

Ai GROUP SUBMISSION

Industrial Relations Victoria

Inquiry into the Victorian On-Demand Workforce

February 2019

The logo for Ai GROUP, featuring the letters 'Ai' in a stylized, bold font above the word 'GROUP' in a smaller, all-caps font.

Ai
GROUP

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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1. EXECUTIVE SUMMARY

Ai Group welcomes the opportunity to provide a submission to the Victorian Government's Inquiry into the Victorian On-Demand Workforce (**Inquiry**). This submission forms part of Ai Group's ongoing contribution to the Inquiry, including the preparation of a Report later in 2019.

Given that this submission was required to be lodged in the earlier stages of the Inquiry, it does not deal comprehensively with various issues that will be analysed and explored by Ai Group during the course of the Inquiry, including through consultations with relevant businesses

Australian industry and labour arrangements are continually impacted by increasing digitisation in all sectors of the economy. This is felt by both digitally native businesses and those businesses which pre-date the internet. Digital technologies are altering the way people work and the way that jobs are designed. However, not all businesses, including those operating with an online platform engage with, procure or provide on-demand workers.

As relevantly stated in the Victorian Government's December 2018 Background Paper for the Inquiry:

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

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

On-demand labour has existed for centuries in a variety of industries, businesses and occupations. It is often necessitated by the need to obtain labour for work that may be unplanned, seasonal, ad hoc and/or requires specialised skills.

Despite the highly visible nature and 'branding' of many gig platform operators, the proportion of workers considered to be gig economy workers within the overall workforce is extremely small (less than half of 1%).

The gig economy provides many benefits to workers. Individuals who wish to work flexibly around other commitments, such as studies, recreational activities, family commitments or other forms of paid employment often find the experience of working via online platforms, a useful and convenient way of earning or supplementing income.

The vast majority of contracting and employment relationships rely on Australia's current workplace relations framework, including the flexibility afforded by the common law tests in determining whether a worker is an employee or an independent contractor. The existing framework should not be disturbed when the current framework provides strong protections to on-demand workers.

Any new overly prescriptive laws could stifle innovation – both for digitally native businesses and those that are not – to the detriment of the whole community, including workers.

2. RECENT GOVERNMENT INQUIRIES RELATING TO ON-DEMAND WORKERS

Ai Group has participated in various recent Government inquiries relating to on-demand workers, including the following.

Senate Future of Work and Workers Inquiry

In late 2017, the Select Senate Committee on the Future of Work and Workers established a Future of Work and Workers Inquiry.

Ai Group made a detailed [submission](#) to the inquiry in February 2018.

Victorian Government Inquiry into the Labour Hire Industry and Insecure Work

In 2015, the Victorian Government established an Inquiry into the Labour Hire Industry and Insecure Work. The Inquiry was chaired by Professor Anthony Forsyth (**the Forsyth Inquiry**). Ai Group made a detailed [initial submission](#) to the Inquiry in November 2015 and a [supplementary submission](#) in March 2016.

In August 2016, the Forsyth Inquiry released its [Final Report and Recommendations](#). The Inquiry found that the industries of contract cleaning, horticulture and meat processing contained higher risks of worker exploitation, and it was recommended that the Victorian Government consider targeted regulation for those sectors.

Following the Forsyth Inquiry, the Victorian Government introduced a Bill to implement a labour hire licensing scheme across all industry sectors. The *Labour Hire Licensing Act 2018* (Vic) was passed by the Victorian Parliament in June 2018.

The LHL Act covers a significant portion of on-demand workers in Victoria, as well as the businesses that engage with them, either as providers or as users. While certain administrative provisions of the Act took effect on 27 June 2018, the Victorian Government has announced that compliance obligations will not begin until later in 2019. The legislation is discussed in section 5 of this submission.

The pending full operation of the LHL Act is highly relevant to this present Inquiry. It is likely that a significant number of on-demand workers, their employers or providers and business users will be covered by the Victorian labour hire licensing scheme. It is very important that the current Inquiry not recommend the imposition of further regulation on such employers and businesses, as these businesses are already subject to legislation which will impose a very onerous regulatory burden upon them.

3. THE DIGITAL ECONOMY

The rapid development in digital technologies has transformed all segments of the economy. It has and is continuing to have impacts, of varying degrees, on business operations, business models, workforce skills, job design and how business functions are orchestrated through jobs and labour allocation.

Digital technologies have enabled the creation of new types of businesses and business models, but equally such technologies are significantly impacting and transforming existing businesses. Innovation with digital technologies needs to be encouraged, not stifled.

Industry 4.0 and digital transformation

Industry 4.0, or the fourth industrial revolution, is altering how businesses function and interact with their workforces and consumers. Industry 4.0 follows a long line of transformational technological changes, dating back to the first industrial revolution in the eighteenth century (and even earlier). Each of these waves of technological change has been associated with the replacement or reform of particular industries and occupations. They have created entirely new types of goods and services, industries and occupations. This process is the foundation of growth in economic productivity and underpins rises in incomes and living standards for the whole community over time. The pace of change in digital technologies continues to increase and become more embedded in the economy.

These changes are occurring at a time when the world economy is dominated by global value chains. Stages of value chains can be located in different parts of the world, subject to diverse regulatory settings, and accessing skills and materials that ensure competitive cost and quality.¹

Australia in particular, is increasingly influenced by the key emerging technologies of cloud computing, the Internet of Things (IoT), big data, blockchain, artificial intelligence and robots; and immersive technology.² Digital transformation will create new markets and new jobs and some existing jobs will be re-designed.

Overall, digital transformation will bring positive change and opportunities to businesses, workers and the community at large.

¹ Beitz, S 'Developing the capacity to adapt to industry transformation' in *Australia's future workforce*, Committee for Economic Development of Australia, June 2015.

² Taylor, N, 2015, "Introduction: The industrial revolution's next wave" in *Australia's future workforce*, Committee for Economic Development of Australia, June 2015.

Why digital infrastructure is important

A mix of communication platforms will enable the growth of the digitally enabled economy including the NBN, 5G, and a mix of other IoT communications platforms. Some of these technologies are growing fast and accommodating them (such as through lower regulatory barriers and increased regulatory flexibility) is challenging for governments and regulators.

Strong growth in the NBN roll-out will be critical to meeting business needs, as will be growth in other emerging communications platforms. Despite recent activity, Australia remains far behind in global broadband speed rankings, and may be slipping further. The deployment of these platforms needs continuing scrutiny against benchmarks including affordability, easing regional constraints, meeting business demand and maximising business benefits.

The Productivity Commission has identified that the enabling technologies of the internet (and supporting infrastructure), cloud computing and sensor technologies have been strongly associated with the growth of digital disruption and innovation.³

Automation and jobs

The rate of diffusion of technology and innovation has increased as global information has become available instantly and at lower cost.⁴ Parts of nearly all jobs will be affected by automation to a greater or lesser degree, with the transformation now moving beyond manufacturing to white collar knowledge work.

Most affected by automation are those industries with skills based around predictable physical activities. These include technical aspects of manufacturing, food service and accommodation and retailing.⁵ Automation has introduced the remote operation of autonomous vehicles within the mining industry.⁶

Personal and human services delivered by people and which cannot be automated through mass markets are strong growth industries. These include personal care, healthcare and education.⁷

³ Productivity Commission 2016, *Digital Disruption: what do governments need to do?*, Commission Research Paper, Canberra, p.18

⁴ Chui, M, Manyika J, Meremadi M, 2016, 'Where machines could replace humans—and where they can't (yet)', *McKinsey Quarterly*, <http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/where-machines-could-replace-humans-and-where-they-cant-yet?cid=other-eml-ttn-mkq-mck-oth-1612>

⁵ Chui, M, Manyika J, Meremadi M, 2016, 'Where machines could replace humans—and where they can't (yet)', *McKinsey Quarterly*, <<http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/where-machines-could-replace-humans-and-where-they-cant-yet?cid=other-eml-ttn-mkq-mck-oth-1612>>

⁶ Durrant-Whyte, H, McCalman, L, O'Callaghan, S, Reid, A and Steinberg, D, "The impact of computerisation and automation on future employment", in 'Australia's future workforce', Committee for Economic Development of Australia, June 2015.

⁷ Coppola, F, 2014, 'Automation and Jobs: Competition or Cooperation?' in *Our Work Here is Done: Visions of a Robot Economy*, Nesta, London.

Automation cannot currently threaten human expertise or complex interactions involved with, for example, learning between teachers and students.⁸

Through access to even more elaborate data, smart machines will continue to become cleverer. Organisations will be able to do more with less, automating some professional tasks in legal services, medical diagnosis and financial analytics.⁹

As the transition to the digital economy continues, some work activities of almost all occupations will be automated: essentially work processes will be built around close collaboration with technology.¹⁰

Automation is changing the demand for labour in a way that allows for increases in earnings as productivity increases.¹¹

The Productivity Commission has estimated which occupations are most likely to be changed or automated in Australia. The occupations more likely to be disrupted include labourers, machinery operators and drivers and clerical workers. Personal service workers and professionals are more likely to remain unaffected.¹² It is important to note that this body of research helps to identify occupations that will be affected by computerisation and digitalisation; it does not imply that all individuals employed in these occupations will be wholly automated and displaced by machinery.

Significantly the digital economy is forming completely new jobs and new markets.¹³

Current digital technology use by businesses

Emerging technologies and the way businesses use them (or do not) are a key part of our productivity story and will remain central to our policy solutions. As a very broad generalisation, Australian businesses are often active and enthusiastic adopters of new technologies (developed here or more commonly overseas), but not necessarily the most successful at harnessing them to generate direct productivity gains, or the best at spreading the benefits beyond the businesses that are closest to the ‘technology frontier’.

This pattern is illustrated for example, by the headline numbers in the ABS data on ‘business use of IT’, which show that 95% of businesses had access to the internet in 2015-16 but only half had their own web page and only one third were selling online (**Chart 1**).

⁸ Ibid.

⁹ Beitz, op. cit.

