Ai GROUP SUBMISSION

Australian Senate Select Committee on Job Security

Select Committee on Job Security

9 April 2021

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1. EXECUTIVE SUMMARY

Ai Group welcomes the opportunity to provide a submission to the Select Committee on Job Security.

Flexibility in the labour market is essential to Australia's economy, and to the recovery from the pandemic induced recession. Flexibility is important for businesses and for workers.

Different labour arrangements are essential because of the diversity of business models, industry demands and the wide variety of products and services provided to the local and international community.

Despite the view of some commentators, the workforce is not subject to 'casualisation' or experience a growth in independent contractors. The proportion of the total workforce engaged as casual employees has remained around the same for over two decades. Also, the proportion of the total workforce engaged as independent contractors is decreasing.

As with all previous waves of new technology through history, digital transformation should not be seen as inherently negative to the workforce, the workplace or society more broadly. Digital technologies will enable businesses to innovate, grow, improve their productivity and remain competitive in an increasingly global marketplace. Australia has a long and positive history of business and industry successfully adopting and adapting new technologies.

Platform work 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.

Australia's workplace laws must recognise and accommodate the need for Australian businesses to engage employees and contractors in different ways. The vast majority of employment and contracting 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.

Overly prescriptive laws would stifle innovation to the detriment of businesses, workers and the whole community.

2. RELEVANT RECENT INQUIRIES

There have been several inquiries relating to job security and on-demand work in recent years, to which Ai Group has made detailed submissions, including:

- A 10 November 2020, submission to the NSW Select Committee Inquiry into the *Impact of Technological and Other Change on the Future of Work and Workers* (**NSW Inquiry**).

- Answers to Questions on Notice arising from Ai Group's appearance at a public hearing for the NSW Inquiry on 16 November 2020.

- A February 2019 submission to the *Inquiry into the Victorian On-demand Workforce* (**Victorian Inquiry**). The Final Report for the Victorian Inquiry was released in July 2020.

- An October 2020 submission to the Victorian Government setting out Ai Group's position on each of the recommendations of the Victorian Inquiry. (included as **Attachment A**).

- A February 2018 submission the Senate Select Committee Inquiry on the Future of Work and Workers.

- A July 2017 submission to an ACT Parliamentary Inquiry into Insecure Employment.

- A November 2015 initial submission and a March 2016 supplementary submission to the Victorian Inquiry into the Labour Hire Industry and Insecure Work (**Forsyth inquiry**). In August 2016, the Forsyth Inquiry released its Final Report and Recommendations.

3. TECHNOLOGICAL CHANGE AND THE IMPORTANCE OF LABOUR MARKET FLEXIBILITY

Digital transformation

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

The digital economy is forming completely new jobs, new markets, new types of businesses and new business models.[1] The pace of change in digital technologies continues to increase and become more embedded in the economy. Innovation with digital technologies needs to be encouraged, not stifled through inappropriate regulation.

As with all previous waves of new technology through history, digital transformation should not be seen as inherently negative to the workforce, the workplace or society more broadly. If adopted successfully and combined with successful organisational change and change management practices, digital technologies will enable businesses to innovate, grow, expand their workforces, improve their productivity and remain competitive in an increasingly global marketplace. There is a long and positive history of businesses and industries successfully adopting and adapting new technologies.

[1] 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

Automation

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.[2]

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.[3] Automation cannot currently threaten human expertise or complex interactions between people.

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.[4]

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.[5]

Labour market flexibility and job security

A common catch-cry of the union movement is 'job security', and their claims in this area typically include:

- Restricting casual employment;
- Restricting the use of independent contractors;
- Restricting labour hire; and
- Restricting outsourcing.

Of course, these union claims inhibit the ability of businesses to be responsive and adaptable to market changes. In the real world the only true job security for workers comes from ensuring that businesses remain profitable and competitive.

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[2] 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>

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

[4] Beitz, op. cit.

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

Companies need flexibility and so do employees. A lot of people prefer to work as contractors, casuals and on-hire workers because it gives them more flexibility to balance work, family, study and leisure. Flexibility is vital to increase workplace participation and Australia's future success depends upon the maintenance of flexible workplaces.

4. THE LEVEL OF CASUAL EMPLOYMENT IN AUSTRALIA IS NOT INCREASING

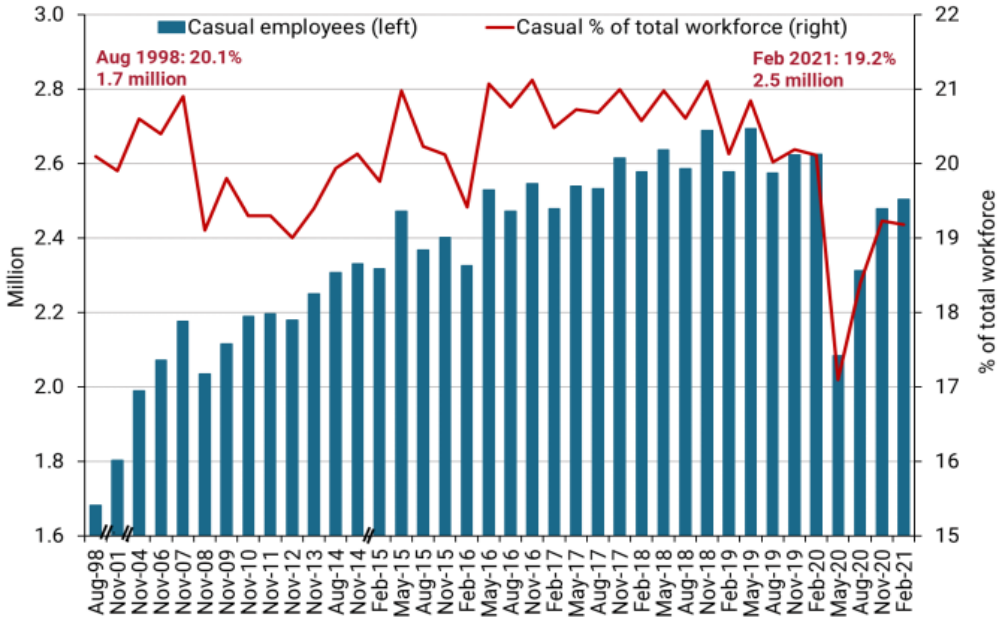
The Australian workforce is not being increasingly 'casualised'. This common assertion of unions is simply incorrect and not supported by relevant labour force data.

The ABS does not formally identify 'casual employees' in the national labour market data. Instead, the ABS employment status category of 'employees without paid leave entitlements' is commonly used as a proxy for 'casual workers'.

As can be seen in Chart 1 below, apart from the major drop in the last 12 months, for the past 23 years the level of casual employment has been around 20% of the total workforce, or 25% of employees in the workforce (if business owners and contractors are excluded from the total) since 1998. Casual employment remained 5% below pre-pandemic levels in Feb 2021 but had recovered 75% of the jobs lost in Q2 of 2020 (casual employment fell by 21% in the three months to May of 2020). 2,503,400 people (19.2% of the total workforce and 23.1% of all employees) were casual employees in February 2021.

