 2006* (Cth) (IC Act) (see IC Act s 7(2)(b)(i.) 2005/2006) (TWU 2011: 8; Kaine and Rawling 2010: 191; Rawling et al report 2017: 41). The Chapter 6 provisions remain in operation today. This NSW scheme has therefore enjoyed bipartisan support at both State and federal level for four decades.

### **The current Chapter 6 regime**

Under Chapter 6, a system of 'contract determinations' (akin to industrial awards) and 'contract agreements' (similar to collective agreements) govern the direct contractor driver-principal relationship (including both contracts of carriage and bailment) in a range of industry subsectors including general transport, waste collection, couriers, breweries, waterfront, concrete, quarries, excavated material carriage, taxis and car carriage (Rawling and Kaine 2012: 248; Quinlan and Wright 2008: 74). In each of these sub-sectors there are minimum rates and conditions tailored to the particular sector. Those minimum rates take the form of cost recovery rates of pay that take account of all costs incurred by owner-drivers in providing road transport services. The system of contract agreements allows groups of owner-drivers to negotiate agreements above these minimum rates (Part 3 Chapter 6). These contract agreements can be registered with the NSW Industrial Relations Commission and must provide conditions that are no less favourable than those available under the applicable contract determinations.

In addition to setting driver remuneration, contract determinations and contract agreements can provide for almost any condition of engagement: ss 312-313, 322. Chapter 6 also provides remedies for unfair or arbitrary termination of owner-driver contracts : s 314. The separate legislative provisions also include specific provision for representation of owner-drivers by the relevant union:ss 333-342. Furthermore, Chapter 6 includes a simple and effective tribunal system for resolution of disputes between owner-drivers and the businesses which directly hire them (Part 4; Nossar and Rawling 2017: 3). Finally, chapter 6 is supported by an effective enforcement regime. There are applied provisions included in Chapter 6 which have the effect of extending all of the employee enforcement provisions under the *Industrial Relations Act 1996* (NSW) (IR Act) to contract drivers : ss 343-344. As a result, there has generally been compliance by direct hirers of contractor drivers with terms and conditions mandated under Chapter 6 instruments (Quinlan and Wright 2008: p29; Rawling and Kaine 2012: 248-249). Therefore, Chapter 6 has created certainty for owner-drivers and principals who engage those owner-drivers (Rawling and Kaine 2012: 249). Many long-term agreements have been negotiated on the basis of the standards established under Chapter 6. In particular, the Transport Workers Union has negotiated numerous contract agreements with major transport companies.

A broad 'trade practices' exemption is included in Chapter 6 which specifically authorises for the purposes of the *Competition and Consumer Act 2010* (Cth) s 51 (and the NSW Competition Code) the exercise of tribunal powers under Chapter 6, anything done by a person in order to comply with a contract determination, including entering into and doing anything preparatory or incidental to the determination, and anything done under a contract agreement (IR Act s 310A.)

As presently enacted Chapter 6 specifically excludes food delivery drivers and cyclists, because 'a contract of carriage' does not include a contract 'for the delivery of meals by couriers to home or other premises for consumption': IR Act s 309(4)(i). (Chapter 6 does not



explicitly include or exclude ride share driving). No doubt when this legislation was first enacted any person delivering meals to homes would have been a 'meals on wheels' charity worker, or an employed servant of a restaurant or other meal provider. Bread and milk delivery drivers were already deemed to be employees for the purposes of the IR Act by Schedule 1, cl 1(a) and (e). The existence of today's fleets of delivery workers picking up food from restaurants for delivery to customers was unimaginable when this legislation was enacted. Nevertheless, these are the very kind of workers who Chapter 6 was designed to protect. If IR Act s 309(4) were amended to remove the exclusion of these workers from this scheme, on demand RT workers in NSW might be covered by this scheme.

However, for a range of reasons, it is preferable to enact new, federal legislation. Firstly, due to State jurisdictional limitations, Chapter 6 does not cover any road transport work beyond NSW local work (Rawling and Kaine 2012: 249). Also (post Work Choices) the NSW system has been unable to regulate anything other than terms and conditions for owner-drivers: it can no longer regulate the pay and conditions of employee drivers (these are now mainly regulated by the federal Fair Work system). Additionally, Chapter 6 is confined to regulating the direct contract worker/hirer arrangement and does not extend to provide transparency regulation covering clients at the top of the transport supply chain. As such, a new federal scheme of regulation might be designed to incorporate a similar method of providing for minimum rates and conditions but overcome the shortcomings and limited reach of the NSW legislation.

### **Best practice model B: the Road Safety Remuneration Tribunal (Cth)**

At the federal level, a review headed by the National Transport Commission in 2008 examined the relationship between remuneration systems and workplace safety in the road transport industry. That review found evidence for the link between driver remuneration and safety outcomes and recommended a national scheme for mandatory safe rates that would cover employee as well as owner drivers (Nossar and Rawling 2017: 9 citing Quinlan and Wright 2008: 61). The review also recommended the creation of a specialized body that could set rates of remuneration and govern safety issues in the industry. It also suggested adequate enforcement measures; a supply chain payment system in the case that a driver does not receive their wages; and the creation of escalating penalties for failure to pay mandated rates (Nossar and Rawling 2017 citing Quinlan and Wright 2008). Following these findings, a Safe Rates Advisory Group was established to advise the federal government on the implementation of these recommendations (Nossar and Rawling 2017: 10).

Subsequently, in March 2012, the federal Parliament enacted the Road Safety Remuneration Act 2012 (Cth) (RSR Act). This legislation established the Road Safety Remuneration Tribunal (RSRT) which commenced operation on 1 July 2012 (RSR Act s 79, s 2). The RSR Act was repealed by the *Road Safety Remuneration Repeal Act 2016* (Cth) in mid-April 2016. This dissolved the RSRT (Nossar and Rawling 2017: 10).

Despite the abolition of the RSRT, this paper discusses the various components of the *RSR Act* (and some initiatives of the RSRT) as these remain a best practice model of a federal, industry-specific regime which can adequately address the root causes of pressures on the road transport industry and road transport workers. Indeed, a number of key features of the RSR Act provided a valuable model which could be adapted to create national regulation of on-demand gig work in the road transport industry, especially since the persuasive explanation for why the RSRT was abolished is that it was for political expediency. There was no lack of

evidence for the need for the tribunal or indeed any lack of evidence that it could be effective (Rawling et al 2017).

The principal object of the *RSR Act* was to promote safety and fairness in the RT industry (*RSR Act* s3). The RSRT's role in meeting this principal object was to address the relationship between pay and safety in the RT industry by, amongst other things, developing and applying reasonable and enforceable standards throughout the RT supply chain to ensure the safety of road transport workers (*RSR Act* s 3; Acton 2012: 2). The main functions of the RSRT were: making road safety remuneration orders; approving road transport collective agreements; and dealing with disputes between road transport industry participants (*RSR Act* s 80; Acton 2012: 2; Rawling et al 2017:19).

RSRT orders, agreements and disputes could relate to road transport drivers who were employees and independent contractors (including those operating via a corporation) (Rawling and Kaine 2012: 252). For employees, RSRT order, agreements or dispute arbitration orders applied to the extent that any relevant federal award, agreement, or instrument was less beneficial than the RSRT right and entitlements: *RSR Act* s 12. For contractors, these binding RSRT decisions or instruments applied regardless of the terms of any road transport contract to which they were a party: *RSR Act* s 13. Despite the broad coverage of the *RSR Act*, it was not intended to exclude or limit the operation of Chapter 6 of the *IR Act* NSW (*RSR Act* s 10).

### **Road Safety remuneration orders**

The RSRT could make binding orders. In deciding whether to make an order, the tribunal was to consider the safety and fair treatment of road transport drivers and the likely impact of the order on the viability of businesses in the road transport industry: *RSR Act* s 39). However, the Act did not impose any substantive threshold to the making of orders. (Rawling and Kaine 2012: 251; Rawling et al 2017: 20). In particular, there was no requirement to re-inquire as to whether or not there was a link between pay and safety every time an order was made or whether or not the order was necessary for the safety of the particular workers to be covered by the order (Rawling and Kaine 2012: 251; Rawling et al 2017: 20).

The *RSR Act* used the broad scope of the Commonwealth Parliament's legislative powers with respect to industrial legislation so that tribunal orders could have been validly imposed on employers, hirers of road transport contractor drivers and all other participants in the road transport supply chain including clients or lead firms at the apex of conventional road transport supply chains: *RSR Act* s 27(3), s 9.

The tribunal's orders could have included any provision the RSRT considered appropriate in relation to remuneration and related conditions for road transport drivers to whom the order might have applied: *RSR Act* s 27(1). Such provisions might have included but were not limited to:

- Conditions about minimum remuneration and other entitlements for RT employee drivers and conditions about minimum rates of remuneration and conditions of engagement for RT contractor drivers;
- Conditions for the loading and unloading of vehicles; waiting times, working hours, load limits, payment methods and payment periods; and
- Methods of reducing or removing 'remuneration-related incentives, pressures or practices that contribute to unsafe working practices' (*RSR Act* s 27(2); Rawling et al 2017: 20-21).

In its time the RSRT made two orders. The first order covering the long haul and supermarket sectors of the road transport industry was relatively weak and did not deal with pay rates for independent contractor drivers. (Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014; for details see Johnstone et al 2015). By contrast the second order (also covering the long haul and supermarket sectors) set minimum payments for contractor drivers; and imposed substantive obligations upon certain supply chain businesses to conduct audits of their subcontractor businesses who were the direct hirers of contractor drivers (Contractor driver Minimum Payments Road Safety Remuneration Order 2016). The second order took effect on 7 April 2016 after a Federal Court stay was lifted. Thus the second order only lasted for a matter of days before it was dissolved when the *RSR Act* was repealed and the RSRT was abolished in mid-April 2016. This prevented the second order from ever being properly implemented. (Rawling et al November 2017 : 24-25; for details see Rawling Johnstone Nossar 2017).

A cost benefit analysis commissioned by the federal Coalition government found that it was anticipated that there would be a 28 per cent reduction in heavy vehicle crashes as a result of the first two orders made by the RSRT (Price Waterhouse Coopers 2016: 83, 86).

