

## CONSTRAINING THE UBER-POWERFUL DIGITAL PLATFORMS: A PROPOSAL FOR A NEW FORM OF REGULATION OF ON-DEMAND ROAD TRANSPORT WORK

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*Late in 2020 in California, two giant rideshare operators, Uber and Lyft, spearheaded a USD200 million campaign to overturn state legislation providing employment entitlements to their workers. This article exposes the way these enterprises employ legal drafting to disguise the reality of their relationships with workers; and we consider the rhetorical arguments they use to justify these strategies. We conclude that it is time for Australian regulators to adopt an alternative approach to ensuring basic protections for workers which focusses on the nature of the work being undertaken, rather than on the legal form of the contract between enterprise and worker. We focus on the Australian road transport industry, and particularly on rideshare and food delivery workers, because despite assertions that their labour is part of a shiny new ‘digital economy’, this kind of work has been important in societies since medieval times, or earlier.*

### I INTRODUCTION

In November 2020, Uber and other digital platforms operating rideshare businesses demonstrated just how powerful they truly are, by engineering a change in the law in California.<sup>1</sup> In 2019 the Californian legislature had passed a law, Assembly Bill 5 (‘AB5’)<sup>2</sup> to expand the definition of ‘employee’ to include

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1 See Miriam A Cherry ‘Proposition 22: A Vote on Gig Worker Status in California’ (2021) *Comparative Labor Law & Policy Journal Dispatch* 31:1–9.

2 Assembly Bill 5, ch 296, 2019 Cal Stat 91. For commentary on this enactment see Recent Legislation, ‘California Adopts the ABC Test to Distinguish Between Employees and Independent Contractors’ (2020) 133(7) *Harvard Law Review* 2435.

rideshare drivers engaged on these platforms. This law meant that workers undertaking work ‘on-demand’ through these and other digital platforms would be classified as employees for the purposes of entitlements to a range of employment rights, including rights to engage in collective bargaining. Uber and other digital platforms spent an estimated USD200 million on a campaign to support a ballot of electors to overturn AB5, and they were successful. Others have explained the Californian story in detail.<sup>3</sup> We cite it simply as an illustration of the extensive power of the digital platforms, and the money they are prepared to spend to avoid liability as ‘employers’ under labour laws.

Our concern in this article is to demonstrate that under Australian employment laws as they presently stand, it is very easy for the digital platforms operating in the road transport industry to avoid a range of obligations to the workers who drive vehicles in their businesses. The platform operators use the power of contract law to define the workers they engage as independent commercial businesses, not as employees, and often not even as independent contractors providing labour to the platforms. In this way they avoid obligations under a number of protective statutes. They do not need to concern themselves with paying minimum hourly rates of pay imposed by the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*) and modern awards made under that Act.<sup>4</sup> They do not have to engage in collective bargaining to make enterprise agreements covering the work.<sup>5</sup> They avoid the imposition of any obligation to pay workers’ compensation insurance premiums, to ensure that their riders and drivers are insured against the risk of injury from their inherently dangerous work (although as we discuss below, there are persuasive arguments that riders and drivers may fall within a category of ‘deemed’ employment for the purposes of workers’ compensation laws). And they can effectively sack workers capriciously (by ‘blocking’ them from using the app) without fear of any order of reinstatement or compensation under statutory unfair dismissal laws.<sup>6</sup>

When the workers themselves, or others agitating in the workers’ interests,<sup>7</sup> protest the lack of these protections, and when governments undertake inquiries into these questions, the platforms use the power of rhetoric to persuade legislators

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3 Cherry (n 1).

4 See *Fair Work Act 2009* (Cth) s 285. From 1 July 2021, the minimum wage order adjusted the minimum hourly rate for adult employees not covered by a specific award to \$20.33: *National Minimum Wage Order 2021* (Cth) ord 4.1.

5 *Fair Work Act 2009* (Cth) ss 170–2 provide that enterprise bargaining is available to ‘national system employers’ and their ‘employees’.

6 National system employees are entitled to bring applications for reinstatement or compensation for a harsh, unjust or unreasonable dismissal under the *Fair Work Act 2009* (Cth) pt 3-2. See *Fair Work Act 2009* (Cth) s 380 for the definition of employer and employees in this part.

7 The Transport Workers’ Union has supported a number of workers bringing test cases. See, eg, *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 (*‘Klooger’*); *Gupta v Portier Pacific Pty Ltd* [2020] FWC 1698 (*‘Gupta’*); Candice Prosser, ‘Uber Settles Out of Court with Driver Who Alleged Unfair Dismissal for Late Delivery’, *ABC News* (online, 30 December 2020) [5] <<https://www.abc.net.au/news/2020-12-30/uber-settles-with-delivery-driver-who-claimed-unfair-dismissal/13021798>>; *Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818 (*‘Franco’*).

to leave the law as it is.<sup>8</sup> Focusing their arguments on the present common law tests for determining employment status,<sup>9</sup> they raise persuasive arguments for why the particular flexible working arrangements they offer fall outside of the employment category, and are beneficial for workers in any event.<sup>10</sup> For example, they commend the opportunities that this kind of flexible work provides for people who are not able to access regular employment. Perhaps more insidiously, they ‘dog whistle’ to the consuming public, insinuating that they will not provide their convenient and inexpensive services any more, if the community demands that their workers must enjoy the same or similar protections as employees.<sup>11</sup> They threaten governments that they will withdraw from jurisdictions completely, exacerbating unemployment at a time when we can least afford reductions in employment opportunities.<sup>12</sup>

These arguments assume that all regulation of working relationships should continue to depend upon a bifurcation between ‘contracts of service’ (employment) which provide workers with a range of protections, and ‘contracts for services’ (commercial contracts) which leave workers to fend for themselves in a regulatory wilderness.<sup>13</sup> This article challenges that assumption. We argue that even if workers engaged through digital platforms are not properly classified as employees for all purposes, they can still be afforded certain essential entitlements, appropriate to any person who performs labour for reward.