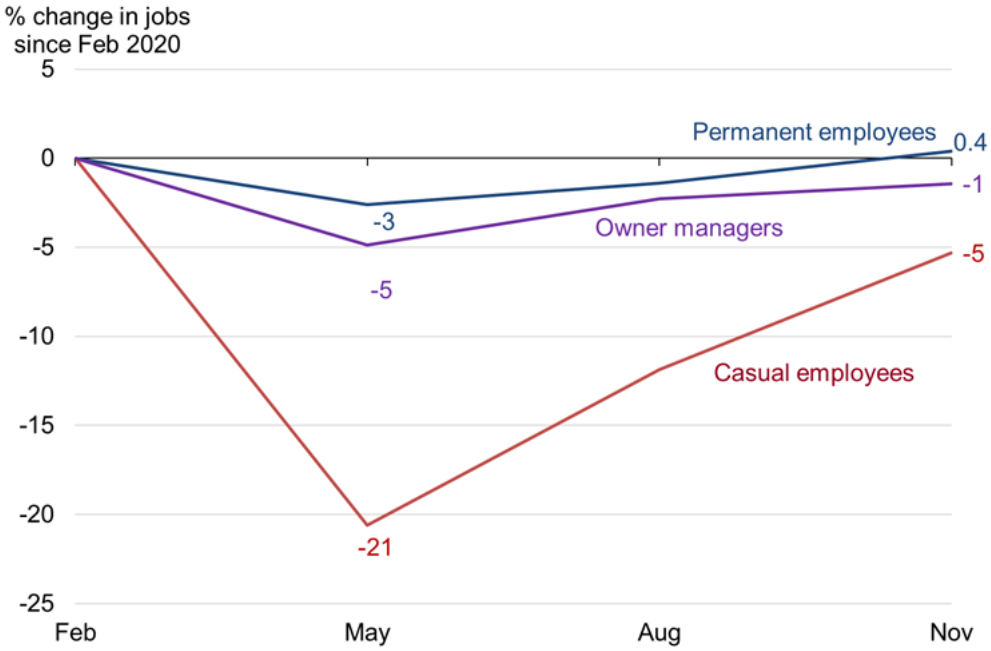
Casual employment fell by a larger margin than any other employment category in Q2 of 2020, but it also recovered relatively quickly after Q3. This large rapid movement underscores the flexible nature of this form of work but also reflects the industries in which it is most prevalent – retail and hospitality – which were severely affected by COVID-19 activity restrictions during 2020.

Chart 1: Casual employees*, number and share of the total workforce, 1998 to 2021



* Employees with no leave entitlements. Source: ABS, *Detailed Labour Force Australia*, February 2021.

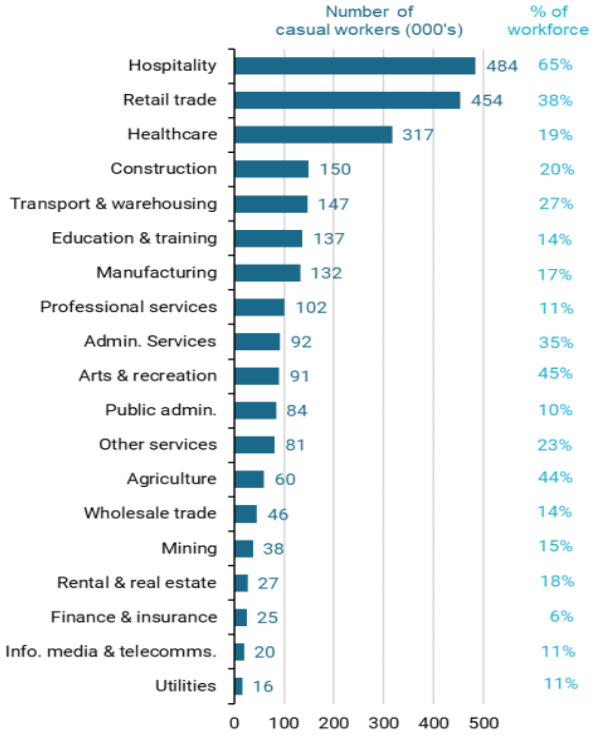
Chart 2: Changes in employment for casuals, permanent employees and owner-managers in 2020



ABS 6291.0, *Labour Force Australia, Detailed*, November 2020, Table 13
* 'casuals' are identified in the ABS labour force survey as 'employees without paid leave entitlements'.

As can be seen from Chart 3 below, there are significant differences in the level of casual employment in different industries. The hospitality and retail industries have the highest level of casual employment.

Chart 3: Number and share of casual employees, Feb 2021



Source: ABS, *Detailed Labour Force Australia*, February 2021.

As set out in the *Characteristics and Use of Casual Employment in Australia* report, published in 2018 by the Commonwealth Parliamentary Library, over 80% of casuals worked for Small and Medium Enterprises (SMEs):

- Over 51.4% of casuals work for small businesses with less than 20 employees;
- Over 30.7% of casuals work for businesses with 20-99 employees; and
- Less than 17.9% of casuals work for businesses with 100 or more employees.

There are a very large number of casual employees in every State as highlighted by the following table which reproduces the latest ABS statistics, released in December 2020:

State or Territory	Number of Casual Employees in the State / Territory as at August 2020[a]
NSW	716,200
VIC	505,600
QLD	486,000
SA	177,700
WA	277,400
Tas	56,200
NT	22,800
ACT	39,700
Australia	2,281,600

[a] ABS 6333.0 *Characteristics of Employment*, August 2020, Table 1c.3.

Businesses and workers have a shared interest in ensuring that casual employment arrangements remain widely available. Casual employment enables businesses to deal with peaks and troughs in demand for their products and services, and to employ people in circumstances where there is uncertainty about how long the work will be available.

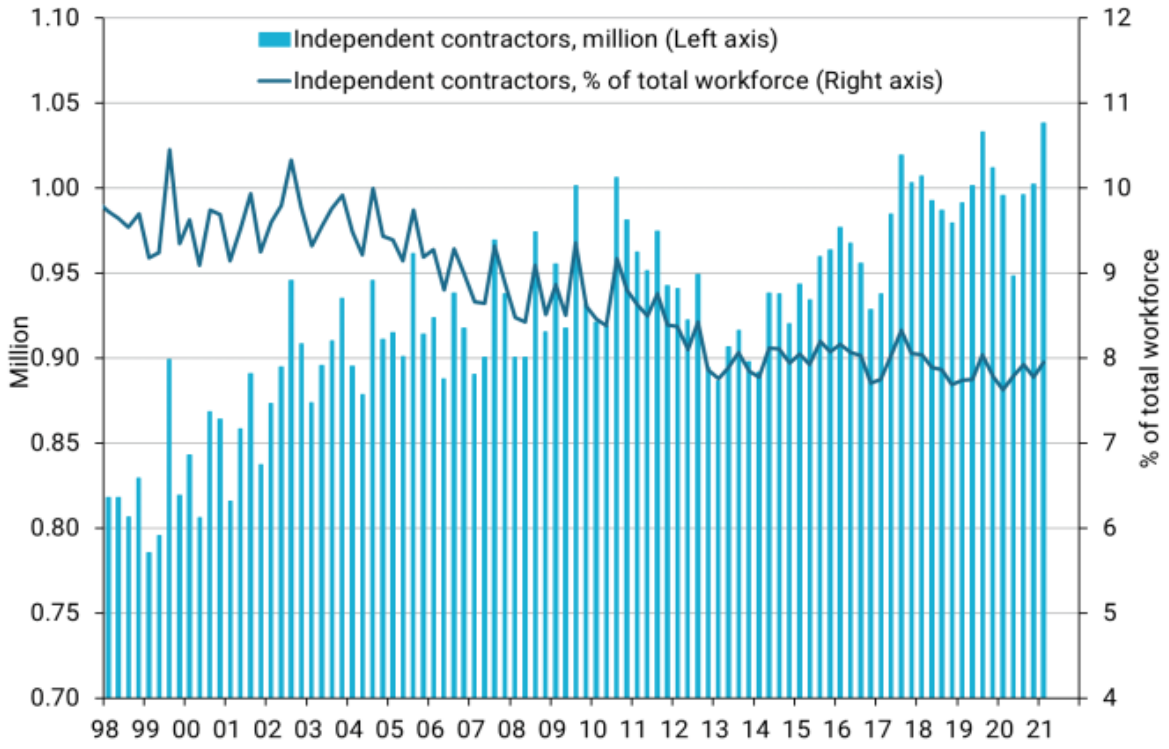
Casual employment is preferred by many employees because it provides them with flexibility that they need to balance their work, family, study and other commitments.