By the time of its abolition, the RSRT had developed well advanced plans to regulate a number of key RT industry sub-sectors including those involving the transport of oil, fuel and gas and the transport of cash and valuable and waste as well as developing plans to regulate intermodal hubs (such as maritime ports) (Nossar and Amoresano 2019: 13).

### **Road Transport Collective Agreements**

Instead of extending collective bargaining rights to contractors by treating them as employees, the *RSR Act* maintained the contractor status of RT drivers but created a separate collective agreement-making system which applied to them as contractors. (Johnstone et al 2012:149) Critically, the Act created both a mechanism for the enforcement of collective agreements and a safety net of minimum remuneration and related conditions (in the form of the RSRT orders) against which those agreements could have been negotiated (Johnstone et al 2012: 149). The RSRT could have approved collective agreements which were negotiated between a collective of contractor drivers and a hirer (or potential hirer) and which specified remuneration or related conditions for those drivers: *RSR Act* s 33;). Such an approval might have only been made where an order that applied to the relevant drivers was in effect; a majority of the drivers approved of the agreement and would have been better off overall under the agreement than under the order; and there was an agreement method for adjusting pay levels (where the agreement operated for more than 1 year: *RSR Act* s 34). Finally, there was a 'trade practices' exemption for action taken in bargaining or pursuant to a collective agreement. That is, anything done by a participating hirer or contractor driver in bargaining or in accordance with an approved agreement was specifically authorised for the purposes of sub-section 51(1) of the *Competition and Consumer Act 2010* (Cth) (*RSR Act* s37A; Rawling et al 2017: 21; Rawling and Kaine 2012: 255).

### **RSRT dispute resolution**

The RSRT could have dealt with disputes by mediation or conciliation, by making a recommendation or by expressing an opinion, or where the parties to the dispute agreed, by arbitration. The main types of disputes that the RSRT could deal with in this way were: disputes about pay or related conditions that might have affected whether a road transport driver worked in an unsafe manner; disputes about the practices of participants in the supply

chain beyond the employer or hirer where it was contended that those practices affected the employer or hirer's ability to provide safe rates and conditions; and disputes about the dismissal of an employee or contractor driver because the driver refused to work in an unsafe manner: RSR Act ss 40-43 (Rawling et al 2017: 21-22).

### ***RSR Act Compliance and Enforcement***

The Fair Work Ombudsman (FWO) had the responsibility of monitoring compliance with the RSR Act and orders and agreements made under the Act. FWO also had the power to inquire into and investigate any practice or act that might be contrary to the *RSR Act* or instruments made under that Act and its inspectors could exercise inspection and enforcement powers to determine whether relevant stakeholders were complying with the RSR Act or an enforceable instrument: *RSR Act* ss 73, 74) The FWO could also commence court proceedings to enforce the Act and instruments made under the Act and represent drivers who might have been party to any such proceedings: *RSR Act* s 73). The relevant union could also initiate enforcement proceedings for contraventions of the *RSR Act* and instruments made under that Act as well as exercise powers of inspection for suspected contraventions: RSR Act ss 46; 78 (Rawling et al 2017 : 23).

### **Greens Bill – a Hybrid model?**

The Greens member of Parliament, Adam Bandt, tabled a bill titled the *Fair Work Amendment (Making Australia More Equal) Bill 2018* (Cth) in federal Parliament. The Bill was not passed by Parliament but represents an interesting proposal to reform the *Fair Work Act 2009* (Cth) in order to protect precarious workers who may not be employees. If the Bill had been enacted the Fair Work Commission would have been able to make 'minimum entitlements orders' to extend provisions of the *Fair Work Act*, a modern award or an enterprise agreement so that they applied to work performed by 'workers' to whom the order might have applied and the businesses for which those workers directly or indirectly performed work. The worker would have performed work for the business 'irrespective of the legal relationship' between the worker and the business. The orders might have applied to 'a class of workers' such as those that perform work in a particular industry or a particular part of an industry.

This bill represented a hybrid model of regulation falling somewhere in between the best practice models discussed above (such as the 'alternative' legislative model of NSW Chapter 6) on the one hand, and the proposals to extend the definition of worker in the *Fair Work Act*, on the other. With some more explicit provisions about the category of 'workers' entitled to be covered by FWC orders, (including a provision which specifically states that workers designated as contractors could be so covered), the Bill, if enacted, may have formed an interesting method of (partially) protecting RT on demand workers. Although we recommend below a fuller set of legal protections for RT on-demand workers, this proposed hybrid method of regulation deserves to be investigated further.

### **Work Health and Safety legislation**

Another regulatory model that escapes dependence on the common law definition of employment for its coverage in the harmonized Model Work Health and Safety regime, adopted by most Australian states (except for Victoria and Western Australia). The *Model Work Health and Safety Act* is supported by the *Model Work Health and Safety Regulation*, and the National Compliance and Enforcement Policy, to which all WHS regulators are signatories. (See *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011*

(Qld); *Work Health and Safety Act 2012* (SA); *Work Health and Safety Act 2012* (Tas); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT)) While this legislative framework is an important measure designed to promote worker health and safety it does not provide a solution to the whole problem of worker safety, because it largely ignores the economic pressures experienced by road transport workers (Rawling and Kaine 2012: 246). It has nothing to say about the means for setting pay and conditions so ignores the economic drivers of behaviours affecting safe working practices. The current 'bifurcation' (Quinlan 1993) of laws regulating pay and conditions from safety regulation is a persistent problem, that must be addressed in a new and more effective system for regulating on demand road transport work.

Some features of the model legislation nevertheless offer useful lessons for the potential creation of a new legislative regime to cover on demand workers, the main ones being the broad definitions of the persons bearing duties, the persons protected, and the places of work governed by the scheme. (Section number references are to the *Work Health and Safety Act 2011* (NSW) ('*WHS Act*') but the same section numbers are generally used in the other states adopting the law.)

### **Key definitions: 'PCBUs', 'workers' and 'workplaces'**

A key feature of the *WHS Act* is that it escapes the limitations inherent in the *Fair Work Act* by extending liability for ensuring work health and safety beyond parties to employment contracts. All 'Persons Conducting a Business or Undertakings' (PCBUs) (defined inclusively in *WHS* s 5) are responsible for ensuring work health and safety. The PCBU's primary duty, set out in s 19, is to ensure 'as far as is reasonably practicable' the workplace health and safety of all workers carrying out work that is influenced or directed by that person.

'Worker' is also defined broadly in s 7(1) to include employees, contractors, subcontractors, labour hire workers, outworkers, apprentices, trainees, work experience students, and volunteers.

The 'workplace' is defined to include 'any place where a worker goes or is likely to be while at work' and includes vehicles, vessels and aircraft: *WHS* s 8.

These broad definitions of PCBU, worker and workplace mean that there need be no direct contractual relationship (let alone an employment contract) between the PCBU and the worker before the PCBU becomes responsible for ensuring safe working conditions. This scheme demonstrates that when an interest as important as work health and safety is concerned, regulators have been prepared to extend coverage of responsibilities outside of the confines a binary employment relationship.

Other features of the *WHS* legislation also demonstrate the adoption of useful regulatory tools, although they tend to have been framed in the context of a particular geography of work that assumes workers congregate in common places. For example, PCBUs are subject to extensive obligations to consult with workers about safety matters, because the workers themselves, and also any other persons at the workplace, also bear a duty to take reasonable care for their own and others' health and safety, and must cooperate in compliance with policies and procedures: *WHS* ss 28-29. PCBUs must consult, so far as is 'reasonably practicable', with the workers who are likely to be affected by safety management practices: *WHS* ss 47-49. Consultation requires that the PCBU provides workers with relevant information and an opportunity to express views, and also requires that their views are taken

into account and they are advised of any outcomes of the consultation. A mechanism provided in the Act for orderly consultation is the appointment of Health and Safety Representatives (HSRs), elected by members of work groups. A worker in a business or undertaking is able to request that the PCBU undertake an election to appoint one or more HSRs to represent the workers in the enterprise: WHS s 50. If a request is made, then within 14 days the PCBU must negotiate with workers to establish work groups for the purposes of electing HSRs from among their members to represent those groups: WHS s 52.

The role of HSRs is set out in s 68 and includes:

- Representing workers in the work group in WHS matters;
- Investigating WHS complaints;
- Monitoring WHS measures taken by PCBUs;
- Inquiring into potential risks arising from the conduct of the business; and
- Issuing 'provisional improvement notices' where appropriate: WHS s 90.

PCBUs are required to provide HSRs with training (WHS s 72) resources, assistance, and paid time to perform their duties: WHS s 79.

### **Enforcement**

The HSRs at a workplace participate in monitoring and enforcement of safety standards, as do unions, and the statutory inspectorates. These include SafeWork NSW; Workplace Health and Safety Queensland; SafeWork SA; WorkSafe Tasmania, WorkSafe ACT, NT WorkSafe. (WorkSafe Victoria and WorkSafe WA have not yet joined the model scheme.)

Statutory inspectorates wield a wide range of powers, including powers of entry to inspect and collect evidence of potential health and safety breaches: WHS ss 163-175. They may also issue improvement notices requiring PCBUs to take steps to address risks (WHS s 191); prohibition notices requiring unsafe activities to cease (WHS s 195); and 'non-disturbance notices' to prevent any clean-up or other disturbance of a site that would hinder the collection of evidence of a contravention: WHS ss 198-200. They also have powers to copy and retain documents (WHS s 174) and seize other evidence that may be relevant to a contravention: WHS s 175.

### **Remedies for breach**

A breach of the *WHS Act* need not result in actual harm. Creation of a hazard is an offence, even before the hazard has resulted in an accident. Offences under the *WHS Act* are 'risk-based, not harm-based': *Keilor Melton Quarries v R* (2020:[50], citing *Director of Public Prosecutions v Vibro-Pile (Aust) Pty Ltd* (2016: [90]).

The WHS legislation provides for a wide range of sanctions, depending on the seriousness of the breach, and the interest in prevention as well as punishment. Punitive remedies include three categories of criminal offences, Category 1 being the most serious, and Category 3 the least.