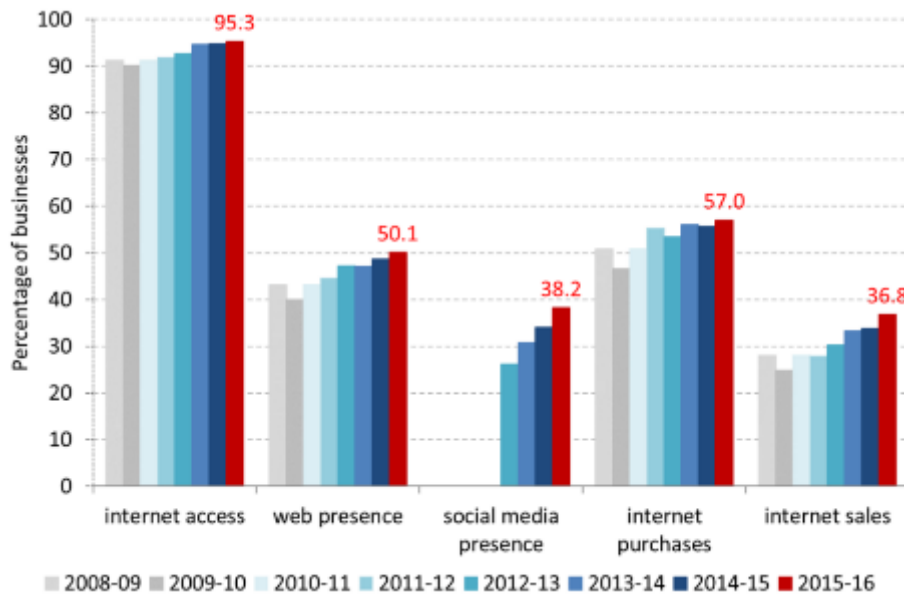
¹⁰ McKinsey Global Institute, 2017, *A Future That Works: Automation, Employment, and Productivity*.

¹¹ Autor, D 2015, ‘Why Are There Still So Many Jobs? The History and Future of Workplace Automation’, *Journal of Economic Perspectives*, Vol. 29, No. 3.

¹² ‘*Digital Disruption: What do governments need to do?*’, Productivity Commission Research Paper, June 2016.

¹³ Gabriel, S & Gurría, A, 2017, ‘Policy 4.0: Bringing the People on Board in a Digital World’, *The World Post*, <http://www.huffingtonpost.com/oecd/policy-40-bringing-the-pe_b_14114510.html

Chart 1: Proportion of all Australian businesses using IT, by purpose



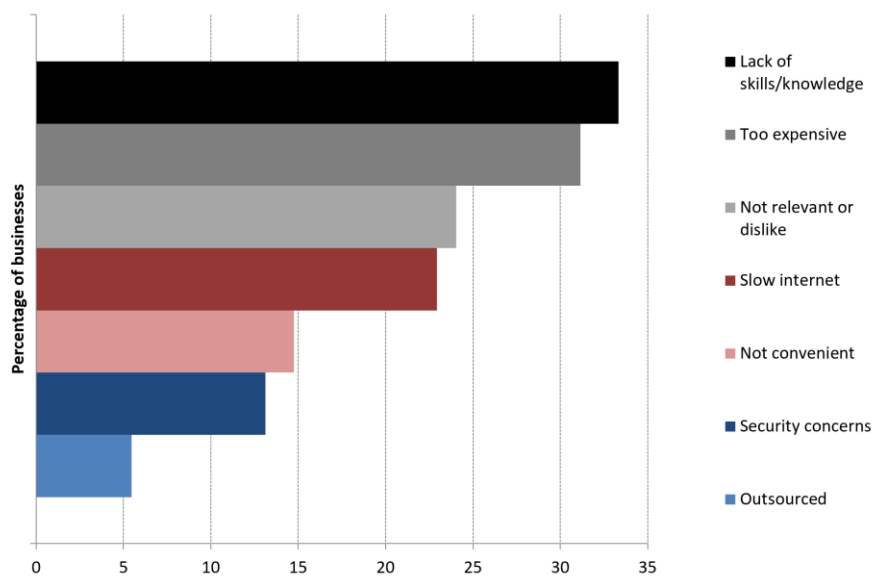
Source: ABS *Business Use of IT*, 2017.

Our inability to successfully adopt and adapt digital and other new technologies has affected our global competitiveness as well as our own productivity. In 2017, the World Bank ranked Australia at 15th of 190 economies for its ‘ease of doing business’ (down from 13th in 2016). The World Bank ranked Australia particularly poorly for ‘trade facilitation’ (91st), ‘property settlements’ (45th) and ‘ease of paying taxes’ (25th). All of these are transactional aspects of ‘doing business’ that could be directly improved through better digital technology applications within business and within the government agencies that regulate and facilitate these areas.

In its recent *Business Beyond Broadband* report, Ai Group surveyed 248 Australian businesses about their use of and investment in digital technologies, as well as barriers to this investment. We found that the main barriers to business investment in digital technologies were lack of employee skills (33%), costs (31%), perceived lack of relevance (24%) and slow internet (23%) (**Chart 2**).¹⁴

¹⁴ Ai Group, *Business beyond broadband: Are Australian businesses ready for the Fourth Industrial Revolution* (Report, May 2017).

Chart 2: Barriers to business investment in digital technology (% of businesses)



Source: Ai Group, *Business beyond broadband: Are Australian businesses ready for the Fourth Industrial Revolution* (Report, May 2017).

Ai Group has also heard anecdotally from Member companies about possible reasons for the slow adoption of digital technologies, particularly among SMEs:

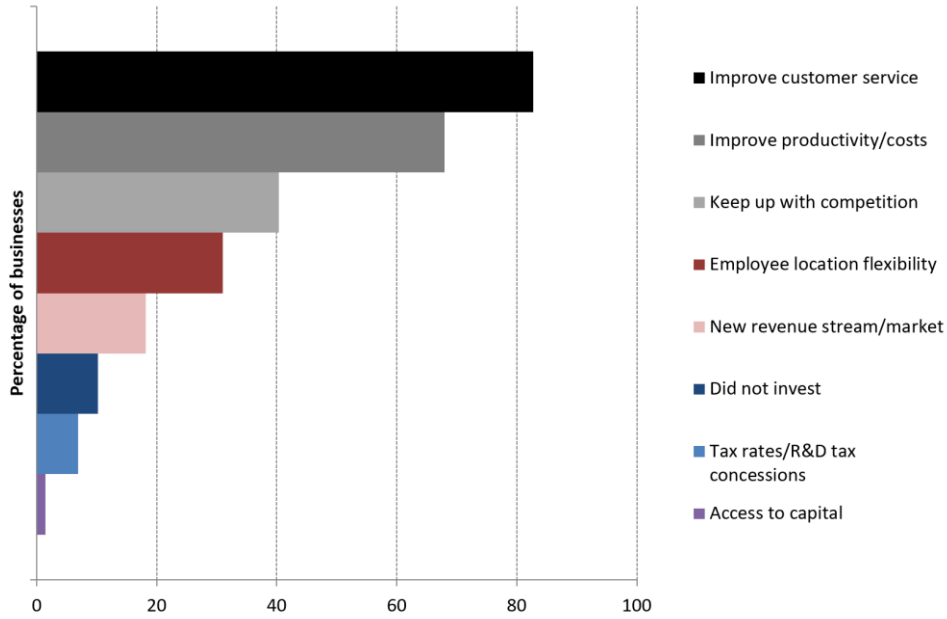
- They do not have the time to assess digital technologies to know what is relevant to them and what the benefits may be;
- They do not know where to start;
- They would like to know what others are doing to determine the benchmark; and
- The speed of change makes it hard to keep up and adapt, even for innovative manufacturers.

Ai Group has also heard from both end users and suppliers that while there may be interest from businesses in digital technologies, the development and implementation of a real business case is the real challenge.

Ai Group’s research has found that the top objectives of businesses when they invest in digital technologies are to improve: (1) customer service; (2) productivity; and (3) competitiveness (**Chart 3**).¹⁵

¹⁵ Ai Group, *Business beyond broadband: Are Australian businesses ready for the Fourth Industrial Revolution* (Report, May 2017).

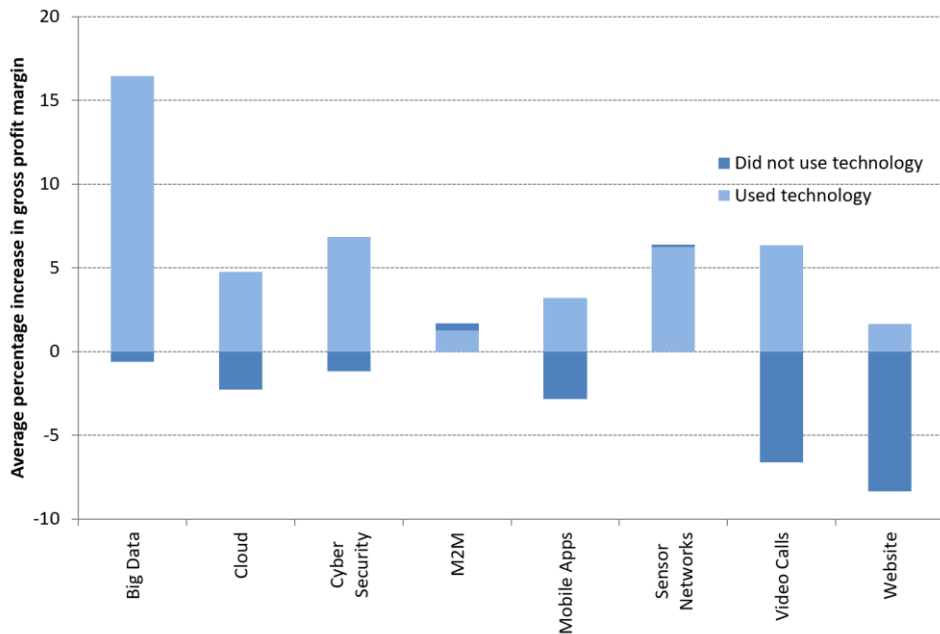
Chart 3: Reasons for investment in digital technology in 2017 (% of businesses)



Source: Ai Group, *Business beyond broadband: Are Australian businesses ready for the Fourth Industrial Revolution* (Report, May 2017).

Ai Group’s survey results also showed a close association between digital investment and higher business performance (**Chart 4**).

Chart 4: Impact of digital technology investment on gross profit margins



Source: Ai Group, *Business beyond broadband: Are Australian businesses ready for the Fourth Industrial Revolution* (Report, May 2017).