Restricting casual employment would destroy jobs, including for young people and others who are disadvantaged in the labour market.

5. THE LEVEL OF INDEPENDENT CONTRACTING IN AUSTRALIA IS NOT INCREASING

Independent contracting and small business self-employment have declined as a share of the total workforce since the early 2000s. Independent contractors and self-employed small business owners (accounted for just over 1 million workers in Feb 2021.

Chart 4: Independent contractors and owner managers of unincorporated enterprises without employees, number and share of the total workforce, 1998 to 2021



Restricting self-employment would destroy jobs. Self-employment is a popular 'aspirational' career choice among many Australians, rather than an insecure or sub-optimal form of work.

6. THE PROPORTION OF THE WORKFORCE WHO ARE EARNING INCOME FROM PLATFORM WORK

The National Survey commissioned by the Victorian Inquiry (**National Survey**) reported that 7.1% of *survey respondents* were currently working or seeking work via a digital platform. The Victorian Inquiry Report concluded that results of the National Survey "*indicated that more people are accessing online work than labour market data or earlier studies suggest*." Some commentators have erroneously used the above 7.1% figure to claim that a similar proportion of the workforce are engaged in platform work. Such a claim is not correct.

The National Survey derived its results from a survey of respondents self-selecting to participate in a survey branded as a university research project. The National Survey is a useful body of research in relation to the nature and features of digital platform work; however because of its nature as a

survey inviting responses from a self-selecting sample, it cannot be validly relied upon as a data source for the purpose of demonstrating the prevalence of digital platform work as a proportion of the broader Australian workforce. Moreover, the researchers who conducted the National Survey acknowledged the overrepresentation in the survey sample of persons holding university qualifications and the underrepresentation of persons with no post-school qualifications. The sample also overrepresented respondents living in major cities and underrepresented respondents living in more remote areas.

As can be seen from chart 4 above, around 8% of the workforce are independent contractors. The industries which have the highest percentage of independent contractors are Construction (24%), Administrative and support services (18%) and Professional, scientific and technical services (15%).[6] These statistics highlight that the 7.1% figure in the National Survey cannot be validly used as an estimate of the proportion of the workforce who are carrying out platform work. If 8% of the workers in the workforce are independent contractors, it is clearly wrong to suggest that the vast majority of these are platform workers.

The Grattan 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[7] based on an assessment of figures published by a selection of digital platform information, bank transaction data, and other research reports. The 0.5% estimate of the Grattan institute is credible.

7. THE BENEFITS OF PLATFORM WORK

The Victorian Inquiry Final Report recognised the important ongoing role that platform businesses are playing in the labour market and the community:

> *Platforms have greatly enhanced our choices and created flexible work, proving to be highly responsive and agile in enabling people to access services as, and when, we need.*
>
> *Flexibility and autonomy are highly desirable elements of a modern labour market. And platforms are a new way of facilitating this work, providing access to the labour market for workers who may encounter difficulties getting work.*[1]

The Final Report also recognised the critical role that platform business have played, and are continuing to play, during the COVID-19 crisis:

> *Platforms have played an important role in helping us manage the response to COVID-19. They have supported business to pivot to online delivery and enabled the self-isolating community to source what we need via our devices. Food delivery, rideshare, the buying and selling of goods, along with social interaction and work have all been driven online.*

[6] ABS *characteristics of employment, Australia*; *August 2020*

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

Rideshare and food delivery platforms were among the first businesses to 'lean in' and cover lost income for workers needing to self-isolate due to COVID-19. These workers are not entitled to any sick or carers' leave – unlike regularised workers – so this measure seeks to overcome the incentive for them to 'soldier on' when sick so they can pay the rent. A global pandemic reinforces that these benefits are not just entitlements that benefit individuals but the community at large.[2]

In respect of direct economic benefit, a recent AlphaBeta report identified that food delivery apps from restaurants bring $2.6 billion of trade to the Australian restaurant industry, of which 70% is incremental.

Other economic benefits associated with platform businesses include:

- The introduction of new services and products to the market;
- A greater range of choices for consumers;
- Increased accessibility to products and services to people who may have had limited options or access (e.g. food delivery for consumers with limited mobility);
- Consumers save time in accessing products and services;
- Increased workforce participation by people who are unable to work regular or full-time hours, or work prescribed minimum engagement periods, because of marginal attachment to the workforce, or because of family or study commitments;
- The ability for workers to earn supplementary income;
- Faster access to income for workers than may not be offered through full-time, part-time or casual employment; and
- New jobs that do not displace existing or traditional jobs.

8. PLATFORM WORKERS' INCOME

The report, Digital Platform Work in Australia – Preliminary Findings from the National Survey, (published on 18 June 2019) surveyed remuneration arrangements for people performing work through digital platforms. Multiple findings from the National Survey supported the finding that platforms are commonly used by workers to generate additional or supplemental income to that earned through other activities (Victorian Inquiry Report, page 16).

The National Survey reported that:

- Roughly 80% of participants indicated that the income earned from working through platforms was non-essential.

- Only 2.6% of respondents reported working more than 35 hours per week on digital platforms.
- Only 2.7% of respondents derived 100% of their total annual income from platform work.
- Four in five current platform workers (80.7%), reported that digital platform work made up less than half of their total annual income.
- Engagement with digital platforms varied between a few times per week (27.5% of current platform workers) and less than once per month (28.3%).
- Only a very small percentage of people in Australia were spending a large number of hours undertaking digital platform work. Almost half (47.2%) of current platform workers report spending less than 5 hours per week working or offering services through all digital platforms with which they engage, whereas only 5.4% of current platform workers reported spending 26+ hours per week.
- Only 19.2% of current platform workers derived half or more of their income from platform work.

In its submission to the Senate Select Committee on the Future of Work and Workers, Airtasker stated that on average workers complete less than five tasks a month, with the average task price at January 2018 being $140. The Victorian Inquiry Report noted that this suggested that the average Airtasker worker is not using the platform for full-time work, but mostly to supplement other income (Victorian On-Demand Report, p. 63).

A recent AlphaBeta report, (p.6) also found that, based on an assessment of average hours online, most Uber drivers drive to earn a supplementary income, with nearly half of all drivers spending less than 10 hours per week on the app.

It is evident that platform work provides new avenues for many workers to supplement income from other sources, rather than to serve as the exclusive means on which workers' livelihoods depend.

9. WORKPLACE LAWS

Australia's workplace relations laws provide extensive protections for Australian workers, including those carrying out platform work.

Recent Fair Work Ombudsman (**FWO**) enforcement actions and Fair Work Commission (**FWC**) proceedings, as discussed below, demonstrate that the current regulatory framework accommodate newer ways of working.

Casual employment provisions in the Fair Work Act and awards

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* made important and necessary changes to casual employment laws and arrangements in Australia. The Act amended the National Employment Standards (**NES**) in the *Fair Work Act 2009* (**FW Act**) to:

- Define a 'casual employee' for the purposes of the entitlements in the NES;
- Protect employers from unfair 'double-dipping' claims by casual employees and ex-employees who claim they are entitled to annual leave and other entitlements of permanent employment, despite being paid a casual loading in lieu of these entitlements;
- Give eligible casual employees the right to convert to permanent employment in certain circumstances; and
- Require employers to give each casual employee a copy of a Casual Employment Information Statement.

The amendments require the FWC, within a six-month period from commencement, to review the casual employment terms in all awards to ensure that they operate consistently or effectively with the amendments.

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.

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* (**IC Act**). 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 Court's decision in *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] FWAFB 8307, a Full Bench of the FWC summarised the general law approach to distinguishing between employees and contractors as follows:[8]

> ***[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*

[8] [2011] FWAFB 8307 at [30].