Category 1 (WHS s 31) involves conduct by a duty-bearer that exposes a person to a risk of death or serious injury or illness, in circumstances where the duty-bearer was reckless as to the serious potential consequences of their conduct. In NSW, individual PCBUs or officers of PCBUs who commit Category 1 offences are liable for fines of up to \$600,000 and/or five years' imprisonment. Other individuals, for example workers who are not officers, are liable to

finest of up to \$300,000 and/or five years in prison. Corporate bodies who commit a Category 1 offence are liable for a fine of up to \$3 million.

Category 2 (WHS s 32) involves conduct by a duty-bearer that exposes a person to a risk of death or serious injury or illness, but with no requirement for the prosecution to establish recklessness. The maximum fine for an ordinary worker is \$150,000, and for a PCBU or officer of a PCBU is \$300,000 (without any prison sentence). The maximum fine for a body corporate is \$1.5 million.

Category 3 involves any failure of a health and safety duty by a duty-bearer.<sup>1</sup> The maximum fine for an individual worker is \$50,000, for a PCBU or officer is \$100,000, and for a body corporate is \$500,000.

The Act also nominates a range of provisions as 'civil remedy provisions', breach of which attract civil penalties. As these are treated as civil matters, civil procedure and the burden of proof for civil proceedings applies.

A range of more prophylactic remedies aimed at correction and prevention are also provided. These include:

- Adverse publicity orders, to 'name and shame' persons who breach their obligations (WHS s 236);
- Restoration orders, requiring an offender to rectify any matter caused by their breach (WHS s 237);
- WHS project orders requiring the offender to undertake a specified improvement project (WHS s 238);
- Injunctions requiring persons to cease contraventions (WHS s 240); and
- Training orders requiring persons to undertake training or provide training for workers (WHS s 241).

The Act also permits the regulator to negotiate enforceable undertakings with any person involved in a contravention of the Act (*WHS Act Pt 11*). Examples of enforceable undertakings are listed at <http://www.safework.nsw.gov.au> under 'Enforceable undertakings'. Breach of an enforceable undertaking also attracts potential penalties and injunctive orders (WHS s 220).

### **Summary**

WHS legislation offers some guidelines for developing a regulatory model for on demand transport workers:

- Duty bearers must be defined broadly, and not restricted to parties to employment contracts;
- There must be a mechanism for consultation with workers about matters that affect their interests;
- Enforcement must be rigorous, and include a range of remedies designed to encourage and support compliance, as well as punish breach;
- A supervisory body or inspectorate is needed to support enforcement.

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<sup>1</sup> *WHS Act* s 33.

WHS legislation is not presently sufficient to address on demand transport workers needs because it fails to address the link between the terms and conditions affecting remuneration of work and safety risks, and it is predicated on assumptions about the usual geography of work, being conducted in certain places where managers and workers congregate, and where inspectors can visit. A form of regulation that respects the more chaotic nature of on demand work is necessary.

## Workers Compensation Laws

### *Workers compensation eligibility*

Another gap in the protection of on demand road transport industry workers is their ability to access workers' compensation benefits when injured or killed in the course of work. As these workers have been found not to be 'employees', working under a 'contract of service' the potential for them to enjoy workers' compensation coverage depends on whether the extended coverage in State Workers' Compensation statutes can be stretched to cover on demand independent contractors. To date, two decisions in NSW (*Hassan v Uber Australia Pty Ltd* (2018) and *Kahin v Uber Australia Pty Ltd* (2020) ) suggest that Uber drivers will not meet the extended definition in the NSW legislation. (These are discussed below.)

Workers' compensation statutes generally rely on the common law definition of employment (the 'contract of service') to determine which workers are covered, and extend coverage to a range of dependent workers who are either defined, 'deemed' or 'presumed' to be workers for the purpose of the legislation. Each state's statute provides its own definitions. The following paragraphs provide a survey of the provisions in different state and territory workers' compensation statutes which have some bearing on the work of on demand road transport workers.

### *New South Wales*

The *Workplace Injury Management and Workers Compensation Act 1988* (NSW) Section 5 and Schedule 1 deems certain persons to be workers. Two clauses in this Schedule are relevant to on demand work.

Clause 2 – Other contractors – provides that a contractor is a worker for the purpose of workers' compensation coverage if the contractor performs work worth more than \$10, and is not performing that work as part of any trade or business regularly carried on by the contractor in their own name, or does not subcontract the work or hire their own employees to perform the work. This provision has been interpreted in a regularly cited case, *Malivanek v Ring Group Pty Ltd* (2014) ('*Malivanek*'). It was found in that case that a contractor did not perform the work in his own trade or business because (*Malivanek* 2014: [235]-[243]):

- (1) He employed no workers;
- (2) Although he used a business name and held an Australian Business Number (ABN) he had obtained that only because he was required to do so by the principal engaging him;
- (3) He had no tangible assets of his own other than hand tools;
- (4) He did not advertise for work and his vehicle was not badged with any business name;
- (5) He was engaged for his own personal skill and experience and was not permitted to delegate work to others;
- (6) He had no identifiable goodwill in his business name;



- (7) His invoices were handwritten and had not letterhead, business address or other information typical on business invoices;
- (8) He did not systematically and regularly accept work from any other principal.

Only item (3) in this list would create difficulties for an on demand road transport worker (provision of tangible assets), given that on demand drivers and cyclists provide their own vehicle. In *McLean v Shoalhaven City Council* (2015) it was held that a contract driver who performed delivery work for a local council was not a deemed worker under this provision, because his contract was for the hire of a truck with a driver (and not, presumably, for the hire of a driver with a truck).

Clause 10 of Schedule 1 provides that drivers of hire vehicles or vessels under contracts of bailment (which would include taxi drivers or hire care drivers) are taken to be workers, but these drivers do not own or lease their own vehicles. They are deemed to be workers only if they take possession of a vehicle under a bailment contract with the owner or lessee of the vehicle. This provision, as it presently stands, would not cover on demand drivers who own their own vehicles.

Two decisions concerning on-demand food delivery workers in NSW have found that the workers could not bring claims against Uber. In *Hassan v Uber Australia Pty Ltd* (2018) an Uber driver was unable to bring a claim when he was in a car accident, because he was not able to establish that he was in a contract of service with Uber Australia Pty Ltd. The contract he had signed was with Rasier Pacific VOF, an unlimited partnership registered in the Netherlands. In *Kahin v Uber Australia Pty Ltd* (2020: [81]) an UberEats rider who was assaulted while picking up a delivery was refused access to documents to assist her in bringing her claim, and in the course of refusing the application the arbitrator observed that the Fair Work Ombudsman had already found that these on demand workers were not in employment relationships.

### **Victoria**

The *Workers Compensation Act 1958* (Vic), Section 3(6), provides that a contractor who enters into an agreement to perform work for a principal is a worker, so long as the work is not 'incidental to a trade or business regularly carried on by the contractor in his own name or under a firm or business name', and where the contractor performs some or all of the work themselves. This provision is comparable to the *Workplace Injury Management and Workers Compensation Act 1988* (NSW) Schedule 1, Clause 2 described above.

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3(b) and Schedule 1, Clause 7 – Drivers carrying passengers for reward – provides that drivers who have the use of a motor vehicle under a contract of bailment (other than a hire purchase arrangement) to carry passengers for reward, and are required to make payment to the operator for the use of the vehicle will be workers for the purpose of the Act. As with the NSW legislation, this provision depends upon the driver not owning the vehicle themselves (see above.)

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3(b) and Schedule 1, Clause 8 – Owner drivers carrying goods for reward – does contemplate that an owner driver may be a worker covered by the Act. Individual (that is, unincorporated) owner drivers are deemed workers if they drive their own vehicle 'mainly for the purposes of providing transport services to the principal': clause 8(1). This will not apply, however, if the Authority (Work Safe Victoria) determines that the owner-driver is carrying on an independent trade or business:

clause 8(2). The Authority has published a 'Premium Guideline' on Owner Drivers, effective from 1 July 2014. This guideline identifies the following principles:

- In order to be a deemed worker the owner-driver must be unincorporated.
- They must not engage relief drivers to perform 20 per cent or more of the contracted work.
- They must not earn less than 80 percent of their income from the hirer.
- They must not provide services for fewer than 180 days a year (six months), or for fewer than three days per week.

### **Australian Capital Territory**

The *Workers Compensation Act 1951* (ACT), s 8 deals with the definition of worker. Section 8(b) provides that a person who works under a contract, or at piece work rates, for labour only or substantially for labour only is a worker. Section 8(c) provides that a person who works under a contract is a worker, unless the individual is paid to achieve a stated outcome, has to supply the plant and equipment or tools of trade needed to carry out the work, and would be liable for the cost of rectifying defects in the work. These replicate common factors for identifying an independent contractor. Section 11 – Regular contractors and casuals – provides that individuals are workers for the purposes of the Act if they are engaged to work for a principal, and do part or all of the work personally, and the work is regular and systematic. Among the examples listed of individuals who are workers are the owner-driver of a truck who is regularly engaged (leaving regularly for trips on the same day each week); however an owner-driver undertaking irregular engagements for a principal is listed among the examples of those who are not workers. Regularity of work for the same principal appears to be the crucial factor.

### **Queensland**

The *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 11(2) and Schedule 2 Part 1, clause 3 deals with contractors who perform work that is not part of their own regularly carried on trade or business, and who do not subcontract the work or employ any workers (or at least they perform some of the work personally). The Queensland legislation also uses the determinations made under the *Taxation Administration Act 1953* (Cth) Schedule 1, Part 2-5 to identify workers covered by the workers' compensation legislation. A worker who falls within the requirements to deduct PAYG withholding tax is a worker (s 11(1)(b)), and a worker who does not fall with those requirements is not a worker: Schedule 2, Part 2 clause 6(b).

### **South Australia**

The *Return to Work Act 2014* (SA), s 4(c) defines a worker to include a 'self-employed worker', and this is defined as a person to whom the Return to Work Corporation has extended the protection of the Act, so this legislation leaves the determination of coverage of workers who are not employees to the Return to Work Corporation.