The survey found that businesses which maintained investment showed increasing revenue (5%), as did those that increased investment (4%). Businesses that did not invest in digital technologies saw an average 3% decline in revenue.

Ai Group's analysis shows an association but does not prove causation. Also, while our analysis suggested a link between digital investment and revenue growth, there was still a disconnect amongst business respondents in realising these opportunities and implementing strategies to achieve growth.

New business models and services

On a more general level, the various features and impacts of digital technologies can shape how businesses evolve, are created or modelled. Features of digital technology that may be attractive to businesses include:

- The adding of value by enhancing the gathering, processing, storage and transmission of data and the delivery of information in digital form;
- An ability to scale up or replicate at low costs;
- The ability to create a network effect in value; the value of the network increases with the number of users and amount of data entered;¹⁶

For businesses that are not digitally native, or pre-dated the internet, digital technologies can enable businesses to innovate, grow, improve their productivity and remain competitive in an increasingly global marketplace. There is a long and positive history of business and industry successfully adopting and adapting new technologies. The embracing of digital technology to improve business operations through Industry 4.0 has been a core focus of advanced manufacturing and other 'asset constructor' businesses, many of which now adopt service provision models beyond the supply of goods or products.

For instance, some manufacturers and equipment rental companies are joining the sharing economy in starting to rent out asset equipment (which may otherwise be idle) for certain time periods, packaged with other services through an online platform. The product becomes the buying of functionality rather than the piece of equipment itself.

For many digitally native businesses or 'digital orchestrators', particularly of the 'start-up' variety, much focus has been on their rapid ability to scale up for low cost. Having achieved scale, trends are now emerging however, about the sustainability of such businesses amidst greater competition from new entrants and the full ambit of challenges offered by business models grown on the 'network effect, particularly the risk of disintermediation (where consumers bypass the intermediary and engage directly).'¹⁷

¹⁶ Productivity Commission, 2016, *Digital Disruption: What do governments need to do?* Commission Research Paper, Canberra

¹⁷ Zhu, F., Iansiti, M. *Why some platforms thrive...and others don't*, Harvard Business Review, Jan-Feb 2019, pp.119-125

Essentially however, the diversity and variety of business models, goods and services, even amongst the digitally native businesses are extensive.

The functions of digital platforms

At its broadest, digital platforms are the collection of cloud-based services and software utilised by businesses as technology infrastructure, and encompass both hardware and software. They include search engines (such as Google or Bing), social platforms (such as Facebook), and are frequently embedded with services relevant to business objectives and allow businesses to grow.

In the role of 'platform as a service' or 'platforms as intermediaries', online platforms connect two sides of a market, whether it be buyers and sellers, advertisers and viewers, or App developers and users. While the functions of digital intermediaries vary, the Productivity Commission has characterised the core functions of matching, analysing and sorting, and adding product value.¹⁸ The growth in use of online platforms in this way can be largely attributed to improvements in communications technologies, particularly cloud-based, mobile technology.

The role of digital platforms within businesses and the various benefits and opportunities they offer, are increasingly more refined as more businesses are embracing and operating on digital platforms as part of a broader digital business strategy.

Accenture report that platform business models represent a fast-increasing proportion of the growth of the digital economy.¹⁹ In its Digital Platforms Survey 2018, (surveying 500 C-level executives in 12 countries, including Australia), companies reported that digital platforms:

- Create new ways of engaging with customers (rethinking new channels);
- Develop platform-as-a-business, e.g. as potential marketplaces;
- Reimagine experience for customers or employees;
- Adopt Intelligence-driven enterprise to optimise operations;
- Launch products as a service;
- Co-create new services with ecosystem partners (e.g. enable third-party developers); and
- Distribute process automation (intelligent edge device).

¹⁸ Productivity Commission, 2016, p.139

¹⁹ Accenture, *Digital Platforms will define the winners and losers in the new economy*, 2018

Actual platform use was most prevalent among electronics / high technology companies and retailers, and least prevalent in companies in utilities, health and insurance.

There has been an abundance of digitally native businesses, (or digital orchestrators) that utilise digital platforms as key infrastructure to provide services, build consumer communities, share and store data; whether for-profit or not.

G2 Crowd research²⁰ usefully identify some of the business models built around digital platforms as follows:

- **Subscription/freemium models**, encompassing media platforms like Spotify, Netflix, social search platforms and collaboration platforms like Slack, WhatsApp and Skype.
- **Information business models**, encompassing review platforms like Glassdoor and Yelp.
- **Advertising business models**, encompassing search engine platforms such as Google, social platforms like Facebook and LinkedIn, knowledge platforms such as Stack, and classified platforms such as Craigslist and Zillow.
- **E-Commerce business models**, such as Amazon, eBay, Etsy, and marketplaces such as Apple Store, Google Play and Salesforce.
- **Pay-per-service business models**, including service exchange platforms such as Uber, Lyft and Airbnb, and cloud platforms as a service, infrastructure as a service and database as a service.

Digital platforms and diverse service models

The role of digital platforms in business is of course not confined to the matching and supply of on-demand labour. This is but one of many functions online platforms perform.

Within the broader notion of the digital economy, different new economy models have emerged largely based on the diversity of focus and activities undertaken by participants.

An article published by the World Economic Forum²¹ identifies no fewer than 10 such economy models (see table below) and it is likely that more will develop.

²⁰ Fauscette, M. *Tech Trends 2018: The Digital Platform*, G2 Crowd, November 2018.

²¹ Rinne, A., *What exactly is the sharing economy?* World Economic Forum, December 2017.

Economy model	Focus
Sharing economy	sharing of underutilised assets, monetised or not, in ways that improve efficiency, sustainability and community
Collaborative economy	collaborative forms of consumption, production, finance and learning
On-demand economy	“on-demand” (i.e. immediate and access-based) provision of goods and services
Gig economy	focused on workforce participation and income generation via “gigs”, i.e. single projects or tasks for which a worker is hired
Freelance economy	workforce participation and income generation by freelancers, also known as independent contractors and self employed
Peer economy	peer to peer (P2P) networks in the creation of products, delivery services, funding and more
Access economy	access over ownership (may overlap with sharing, though sharing is not a requisite)
Crowd economy	economic models powered by “the crowd”, including but not limited to crowdsourcing and crowdfunding
Platform economy	anything powered by tech-centric platforms

These categories as a useful signpost of the vast diversity of purpose and activities undertaken by consumers, businesses and workers alike. It also demonstrates the nebulous nature of digital technology, including where digital platforms and/or digital intermediaries are used to connect multiple users for varied purposes.

While digital technologies are altering the way people work, the jobs and tasks available, and how jobs are designed, not all businesses, including those operating an online platform as a service, engage with, procure or provide on-demand workers.

4. THE GIG ECONOMY AND ON-DEMAND LABOUR

Forms of ‘on-demand’ labour

On-demand labour has existed for centuries in a variety of industries, businesses and occupations. It is often necessitated by the need to resource work that may be unplanned, seasonal, ad hoc, or linked to a specialised skill or service delivery. On demand labour may arise from one or a combination of these factors and may comprise varying timeframes and levels of responsiveness.

In business to business arrangements some straightforward examples include:

- A maintenance crew performing emergency repair and maintenance services on plant and equipment sold to a customer;

- Traffic controllers required to provide traffic management services for a particular activity scheduled to occur on a construction project;
- Transportation or courier services delivering goods and products from one business to another to satisfy supply chain and/or principal customer requirements;
- Labour sourced from a labour hire company required to cover unplanned absences of other workers, e.g. to cover sick leave;
- Retail employees engaged for the Christmas period trade; and
- A management consultant hired to resolve a particular short-term business problem.

In individual consumer arrangements, some obvious examples include:

- The engagement of care workers to assist an elderly person;
- A plumber engaged as a sole trader to repair leaking taps in a household;
- A babysitter engaged to care for young children; and
- Removalist workers to assist in moving furniture to another location.

Because of its varied forms and purposes, on-demand labour is not a separate category within employment regulation. Rather it is a description of the purpose of labour activity that may fall into different established forms of employment or engagement, such as casual employment and independent contracting.

Australia's current workplace relations regulatory framework, principally the *Fair Work Act 2009* (Cth), modern awards and associated common law tests, provide for various categories of labour, including:

- Full-time employment;
- Part-time employment;
- Casual employment;
- Employment for a specific task;
- Employment for a specific period; and
- Independent contracting.

These forms of labour may be engaged directly by a business or via a labour hire arrangement whereby a third party supplies a worker to a host business for a fee. In some instances, a digital platform may serve as an intermediary to assist the engagement of the labour.

Australia's regulatory framework provides comprehensive protections and entitlements for all of the above forms of labour, as discussed in section 5 below.

On-demand labour in the gig economy

In the context of the gig economy, on-demand labour has had a more visible and direct connection with the consumer, linked to an increase in the accessibility of new services provided on-demand to consumers, either in a short-time frame, or at a time of the consumer's own choosing. This has been enabled by the emergence of online platforms where the platform operates as a service to connect consumers with the required labour for the consumer's needs.

The speed and low cost at which platforms can scale up services and increase value and presence through the 'network effect', combined with widespread access to mobile technology, has facilitated access to on-demand labour from individual consumers. Accordingly, this has led to a broader take-up of paid services by individuals who may never have otherwise engaged with the service, or who found an alternative means to perform the task.

The Gratten Institute reports that internet platforms have tended to develop in sectors and occupations in which independent contractors are already common, being consistent with the idea that platforms suit tasks that businesses only need infrequently and do not involve complex teamwork with colleagues or deep knowledge of a specific workplace.²² This is evident in the prevalent use of online platforms to source labour to perform many household tasks such as babysitting, house cleaning and gardening. This work has traditionally been performed on an independent contracting or commercial basis and not generally subject to employment regulation when the relevant labour is engaged by an individual or household.

'Gig' contractors are also evident in the types of established freelance occupations that a number of online platforms match with consumers such as designers, web producers, artists and photographers.

Incidence of on-demand workers

ABS estimates of various types of workers suggest that changes to the structure of Australia's labour force as a result of digitalisation are happening more slowly than what some commentators claim.