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 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 IC Act or the FW Act.

Other relevant decisions demonstrating that the Courts and Tribunals are accustomed to dealing with the distinction between employees and independent contractors, including in the context of workers engaged by platform businesses, include:

- In *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 (***Kaseris***) Deputy President Gostencnik of the FWC dismissed an Uber driver's unfair dismissal application on the basis that the driver was not an employee;
- In *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (***Janaka***), Commissioner Wilson of the FWC decided that an Uber driver was not an employee;
- In *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 (***Klooger***), Commissioner Cambridge of the FWC held that a Foodora bicycle courier was an employee rather than an independent contractor; and
- In *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 (***Gupta***), a Full Bench of the FWC upheld a decision of Commission Hampton that an Uber Eats delivery driver was not an employee.[5]

The conclusions reached by the FWC in *Kaseris*, *Janaka, Klooger* and *Gupta* demonstrate how the common law tests of employment are able to respond to the emergence of new systems of work, such as platform business models.

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.

Sham contracting

The current sham contracting provisions in the FW Act are fair and balanced in protecting employees. The sham contracting provisions are included in the general protections in Part 3-1 of the Act. The 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 $66,600) for breaches of the sham contracting provisions. The sham contracting laws are appropriate and effective, and do not need to be amended.

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

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

In 2017, the FW Act was amended to include a new 'serious contravention' penalty, equivalent to 10 times the previous maximum penalty. The FWO was also given the power to require persons to participate in interviews.

Chapter 6 of the *Industrial Relations Act 1996 (NSW)*

In considering the appropriateness of the existing 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 nationally or in other States.

Labour hire licensing schemes

State labour hire licensing schemes exist in Victoria, Queensland, South Australia, and will soon commence in the Australian Capital Territory. These licensing schemes prohibit labour hire providers from supplying workers to work for another person unless the labour hire provider has a valid licence. In order to obtain a licence, the labour hire provider must satisfy a 'fit and proper' test in addition to other criteria. Users of labour hire must only use licensed labour hire providers and it is an offence not to do so.

The State labour hire licencing schemes in Queensland and Victoria are causing major problems for businesses that provide labour to other businesses, or use labour provided by other businesses. The problems include:

- Extremely broad definitions of a 'provider of labour hire services', which capture countless contracting and professional service arrangements that extend beyond any reasonable conception of 'labour hire';
- An extreme regulatory burden on businesses that need to obtain and maintain a licence;
- Commercial confidentiality and privacy concerns associated with the very large amount of information that needs to be provided to the licensing authorities;
- The high cost of obtaining licences, often for numerous different entities of the same business; and
- Extremely high maximum penalties for non-compliance, including imprisonment for directors and managers.

There would be benefit in a 'light-touch' national labour hire licensing scheme being introduced, provided that it overrides the State and Territory labour hire licensing schemes for those businesses covered by the national scheme.

Most major labour hire companies are members of Ai Group, as well as a very large number of businesses that use labour hire. Ai Group has represented the labour hire industry in respect of workplace relations and other matters for many decades.

Ai Group is represented on the Attorney-General's Department's Expert Advisory Group for the consultation process that is underway concerning the development of a National Labour Hire Registration Scheme.

10. ACCIDENT COMPENSATION SCHEMES

It is appropriate that the limits of liability under no-fault workers' compensation be generally delineated using the employee/contractor dichotomy. The State Insurance Regulatory Authority provides an on-line tool for assessing whether an individual is a contractor or employee for the purposes of workers' compensation and this is relevant when determining the obligations of a business where work is allocated through an online platform.

Disputes regarding whether an injury has occurred in the course of employment will likely arise more often in relation to platform workers. By its very nature, platform work is highly flexible. It is possible for workers to be inside their own home, performing their normal household tasks, but with an active app (or even multiple apps) waiting for work to be offered.

There are a number of other characteristics of platform work that would create significant problems for traditional workers' compensation schemes. These complexities include establishing the equivalent of a payroll base for premium calculation when no wages are paid; workers being simultaneously covered by policies paid for by two or more applications; contracting relationships reducing the ability of premium payers to control the risks they are required to pay to cover for; and limited return to work options.

As discussed on pages 3, 10 and 11 of the attached submission to the Victorian Government, Ai Group is pleased that the Victorian Inquiry supported Ai Group's position that measures designed to improve workers' safety and welfare (including accident insurance) must not be disincentivised because of the potential impact on work status.

To reduce any disincentives to platform businesses improving the working arrangements of their independent contractors, Ai Group proposed to the Victorian Inquiry that the following additional wording be inserted into section 12 of the FW Act:

> ***Independent contractor*** *is not confined to an individual and has the common law meaning, except that the provision of the following benefits by the person engaging the contractor shall not be taken into account in determining whether there is a contract for services:*
>
> a. *Safety systems and equipment;*
>
> b. *Training;*
>
> c. *Insurance;*
>
> d. *Standard prices or payment terms;*
>
> e. *Consultation processes*.

We urge the current Senate Inquiry to make a similar recommendation.

11. PORTABLE LEAVE SCHEMES

Some commentators have called for portable leave schemes to be established for platform workers. Ai Group is opposed to this idea.

Portable leave schemes are typically funded by a hefty levy on businesses, which would operate as a tax on jobs and an inhibitor to 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. Ai Group estimated that the implementation of a national portable long service leave scheme would cost Australian businesses over $16 billion per annum. This is only the cost of portable long service leave entitlements. Obviously, the cost of portable annual leave and personal/carer's leave would be much greater.

An estimate of the size of the levy on workers' earnings that would be required to fund a portable leave scheme covering annual leave, personal/carer's leave and long service leave can be obtained by using the calculations of the Australian Industrial Relations Commission (now the Fair Work Commission) when it decided to increase the casual loading from 20% to 25% in 2000. Annual leave was valued at around 10% of ordinary time earnings and personal/carer's leave at around 3%. In addition, levies of up to 3% apply to existing portable long service leave schemes. Therefore, it can be seen that a levy of over 15% would most likely be required for a portable leave scheme covering annual leave, personal/carer's leave and long service leave.

Such a crippling levy would be a major barrier to the continued growth of the gig/platform economy. It would most likely lead to many business closures and a significant decline in platform work.

12. TAXATION

Two sets of taxation considerations related to the range of work arrangements the Committee is examining are its impacts on the broader tax base and the particular issues related to the payroll taxes levied by Australia's states and territories.

The more flexible arrangements being considered by the Committee have been associated with a rise in the workforce participation rate which, in February 2021 was at a near-record level of 66.1 per cent.[9] A quarter of a century earlier the participation rate was 63.7 per cent. The most decisive change has been the increase in the rate of female participation in paid work from 53.8 per cent in 1996 to 61.9 per cent in February 2021.

To the extent that the increase in participation has been facilitated by the availability of the range of work arrangements being considered by the Committee, these work arrangements, by adding both to labour supply and its demand, have allowed Australia's economy to grow faster than would have been the case if work was only able to be performed under more permanent and less flexible work arrangements.

By extension Australia's income and the consumption tax bases are also larger than they would have been if the more flexible work arrangements were not available. As a consequence, Australians have enjoyed some combination of lower tax rates and more taxation revenue than otherwise.

The other taxation consideration relates to payroll taxes. It is sometimes claimed that payroll tax considerations may be a factor contributing to extent of the forms of work being considered by the Committee and in particular, attention has been focused on the way payroll taxes apply to people working as contractors rather than as employees.

Before looking at this issue, it is worth recalling that, as shown in Chart 4, the proportion of independent contractors as a share of the total workforce has fallen over recent years. This strongly suggests that there has not been any erosion of Australia's payroll tax bases from this source in recent years.