### **Tasmania**

The *Workers Rehabilitation and Compensation Act 1988* (Tas) s 4B provides that a contractor is a worker covered by the Act if the contractor performs work exceeding \$100 in value, which is not work incidental to their own trade or business carried out under their own name, and the contractor does not subcontract the work or employ any other person. This will not however be the case if the worker has taken out their own personal accident insurance. Section 4DA deals with luxury hire car drivers, and s 4DB deals with taxi drivers, engaged by persons who

are licensed under the *Taxi and Hire Vehicle Industries Act 2008* (Tas). These are similar to the bailment provisions in the NSW and Victorian legislation and depend upon the driver not owning the vehicle themselves. Section 4E also makes provision for prescription of relationships to be worker/employer relationships, so there is apparently scope within the Act for the making of regulations to include on demand workers, should the legislature be minded to do so.

### **Western Australia**

The *Workers' Compensation and Injury Management Act 1981* (WA) s 5(b) includes as a worker 'any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services'.

### **Northern Territory**

Similarly to the Queensland legislation (see above) the *Return to Work Act 1986* (NT) s 3B definition of worker includes any person who should be treated as an employee for the purposes of PAYG withholding tax: s 3B(1)(b)(ii). There is an exclusion, however, for any person who employs another person to perform the work: s 3B(2)(b). Also, s 3B(17)(a) provides that other persons or classes of persons may be prescribed as workers. Section 3B(18) provides that the fact that a person has an Australian Business Number (ABN) is not determinative of their status as a worker.

### **Summary of Workers Compensation Laws**

The review of the state and territory provisions above indicate that legislatures have been willing to define or deem certain workers to be covered by workers' compensation insurance, and to deem the entity engaging them as the person obliged to take out cover, whenever the worker is performing the service personally, as an unincorporated individual with no trade or business identity of their own. The obstacles to inclusion of on demand road transport workers in these extended definitions largely relate to two matters: the nature of the contract with the platform, and the fact that the drivers/riders provide their own vehicles, phones and data packs.

It is also apparent, however, that it would be a straightforward matter for state legislatures to enact further deeming provisions – or to clarify the general contractor provisions already in the Acts – to provide that on demand road transport workers are covered by workers compensation, and the platforms engaging them should be deemed to be their 'employer' for the purpose of workers' compensation premiums. Stories about workers killed or injured in the course of their work are depressingly frequent. See for example the reports of the deaths of five food delivery drivers in the space of a month in late 2020 (Bonyhady Rabe 2020: 24; Bonyhady and Chung 2020). Given the low rates of pay that these workers receive, and their highly dangerous working conditions, it would be appropriate, and economically efficient, if the platforms taking substantial commissions from their work were required to hold workers' compensation policies to cover them in cases of accident. One policy taken out on behalf of a whole class of workers is more efficient than requiring each of them to take out personal injury insurance individually.

This is not a radical proposal. It is entirely consistent with decisions made in the past about ensuring that certain categories of workers who are not employees should nevertheless be covered by the general workers' compensation system managed by the State. The categories

of deemed workers for the purpose of workers' compensation statutes tend to share a common characteristic: they are workers who are paid only for their labour, and have no organizational structure of their own to carry workers' compensation insurance. For example, among the extensive list of deemed workers in the *Workers Compensation Act 1958* (Vic) s 3(3) are tributers, who undertake mining work for mine owners on the basis that they are paid with a fraction of the minerals they extract. Tributers are also deemed to be workers under the *Workers Compensation and Injury Management Act 1981* (WA) s 7. The mine owner or lessee is deemed to be the employer for the purposes of liability to take out workers' compensation insurance. The decision to include tributers in the coverage of workers' compensation statutes demonstrates that, in the past, legislators have seen a need to ensure that workers who provide their labour for the benefit of property owners, without operating any independent business of their own, should nevertheless be covered by workers' compensation, and the appropriate person to bear responsibility for taking out workers' compensation coverage should be the property owner who profits from their labour. From a broad policy point of view, it would be consistent for workers' compensation coverage to be extended to on demand road transport workers who provide labour without operating their own independent businesses.

According to media reports published late in 2020, the New South Wales government is presently considering proposals to provide some form of workers' compensation coverage for on demand food delivery workers (Cormack and Bonyhady 2020). It appears that consideration of these proposals has emerged from the *Inquiry into the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales*, currently being undertaken by a Select Committee chaired by the Hon Daniel Mookhey. The proposals include the imposition of a special levy on food delivery transactions to fund a form of accident insurance for these workers. While establishing a source of funds for providing compensation to injured workers and their dependants would certainly be an improvement on current arrangements, any proposal that falls short of providing full workers' compensation benefits will fail to address the root of the problem. A workers' compensation system that requires payment of premiums by the business controller who determines the systems of work is far better suited to providing an incentive to improve safety standards, than a system that merely compensates victims after accidents have occurred. And a system that provides for rehabilitation of workers, income maintenance during time off, and facilitates a return to work after recovery, deals more comprehensively with workers' need for economic security.

### **Other less effective regulation requiring brief explanation**

Certain forms of regulation applying to the RT industry are at times invoked by some stakeholders to suggest that RT workers do not require any further legal protections. An explanation of this regulation serves to reveal that it does not adequately protect RT workers (especially RT on-demand workers) and does not constitute a good model for future regulation of RT on-demand work. These forms of regulation are the Heavy Vehicle National Law (HVNL), state-based commercial passenger vehicle legislation and self-regulation.

#### ***HVNL and NHVR***

The Heavy Vehicle National Law is contained in a schedule to the *Heavy Vehicle National Law Act 2012* (Qld). There are also five HVNL Regulations. In addition to the HVNL applying in Queensland, each of the ACT, NSW, South Australia, Tasmania and Victoria have passed modified heavy vehicle legislation that applies in that State or Territory

(<https://www.nhvr.gov.au/law-policies/heavy-vehicle-national-law-and-regulations>).

Western Australia and the Northern Territory have not adopted the HVNL (Thornthwaite 2016: p60; <https://www.nhvr.gov.au/law-policies/heavy-vehicle-national-law-and-regulations>).

The HVNL only applies to heavy vehicles over 4.5 tonnes gross vehicle mass. It does not apply to other vehicles including the cars operated by those RT on-demand workers who are ride-share drivers and does not apply to the bicycles, e-bikes, motor scooters, motorbikes and cars operated by most delivery riders and drivers.

The HVNL contains detailed provisions for heavy vehicle road freight transport. The HVNL prescribes standards including fatigue management requirements (Chapter 6), speed limits (Chapter 5), and mass, dimension and loading requirements (Chapter 4). The standards also include detailed requirements for drivers to record long distance trips in a work diary (Thornthwaite and O’Neill 2016: 60). The HVNL then imposes ‘chain of responsibility’ requirements on those with the capacity to control or influence whether drivers and their vehicles comply with those standards even where those parties have no direct role as a driver or road transport operator (Thornthwaite and O’Neill 2016: 60; Rawling et al 2017: 26-27). Parties owing these chain of responsibility obligations include employers, drivers (including owner-drivers), prime contractors of drivers, consignors, consignees and receivers of goods, loading managers and loaders and unloaders of goods and schedulers of goods or passengers and the scheduler of the driver (Rawling et al 2017: 27).

The HVNL established the NHVR which oversees the enforcement of the HVNL (Thornthwaite and O’Neill 2016: 60-61). Police officers also have powers to inspect, monitor and enforce compliance with the HVNL (HVNL Chapter 9; Thornthwaite and O’Neill 2016: 61).

There is an overlap between the HVNL and WHS laws with both imposing safety obligations on road transport operators (Thornthwaite and O’Neill 2016: 62). Recent amendments to the HVNL - to provide that every party in the heavy vehicle road transport supply chain has a duty to ensure the safety of transport activities (<https://www.nhvr.gov.au/safety-accrreditation-compliance/chain-of-responsibility/changes-to-cor>) were intended to align it with WHS Acts (Rawling et al 2017: 33). In recognition of this overlap, some WHS regulators – for example WorkCover Authority of NSW – defer to the HVNL provisions on road issues and leave inspections and enforcement activities to the NHVR (Rawling et al 2017: 28).

A key issue is how the HVNL is enforced by the NHVR, the police and the various state road inspectorates around the country. In 2014 an ABC Four Corners program on the trucking industry showed that

‘whilst the law formally regulated all participants in the road transport supply chain the burden of the regulation was disproportionately born by truck drivers. The program depicted government regulators and police handing down fines and infringement notices to truck drivers on a mass scale.’ (Rawling et al 2017:29).

That Four Corners program stated that: ‘Chain of responsibility laws are supposed to make everyone in the chain responsible for safety. But so far no major retailer or manufacturer and no major trucking firm has ever been prosecuted’ (cited in Rawling 2017: 29). Thornthwaite (2016: 62) also advises of the limitations of the HVNL in that the focus remains foremost on the driver, the HVNL is overly complex and requires extensive monitoring for detection.

More recently, there is some indication that at least one government regulator is taking proactive measures to ensure that all parties in the supply chain comply with the NHVL. That regulator has identified that the heart of the problem is pressure from off-road parties and therefore uses on road enforcement data to investigate all of the parties in the chain (Rawling et al 2017: 29). However, despite such efforts, the HVNL regulatory framework remains predominately directed towards post-breach enforcement activity (Rawling and Kaine 2012:11). Like WHS laws, the NHVL does not deal with how hazardous work practices (including driving whilst fatigued) arise out of remuneration problems. Given that antecedent factors to unsafe on-road behaviour (including low pay) are not adequately dealt with by the NHVL, the National Transport Commission in its assessment of these reactive road laws concluded that ‘further reforms are needed in relation to low remuneration and inappropriate payment systems.’ (cited in Rawling and Kaine 2012: 247). As such the HVNL is not a preferred model for future regulation of the road transport on-demand sector as the HVNL does not include the minimum pay and conditions provisions needed to ensure adequate pay and safety for RT on demand workers.