The Gratten Institute estimates that fewer than 0.5% of adult Australians (or 80,000 people) work on peer to peer platforms more than once per month.²³

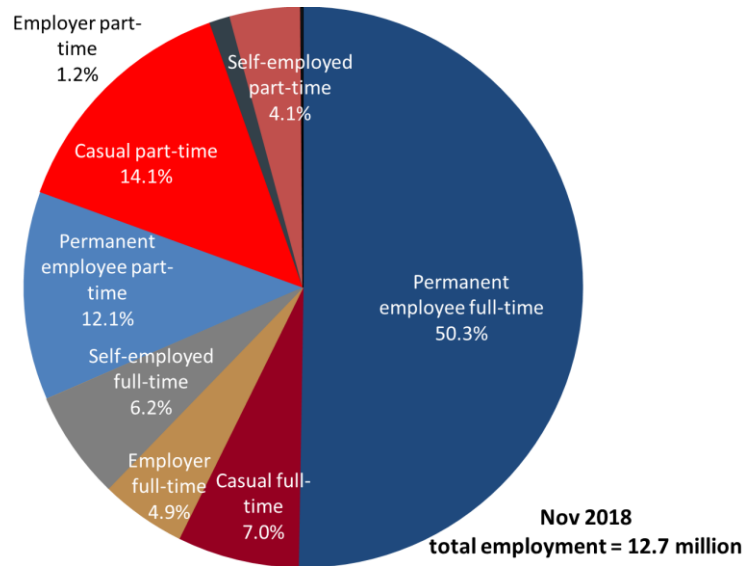
²² Minifie, J., *Peer-to-peer pressure, Policy for the sharing economy*, Grattan Institute, April 2016

²³ Minifie, J., *Peer-to-peer pressure, Policy for the sharing economy*, Grattan Institute, April 2016

The Australian workforce

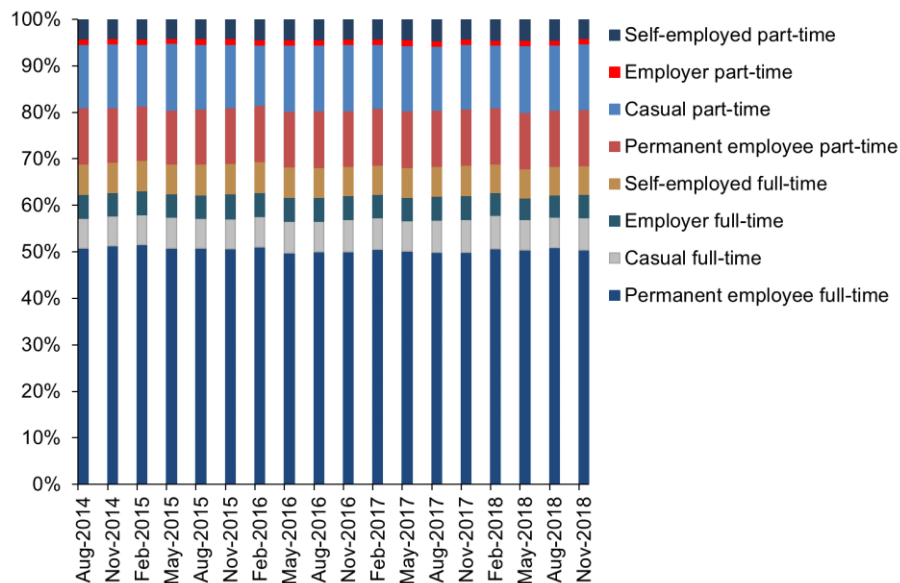
The composition of the Australian workforce is addressed in **charts 5, 6 and 7** below.

Chart 5: Australian workforce by employment status and full-time / part-time hours, Nov 2018



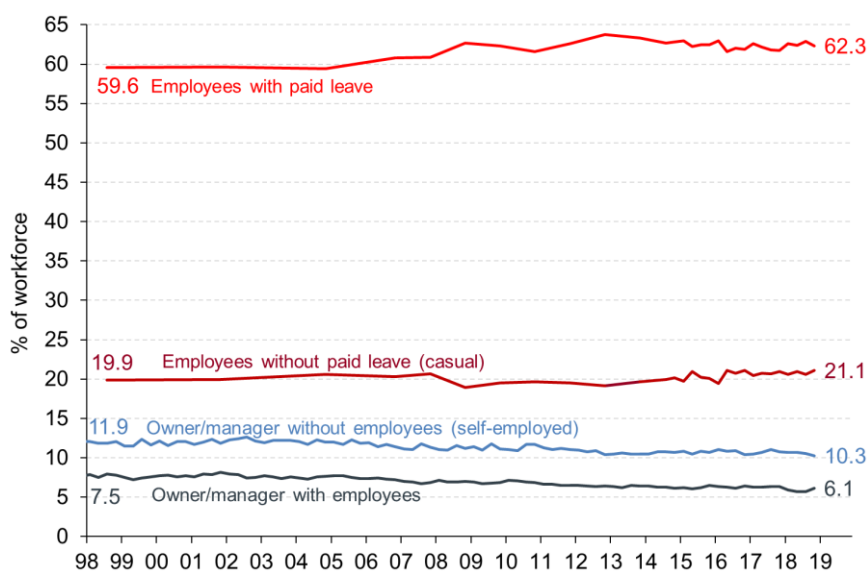
Source: ABS 6291.0.55.003 *Labour Force, Australia, Detailed, Quarterly*. Nov 2018.

Chart 6: Australian workforce by employment status and full-time / part-time hours, 2014 to 2018



Source: ABS 6291.0.55.003 *Labour Force, Australia, Detailed, Quarterly*. Nov 2018.

Chart 7: Australian workforce by employment status, Nov 1998 to Nov 2018



Source: ABS 6291.0.55.003 *Labour Force, Australia, Detailed, Quarterly*. Nov 2018.

Casual employees

A significant portion of on-demand workers are employed as casual employees.

A recent Ai Group [research paper](#) shows²⁴ that 2.6 million Australian workers were casual employees in August 2018 (defined by the ABS as ‘employees with no leave entitlements’).

About the same share of the workforce were casual employees in 2018 (20.6%) as in 1998 (20.1%), even though the number of casual workers has increased from around 1.7 million workers in 1998 to 2.6 million in 2018, in line with growth in Australia’s population.

Casual workers are employed in all industries in Australia, but they are more evident in the hospitality (food and accommodation services), retail trade, healthcare and other services sectors. The largest concentration of casual work is in the hospitality industry which employed around 480,000 casual workers in August 2018. Hospitality casuals accounted for 54.4% of the industry’s workforce and 18.5% of all casual workers in Australia. Retail trade employs 430,600 casuals. They accounted for one third of workers in the retail industry or 16.5% of all casual workers. Healthcare, education and construction also employ relatively large numbers of casuals, but the very large size of these sectors means that casual workers comprise a small proportion of their total workforces.

ABS data indicate that 39% of the total workforce worked in small businesses (those employing 1-19 people) as of June 2017. The industries with the highest proportion of workers in small businesses are also the industries in which high numbers and/or proportions of casual workers are employed (see table 1 in Ai Group’s [research paper](#)). This means that casual workers are more likely to be employed in small businesses than are other types of workers. This is confirmed by data from the

²⁴ Ai Group, *Where are Australia’s Casual Workers in 2018?* Economics Fact Sheet, October 2018

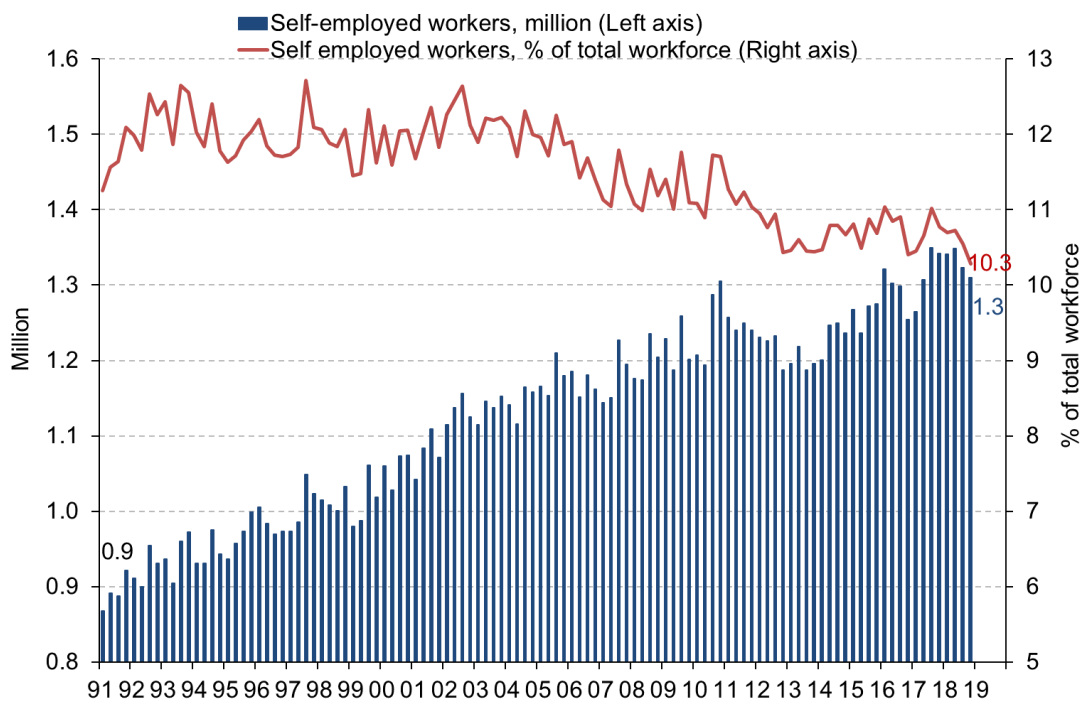
HILDA survey for 2015, which indicates that 51% all casuals worked in small businesses in 2015 (1-19 employees), and a further 31% work in medium sized businesses (20-99 employees).

Independent contractors / self-employed

The vast majority of independent contractors are not ‘gig workers;’ in fact they comprise a tiny minority of all independent contracting arrangements.

ABS statistics on self-employment are available on a consistent basis for the period since 1991. The data indicates that the number of ‘owner/managers of an enterprise’ (incorporated or unincorporated) with no employees of their own has declined as a proportion of the workforce over the past 25 years (**chart 8**).