Around the country, the states and territories place payroll tax liabilities on the wages paid to the employees of a business. In addition, where labour services are contracted for under *employee-like* relationships (as defined in the relevant legislation), the remuneration associated with these services is also included under special contractor provisions when determining a business's payroll tax liability.

Whether payroll tax is actually payable in respect of such remuneration will depend on whether the total amount of assessable remuneration of the business (i.e. employer remuneration and contractor remuneration) is above or below the relevant payroll tax threshold (subject to grouping provisions). These arrangements apply to businesses providing digital platform services in the same way as they apply to any other business.

[9] The participation rate data in this paragraph are drawn from ABS, 6202.0, *Labour Force Australia*, March 2021.

In the absence of compensating measures, contractor provisions remove the availability of the payroll tax threshold in respect of the labour services captured by those provisions. Such an outcome would be unfair and inequitable to the extent that these labour services would otherwise have been excluded from payroll tax by virtue of the payroll tax thresholds.

To minimise such outcomes, contractor provisions generally include a range of exemptions aimed at excluding from payroll tax remuneration amounts that, but for the contractor provisions, would not attract payroll tax liabilities by virtue of the payroll tax threshold. To the extent that this purpose is achieved, the exemptions act to ensure that payroll tax arrangements apply more consistently.

This situation complicates the assessment of the fairness or equity of the contractor provisions in the Australia's payroll tax arrangements.

One dimension of the fairness or equity of payroll tax arrangements is the role played by the payroll tax threshold (and by extension the exemptions to the contractor provisions) in providing compliance cost relief to smaller businesses. To the extent that smaller businesses bear proportionally higher compliance costs (relative to their capacity to pay) than larger businesses, excluding them from payroll tax liabilities and compliance costs can be argued to improve the fairness or equity of Australia's overall taxation arrangements. While it may be a very rough way to achieve this purpose, it is a factor relevant to the assessment of the working of the contractor provisions.

Ai Group is keenly interested in reforms to taxation arrangements. One approach would be to remove payroll tax completely. This would of course also remove all discriminatory features of the tax and would also remove the deadweight losses it imposes on the economy. The complicating consideration is whether other taxes would need to rise to make up for the loss of payroll tax and/or whether government spending could be reduced to make up for the lower level of revenue collected. The fairness, equity and efficiency implications of the alternative taxes or of the lower spending would need to be assessed in light of concrete proposals.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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ATTACHMENT A

Ai GROUP SUBMISSION

Victorian Government Consultation

Recommendations of the Inquiry into the Victorian On-Demand Workforce

October 2020

INTRODUCTION

The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a submission to the Victorian Government's Consultation on the 20 Recommendations of the Inquiry into the Victorian On-Demand Workforce (**Inquiry**).

The Final Report on the Inquiry recognises the important ongoing role that platform businesses are playing in the labour market and the community:

> Platforms have greatly enhanced our choices and created flexible work, proving to be highly responsive and agile in enabling people to access services as, and when, we need.
>
> Flexibility and autonomy are highly desirable elements of a modern labour market. And platforms are a new way of facilitating this work, providing access to the labour market for workers who may encounter difficulties getting work.[1]

The Final Report also recognises the critical role that platform business have played, and are continuing to play, during the COVID-19 crisis:

> Platforms have played an important role in helping us manage the response to COVID-19. They have supported business to pivot to online delivery and enabled the self-isolating community to source what we need via our devices. Food delivery, rideshare, the buying and selling of goods, along with social interaction and work have all been driven online.
>
> Rideshare and food delivery platforms were among the first businesses to 'lean in' and cover lost income for workers needing to self-isolate due to COVID-19. These workers are not entitled to any sick or carers' leave – unlike regularised workers – so this measure seeks to overcome the incentive for them to 'soldier on' when sick so they can pay the rent. A global pandemic reinforces that these benefits are not just entitlements that benefit individuals but the community at large.[2]

In summary, Ai Group's views on the Inquiry's key recommendations are as follows:

- Consistent with a central recommendation in the Final Report, the reform process needs to be led by the Commonwealth, in collaboration with the States and in consultation with stakeholders. It would not be in anyone's interests for legislative or other changes to be introduced in Victoria when all the major platform businesses operate nationally and when Australia has a national workplace relations system.

- The Victorian Government should request that the Federal Government commence a consultation process, in collaboration with State Governments, platform businesses, industry groups and other stakeholders, to work through what reforms would be worthwhile.

- Ai Group supports the retention of the common law approach to defining an independent contractor. The common law is far better equipped to assess the substance of particular relationships than any statutory definition could. Any 'one size fits all' definition 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.

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[1] Final Report, p.2.

[2] Final Report, p.1.

- It would not be possible, or desirable to align work status across workplace laws. 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* (Cth) (**IC Act**) or the *Fair Work Act 2009* (Cth) (**FW Act**).

- 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. These provisions clearly identify the WHS obligations of an employer to any worker they engage, in whatever way they engage that worker.

- It would be very inappropriate for the 'entrepreneurial worker' approach to defining an independent contractor to be adopted in legislation when three judges of the Federal Court (Allsop CJ, Jessup and White JJ) have rejected the approach.[3] Also, the approach is inconsistent with current High Court authority.[4] The Inquiry's recommended change would not be limited to platform businesses and their workers. If implemented, the change would have adverse implications for plumbers, electricians, truck drivers, graphic designers and countless other independent contractors who have no desire to be employees.

- There is no need to disturb the existing common law tests to give more emphasis to the relative bargaining positions of the parties. This issue is already addressed in various factors that Courts and Tribunals are required to take into account.

- Ai Group is pleased that the Inquiry has supported our position that measures designed to improve workers' safety and welfare must not be disincentivised because of the potential impact on work status.

- The Fair Work Ombudsman (**FWO**) is a clear primary source of advice and support for workers to help them understand their work status, and to address any disputes about work status. The creation of an additional body would lead to confusion and uncertainty.

- The FWO already provides suitable avenues for workers to resolve their work status. This can be seen in the investigations that the FWO carried out into Uber and Foodora. After its investigations, the FWO concluded that:

    - Uber drivers are not employees; and

    - Foodora riders were employees. (The FWO then initiated Court proceedings to recover entitlements and pursue penalties).

- The major platform businesses have devoted, and continue to devote, a great deal of resources to ensuring that their work arrangements are lawful.

Ai Group's position on each of the 20 recommendations is outlined below.

[3] *Tattsbet Ltd v Morrow* [2015] 233 FCR 46.

[4] *Hollis v Vabu* (2001) 207 CLR 21.

RECOMMENDATION 1

The Inquiry recommends that the Commonwealth Government, in collaboration with state governments and other key stakeholders, lead the delivery of the recommendations in this report regarding the national workplace system.

Ai Group strongly supports this recommendation.

It would not be in anyone's interests for legislative or other changes to be introduced in Victoria when all the major platform businesses operate nationally and when Australia has a national workplace relations system.

Consistent with the Inquiry's recommended approach, the Victorian Government should request that the Federal Government commence a consultation process, in collaboration with State Governments, industry groups and other stakeholders, to work through what reforms would be worthwhile.

RECOMMENDATION 2

The Inquiry recommends that, if the Commonwealth does not act, Victoria, in consultation and collaboration with other states, should pursue administrative and legislative options to improve choice, fairness and certainty for platform workers that:

- *are constitutionally available;*
- *align with its broader priorities;*
- *are appropriate in the current regulatory landscape; and*
- *meet the needs of the current and future workplace.*

Ai Group opposes this recommendation.

It would not be in anyone's interests for legislative or other changes to be introduced in Victoria when all the major platform businesses operate nationally and when Australia has a national workplace relations system. Any reforms need to be developed and implemented in collaboration with the Commonwealth and the other States.

RECOMMENDATION 3

The Inquiry recommends governments should, in implementing change, consult and collaborate with stakeholders; including platforms, employees, industry groups and unions.