### **Commercial passenger vehicle legislation**

The *Commercial Passenger Vehicle Act 2017* (Vic) was designed to promote the creation of uniform commercial regulation for taxi services, hire-car services and rideshare services. Previous Victorian commercial regulation of passenger vehicle services has been replaced with a scheme covering all commercial passenger services including ridesharing. Every trip conducted by any these services is now subject to a \$2 levy. Taxi licence fees have been abolished and an existing accreditation process for taxi drivers has been extended to rideshare services. Overall, the Act appears to deregulate existing taxi services to some extent, whilst subjecting ridesharing services to light touch commercial regulation (Rawling and Schofield-Georgeson 2018: 392). While it may be important to begin to create a uniform commercial regulatory regime for taxis and ride-share services, it must be recognised that this legislation is not industrial regulation and will not address the root causes of low pay and poor safety experienced by RT on-demand workers. Similar recent attempts at uniform regulation of commercial passenger vehicle services such as the *On-Demand Passenger Transport Services Industry (Miscellaneous Amendments Act) 2020* (Tas) (which imposes fees on ride-share providers) may also be a step in the right direction, but, still fall short of levelling the industry's playing field (Cootes 2020) because they do not address the cost of labour. Under other parallel state legislation such as the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* (NSW), rideshare drivers are required to hold a NSW Private Hire Vehicle driver authority, register their vehicle for business use, and comply with certain safety standards. This is even less interventionist than the Victorian owner driver legislation discussed above. The main effect of the NSW legislation (and arguably all the recent changes to commercial passenger vehicle legislation in Australia) is to legalise ride-share services such as Uber. It is legislation designed to protect industry stakeholders and consumers, but not workers.

### **Self regulation**

Pure self-regulation describes voluntary codes, whereby a firm or industry make rules with no direct government involvement (Thorntwaite and O'Neill 2016: 37). Examples of self-regulation include unilateral corporate codes of conduct.

Self-regulation is perhaps the most unsuitable form of regulation for the purpose of promoting improved pay and safety of workers. First and foremost, in competitive industries such as the

road transport industry, self-regulation does not prevent a race to the bottom. More ethical companies who put in place a corporate code of conduct which improves rules relating to working conditions for workers are placed at a considerable competitive disadvantage if the cost of their labour is any higher as a result of compliance with their own code. This form of unilateral regulation can be retracted at any time, such as when adverse media ceases or consumer pressure wains. In any case, many companies engage in self-regulation as a purely promotional exercise frequently to dissuade the state from imposing more robust forms of regulation upon them. Furthermore, a previous report on the road transport industry found that self-regulation might establish new company rules but change 'practices very little because of insufficient accountability and enforcement' (Thornthwaite and O'Neill 2016:37). As such we concur with the conclusion of that report that 'voluntary regulation on its own is not the solution: strong state regulation is necessary' (Thornthwaite and O'Neill 2017: 18 ).

Table 1: Summary of Regulatory Features of Existing (and Prior) Legislative Schemes

|   | Road Safety Remuneration Act                               | Chapter 6 NSW IR Act                 | Victorian ODFC Act  | Western Australian Owner Driver Act | Work Health and Safety legislation  | Fair Work Act                                 | Heavy Vehicle National Law                                   |
|---|--|--------------------------------------|---|-------------------------------------|---|---|--|
| <b>National application</b>   | Yes  | NSW application only                 | Victorian application only  | WA application only                 | Model uniform laws  | Yes   | Model uniform laws   |
| <b>applies to RT on demand gig workers</b>                          | No   | No                                   | Applies to arrangements involving delivery of goods only (not ride share) | No                                  | Yes any person in control of a business or undertaking who engages their services would bear WHS duties | No  | No   |
| <b>Applies to all conventional RT workers including contractors</b> | Applied to contractors and employees                       | Currently applies to contractors     | applies to contractors  | applies to contractors              | applies to contractors and employees  | Almost exclusively applies to employees only  | Applies to all heavy vehicle employee and contractor drivers |
| <b>mandatory minimum rates for RT contractors</b>                   | Yes  | Yes                                  | Recommended rates only  | Recommended rates only              | No  | No – minimum pay for employees only           | No   |
| <b>mandatory minimum working conditions for RT contractors</b>      | Tribunal could have made orders about 'related conditions' | Can provide for almost any condition | No  | No                                  | WHS only  | No (minimum conditions for RT employees only) | No   |



|   |  |  |  |  |                  |   |                  |
|---|--|--|--|--|------------------|---|------------------|
| <b>comprehensive collective agreement making and bargaining for contractors</b> | Yes tribunal could have approved agreements for contractors; trade practices exemption | Yes approval of agreements for contractors and trade practices exemption | Right to representation and trade practices exemption                                    | Right to representation and trade practices exemption (similar to Victorian legislation)                                     | No               | No – (agreement making etc only provided for employees)                               | No               |
| <b>Protection for contractors from unfair termination</b>                       | Disputes about dismissal due to refusal to work in unsafe manner                       | Yes  | yes can get order regarding a contract term which is unconscionable, harsh or oppressive | Yes similar to Victorian unfair contracts jurisdiction but no power to vary a contract except by declaring a term void (s47) | No               | Unfair dismissal for employees only; but general protections may apply to contractors | No               |
| <b>Supply chain accountability</b>  | Yes  | No   | No   | No   | yes              | No  | yes              |
| <b>Dispute resolution system and enforcement</b>                                | yes  | yes  | Yes for enforcement see Division 3   | No parallel enforcement provisions to Victorian division 3?  | Enforcement only | Almost exclusively for employees only   | Enforcement only |

## 3 Regulation required to adequately protect on-demand workers

### Objectives for regulation of on demand road transport work

In Section 1 we described the features of the on demand RT industry, and in Section 2 we interrogated the various legislative schemes that deal (to some extent) with road transport work. As we have seen, none of these regimes presently addresses the needs of on demand RT workers. In this Section, we consider the necessary features of an appropriate new scheme.

In order to devise an appropriate regulatory scheme, we must first decide the regulatory objectives we wish to achieve. What interests require protection? Since technology has transformed the ways in which labour is now engaged, we need to interrogate the nature of the work and the interests of the workers when designing regulation, and not tie regulation to a particular form of contract.

‘If regulation is to transcend the artificial legal distinctions between different classifications of work, the focus of regulation needs to shift. The question for regulation should not be ‘what kind of contract is this’ but ‘what interests are at risk in this relationship, and how are those interests best recognised and respected within this kind of relationship?’ (Johnstone et al 2012: 195)

In this section of the Report we outline the objectives of a system of regulation suitable to address the particular vulnerabilities of on demand road transport workers. What, essentially, are the interests of these workers that require protection? What needs must be met by a system of regulation suitable to the particular circumstances of their work? We commence with an explanation of the International Labour Organisation’s fundamental principles for ensuring decent work, as these reflect the baseline for any regulatory regime protecting decent work. We also reflect on the observations drawn from a Rideshare Driver Survey conducted by the Rideshare Driver Cooperative and the TWU in October 2018, to indicate what the workers themselves consider to be their most important needs. Finally, we draw on and extend the recommendations made in *Beyond Employment* (Johnstone et al. 2012: 197 ff) to frame a set of core principles that any new system of regulation must address in order to ensure that on demand workers enjoy the basic protections demanded by others in the Australian labour market.

#### **Core principles of the International Labour Organisation.**

Our report proceeds from the foundational assumption of the International Labour Organisation (ILO) that ‘labour is not a commodity’. The negotiation of the cost of labour ought not to be left to the invisible hand of an unregulated market, because decent wages and working conditions are essential to the sustenance of workers and their dependants, and are crucial to the maintenance of a civilised democracy. Our system of labour laws must respect the human dignity of all workers, whether or not the arrangements under which they provide their labour conform to common law notions of ‘employment’.

Australia is a foundation member of the ILO, and except during a short period of the Howard government's time in office, it has held a seat on the ILO's Governing Body (Kent 2001: 267). The ILO's initial Constitution, set out in Part XIII of the *Treaty of Versailles* (1920), recognised that a lasting peace, and global economic and political stability, depended upon the establishment of socially just conditions for the working people of the world. The fundamental principles of this initial Constitution were reaffirmed in a revision in 1944 (the *Declaration of Philadelphia*) and again in the 1998 *Declaration on Fundamental Principles and Rights at Work*, and the 2008 *Declaration on Social Justice for a Fair Globalisation*. They include that labour is not to be treated as a commodity or article of commerce; respect for freedom of association and the effective recognition of rights to collective bargaining; abolition of all forms of forced labour (slavery) and child labour; and in the more recent declarations, the elimination of discrimination in employment. These principles were recently reaffirmed when the ILO marked its centenary with the *ILO Centenary Declaration for the Future of Work*.

In its publication *Work for a Brighter Future*, the ILO's Global Commission on the Future of Work (GCFW) asserts that the guarantee of these fundamental rights, including an adequate living wage, maximum limits on working hours, and protection of health and safety at work, should be enjoyed by all workers 'regardless of their contractual arrangement or employment status' (Global Commission on the Future of Work 2019: 12). The GCFW specifically refers to the need to extend ILO principles to on demand work negotiated through digital platforms (GCFW 2019: 14):

'We further recommend that particular attention be given to the universality of the ILO mandate. This implies scaling up its activities to include those who have historically remained excluded from social justice and decent work, notably those working in the informal economy. It equally implies innovative action to address the growing diversity of situations in which work is performed, in particular, the emerging phenomenon of digitally mediated work in the platform economy. We view a Universal Labour Guarantee as an appropriate tool to deal with these challenges and recommend that the ILO give urgent attention to its implementation.'

According to the ILO's founders, humane working conditions require:

'the regulation of the hours of work, including the establishment of a maximum working day and week, . . . the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of employment, the protection of children young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association' (Preamble ILO Constitution 1919).

For on demand workers this means earning a sufficient hourly rate from their work to preclude the need to work excessive hours. They should be insured against work-related illness and injury. Their earnings should take account of a need to provide a retirement income. These rights should be available also to migrant workers and those on temporary working visas. And all workers should enjoy the freedom to join worker associations and act collectively in the pursuit of these entitlements.