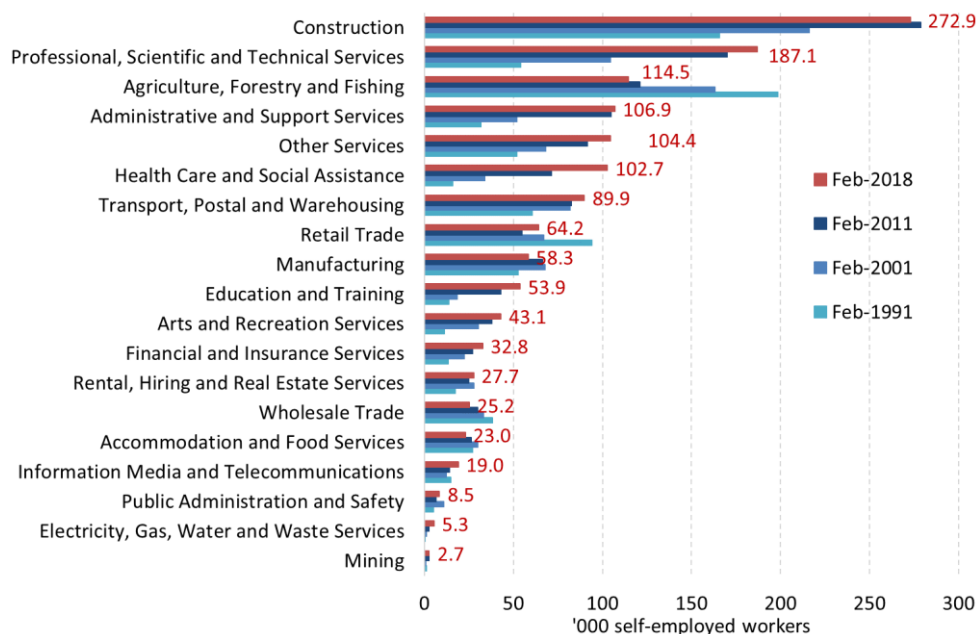
Chart 8: Australian ‘self-employed’ workforce (owner-managers with no employees), 1991 to 2018



Source: ABS 6291.0.55.003 *Labour Force, Australia, Detailed, Quarterly*. Nov 2018.

The construction industry has long dominated the number of self-employed workers due to the prevalence of this type of work arrangement in the licensed construction trades (including electricians, plumbers and carpenters) (**chart 9**). Other industries with large numbers of self-employed workers include professional services (legal, accounting, engineering and design services), agriculture and administrative services.

Chart 9: Number of self-employed workers* by industry, 1991 to 2018



Source: ABS 6291.0.55.003 *Labour Force, Australia, Detailed, Quarterly*.

The demographic profile of Australia’s self-employed workers tells a life-cycle story, with high rates of self-employment for older workers. The proportion who are self-employed increases with each age group, peaking at 29.1% for workers aged 65 and over, from less than 1% for workers aged 15-19.

Benefits of gig economy platforms for workers

The growth in both the number and size of gig economy platforms is not simply based on consumer demand. The ‘network effect’ of online platform businesses is strengthened by the number of participating workers and contractors.

Ai Group has long promoted effective measures to enable greater workforce participation. The gig economy has an important role to play in creating workforce participation opportunities for those who may not otherwise find it easy to enter the labour market or to earn supplementary income. Some of these benefits are highlighted below.

1. Easier access to paid work

Online platforms provide individuals with opportunities to enter the labour market more easily than through conventional recruitment and employment methods.

Individuals who wish to work flexibly around other commitments, such as studies, recreational activities, family commitments or other forms of paid employment often find the experience of working via online platforms, a useful and convenient way of earning or supplementing income.

Providing avenues to earn an income, alleviates the adverse effects associated with unemployment, such as social isolation, poorer mental health and reduced confidence. Periods of unemployment

are often longer for mature age workers than other workers, making the ability to earn an income, even temporarily, through an online platform a useful option. ABS *Labour Force* statistics show that the average durations of unemployment in weeks for workers of different ages are: 15-44 years – 45 weeks; 45-54 years – 63 weeks; and 55 years and over – 76 weeks.

For younger workers, entry into the labour market can be difficult without relevant work experience. Many online platforms provide paid work opportunities that do not require extensive work experience or professional qualifications.

2. A way to supplement income

A large proportion of gig economy workers engage in gig economy jobs to supplement their incomes which may be volatile. Gig work enables individuals to supplement existing income without investing in their own advertising or operating costs, or submitting to the conventional and more time consuming recruitment process.

Access to gig platform work as a secondary source of income can also alleviate the impact of underemployment on some individuals. Individuals who wish to work more hours, but where none are available that suit, may find that gig economy work opportunities are a useful means of boosting income.

3. Greater flexibility than traditional employment

Gig platform work provides flexibility that may not be available with conventional employment. It often suits people who would like to be in the workforce but may have difficulty finding the flexibility they need to meet their personal circumstances.

Gig work is appealing to some mature aged workers who prefer to work flexibly as a transition to, or alternative to retirement. Also, the flexibility offered via many gig platforms allows many younger workers to combine paid work with study commitments, making it a useful option during extended periods of study and training.

A recent Ai Group research paper, citing RBA research notes:

“the majority of young part-time workers indicate that their main motivation is that part-time work allows them to combine paid work with study. The increase in young people working part-time has occurred at the same time as a significant increase in the participation of young people in full-time education. Just over three-quarters of 15-19 year olds and around one third of 20-24 year olds are enrolled in full-time study. This is up from one half and 10 per cent, respectively, in the 1980s. The high incidence of full-time students working part-time means that Australia has the fourth highest labour force participation rate for younger workers in the OECD.” (RBA, Oct 2018)

5. WORKPLACE RELATIONS LAWS

Australia's workplace relations laws provide extensive protections for Australian workers, including those working in the gig economy.

Recent Fair Work Ombudsman (**FWO**) enforcement actions and Fair Work Commission (**FWC**) proceedings, as discussed below, demonstrate that the current regulatory framework, including the common law tests for determining independent contractors and employees, are capable of accommodating newer ways of working.

A range of important workplace relations matters of relevance to the future of work are dealt with below.

Casual employment provisions in the Fair Work Act and awards

The definition of "casual employee"

Awards typically define a casual employee as an employee engaged and paid as a casual employee.

On 16 August 2018, the Full Court of the Federal Court handed down a decision in the *WorkPac v Skene* case. The decision creates significant uncertainty for businesses. The Court held that the term 'casual employee' in the *Fair Work Act* has no precise meaning and whether or not an employee is a casual for the purposes of the Act depends upon the circumstances surrounding the employee's employment. The Court decided that the fact that an employee is engaged as a casual and paid a casual loading does not necessarily mean that the employee is a 'casual employee' for the purposes of the annual leave entitlements under the *Fair Work Act*.

In December, the Australian Government made the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* which amend the *Fair Work Regulations 2009* to insert a new regulation 2.03A. Regulation 2.03A gives employers more protection against 'double dipping' claims by casual employees following the Federal Court's decision in the *WorkPac v Skene* case.

The new regulations expressly allow an employer to make a claim to offset the cost of any casual loading paid. Such a claim would be able to be pursued by an employer in a Court in response to any employee claim for annual leave or other entitlements of permanent employees under the *Fair Work Act*. The regulation applies in relation to employment periods that occur before or after the regulations were made.

Labor Senator Doug Cameron has put forward a motion to disallow the regulations, which is scheduled to be voted upon on 2 April 2019. Ai Group is urging Crossbench Senators not to support the disallowance of the regulations.

Right to Request Casual Conversion Bill

On 13 February 2019, the Australian Government introduced the *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019* into Parliament. If passed by Parliament, the provisions in the Bill would:

- Amend the National Employment Standards in the *Fair Work Act* to ensure that casual employees with 12 months of regular service have the right to request conversion to full-time or part-time employment;
- Give employers the right to reasonably refuse a casual employee's conversion request;
- Not disturb casual conversion provisions in modern awards;
- Apply to award-free and enterprise agreement-free employees;
- Apply to enterprise agreement-covered employees whose enterprise agreement does not have a casual conversion term that is:
 - the same or substantially the same as the casual conversion term included in the relevant modern award; or
 - more beneficial on an overall basis than the casual conversion term included in the relevant modern award.
- Clarify that, for an employee who converts from casual employment to full-time or part-time employment, periods of casual employment do not count for the purposes of calculating entitlements to annual leave, personal/carer's leave, redundancy pay and notice of termination. However, periods of casual employment count for the purposes of calculating service to qualify for the right to request flexible work arrangements and to take unpaid parental leave.

The Bill defines the class of employees who are entitled to make a request for conversion from casual employment to full-time or part-time employment but does not define casual employment for other purposes under the Act.

The Bill has been referred to a Senate Committee inquiry. Submissions are due on 1 March 2019 and Ai Group is currently preparing a submission.

Further Federal Court test case on casual employment

WorkPac has initiated a further important Federal Court case about casual employment.

The *WorkPac v Rossato* case is separate to the *WorkPac v Skene* case referred to above. In the *WorkPac v Rossato* Case, the Court will consider further arguments about the meaning of the expression 'casual employee' in the *Fair Work Act* and also arguments about the ability for an

employer to offset any annual leave loading paid against other entitlements that may be owed. The Australian Government has intervened in the proceedings.

It is vital that casual employment flexibility is maintained

Casual employment suits a very large number of employees. Also, a very large number of businesses rely upon the flexibility that casual employment arrangements offer.

The FWC and its predecessors have long recognised that a large number of employees prefer to work on a casual basis, even though their employment may be regular. Award clauses which enable casual employees to request to convert to permanent employment, with employers having the right to refuse an employee's request on reasonable grounds, were first inserted into federal awards in 2001 following the *Metal Industry Casual Employment Decision*.²⁵

On 5 July 2017, a Full Bench of the FWC handed down its decision in the *4 Yearly Review of Awards – Casual and Part-time Employment Case*.²⁶ The Commission rejected an ACTU claim to impose unworkable rigidity on the engagement of casual employees covered by modern awards. Ai Group played the lead role in the case on behalf of employers and filed over 800 pages of submissions and evidence. The case was heard over about 20 days of hearings. In dismissing the most problematic elements of the unions' claims, the Full Bench decided to retain the existing casual conversion clauses in awards and to insert a new 'model casual conversion clause' in 85 awards that did not contain such a clause.