Ai Group supports this recommendation.

It is essential that any changes are developed and implemented through consultation and collaboration with platform businesses, industry groups and other stakeholders.

RECOMMENDATION 4

The Inquiry recommends governments cost the changes and consider those costs alongside the transferred costs of the current systemic uncertainty around work status – the impacts on workers, businesses, the economy and community more broadly.

Ai Group supports the need for appropriate costing of any legislative or other changes that are contemplated, before such changes are implemented.

The costing needs to take into account:

- The substantial economic benefits to the community that are being derived from platform businesses;
- The vital ongoing role that platform businesses are playing in creating jobs;
- The important role that platform businesses are playing in workforce participation through offering flexible work opportunities to many workers who would otherwise be unable to readily participate in the labour market (e.g. students, semi-retired people);
- The critical role that platform businesses have played, and are continuing to play, during the COVID-19 crisis;
- The costs to workers, businesses and the broader community if any new barriers are imposed on the expansion of platform businesses; and
- The economic benefits of labour market flexibility and the major economic costs that would result from a reduction in such flexibility.

RECOMMENDATION 5

The Inquiry recommends appropriate government funded surveys and evidence-based research to ensure policy makers are aware of critical developments in platform work.

Ai Group supports this recommendation. It is extremely important that further research is carried out to better understand the nature, characteristics and importance of platform work, and relevant trends.

RECOMMENDATION 6(a)

The Inquiry recommends that the Fair Work Act 2009 be amended to:

(a) codify work status on the face of relevant legislation (rather than relying on indistinct common law tests);

Ai Group opposes this recommendation.

Ai Group supports the retention of the common law approach to defining an independent contractor. The common law is far better equipped to assess the substance of particular relationships than any statutory definition could. Any 'one size fits all' definition 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.

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

Courts and tribunals are accustomed to dealing with the distinction between employees and independent contractors, including in the context of workers engaged by platform businesses. For example:

- In *Hollis v Vabu* (2001) 207 CLR 21, the High Court of Australia determined that a bicycle courier was an employee rather than an independent contractor;

- In *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 (***Kaseris***) Deputy President Gostencnik of the Fair Work Commission (**FWC**) dismissed an Uber driver's unfair dismissal application on the basis that the driver was not an employee;

- In *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (***Janaka***), Commissioner Wilson of the FWC decided that an Uber driver was not an employee;

- In *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 (***Klooger***), Commissioner Cambridge of the FWC held that a Foodora bicycle courier was an employee rather than an independent contractor; and

- In *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 (***Gupta***), a Full Bench of the FWC upheld a decision of Commission Hampton that an Uber Eats delivery driver was not an employee.[5]

The conclusions reached by the FWC in *Kaseris*, *Janaka, Klooger* and *Gupta* demonstrate how the common law tests of employment are able to respond to the emergence of new systems of work, such as platform business models.

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.

[5] The worker involved in this case (Amita Gupta), with the support of the Transport Workers Union, has filed an application in the Federal Court of Australia for judicial review of the FWC decision (NSD566/2020). The matter has been listed for hearing before the Full Court of the Federal Court on 27 November 2020.

RECOMMENDATION 6(b)

The Inquiry recommends that the Fair Work Act 2009 be amended to:

- - -

(b) clarify the work status test including by adopting the 'entrepreneurial worker' approach, so that those who work as part of another's enterprise or business are 'employees' and autonomous, 'self-employed' small business workers are covered by commercial laws;

Ai Group opposes this recommendation.

The 'entrepreneurial worker' approach is described in the Final Report in the following manner:

> 738 The focus on 'entrepreneurial' factors has emerged in decisions of the Federal Court of Australia and the Full Bench of the FWC when considering the application of the FW Act.[6] They were also applied by the Federal Court of Australia in a case involving superannuation obligations – *On Call Interpreters and Translators Agency Pty Ltd v the Commissioner of Taxation (No 3)*[7] (*On Call Interpreters v Commissioner of Taxation*). His Honour, Justice Bromberg said, where a worker did not carry the risk of financial loss or possess the opportunity to make a profit, this pointed to an employment relationship. The Court looked beyond the words in the contract to the totality and real substance of the relationship – the parties' roles, functions and work practices, in considering the 'totality of the relationship'. Justice Bromberg described the approach as an intuitive test. The Court proposed that the central questions should be:
>
> Viewed as a 'practical matter':
>
> (ii) is the person performing the work as an entrepreneur who owns and operates a business; and
>
> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work? If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.[8]
>
> 739 This approach was applied by a Full Court of the Federal Court of Australia (Full Federal Court) in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*.[9] In that case, the Full Federal

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[6] *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWAFB 8307; *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

[7] *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366.

[8] *On Call Interpreters and Translators Agency Pty Ltd v the Commissioner of Taxation (No 3*) [2011] FCA 366 [208].

[9] *Fair Work Ombudsman v Quest South Perth Holdings Ltd* [2015] FCAFC 37 (per North and Bromberg JJ) Quest Serviced Apartments sought to re-engage employees (providing housekeeping services to Quest Serviced Apartments), as independent contractors, via a triangular contracting arrangement with Contracting Solutions Pty Ltd. The decision was appealed in the High Court. The High Court did not consider the application of the entrepreneurship test on appeal but confirmed that the sham contracting provisions in s357 of the Fair Work Act 2009 (Cth) applied when a business contracted with a third party (labour hire firm) and that third party entered into contracts for services with two housekeepers.

Court found that sham contracting had occurred, meaning that employment relationships had been 'disguised' as independent contracting arrangements. The Court said that it is necessary to consider if someone is operating a business and then consider the hallmarks of the business. The Full Federal Court concluded housekeepers working for Quest serviced apartments did not possess any of the true characteristics of a business.[10]

740 This entrepreneurship approach has been adopted in some subsequent cases,[11] but questioned in others.[12] Its application is yet to be authoritatively determined by the High Court.[13]

In *Tattsbet Ltd v Morrow* [2015] 233 FCR 46, Jessup J (with whom Allsop CJ and White J agreed) roundly rejected the notion of focussing on whether or not the worker is an "entrepreneur".

Similarly, in *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296, White J rejected the approach. His Honour relevantly stated: (emphasis added)

78. In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR 846 the Full Court (North and Bromberg JJ, with whom Barker J agreed) considered that the question of whether workers were employees or independent contractors should be determined by examining first whether they were engaged in the conduct of their own businesses: at [175]-[200]. However, in *Tattsbet v Morrow* Jessup J (with whom Allsop CJ and White J agreed) said that the framing of the issue in this way could distract attention from the true question for the Court's consideration, namely, whether the person is an employee:

> [61] [The trial Judge] ultimately saw the question as one which involved, in effect, a dichotomy between a situation in which the putative employee works in the business of another and a situation in which he or she conducts his or her own business as an "entrepreneur". To view the matter through a prism of this kind is, however, to deflect attention from the central question, whether the person concerned is an employee or not; or, perhaps, as Mason J put it in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 28, to "shift the focus of attention" to a no less problematic question. As Buchanan J put it in *ACE Insurance*, "[w]orking in the business of another is not inconsistent with working in a business of one's own" (209 FCR 146, 182 [128]). On the other hand, if the putative employee's circumstances exhibit the characteristics of a business, that will undoubtedly be a matter proper to be taken into account in determining the question at hand, so long as sight is not lost of the question itself. The question is not whether the person is an entrepreneur: it is whether he or she is an employee.

As can be seen, this passage indicates that, while it may be appropriate to take into account that the putative employee's circumstances exhibit the characteristics of a business, the focus of the judicial enquiry should remain on whether the person is an employee.

[10] *Fair Work Ombudsman v Quest South Perth Holdings Ltd*; J. Murray, 'A Subtle Judicial Conversation About How to Define the Employee: Recent Cases on 'Working in the Business of Another'; Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 8.