Freedom of association is a particularly important fundamental principle because it is instrumental in allowing workers to pursue their own best interests collectively. The two key

ILO Conventions dealing with freedom of association rights are ILO C 87 *Freedom of Association and the Protection of the Right to Organise Convention 1948* which affirms workers' rights to form associations, free of interference from employers or government, for the purpose of furthering their own collective interests; and ILO C 98 *Right to Organise and Collective Bargaining Convention 1949* which purports to guarantee workers a right to engage in trade union activity, free of the interference of employers, and to engage in collective bargaining. Although the right to withdraw labour is not explicit in these Conventions, they have been interpreted to encompass a right to strike, subject only to reasonable controls to protect the public interest.

The GCFW recognises that platform based on demand work presents particular challenges for worker organisation and collective bargaining, and proposes that 'workers' and employers' organizations must strengthen their representative legitimacy through innovative organizing techniques that reach those who are engaged in the platform economy, including through the use of technology' (GCFW 2019: 12)

### **Rideshare survey results**

Beyond the fundamental principles of decent work promulgated by the ILO, our principal source of information about the needs and interests of workers should be the experience of the workers themselves. The Rideshare Driver Survey, conducted by Rideshare Driver Cooperative and TWU in October 2018, provided answers from more than 1100 respondents. The survey indicated that drivers want:

- A fair rate of pay, sufficient for them to save enough to permit them to take annual leave;
- Protection from capricious sacking ('blocking') without being given any right of reply;
- No changes to their contract terms and conditions without meaningful consultation;
- Superannuation entitlements, so that they can prepare for ultimate retirement;
- Protections from threats of assault, including sexual assault, while working.
- Protection from racial and sex discrimination;
- Insurance for losses suffered due to property damage caused by clients;
- Paid time off to recover from workplace assaults and injuries.

These needs can be divided into four broad categories: safe working conditions; adequate remuneration; income security and job security. These categories are interrelated. An adequate hourly rate for work assists in the provision of safe working conditions because it alleviates pressure to work excessive hours and risk exhaustion-related illness and injury. Job security enables workers to refuse unsafe working conditions without the threat of job loss. Income security (notwithstanding absences from work due to illness or injury) supports an adequate level of overall remuneration, sufficient to allow for annual recreation breaks and to prepare for retirement. Implicit in these four interests are also the need for appropriate mechanisms for setting rates of pay; for consulting on the terms and conditions of work; and for resolving disputes and adequate enforcement. We consider each of these interests in turn.

### **Safe working conditions**

Safe working conditions, and support when accidents occur, are particularly urgent concerns for transport workers. Stories about workers killed or injured in the course of their work are depressingly frequent. See for example the distressingly frequent reports of deaths of food

delivery drivers (Bonyhady and Rabe 2020; Bonyhady and Chung 2020, 8). Workers also suffer assaults while working. See the report concerning Menulog worker, 'Mohammed', who was seriously assaulted (breaking his front teeth) by a bystander while he was working, and there was no insurance to assist with his medical costs, or time away from work (Bonyhady and Rabe 2020).

So there are two aspects to regulating for safety at work: ensuring that the conditions of work are as safe as possible; and ensuring that where any accidents do occur, workers have prompt access to workers' compensation entitlements, including medical costs, income support, and rehabilitation services. There is an urgent need for on demand road transport workers to have access to workers' compensation coverage.

### **Adequate remuneration**

Workers need to be able to earn rates of pay for their work that allow them a decent standard of living in the present, and if they do not have any entitlement to paid sick and annual leave, they need a sufficient income from working time to enable them to prepare for times when they need to take breaks from work. (Alternatively, as we discuss below, if the model of regulation we propose is adopted, a tribunal may decide that sick leave is one particular condition of work that needs to be provided to RT on-demand workers.) Likewise, if they are not entitled to receive the benefit of employer contributions to a superannuation scheme, they should be paid at a rate that permits them to make those savings themselves. It is not enough, however, to simply assert that workers need an adequate level of remuneration from their work. A system of regulation also needs to address the means by which remuneration levels should be set.

Presently, on demand workers are subject to the terms of 'take it or leave it' contracts determined by the platforms. As these contracts have been deemed to be commercial contracts, they are not subject to any supervision on the grounds that they set adequate rates of remuneration (such as compliance with mandatory minimum rates as is the case with employed workers covered by modern awards). In order to ensure that these contracts provide for adequate rates of remuneration on demand workers will require a mechanism for scrutinising pay rates, and, if necessary, mandating minimum rates of pay. This might be by way of a government body authorised to fix minimum rates (in the way that the Fair Work Commission sets minimum rates of pay in modern awards). A system providing for standard minimum entitlements for classes of workers is needed, not merely a scheme for unfair contracts review of individual contracts as is provided by the federal *Independent Contracts Act 2006* (Cth), or the *ODFC Act* (Vic) discussed above. Low paid workers do not access individual unfair contracts review scheme. A right to adequate remuneration from the outset is a core interest that must be supported by a regulatory scheme.

### **Income security**

The need for income security means that workers need a predictable income, and assurance that they will receive income if they are not able to work as a result of illness or injury. Income security involves a guarantee of a minimum 'wage' (either from work or through access to social security payments) and a guarantee of regular receipt of pay and other entitlements (ie security of payment) (Johnstone et al 2012: 197). A right to income security assumes access to workers' compensation insurance, to ensure income maintenance during a period off work due to workplace injury.

## Job security

One of the main complaints of rideshare workers (after safety concerns) is that their contracts can be terminated suddenly and without warning. The unfair dismissal cases described in Section 1 concerned drivers or cyclists who had been blocked from access to the app, and hence deprived work. With the exception of the applicant in *Klooger*, these workers were refused any opportunity to contest their dismissal, on the basis that they were not employees and so had none of the rights to be given a valid reason for dismissal, and to be afforded procedural fairness. They had no entitlement to reasons, warnings or opportunities to respond before their livelihood was taken away. They had no entitlement to reasonable notice of the termination of their work contract. The right to reasonable notice to termination of a work contract – and even of a commercial contract – is a standard feature of Australian law.

As one example, the provisions of the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) provides that franchisees are entitled to reasonable notice and reasons before a franchise agreement can be terminated (cl 28). Even when the franchisee is in breach of the franchise agreement, the franchisor cannot terminate the agreement without giving the franchisee a warning and opportunity to correct the breach before terminating on reasonable notice: cl 27. The legislation introducing the original version of these protections for franchisees was enacted in 1998 by the Howard government when Peter Reith was Minister for Small Business. It followed several enquiries concerned about abusive practices in the franchising sector. Even if on demand transport workers are to be regulated as independent owners of their own small businesses, they must surely be afforded similar regulatory protection as other small businesses, such as franchisees. The right to reasonable notice of termination of a work contract, and the right to be given reasons and an opportunity to contest a capricious dismissal, is an essential component of a regulatory system.

Two other rights are necessary to secure workers' interests in safe work, adequate remuneration, and income and job security. They are the right to bargain collectively, and the right to accessible and affordable dispute resolution and enforcement.

## Collective bargaining

A right to collective bargaining secures an avenue for workers to have a say in establishing their rights to adequate remuneration and other conditions of work. The right to 'freedom of association' alone is not sufficient. The right must encompass the right recognised by ILO Conventions to act as a collective in pursuing improved working conditions (ILO Convention 98 *Right to Organise and Collective Bargaining Convention* 1949). A right to collective bargaining is only meaningful when it permits withdrawal of labour with immunity from suit for economic torts and any sanctions for allegedly anti-competitive conduct in the *Competition and Consumer Act* 2010 (Cth).

The anti-trust provisions in the *Competition and Consumer Act* 2010 (Cth) operate to curtail the scope for independent contractors to engage in collective industrial action (McCrystal 2012: 139). Some specialist legislation is already granted an exemption from these restrictions. See the *Owner Drivers and Forestry Contractors Act* (Vic) s 64(1)(c)-(e). Also, in October 2020 the Australian Competition and Consumer Commission (ACCC) issued a new class exemption for independent contractors (and businesses with a turnover of less than \$10 million) to collectively bargain without having to apply to the ACCC. From early 2021 such

contractors wanting to collectively bargain will only have to lodge a simple one-page notice with the ACCC and with each business to be bargained with. This will allow RT on demand workers to engage in some forms of collective bargaining. But there are some significant limitations compared to the collective bargaining rights of employees. While the exemption provides immunity from competition and consumer statute law, it does little to address other legal liabilities that arise under the common law. Also, the exemption does not permit collective boycott conduct or withdrawal of labour and limits information-sharing among a group of contractors. (Workplace Express 2020b; Hardy and McCrystal 2020). Moreover, there is no bargaining infrastructure like the agreement-making provisions in the *Fair Work Act*. In particular, there are no mechanisms such as bargaining orders, good faith provisions or majority support determinations to compel a work provider to bargain in good faith with workers. Additionally, there is no mechanism to register a collective agreement.

All on demand road transport workers need full protection from all legal liability arising out of competition laws and the common law so that they can act collectively. This requires explicit statutory exemption as well as provisions establishing an agreement-making and bargaining infrastructure (such as those provisions in *Fair Work Act 2009* (Cth) or Chapter 6 of the NSW *Industrial Relations Act*) to establish full collective bargaining rights for RT on-demand workers.

### **Accessible dispute resolution**

A right to accessible dispute resolution means that on demand workers need an affordable and prompt avenue for raising grievances and having them resolved impartially. Just as unfairly dismissed employees can approach the Fair Work Commission by filling in a simple form and paying a minimal filing fee to access impartial and prompt conciliation of unfair dismissal grievances, so too, on demand transport workers should have access to an equally affordable and informal avenue to resolve grievances. It is intolerable that they should be held to a commercial dispute resolution clause in a contract like the Uber Contract, requiring them to arbitrate disputes at their own cost in the Netherlands. It is also intolerable that they should be left to the expense and delay of proceedings in a Federal Court to have these matters resolved.

### **Adequate Enforcement**

In relation to enforcement, for over a century now a gap between the 'law in the books' and the 'law in action' has been identified as a (potentially worrying) feature of legal systems (Pound 1910; Halperin 2011). It is important to ensure not only that the formal legal and structural arrangements are adequate, but that there is minimal gap between the expectation and the actual outcomes, so people actually receive their lawful entitlements. Successful enforcement of minimum working protections for workers depends upon regulators, (such as the relevant union and the FWO) knowing the location of these workers during their work, and also key details of their working conditions (including pay rates and hours of work) (Nossar and Amoresano, 2019: 7).