Casual employment plays a critical role in enabling Australian businesses to remain agile and competitive and, consequently, to continue to employ Australian workers.

The Productivity Commission, in its final report on Australia's Workplace Relations Framework, stated that casual work is '*a now critical part of the labour market*'²⁷ and described the perspective of the ACTU and others on non-standard work, including casual work, as '*an overly negative one*'.²⁸

The flexibilities inherent in casual employment for both employer and employee should be preserved for all employees engaged as casuals, including many on-demand casual employees engaged through gig platforms.

Independent contractors

An 'independent contractor' is an individual who performs work under a contract *for* service, rather than under a contract *of* service. That is, an independent contractor is not an employee, but an individual providing services pursuant to a commercial rather than employment relationship.

²⁵ Australian Industrial Relations Commission, Print T4991.

²⁶ [2017] FWCFB 3541

²⁷ Productivity Commission Inquiry Report, *Workplace Relations Framework*, 30 November 2015, p.109.

²⁸ Productivity Commission Inquiry Report, *Workplace Relations Framework*, 30 November 2015, p.108.

This distinction is not always clear-cut and can be subject to judicial scrutiny. Ai Group strongly supports the retention of the common law approach to defining an independent contractor.

Ai Group was heavily involved in the development of the *Independent Contractors Act 2006*. When the Act was being developed, the Australian Government and the Commonwealth Parliament accepted Ai Group's submissions that the meaning of 'independent contractor' must be left to the common law to determine.

The common law is far better equipped to assess the substance of particular relationships than any statutory definition of an 'independent contractor' could. Any 'one size fits all' definition of an 'independent contractor' would prevent the facts and circumstances of individual cases being fully considered, and would disrupt, to the detriment of the parties, a very large number of existing contractual arrangements that are legitimate under common law.

The High Court's decision in *Hollis v Vabu* (2001) 207 CLR 21 is relevant when assessing whether an independent contractor relationship exists. This case involved a bicycle courier. The High Court considered whether the courier was an employee or contractor. The Court gave weight to the following factors in concluding that the courier was in fact an employee. The Courier:

- Did not supply skilled labour;
- Had little control over the manner of performance of the work;
- Was required to be at work at a certain time and to work in accordance with a roster;
- Was presented to the public as a representative of the company;
- Was required to wear a uniform bearing the company's logo;
- Was subject to dress and appearance requirements imposed by the company; and
- There was no scope to bargain with the company with respect to the rate of remuneration.

The above factors resulted in the Court concluding that the courier was an employee despite the existence of a written contract headed 'contract for service'. The case of *Hollis v Vabu* demonstrates that irrespective of the contractual intentions of the parties, a relationship of 'independent contractor' must meet the tests set down by the Courts.

The case of *Personnel Contracting Pty Ltd t/a Tricord Personnel v CFMEU* [2004] WASCA 312 handed down by the Western Australian Supreme Court of Appeal emphasised that in analysing the purported contractual relationship, it is necessary to look at the 'totality of its incidence' rather than focusing on one particular test to the exclusion of another.

In *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWA FB 8307, a Full Bench of the FWC summarised the general law approach to distinguishing between employees and contractors as follows:²⁹

[30] The general law approach to distinguishing between employees and independent contractors may be summarised as follows:

(1) In determining whether a worker is an employee or an independent contractor the ultimate question is whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own of which the work in question forms part? This question is concerned with the objective character of the relationship. It is answered by considering the terms of the contract and the totality of the relationship.

(2) The nature of the work performed and the manner in which it is performed must always be considered. This will always be relevant to the identification of relevant indicia and the relative weight to be assigned to various indicia and may often be relevant to the construction of ambiguous terms in the contract.

(3) The terms and terminology of the contract are always important. However, the parties cannot alter the true nature of their relationship by putting a different label on it. In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole: the parties cannot deem the relationship between themselves to be something it is not. Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract.

(4) Consideration should then be given to the various indicia identified in *Stevens v Brodribb Sawmilling Co Pty Ltd* and the other authorities as are relevant in the particular context. For ease of reference the following is a list of indicia identified in the authorities:

- *Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place or work, hours of work and the like.*

Control of this sort is indicative of a relationship of employment. The absence of such control or the right to exercise control is indicative of an independent contract. While control of this sort is a significant factor it is not by itself determinative. In particular, the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where the work involves a high degree of skill and expertise. On the other hand, where there is a high level of control over the way in which work is performed *and* the worker is presented to the world at large as a representative of the business then this weighs significantly in favour of the worker being an employee.

"The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was

²⁹ [2011] FWA FB 8307 at [30].

possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions." "[B]ut in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty. Ltd v Federal Commissioner of Taxation*, a case involving a droving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract."

- *Whether the worker performs work for others (or has a genuine and practical entitlement to do so).*

The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, working for others (or the genuine and practical entitlement to do so) suggests an independent contract.

- *Whether the worker has a separate place of work and or advertises his or her services to the world at large.*
- *Whether the worker provides and maintains significant tools or equipment.*

Where the worker's investment in capital equipment is substantial and a substantial degree of skill or training is required to use or operate that equipment the worker will be an independent contractor in the absence of overwhelming indications to the contrary.

- *Whether the work can be delegated or subcontracted.*

If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator that the worker is an independent contractor. This is because a contract of service (as distinct from a contract for services) is personal in nature: it is a contract for the supply of the services of the worker personally.

- *Whether the putative employer has the right to suspend or dismiss the person engaged.*
- *Whether the putative employer presents the worker to the world at large as an emanation of the business.*

Typically, this will arise because the worker is required to wear the livery of the putative employer.

- *Whether income tax is deducted from remuneration paid to the worker.*
- *Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.*

Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks. Obviously, in the modern economy this distinction has reduced relevance.

- *Whether the worker is provided with paid holidays or sick leave.*
- *Whether the work involves a profession, trade or distinct calling on the part of the person engaged.*

Such persons tend to be engaged as independent contractors rather than as employees.

- *Whether the worker creates goodwill or saleable assets in the course of his or her work.*
- *Whether the worker spends a significant portion of his remuneration on business expenses.*

It should be borne in mind that no list of indicia is to be regarded as comprehensive or exhaustive and the weight to be given to particular indicia will vary according to the circumstances. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

(5) Where a consideration of the indicia (in the context of the nature of the work performed and the terms of the contract) points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result. However, a consideration of the indicia is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture of the relationship from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The ultimate question remains as stated in (1) above. If, having approached the matter in that way, the relationship remains ambiguous, such that the ultimate question cannot be answered with satisfaction one way or the other, then the parties can remove that ambiguity a term that declares the relationship to have one character or the other.

(6) If the result is still uncertain then the determination should be guided by “matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability” including the “notions” referred to in paragraphs [41] and [42] of *Hollis v Vabu*.

The above summary of the common law tests show that a multitude of factors are to be considered, but, importantly, the factors may vary in importance from one situation to another.

Indeed the multi-factor approach was most recently re-confirmed as the relevant test by the Federal Circuit Court in *Li v KC Dental Pty Ltd & Ors* [2019] FCCA 104 (24 January 2019), in concluding that a dentist engaged by a dental firm was an independent contractor and not an employee. This finding was made despite the dental firm “enjoying a significant measure of control” over the worker.

The definitions used within income tax and superannuation legislation are workable for the purposes to which they are directed, but they would not be workable for the purposes of defining an ‘independent contractor’ under the *Independent Contractors Act 2006* or the *Fair Work Act*.

Sham contracting laws

Sham contracting provisions are incorporated within the general protections in Part 3-1 of the *Fair Work Act*.

The *Fair Work Act* leaves the definition of ‘independent contractor’ to be determined through the application of the common law tests and includes a very substantial maximum penalty (currently \$63,000) for breaches of the sham contracting provisions.

The sham contracting laws are appropriate and effective, and do not need to be amended.

Other protections against sham contracting

In addition to the sham contracting provisions, there are various other provisions of the *Fair Work Act* that provide protection to employees who are faced with sham contracting arrangements, including the following:

- Underpayment orders and penalties for breaches of:
 - the National Employment Standards; and
 - modern awards;
- The unfair dismissal laws;
- A prohibition on coercion in relation to workplace rights (s.343); and
- A prohibition on misrepresentations in relation to workplace rights (s.345).

Protections in the *Fair Work Act* for independent contractors

Adverse action provisions in the *Fair Work Act* provide a high level of protection to independent contractors. A person must not take adverse action against an independent contractor because the contractor: has a workplace right, has or has not exercised a workplace right, or proposes to exercise a workplace right (s.340). A ‘workplace right’ includes a right given to independent contractors under the *Fair Work Act* or the *Independent Contractors Act*.

The *Fair Work Act* expressly prohibits the following parties taking adverse action against an independent contractor:

- A principal who has entered into a contract for services with an independent contractor (s.342(1), Item 3);
- A principal proposing to enter into a contract for services with an independent contractor (s.342(1), Item 4); and
- An industrial association (s.342(1), Item 7).

Adverse action includes:

- Terminating a contract;
- Injuring the independent contractor in relation to the terms and conditions of the contract;
- Refusing to engage an independent contractor;
- Discriminating against an independent contractor; and
- Refusing to supply goods to an independent contractor.

Protections in the *Independent Contractors Act*

The *Independent Contractors Act* provides protection against unfair contracts for independent contractors covered by Part 3 – Unfair contracts, of the Act.

If a relevant court determines that a contract, to which an independent contractor is a party and that relates to the performance of work by the independent contractor, is harsh or unfair, the Court may set aside the whole or part of the contract, or vary the contract.

Vulnerable worker reforms

The Federal Government's *Fair Work Amendment (Protecting Vulnerable Workers) Amendment Act 2017* (Cth) provides additional protection to vulnerable workers and increases obligations on employers. Operative from September 2017, the *Fair Work Act*:

- Includes a new 'serious contravention' penalty – up to \$630,000 per breach for a company (10 times the previous maximum penalty);
- Includes much higher penalties for pay-slip and record keeping offences – up to \$63,000 per contravention (double the previous maximum penalty) and up to \$630,000 for a serious contravention (20 times the previous maximum penalty);
- Gives franchisors and holding companies more responsibility for breaches of workplace relations laws and instruments by franchisees and subsidiaries; and
- Grants the FWO compulsory interrogation powers (similar to the powers of the ABCC).