[11] See for example, *Fenwick v World of Maths* [2012] FMCA 131; *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034.

[12] See for example, *Tattsbet Ltd v Morrow* [2015] 233 FCR 46; *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296.

[13] Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 8.

It would be very inappropriate for the 'entrepreneurial worker' approach to be adopted in legislation when three judges of the Federal Court (Allsop CJ, Jessup and White JJ) have rejected the approach. Also, the approach is inconsistent with current High Court authority (i.e. *Hollis v Vabu* (2001) 207 CLR 21).

The Inquiry's recommended change to the definition of an independent contractor to reflect the 'entrepreneurial worker' approach would not be limited to platform businesses and their workers. If implemented, the change would have adverse implications for plumbers, electricians, truck drivers, graphic designers and countless other independent contractors who have no desire to be employees. The three industries which employ the most independent contractors (in order) are Construction; Professional, Scientific and Technical Services; and Agriculture, Forestry and Fishing.[14] Approximately 10% of the workforce are independent contractors who do not employ any other people.[15]

RECOMMENDATION 6(c)

The Inquiry recommends that the Fair Work Act 2009 be amended to:

- - -

(c) provide that the:

(i) provision of safety protections and entitlements such as superannuation, training, occupational health and safety and worker consultation is not disincentivised because of the potential impact on work status;

(ii) party asserting a worker is not an employee, bears the onus of proving work status; and

(iii) the relative bargaining positions of each party are expressly considered when determining work status.

Ai Group supports recommendation 6(c)(i), opposes recommendation 6(c)(ii), and notes that recommendation 6(c)(iii) largely reflects the current law.

Removing disincentives for businesses to implement measures to improve their workers' safety and welfare

Recommendation 6(c)(i) is consistent with the following submission that Ai Group made to the Inquiry:

> **Definition of an 'independent contractor'**
>
> It is essential that the current common law approach to defining an 'independent contractor' is not fundamentally disturbed. This approach caters for the very wide range of legitimate independent contracting arrangements.

[14] ABS *Labour Force, Australia, Detailed, Quarterly.*

[15] ABS *Labour Force, Australia, Detailed, Quarterly*

There is currently a great deal of focus on the definition of an 'independent contractor', in the context of the public debate about the entitlements of 'gig workers'.

It is apparent that 'gig economy' businesses are sometimes reluctant to offer benefits that would improve the working arrangements of their workers because of concern that the provision of such benefits could be held by a Court to constitute exercising too much control for a genuine 'independent contracting' arrangement.

It is in everyone's interests for independent contractors to work in a safe environment, to receive appropriate training, to be covered by accident insurance, to be consulted about workplace changes and to be paid on time at a fair price.

The FW Act does not define an 'independent contractor'. However, the following clarification is provided in s.12 of the Act:

> ***Independent contractor*** *is not confined to an individual.*

To reduce any disincentives to 'gig economy' businesses improving the working arrangements of their independent contractors, we propose that the following additional wording be inserted into section 12 of the FW Act:

> ***Independent contractor*** *is not confined to an individual and has the common law meaning, except that the provision of the following benefits by the person engaging the contractor shall not be taken into account in determining whether there is a contract for services:*
>
> a. *Safety systems and equipment;*
>
> b. *Training;*
>
> c. *Insurance;*
>
> d. *Standard prices or payment terms;*
>
> e. *Consultation processes.*

Reverse onus of proof

A reverse onus of proof already exists under the sham contracting laws in the FW Act. Ai Group opposes any extension of the reverse onus of proof to other laws.

Consistent with longstanding, widely recognised principles of justice, a party making a legal claim should bear the onus of proving that the claim is valid.

Consideration of relative bargaining positions

There is no need to disturb the existing common law tests to give more emphasis to the relative bargaining positions of the parties. This issue is already addressed in various factors that Courts and Tribunals are required to take into account. For example, Courts and Tribunals are required to consider whether there is any scope for the worker "to bargain for the rate of their remuneration".[16]

[16] *Hollis v Vabu* (2001) 207 CLR 21 (Gleeson CJ, Guadron, Gummow, Kirby and Hayne JJ); para 54.

RECOMMENDATION 7

The Inquiry recommends that governments review the approach to 'work status' across work laws (e.g. Independent Contractors Act, superannuation, workplace health and safety, tax) with the purpose of more closely aligning them, specifically, considering:

(a) the need for clarity, consistency and simplicity;

(b) the policy imperatives of each regulatory framework;

(c) appropriate coverage for low-leveraged workers; and

(d) the need to appropriately protect platform workers.

Ai Group opposes this recommendation. It would not be possible, or desirable to align work status across workplace laws.

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 IC Act or the FW Act.

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. These provisions clearly identify the WHS obligations of an employer to any worker they engage, in whatever way they engage that worker.

WorkSafe Victoria has released easy to use Guidelines for businesses that inform businesses when and how they should treat contractors as workers for the purposes of workers' compensation, including platform workers.

RECOMMENDATION 8

The Inquiry recommends there be a clear primary source of advice and support to workers to help them understand and use dispute resolution or other informal options to resolve their work status.

Ai Group supports this recommendation. However, it is already in operation.

The FWO is a clear primary source of advice and support for workers to help them understand their work status, and to address any disputes about work status.

The creation of an additional body would lead to confusion and uncertainty.

RECOMMENDATION 9

The Inquiry recommends that a Streamlined Support Agency (whether stand alone or incorporated into the functions of an existing suitable body) should:

(a) have dedicated and sufficient resources;

(b) be accessible to and prioritise platform workers, particularly low-leveraged workers;

(c) help resolve work status through advice and dispute resolution;

(d) help workers understand the entitlements, protections and obligations of their work status; and

(e) where work status is borderline, escalate the question to Fast-tracked Resolution (see Recommendation 10) prioritising a determination.

Ai Group supports this recommendation, so long as the proposed Streamlined Support Agency is the FWO.

The FWO is a clear primary source of advice and support for workers to help them understand their work status, and to address any disputes about work status.

The creation of an additional body would lead to confusion and uncertainty.

RECOMMENDATION 10

The Inquiry recommends that a fit-for-purpose body provides a mechanism for accessible, fast resolution of work status that:

(a) produces authoritative and binding determinations for all parties;

(b) is available to all workers and businesses;

(c) is as informal as possible;

(d) is appropriately funded so as to provide access;

(e) has decision makers with appropriate expertise;

(f) allows for resolution from the outset of the work arrangement;

(g) allows groups of workers under similar arrangements to seek resolution;

(h) is inexpensive and helps fund applications and costs of low-leveraged workers; and

(i) operates in a coordinated way with the Streamlined Support Agency, enabling seamless referrals and support.

The FWO already provides suitable avenues for workers to resolve their work status. This can be seen in the investigations that the FWO carried out into Uber and Foodora. After its investigations, the FWO concluded that:

- Uber drivers are not employees;
- Foodora riders were employees. (The FWO then initiated Court proceedings to recover entitlements and pursue penalties).

In addition, the FWC provides avenues for workers who wish to challenge their work status, e.g. through an unfair dismissal claim or a general protections claim. The Federal Court and the Federal Circuit Court also have jurisdiction to deal with work status disputes.

The creation of an additional body would lead to confusion and uncertainty.

RECOMMENDATIONS 11 AND 12

Recommendation 11

The Inquiry recommends that governments encourage platform businesses with significant non-employee, on-demand workforces to seek a work status determination.

Recommendation 12

The Inquiry recommends that, if platforms do not voluntarily seek a proactive determination, governments consider requiring platforms to initiate a determination process, or governments could facilitate this.

(a) Proactive work status determinations should be targeted at enterprises of an appropriate size, maturity and number of workers and consider the costs for businesses, particularly small and emerging businesses.

(b) Platforms should be given appropriate timeframes to apply and react to potential consequences and effect any changes.