## What form should this regulation take? The need for an RT industry tribunal

### **An industry specific scheme**

The rise of what has been called the ‘gig economy’, encompassing on demand work mediated through digital apps in a wide range of industry sectors (for example in odd jobbing, the care sector, and other forms of freelance work), has prompted calls for regulation of all kinds of work negotiated through these platforms. While there are arguments in favour of addressing the wider problem of adequate regulation of worker engagement through these platforms, we argue here that there are good reasons for establishing a specific scheme for on demand RT work. We argue that this new scheme should take the form of an RT industry-specific, tribunal-based regime. To attempt to provide a common form of regulation for all kinds of work negotiated through an app-based platforms would be to emphasise a false commonality between workers in different industries. The means of contracting the workers is peripheral to the nature of the work they perform. Providing appropriate regulation that recognises the particular risks and features of certain kinds of work is more important than focusing on the means by which workers initiate work contracts.

To illustrate this point, we refer to the following analysis of on-demand passenger vehicle work. Uber argues it is a technology business not a transport company, but it is clearly in competition with transport companies (Peetz, 2019: 175). When considering such company statements the focus should be on the work being performed and the services being delivered rather than the company’s own characterisation of the business which has centred on the method of engagement. When this approach is applied to ride-share driving and on-demand freight delivery work, the service being delivered and the labour performed by workers engaged through platforms are almost identical to the work performed by workers engaged through traditional work arrangements in the road transport industry. For example, an Uber driver delivers the same or similar service for passengers and performs the same labour as conventional cab drivers. If we focus on the nature of the work undertaken for profit, large international tech companies – despite their protestations that they are principally tech companies – are rightly characterised as transport companies.

At least in relation to the road transport industry, digitally-mediated, gig economy arrangements are most accurately characterised as work embedded in the transport industry rather than in a separate ‘gig economy’. This reinforces our recommendation that RT gig economy arrangements should be covered by an industry specific legislative scheme for the road transport industry.

Subjecting business controllers of online digital platforms (and associated apps) such as Uber Freight and Amazon Flex who engage freight haulage drivers to the same, similar or a parallel level of regulation as conventional road transport industry businesses promotes a level playing field across the industry and the sustainability of road transport businesses (see ILO 2015). This is critical given that these large digital platform/app businesses involved in the delivery of road transport industry services are currently not even close to being profitable but operate at a massive loss (Sage and Sharma, 2019).

Furthermore, there is a need to provide for minimum pay and conditions of all road transport workers in Australia given the major gaps in the current system. Currently, as we saw in Section 2 of this Report there is no nation-wide legislation that adequately protects the



interests of road transport contractor workers. The road transport industry (is one of the most dangerous, with 28 per cent of all work fatalities occurring in the transport, postal and warehousing industries (Australian Bureau of Statistics 2018; Safe Work Australia 2018). Many owner-drivers/sub-contractors are labouring in conditions where there are no enforceable minimum rates or other standards. Consequently, many of those subcontractors are unable to earn enough to recover costs (Thorntwaite and O'Neill 2017: 16) and insolvency is more frequent in the Australian road transport industry than many other Australian industries. Indeed, the transport, postal and warehousing industry was one of the top industries for the highest number of business insolvencies in 2018 (ASIC 2019: 3).

Road transport is by no means the only industry where there is inadequate regulation of contractor arrangements. Contractors in other industries such as the construction and cleaning industries also require better protections. However, the road transport industry has been at the vanguard of the rise in precarious work as a consequence of widespread use of contractors. A failure to address these issues in the road transport industry has led to the death or injury of the workers, and also members of the road using public. The broader public safety dimension reinforces the need for a road transport industry scheme which protects all classes of workers in the road transport industry and promotes safety on national roads.

### **Responsive tribunal regulation**

There is a history of successful tribunal regulation during the (now largely past) federal and State conciliation and arbitration phase of industrial regulation in Australia which produced a substantial element of fairness for Australian workers (Hancock and Richardson 2004: 203). Prior research has found this form of tribunal regulation is responsive in the sense that it is able to tailor orders to industry needs and address the specific vulnerabilities of road transport workers in different sectors of the industry (Rawling, Johnstone, Nossar 2017; see previously Cooney, Howe and Murray 2006: 226-8). Also as indicated immediately below, it is vitally necessary for road transport industry regulation to cover all types of business network structures and a tribunal is well placed to undertake this task. By legislating for the establishment of a tribunal with broad powers to inquire into and make orders about such industry structures and all forms of road transport work, regulation could be sufficiently tailored to address prevailing circumstances and therefore could be more effective. It is for these reasons of responsiveness and effectiveness that we suggest that industry specific regulation take the form of a standard-setting industrial tribunal.

### **The need for supply chain/business network regulation**

The implementation of a regulatory scheme to provide safe working conditions, adequate remuneration, income security, job security, collective bargaining rights and adequate dispute resolution and enforcement, requires the establishment of a standard setting body (such as an industrial tribunal) with the ability to inquire into, and make orders about, any supply chain or business network relationships that RT direct work providers enter into or are connected with, including but not limited to the business-to-business relationships that online platform companies have with their clients to provide RT delivery services. This is important, notwithstanding that the businesses controlling the digital platforms/apps who directly engage vulnerable gig workers will generally be the main financial beneficiary of the work performed by those workers.

The reasoning behind this additional network regulation feature is as follows:

This first point relates to conventional RT supply chains. An essential feature of a new national RT legislative scheme is adequate remuneration in the form of enforceable minimum rates for all on-demand road transport workers including freight delivery owner drivers, rideshare drivers and delivery riders. Such a scheme, in order for all RT businesses to be subject to the same regulation, would also apply to all employee and contractor road transport workers hired or employed by conventional means beyond those engaged and managed digitally. Contract network regulation - especially the regulation of supply chains - is crucial to address the commercial pressures that are the root cause of low pay and poor safety in conventional RT industry supply chains. Contract network regulation may also be important if businesses controlling apps and digital platforms develop more elaborate means of inserting intermediaries into their arrangements to avoid a future form of regulation.

The second point relates to effective enforcement (see Kaine 2019). Actually achieving the provision of minimum pay and conditions to on-demand RT workers may be contingent on achieving contract network regulation so that regulators including the relevant union can track the flow of RT work and locate and access the relevant on-demand RT workers to ascertain the conditions under which they labour (Nossar 2020: 14). This underscores the continued importance of regulation of whole business networks - even in regards to those networks involving on demand gig workers. Already we have seen examples of more complex arrangements such as those involving Coles (a conventional road transport industry, off-road client) giving out work as part of their supply chain to Uber Eats (an entity owned and controlled by Uber, a global technology company). Woolworths has also recently partnered with Uber to provide home delivery of Woolworths groceries (Retail World 2020). The co-operation of these type of supply chain participants, such as large retailers and fast food outlets, although not necessarily the main financial beneficiaries of the road transport work, could be utilised to make the enforcement of adequate terms and conditions against the large tech direct hirers of gig workers easier and more effective. Mandatory supply chain/business network responsibilities can enhance the ability of regulators to enforce legal minimum entitlements even where the main subject of regulation is the direct work provider – in this case the relevant business controlling the digital platforms/apps.

If a regulatory scheme for the entire road transport industry was sufficiently flexible, regulation could be tailored to regulate both more conventional road transport supply chains as well as these more complex hybrid structures involving both elements of more traditional supply chains and more recent business structures utilising digital platforms/apps (see Coles-Transport Workers Union 2018). Although at this point it is difficult to predict the formation of new commercial avoidance mechanisms beyond supply chains and such contractual networks, the scheme of regulation established should be flexible enough to allow inquiry into, and regulation of, all possible future evolutions of such industry structures.

## Constitutional questions

The proposals presented in this Report raise two potential constitutional law questions. The first is the extent to which the Commonwealth has power (under *Australian Constitution* s 51) to legislate for a national scheme to regulate working conditions for non-employed transport workers, bearing in mind that presently the specific schemes covering the transport industry described above are State-based. The second is whether the proposal for conferring certain responsibilities or powers on an administrative tribunal such as the Fair Work Commission or some other specialist tribunal would fall foul of the *Boilermakers'* doctrine, bearing in mind that

presently the only federal legislation dealing with non-employed work, the *Independent Contracts Act 2006* (Cth), has conferred powers for varying unfair independent contracts upon courts in the federal system, and not upon an administrative tribunal. We address each of these issues separately, to conclude that there are no constitutional objections to a national scheme based on Commonwealth legislation, nor to the conferral of dispute resolution powers on a tribunal rather than courts.

### **Commonwealth power to regulate non-employed work**

The *Fair Work Act*'s reliance on the concept of a 'national system employer' demonstrates the scope for regulating the rights and responsibilities of entities that engage workers on the basis of the corporations power in s 51 (xx) complemented by the trade and commerce (s 51(ii)) and Territories powers.

This has been found to be constitutionally valid, most recently in the *Work Choices* case *New South Wales v Commonwealth* (2006) (Stewart and Williams 2007) and before that in *Victoria v Commonwealth* (1996) which considered challenges to the *Industrial Relations Reform Act 1993* (Cth).

*Victoria v Commonwealth* and the *Work Choices* cases followed earlier decisions finding that the Commonwealth has power under s 51(xx) to pass laws affecting corporations either by imposing responsibilities upon them, or protecting them. For example, in *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982), ('Actors') the High Court found that the secondary boycott provisions in the *Trade Practices Act 1974* (Cth) (now renamed the *Competition and Consumer Act 2010* (Cth)) were a valid excise of Commonwealth power. In that case, Murphy J expressly stated that s 51(xx) would support legislation about 'industrial matters' affecting trading and financial corporations (Actors 1982: 212). So we are confident that legislation expressed to affect the responsibilities or interests of trading or financial corporations in respect of their dealings with non-employed transport workers will be constitutionally valid. Given the extensive use of incorporated forms of business entity such legislation should be effective to cover most of work arrangements.