The vulnerable workers' amendments to the *Fair Work Act* impose supply chain obligations upon franchisors and holding companies, which operate in addition to the accessorial liability provisions of the Act. The accessorial liability provisions have been a focus for the FWO when educating employers on the need to manage their supply chains and address the risks associated with suppliers underpaying workers.

The amendments have increased protection for workers, including many workers who are employed under non-standard work arrangements.

Victorian labour hire licensing laws

Under the Victorian labour hire licensing scheme, businesses that meet the definition of a provider of labour hire services will be required to hold a licence. Businesses that use a provider of labour hire services will be required to only use a licensed provider.

Specifically, and subject to some limited exclusions and additional inclusions, a business is considered a provider of labour hire services under the *Labour Hire Licensing Act 2018 (LHL Act)* if, in the course of conducting a business, the provider supplies one or more workers to another person (a host) to perform work *in and as part of* a business or undertaking of the host (s.7(1), LHL Act).

Relevantly, s.7(2) of the LHL Act states that a provider may provide labour hire services to a host regardless of:

- Whether a contract has been entered into between the provider and host;
- Whether the individuals supplied by the provider are supplied directly or indirectly through one or more intermediaries; or
- Whether the work performed is under the control of the provider or host.

The Victorian licensing scheme adopts a broad definition of ‘Worker’ that is not confined to employees. The definition extends to independent contractors placed with another person to perform work in and as part of a business or undertaking of the host.

The Regulations provide a list of limited exclusions for persons who are not considered a ‘Worker’ for the purpose of the licensing scheme’s coverage. A provider of labour hire services who supplies an individual who is not considered a Worker by the Regulations will not be required to hold a licence for the supply of that individual.

The Regulations state that an individual is not a Worker if the individual:

- is a class of secondee, other than where the provider is predominantly in the business of providing the services of workers to other persons;
- is a person whom a provider provides to another person to do work in the circumstances where the provider and other person are each part of an entity or group of entities that carry on business collectively as one recognisable business, other than where the provider is predominantly in the business of providing the services of workers to other persons where those persons include persons that are not part of the entity or group;

- is a person whom the provider provides to another person to do work if the provider is a body corporate with no more than 2 directors and the person provided by the body corporate is a director of the body corporate who participates in the management of the body corporate or shares in its profits;
- is employed by a public sector body within the meaning of the *Public Administration Act 2004* who are seconded, transferred, provided or made available to do work for another person, however described, pursuant to an Act;
- is a student to whom Division 1 or 2 of Part 5.4 of the *Education and Training Reform Act 2006* applies; or
- is a person undertaking work or services under a vocational placement within the meaning of the *Fair Work Act*.

A secondee is a Worker of a provider that is provided to another person to do work on a temporary basis and:

- is engaged as an employee by the provider on a regular and systematic basis; and
- has a reasonable expectation that the employment with the provider will continue; and
- primarily performs work for the provider, other than as a worker supplied to another person to do work for that other person.

The Regulations provide the following examples of a secondee:

- A lawyer employed by a law firm is seconded for a period of time to a client of the law firm to do work for the client.
- A consultant employed by a consultancy business is supplied to a business to conduct a review for the other business.
- A farmer who assigns a worker (the secondee) to work on a neighbouring farm to fulfil an immediate need at the neighbouring farm which may be fully or partly on a goodwill basis.

In the industries of contract cleaning, horticulture and meat processing, the Regulations provide for additional circumstances in which a Worker is taken to be performing work in and as part of a business or undertaking of a host, for the purpose of their providers holding a licence.

The Victorian licensing scheme requires applicants to provide extensive information and supporting declarations to apply for a licence and requires licensees to be a 'fit and proper persons' (as defined in the Act). Further, licence holders will be required to comply with extensive reporting requirements every 12 months, including on matters relating to the number of workers supplied during the reporting period, the types of employment arrangements, the types of work performed and work locations.

The LHL Act contains penalties of up to \$507,424 for companies and \$126,856 for individuals for breaches of the Act. The penalties apply to those who provide 'labour hire services' without a licence and to those who use an unlicensed labour hire provider. The penalties also apply to persons who enter into an arrangement to avoid obligations under the legislation. There are a range of other offences under the LHL Act attracting financial penalties, including a prohibition on advertising for the provision of labour hire services without a licence.

Ai Group has previously raised concerns with the Victorian Government about the broad and ambiguous definition of labour hire service provider in the LHL Act.

It is conceivable that a large number of businesses which either directly, or through intermediaries, supply labour on-demand to other businesses via a digital platform would be required to hold a licence as a labour hire provider.

What is less clear is the supply of on-demand labour via a digital platform to individual consumers or households not conducting a business or undertaking. Ai Group considers that the licensing scheme would unlikely apply to the supply of labour in these circumstances because the worker is not performing work in and as part of a business or undertaking, but performing specific tasks for an individual person or household. Moreover, much of the work is not traditionally regulated by modern awards or employment legislation e.g. personal or household services such as cleaning, babysitting, gardening etc.

The LHL Act covers a significant portion of on-demand workers in Victoria, as well as the businesses that engage with them, either as providers or as users. While certain administrative provisions of the Act took effect on 27 June 2018, the Victorian Government has announced that compliance obligations will not begin until later in 2019.

The pending full operation of the LHL Act is highly relevant to this Inquiry. It is likely that a significant number of on-demand workers, their employers or providers and business users will be covered by the Victorian labour hire licensing scheme. It is very important that the current Inquiry not recommend the imposition of further regulation on such employers and businesses, as these businesses are already subject to legislation which will impose a very onerous regulatory burden upon them.

Other measures that reduce vulnerability

Digital technologies and associated service offerings generally create records of work performed and paid. The Inquiry should have regard to features that reduce worker vulnerability and exploitation. Such measures include:

- The existence of a digital profile of a worker and online customer account, creating a record of who has participated in the commissioning and performance of work;
- Records of online transactions between consumers, workers and intermediaries in relation to payments for work performed;

- In some cases, the wearing of uniforms which make workers identifiable and visible to the public;
- Customer online rating systems;
- The use of GPS technology to track customer and worker locations; and
- The use of blockchain technology by businesses to manage supply chains and to track work performed.

The reliance on online records is of significant value in enforcing current legal obligations (or protections) either by the parties themselves, or by regulatory bodies such as the FWO and the ATO.

Further education

During its Sham Contracting Inquiry in 2011, the ABCC recommended:

- That the ABCC undertake education activities (including in partnership with key industry stakeholders and the ATO) to specifically inform employers and employees regarding the appropriate use of ABNs; and
- That, in consultation with key industry stakeholders, the ABCC develops a Fair Work Contractor Statement for voluntary distribution to independent contractors prior to engagement. The Contractor Statement would provide contractors with information regarding the common law test for employment as well as the consequences of engagement as a contractor, rather than an employee.

Ai Group supports the above sensible recommendations of the ABCC.

Workplace relations proposals than need to be rejected

The notion of a ‘dependent contractor’ has no place in Australian law

Some commentators have argued for a new category of worker to be created under Australian law, i.e. a ‘dependent contractor’.

This proposal needs to be rejected. It would disturb the important legal distinction between an ‘employee’ and an ‘independent contractor’ with widespread negative implications for hundreds of thousands of independent contractors and their clients.

The proposal would introduce a minefield of complexity and uncertainty. It would increase costs for businesses and consumers and disrupt the work preferences and commercial arrangements of thousands of contractors.

The vast majority of independent contractors have absolutely no desire to be employees. Some of them predominantly work for one client but it suits them to do so as they receive a regular flow of contracting work.

During its Sham Contracting Inquiry in 2011, the ABCC considered whether a new category of 'dependent contractor' should be created and rejected the idea. The following extract from the final report is relevant:

Creation of the category of 'dependent contractor'

4.57 Employer representatives, as a group, do not support the creation of a third category of worker; the 'dependent contractor'. Overwhelmingly, employer representatives consider that the addition of a third category would be problematic and would further confuse an issue that is already complex. The MBA notes a prior (failed) attempt by the Queensland legislature to adopt the notion of the "dependent contractor".³⁰

The inquiry ultimately recommended: *"That the ABCC not pursue... the creation of a third category of worker – the 'dependent contractor'"* (Recommendation 10).

Portable leave schemes

Some commentators have called for portable leave schemes to be established for gig workers. This idea needs to be emphatically rejected.

Portable leave schemes are typically funded by a hefty levy on businesses, which would operate as a tax on employment and consequently inhibit employment growth and competitiveness.

National or State portable leave schemes do not currently operate in Australia for annual leave or personal/carer's leave. Portable leave schemes only operate throughout Australia for long service leave in the building and construction industry and the coal mining industry, although schemes for a few other industries operate in some States / Territories.

In 2015, Ai Group made a submission to the Senate Education and Employment References Committee's inquiry into the portability of long service leave and appeared at the public hearing. A detailed analysis in Ai Group's submission highlighted that portable long service leave schemes are more than four times as costly as traditional long service leave schemes. The implementation of a portable long service leave scheme would cost Australian employers over \$16 billion per annum. Such a massive cost impost upon employers would damage the Australian economy. These costings only relate to portable long service leave entitlements. Obviously, the cost of portable annual leave or personal/carer's leave would be much greater.

³⁰ ABCC Sham Contracting Inquiry Report, 2011, pp 52.

In the Productivity Commission's final report relating to its Inquiry into the Workplace Relations Framework, the Commission rejected the idea of a national portable long service leave scheme:

Overall, the Productivity Commission is not convinced that the benefits from portable LSL schemes would be sufficient to justify the costs and complications entailed. Submissions to this inquiry have not provided compelling evidence of major and widespread concerns about the present non-portability of most LSL arrangements or include widespread support for greater flexibility or the alternative design.³¹

Chapter 6 of the Industrial Relations Act 1996 (NSW)

In considering the appropriateness of the existing Victorian laws dealing with independent contractors and sham contracting, it is important that an approach like that in Chapter 6 of the *Industrial Relations Act 1996* (NSW) is not proposed. These provisions deem certain independent contractors in NSW to be employees for various industrial purposes. It would be a retrograde step to implement a similar approach in Victoria.