These recommendations appear to be predicated on the incorrect assumption that platform businesses have one standard, static model of operation and of engaging workers. In reality, the business models of platform businesses are constantly evolving to adapt to market changes, technological changes and customer needs.

The major platform businesses have devoted, and continue to devote, a great deal of resources to ensuring that their work arrangements are lawful.

To the extent that they need external advice, they are able to obtain this from industry groups like Ai Group, external lawyers and the FWO.

It is not appropriate for Governments to pressure platform businesses into obtaining work status determinations.

RECOMMENDATION 13

The Inquiry recommends that platforms should be transparent with workers, customers and regulators about their worker contracts. Arrangements should be fair and consider the nature of the work and the workers.

Platform businesses need to be open with their workers about contractual terms and provide any information that regulators require.

However, any requirement that platform businesses publicly display the terms of their contractual arrangements with their workers, is unnecessary and inappropriate for the following reasons:

- Other types of businesses are not required to publicly display the terms of their contractual arrangements with their independent contractors and employees.
- This recommendation appears to be based on the incorrect assumption that platform businesses have one standard contract for workers. This is not correct. Often a business will have many different contracts with different workers.
- Similar to the remuneration details in many employment contracts, the remuneration details in contracts between platform businesses and individual workers will sometimes contain information of a private nature that the relevant worker would object to the publication of.

RECOMMENDATION 14

The Inquiry recommends that governments lead a process to establish Fair Conduct and Accountability Standards or principles, to underpin arrangements established by platforms with non-employed on-demand workforces.

Ai Group's support for the establishment of a set of Fair Conduct and Accountability Standards or Principles is dependent on the content of any such standards or principles.

Any consideration of this idea should be led by the Commonwealth Government because it is important that different standards are not established in different States, given that all the major platform businesses operate nationally and Australia has a national workplace relations system.

RECOMMENDATION 15

The Inquiry recommends Commonwealth competition laws remove barriers to collective bargaining for non-employee platform workers and ensure workers may access appropriate representation in dealing with platforms about their work arrangements.

Ai Group does not agree that the *Competition and Consumer Act 2010* (Cth) imposes an excessive barrier to collective bargaining by non-employee platform workers.

Non-employee workers are able to bargain collectively with the authorisation of the ACCC. There is no evidence that the ACCC is blocking applications by non-employee platform workers for authorisation to bargain collectively. The ACCC has issued numerous authorisations for groups of owner drivers, and many other types of contractors, to bargain collectively with particular businesses.

RECOMMENDATION 16

The Inquiry recommends that the Fair Work Commission work with relevant stakeholders, including platforms and representatives of workers and industry, about the application of modern awards to platform workers, with a view to ensuring fit-for-purpose, fair arrangements that are compatible with work enabled by technology.

This recommendation is unnecessary. There are currently 121 modern industry and occupational awards which apply to employers and employees in a very diverse range of businesses.

Employees of platform businesses are already covered by relevant awards. Non-employees are of course not covered by awards. Awards are industrial instruments that only cover employees.

RECOMMENDATION 17

The Inquiry recommends that governments clarify, enhance and streamline existing unfair contracts remedies so that they:

(a) are accessible to low-leveraged workers;

(b) enable system-wide scrutiny of platforms' arrangements;

(c) introduce penalties and compensation to effectively deter unfair contracts; and

(d) allow materially similar contracts to be considered together and orders made with respect to current and future arrangements.

This recommendation is unnecessary.

The IC Act already 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 is harsh or unfair, the Court may set aside the whole or part of the contract or vary the contract.

The Inquiry's main criticism of the unfair contract provisions of the IC Act appears to be a lack of advice and support available to independent contractors who may wish to use the provisions. The Final Report states: *"The Inquiry is not aware of any platform worker seeking to bring a claim using this remedy. The avenue does not appear to have been highly utilised or well supported".*[17] This is not a ground for changing the law; it is a potential ground for more information to be provided by the Commonwealth Government about the remedies available under the law.

[17] Final Report, p.167.

RECOMMENDATION 18

The Inquiry recommends that the Streamlined Support Agency be responsible for and sufficiently resourced to provide effective support to self-employed platform workers and to prioritise actions against systemic deployment of unfair contracts involving these workers.

The FWO is a clear primary source of advice and support for workers to help them understand their workplace rights. The FWO is a large, well-resourced and effective regulator.

The creation of an additional body would lead to confusion and uncertainty.

RECOMMENDATION 19(a)

The Inquiry recommends strengthening provisions to counter sham contracting to:

(a) reflect the recommendations of previous reviews including the Black Economy Taskforce and the Productivity Commission, to capture conduct where it would be reasonable to expect the employer knew, or should have known, the true character of the arrangement was 'employment', and apply appropriate penalties to this conduct;

Sham contracting provisions are included in the general protections in Part 3-1 of the FW Act. The 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.

In addition to the sham contracting provisions, there are various other provisions of the FW 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 taking 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). 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.

- A prohibition on coercion in relation to workplace rights (s.343); and
- A prohibition on misrepresentations in relation to workplace rights (s.345).

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 FW Act was amended to include a new 'serious contravention' penalty – up to $630,000 per breach for a company (10 times the previous maximum penalty). The FWO was also given the power to require persons to participate in interviews.

In 2015 the Productivity Commission (**PC**) conducted a Review into Australia's Workplace Relations Framework. In its final report (released on 21 December 2015), the PC recommended the following amendment to the sham contracting laws in the FW Act. Ai Group's position, as set out in our January 2016 Response to the PC Review Recommendations, is reproduced below. Our position has not changed.

No.	***Recommendation***	***Ai Group's position***	***Comments***
25.1	The Australian Government should amend the FW Act to make it unlawful to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement (under s. 357) where the employer could be reasonably expected to know otherwise.	**Not supported**	Ai Group opposes the replacement of the "recklessness" test in the sham contracting laws with a "reasonableness test". The small number of sham contracting cases which have been pursued by the FWO to date highlights that the laws are not being widely breached. The sham contracting laws were tightened when the FW Act was implemented and a further tightening is not justified.

The Black Economy Taskforce made the following recommendation in its Final Report (October 2017):

> **Recommendation 10.3: Bolster the sham contracting penalty provisions**
>
> We recommend that the Government implement the Productivity Commission's recommended changes to the sham contracting provisions of the Fair Work Act 2009.

It can be seen that the Black Economy Taskforce recommended the implementation of the above PC proposal. Ai Group continues to oppose the proposal for the reasons outlined above.

RECOMMENDATION 19(b)

The Inquiry recommends strengthening provisions to counter sham contracting to:

- - -

(b) require a court to consider each party's relative bargaining position and how much genuine choice a worker has over their presumed work status.

The existing sham contracting provisions in the FW Act appropriately rely on the common law tests to determine whether a worker is an employee or an independent contractor.

There is no need to disturb the existing common law tests to give more emphasis to the relative bargaining positions of the parties. This issue is already addressed in various factors that Courts and Tribunals are required to take into account. For example, Courts and Tribunals are required to consider whether there is any scope for the worker 'to bargain for the rate of their remuneration'.[18]

RECOMMENDATION 20

The Inquiry recommends that regulators proactively intervene to resolve cases of 'borderline' work status, especially where it is occurring at a systemic level and impacts on low-leveraged workers, including by initiating test cases.

The FWO already proactively intervenes in matters relating to the work status of platform workers. This can be seen in the investigations that the FWO carried out into Uber and Foodora. After its investigations, the FWO concluded that:

- Uber drivers are not employees;
- Foodora riders were employees. (The FWO then initiated Court proceedings to recover entitlements and pursue penalties).

[18] *Hollis v Vabu* (2001) 207 CLR 21 (Gleeson CJ, Guadron, Gummow, Kirby and Hayne JJ); para 54.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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