In the case of the *Fair Work Act*, some private sector employers escaped coverage because they were unincorporated sole traders or partnerships, but in all States bar Western Australia, these employers are now covered by virtue of State legislation referring powers over industrial matters to the Commonwealth.<sup>3</sup> State cooperation in referring powers over these matters to the Commonwealth might also be sought to close any remaining gaps in legislation, if necessary.

Other federal regimes dealing with non-employed workers that have been underpinned by the sources of Commonwealth power include the *Independent Contracts Act 2006* (Cth), and the now repealed *Road Safety Remuneration Act 2012* (Cth).

### **Reliance on external affairs power**

As we explained in Section 1 of this Report, our proposals are based on and consistent with International Labour Organisation fundamental principles and Conventions. On the basis that the Commonwealth has power under the external affairs power in Constitution s 51 (xxix) to make laws that are appropriate and adapted to giving effect to Australia's obligations under international instruments, proposals for federal legislation extending the protections promoted by international instruments will also be constitutionally valid (see *Koowarta v Bjelke-Peterson* (1982: 258); *Victoria v Commonwealth* (1996: 487).

In combination, the corporations power, extended by the trade and commerce and Territories powers, and the external affairs power, provide adequate constitutional support for the enactment of federal legislation in this field. It would not be necessary to take the alternate path of a cooperative or harmonised system such as has been adopted in the field of work health and safety, although a model Act adopted by each of the States would be another means of creating a national scheme.

### **Constitutional validity of a tribunal-based dispute resolution system**

The second constitutional issue raised by the proposals in this Report is the viability of a tribunal-based system of dispute resolution. When the early proposals for the Fair Work system (raised in the *Forward with Fairness* proposals immediate wake of the 2007 federal election, Kevin Rudd and Julia Gillard *Forward with Fairness – Policy Implementation Plan*, ALP, August 2007) suggested a ‘one stop shop’ for all matters dealing with employment, constitutional lawyers raised the spectre of the *Boilermakers’* doctrine (from *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956: 323 (Webb J), 296 (Dixon CJ, McTiernan, Fullager and Kitto JJ) which establishes that only courts can exercise the judicial power of the Commonwealth. The *Boilermaker’s* doctrine draws a crucial distinction between an interests dispute and a rights dispute in our system of federal workplace laws. Interests disputes can be arbitrated by a body exercising administrative power, but rights disputes can only be determined by a court exercising judicial power. (See also *Brandy v Human Rights and Equal Opportunity Commission* (1995: 267-8; Sawyer 1961; Wheeler 1996). The traditional system of conciliation and arbitration of industrial awards (abandoned when the *Workplace Relations Amendment (Work Choices) Act 2006* (Cth) was enacted) depended upon the resolution of interests disputes to create new rights in the form of binding awards determining the conditions of employment in particular industries. Likewise, unfair dismissal arbitrations involve the exercise of administrative power by a tribunal to resolve an interests dispute by determining an outcome to produce a ‘fair go all round’ for the parties concerned, and so establish a new right to reinstatement or compensation. Such rights, if denied, may be enforced in the federal court system. Properly drafted, laws permitting the resolution of disputes (particularly disputes concerning the capricious termination of work contracts) should be able to confer dispute resolution powers on an administrative tribunal, on the basis that the tribunal is settling an interests dispute in the public interest. This approach was found to be constitutionally valid in the case of legislation empowering a tribunal – the Takeovers Panel – to resolve disputes arising in the context of corporate mergers and acquisitions.

In *Attorney-General of the Commonwealth of Australia v Alinta Limited (the Takeovers Panel Case)* (2008) the High Court held that parliament may confer a dispute resolution role on a body exercising non-judicial power whenever resolution of that dispute requires the consideration of matters of public policy (Armson 2007). Resolution of takeovers disputes was considered to require quicker processes than were available in the court system, given the public interest in maintaining an ‘efficient, competitive and informed market’ for corporate securities. (See *Corporations Act 2001* (Cth) s 602(a) and *Takeovers Panel Case* (2008: [6])

Even though the challenged legislation permitted the Panel to make remedial orders (which might suggest the exercise of judicial power) the High Court held that it was playing a supervisory and regulatory function, and exercised its powers to create ‘new rights and obligations’ (Gleeson CJ, [2]; Gummow J, [14]; Kirby J, [42]) and not simply to determine ‘conclusively (as a court might do) controversies over past suggested contraventions of the

Act' (Kirby J, [42]). So long as the exercise of the powers of the Panel in any given case remained subject to the scrutiny of the courts as a matter of judicial review under s 75(v) of the *Constitution*, the regime did not fall foul of the *Boilermakers'* doctrine. The Australian Constitution s 75 (v) provides that the High Court of Australia has original jurisdiction to grant a writ of mandamus, prohibition or injunction against an act of an officer of the Commonwealth. The same findings can be anticipated for the dispute resolution mechanism proposed in this Report.

## Conclusions

The challenge of regulating app-mediated on demand RT work is that this kind of work is not easily described in terms of the common law multiple indicia test for employment. That test is the product of the industrial era, and is most suitable to describing the working relationships typical of the Fordist era of industrial organisation (See Stone 2004). The means by which on demand transport workers are subjugated to the enterprise goals of the digital platforms who profit from their labour are more subtle than the old forms of industrial management. In order to fit this kind of work into the old mould of employment we would need either to ignore some features of their working relationships (such as their ability to serve many platforms simultaneously), or we must alter the definition of employment. This definition still serves as an apt description of the working relationships of those permanently engaged employees who are tied indefinitely to exclusive service of one employer. Alternatively, we can begin afresh by designing an appropriate regulatory regime to address the needs of these workers in a way that recognises and respects the particular features of their working arrangements.

'The underlying economic reality of the relationships between these new enterprises and the workers who generate their revenue is not substantially different from the industrial factories of the past. The new app intermediaries earn their profits by harvesting a share of the workers' wages. Just as systems of labour law evolved throughout the industrial era to ensure that those who profit from the work of others meet certain obligations to provide decent wages and working conditions, so should our general commercial laws develop to ensure that the business structures enabled by digital technology do not permit unregulated exploitation of precarious workers.' (Riley 2017b: 683).

This is not an unreasonable demand. In the language of the organisational integration test for determining employment status, on demand transport workers perform work that is integral and not merely an accessory to the business enterprises of their platform masters. These apps are means for generating revenue from the passenger transport business. The service of the drivers is absolutely essential to the platforms' 'core business'.

Federal government inaction in the face of evasion of mandatory laws by large powerful tech companies has facilitated the exploitation of road transport on-demand workers. This is not right and should be immediately rectified. RT on demand workers deserve the same or similar protection from 'commodification' of their labour as the employed class (Aloisi 2016). To address the exploitation of on-demand RT workers outlined in Section 1 of this Report, we proposed (in Section 3) robust national legislative regulation of on-demand road transport work in the form of an industry-specific, standard-setting tribunal. This new regulatory scheme should provide for the necessary protections regarding safe working conditions, adequate remuneration, income security, job security, collective bargaining and adequate dispute resolution and enforcement. Extended liability may also be required as against the clients

(such as large supermarkets and fast food chains) of on-demand road transport services businesses (such as Uber and Uber Eats) in the form of contract documentation transparency and rights of entry for the purpose of effectively enforcing minimum legal requirements against the road transport services businesses. In Section 2 of this Report we identified some best practice models of regulation which might be considered. Policy-makers could do no better than to consider how the regulatory design of the RSR Act and Chapter 6 of the NSW IR Act might be adapted into a new, federal, road transport industry legislative scheme to protect on-demand RT workers as well as other RT workers. If such a legislative scheme is enacted, this RT industry legislation could be adapted and applied to other industries where vulnerable workers are engaged digitally.

## Recommendations

### Recommendation 1

**The federal Parliament should use the full extent of its constitutional powers to pass legislation which establishes a national industrial tribunal (or a Fair Work Commission jurisdiction) to regulate all work contracts in the road transport industry (including arrangements for the engagement of on demand gig workers in that industry) regardless of work status of those workers and regardless of the means by which those workers are engaged. That regulatory scheme should empower the tribunal to make binding awards providing for safe working conditions and adequate remuneration for all workers.**

### Recommendation 2

**The federal tribunal should be empowered to hear and determine (by conciliation and arbitration) complaints concerning the unfair termination of work contracts for all road transport workers (whether employed or not),**

### Recommendation 3

**Federal legislation should be enacted to establish collective bargaining rights for all road transport workers (whether employed or not).**

### Recommendation 4

**Enforcement provisions ensuring the enforcement of awards and orders of the tribunal should provide for supply chain accountability where road transport workers including on demand gig workers are engaged by subcontractors.**

### Recommendation 5

**State and territory parliaments should amend workers' compensation legislation in order to make it explicit that businesses controlling digital platforms/apps engaging gig workers are covered by that legislation, so that on-demand gig workers are eligible for workers compensation entitlements if killed or injured at work, and businesses controlling the platforms are liable to meet the obligations of employers under those schemes.**

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<sup>1</sup> See *Heller v Uber Technologies Inc and Rasier Operations BV* 2019 ONCA 1 (Canada); *Uber BV et al v Aslam et al* (2017) UAEAT/0056/17/DA (England); *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 and *Kaseris v Rasier Pacific VOF* [2017] FWC 6610 (Australia).

<sup>2</sup> Contract dated 23 December 2015, copy on file with the author: [Joellen.Munton@uts.edu.au](mailto:Joellen.Munton@uts.edu.au).

<sup>3</sup> See *Fair Work Act 2009* (Cth) ss 30A-30S; *Industrial Relations (Commonwealth Powers) Act 2009* (NSW); *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld); *Fair Work (Commonwealth Powers) Act 2009* (SA); *Industrial Relations (Commonwealth Powers) Act 2009* (Tas). Note that Victoria had already referred powers over industrial matters to the Commonwealth in 1996 at the time of the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). See *Commonwealth Powers (Industrial Relations) Act 1996* (Vic); *Workplace Relations and Other Legislation Amendment Act (No 2) 1996* (Cth).

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