6. RECENT DECISIONS ON GIG WORKERS – EMPLOYEES V CONTRACTORS

It should not be assumed that gig workers are a new form of worker. Recent decisions concerning gig workers demonstrate that the common law still has relevance and is capable of scrutinising work arrangements and determining what type of worker an individual is.

Recent cases involving the application of the multi-factor test to gig workers indicate that they may be independent contractors or employees, depending upon the circumstances surrounding a particular worker.

Uber

In *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610, Deputy President Gostencnik of the FWC dismissed an Uber driver's unfair dismissal application on the basis that the driver was not an employee; one of a number of pre-conditions under the *Fair Work Act* to make a valid unfair dismissal application. The Commission applied the well-established common law tests and made findings that:³²

- The driver had control over the way in which he conducted the services he provided. Some control was exercised by Uber over its drivers (e.g. in respect of certain service fee increases for peak periods such as New Year's Eve), but these instances of control were not overwhelmingly strong factors;
- The driver was required to provide his own capital equipment, being the vehicle, a smart phone and a wireless data plan;

³¹ Productivity Commission Inquiry Report, *Workplace Relations Framework*, 30 November 2015, p.525.

³² [2017] FWC 6610 at [54]-[62].

- The driver covered his expenses in respect of vehicle registration and insurance;
- The driver was not required to wear a uniform or display Uber’s logo on his person or on the vehicle;
- The driver registered for the payment of GST and was not subject to PAYG tax;
- The service agreement entered into between the driver and Uber, while not determinative, limited Uber’s relationship to that of payment collection agent and technology services provider;
- The driver was not paid a wage but received a percentage of the fee charged for each trip he provided;
- The driver did not accrue paid leave; and
- Whether or not the driver was integrated into Uber’s business was a neutral consideration.

The Commission found that the totality of these factors weighed against the applicant driver being classed as an employee. In agreeing with Uber’s arguments that the driver was not an employee, the Commission stated:

[48] For there to exist an employment relationship, certain fundamental elements must be present. A contract of employment is, at its essence, a work-wages bargain, so that the “irreducible minimum of mutual obligation” necessary to create such a contract is an obligation on the one side to perform the work or services that may reasonably be demanded under the contract, and on the other side to pay for such work or services.

[67] It seems to me plainly to be the case that the relevant indicators of an employment relationship are absent in this case. The overwhelming weight of the relevant indicia point the other way. In my view and for the reasons given earlier, the Applicant was not an employee for the purposes of s.382 of the Act at the time of the ending of the relationship between the Applicant and the Respondent. He is therefore not a person protected from unfair dismissal. The application must be dismissed.

Both *Raseris* and a subsequent decision concerning another Uber driver, *Janaka Namal Pallage v Rasier Pacific Pty Ltd*³³ (*Janaka*), provide a helpful illustration of how the multi-factor test may be applied to gig arrangements. In neither case were the relevant indicia found to favour the existence of an employment relationship.³⁴ In both of these cases, the applicants were able to choose when to log off and on to the Partner App; they had control over the hours they wanted to work and were able to accept and refuse trip requests.³⁵ The absence of any explicit prohibition on working for

³³ *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579.

³⁴ *Ibid*, [53]; [2017] FWC 6610, [67].

³⁵ [2017] FWC 6610, [54]; [2018] FWC 2579, [36].

others was highlighted as evidence in support of the existence an independent contracting arrangement in *Janaka*.³⁶

The fact that the Uber drivers in *Janaka* and *Kaseris* were required to supply their own capital equipment suggested an independent contracting arrangement,³⁷ as did the fact that each driver was responsible for maintaining registration and motor vehicle insurance.³⁸ The additional point was raised in *Kaseris* that the Services Agreement provided that the parties agree that a driver was not an employee, a worker or a deemed worker for the purposes of workers' compensation insurance.³⁹ The applicants in both cases were also prohibited from wearing any kind of uniform bearing identifying marks of the platform provider.⁴⁰

Both applicants were required to obtain an Australian Business Number and register for GST.⁴¹ In *Kaseris*, it was clear that the income received by the Applicant was not treated by the parties as subject to PAYG tax.⁴² In *Janaka*, there was no evidence before the Commission that PAYG taxation payments had been deducted on behalf of the applicant.⁴³ These matters suggested an independent contracting arrangement in each case.

In both *Kaseris* and *Janaka*, the applicants' respective service agreements described the relationship as that of an independent contractor.⁴⁴ Neither applicant was provided with a periodic wage or salary with remuneration comprising a proportion of the fee paid by passengers of the transportation service.⁴⁵

Whilst in *Janaka*, the Commission mentioned a few additional factors which could be indicative of an employment relationship (including a right of termination by the platform provider where community standards are breached, the unskilled and repetitive nature of the work and an inability to delegate or subcontract), these were not sufficient to outweigh the factors pointing in the other direction.⁴⁶

³⁶ [2018] FWC 2579, [38].

³⁷ [2017] FWC 6610, [56]; [2018] FWC 2579, [40].

³⁸ *Ibid.*

³⁹ [2017] FWC 6610, [56].

⁴⁰ [2017] FWC 6610, [57]; [2018] FWC 2579, [46].

⁴¹ [2017] FWC 6610, [58]; [2018] FWC 2579, [47].

⁴² [2017] FWC 6610, [58].

⁴³ [2018] FWC 2579, [47].

⁴⁴ [2017] FWC 6610, [60]; [2018] FWC 2579, [5].

⁴⁵ [2017] FWC 6610, [61]; [2018] FWC 2579, [48].

⁴⁶ [2018] FWC 2579, [41], [43], [53].

Foodora

A further relevant decision is *Joshua Klooger v Foodora Australia Pty Ltd (Klooger)*.⁴⁷ In this case, Commissioner Cambridge of the FWC held that a Foodora bicycle courier was in fact an employee rather than an independent contractor.

A number of the work arrangements applicable to the Foodora rider in *Klooger* are similar to those that applied to the two Uber drivers referred to above. Each involved reliance on an App for engagement and interaction with the platform provider,⁴⁸ the relevant work did not require a high level of skill,⁴⁹ the written contracts signed by the workers in each case emphasised that the worker was an independent contractor⁵⁰ and none of the workers were required to make a significant capital investment in the equipment required to do their work.⁵¹ Nevertheless, Commissioner Cambridge found that, overall, the various factors relevant to the multi-factor test led to a conclusion that the applicant was an employee of Foodora.⁵²

A significant point of distinction between the characteristics of the work performed by the Uber drivers in *Kaseris* and *Janaka* and those relevant to the applicant in *Klooger* during his engagement as a delivery rider for Foodora related to the manner in which Foodora set the starting and finishing times for workers' shifts.⁵³ Although delivery riders had the option of accepting or not accepting a shift, the times available and the geographical locations of a shift were set by Foodora.⁵⁴ Engagements were organised on a weekly basis via the shifts App.⁵⁵ This was considered relevant in determining that Foodora had considerable control over the performance of work.⁵⁶ Under Foodora's 'batching system', workers needed to meet certain workload thresholds in order to achieve a high ranking.⁵⁷ A high ranking provided greater access to future shifts.⁵⁸

⁴⁷ [2018] FWC 6836.

⁴⁸ [2018] FWC 6836, [8].

⁴⁹ *Ibid*, [78].

⁵⁰ *Ibid*, [7].

⁵¹ *Ibid*, [78].

⁵² *Ibid*, [102].

⁵³ *Ibid*, [8].

⁵⁴ *Ibid*, [68].

⁵⁵ *Ibid*, [68]-[69].

⁵⁶ *Ibid*, [73].

⁵⁷ *Ibid*, [73] – [74].

⁵⁸ *Ibid*, [73].

The service contract in *Klooger* included a range of features which were typical of an employment contract, including clauses dealing with rostering and acceptance of jobs, attire to be worn during performance of services and the specific nature of the engagements to be undertaken.⁵⁹ Contractors were also referred to as ‘employees’ in parts of the documentation.⁶⁰

The conclusions reached in *Klooger*, *Kaseris* and *Janaka* demonstrate how the common law tests of employment are able to respond to the emergence of new systems of work, particularly where a significant determinative factor relates to the amount of control that the business has over the work and the worker.

The common law is best placed to deal with the distinction between an employee and an independent contractor due to the adaptability of the common law tests, and their ability to deal with a multitude of work and business arrangements. A prescriptive regulatory approach must be avoided.

7. WORK HEALTH AND SAFETY AND WORKERS’ COMPENSATION CONSIDERATIONS FOR ON-DEMAND LABOUR

WHS

Victorian businesses have clear primary obligations under Victorian work health and safety legislation to provide safe workplaces to workers, including those engaged other than as employees.

Subsection 21(1) of the *Occupational Health and Safety Act 2004* (Vic) establishes the overarching duties of employers to employees

- (1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

Penalty: 1800 penalty units for a natural person;
 9000 penalty units for a body corporate.

Section 21(2) provides more detail about the general duties.

Section 21(3) of the Act specifically identifies that a reference to an ‘employee’ includes reference to contractors and their employees.

- (3) For the purposes of sub-sections (1) and (2)—
 - (a) a reference to an employee includes a reference to an independent contractor engaged by an employer and any employees of the independent contractor; and
 - (b) the duties of an employer under those sub-sections extend to an independent contractor

⁵⁹ *Ibid*, [72].

⁶⁰ *Ibid*.

engaged by the employer, and any employees of the independent contractor, in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control.

These provisions clearly identify the WHS obligations of an employer to any worker that they engage, in whatever way they engage that worker. It is not necessary to establish an employment relationship for these duties to apply.

The Victorian Inquiry into Labour Hire and Insecure Work recommended (recommendation 5) that the Model WHS Laws approach to regulating labour hire relationships be adopted in Victoria. If the current Inquiry identifies any shortcomings in the Victorian WHS Act, consideration should be given to adopting the Model WHS Laws.

Workers' compensation

WorkSafe Victoria has released easy to use Guidelines for businesses that inform employers when and how they should treat contractors for the purposes of workers' compensation. These Guidelines applied from 1 January 2018.

The Guidelines for assessing whether an individual is a contractor or worker for the purposes of workers' compensation are relevant and applicable when determining the obligations of a business where work is allocated to on-demand labour via an online platform.



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