We explain our argument in a number of parts. In Part II we identify the ways in which the platforms assert and at times abuse power. First we deal with the

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8 Two recent inquiries include the Parliament of Australia, Senate Select Committee on Job Security 2021, and the New South Wales (‘NSW’) Parliament Select Committee Inquiry into the Impact of Technological and Other Change on The Future of Work and Workers in New South Wales: ‘Select Committee on Job Security’, *Parliament of Australia* (Web Page) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Job\\_Security/JobSecurity](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity)>; ‘Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales’, *Parliament of New South Wales* (Web Page) <<https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=265>>.

9 For deeper analysis of the common law definition of ‘employment’ see Carolyn Sappideen, Paul O’Grady and Joellen Riley, *Macken’s Law of Employment* (Lawbook, 8<sup>th</sup> ed, 2016) 13–53.

10 See, eg, the comments of a spokesperson for Deliveroo quoted in Nick Bonyhady, ‘Deliveroo Loses Landmark Case as Sacked Driver Ruled an Employee’, *Sydney Morning Herald* (online, 18 May 2021) <[www.smh.com.au/politics/federal/deliveroo-loses-landmark-case-as-sacked-driver-ruled-an-employee-20210518-p57suc.html](http://www.smh.com.au/politics/federal/deliveroo-loses-landmark-case-as-sacked-driver-ruled-an-employee-20210518-p57suc.html)>.

11 See, eg, Sean Higgins, ‘App Shrugged: Will Uber Go Galt in California?’, *NR Capital Matters* (online, 19 August 2020) <[www.nationalreview.com/2020/08/uber-threatens-leave-california-employment-regulation-dispute](http://www.nationalreview.com/2020/08/uber-threatens-leave-california-employment-regulation-dispute)>.

12 See the comments of Senator Ben Small and Senator Matt Canavan in the Dissenting Report by Liberal and National Senators: Senate Select Committee on Job Security, Parliament of Australia, *On-Demand Platform Work in Australia* (First Interim Report, June 2021) 180 [1.15] (‘*Interim Report*’).

13 For the distinction between a ‘contract of service’ and a ‘contract for services’ see Sappideen, O’Grady and Riley (n 9) 31–53; Joellen Riley, ‘The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations’ in Mark Freedland et al (eds), *The Contract of Employment* (Oxford University Press, 2016) 321–32. The most recent High Court of Australia decisions applying the common law definition of employment are *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 (‘*Personnel Contracting*’) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (‘*Jamsek*’).

particular contracting practices that the platforms have typically adopted, in order to avoid characterisation as employers of their workers, and we explain how courts and tribunals (particularly in Australia) have interpreted those contracts.<sup>14</sup> We then identify the rhetorical arguments they employ to resist claims that the workers should be afforded employment status, and we note that the workers themselves have often been persuaded by the narrative that employment status would hamper their own enjoyment of a beneficial ‘flexibility’ in the way they blend their work with other aspects of their lives. In Part III we note several essential entitlements that these workers nevertheless seek, notwithstanding their acceptance of ‘independent contractor’ status: a decent rate of remuneration for their work, insurance against injury at work, protection from capricious termination of their work contracts, and access to inexpensive and prompt dispute resolution when any of these essential entitlements are denied. These kinds of entitlements have already been recognised as necessary protections in some small business regulation in Australia,<sup>15</sup> so we argue that extension of these entitlements in an accessible form to on-demand workers is consistent with the approach taken to small business regulation in Australia, by both major political parties. Finally, in Part IV, we explain our proposal for a special regime covering all non-employed workers<sup>16</sup> in the road transport industry that is based on regulating the work done, rather than the form of contract under which the worker is engaged. This proposal is aligned to the specific vulnerabilities of on-demand road transport workers (and indeed all road transport contractor workers) and is based on an analysis of two Australian best practice models – chapter 6 of the *Industrial Relations Act 1996* (NSW), and the now abolished federal Road Safety Remuneration Tribunal.<sup>17</sup> Such a scheme would, we believe, remove opportunities and incentives for the platform operators to abuse their power as the dominant contracting party.

## II THE POWER OF ROAD TRANSPORT DIGITAL PLATFORMS

Uber and other large digital labour platforms are operating in countries around the globe backed by USD119 billion of investment.<sup>18</sup> The great paradox of Uber and other major platforms is that they do not appear to be operating profitably in the passenger and delivery transport industry at all. By all accounts, they operate

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14 These contracting practices are not new, nor confined to Australia. See HW Arthurs, ‘The Dependent Contractor: A Study of the Legal Problems of Countervailing Power’ (1965) 16 *University of Toronto Law Journal* 89.

15 See, eg, the provisions regulating franchising relationships in the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) sch 1, discussed below.

16 See International Labour Office, International Labour Organisation, *World Employment and Social Outlook: The Role of Digital Labour Platforms in Transforming the World of Work* (Report, 2021) 210 (‘ILO Report 2021’).

17 For a detailed analysis of this scheme see Michael Rawling, Richard Johnstone and Igor Nossar, ‘Compromising Road Transport Supply Chain Regulation: The Abolition of the Road Safety Remuneration Tribunal’ (2017) 39(3) *Sydney Law Review* 303.

18 ILO Report 2021 (n 16) 30.

at a loss, or at best with only ‘razor-thin profits’.<sup>19</sup> The business model of these enterprises focuses on attracting vast financial backing from venture capitalists on the promise of speculative capital gains from development of huge databases of consumer information and oligopoly dominance of online markets.<sup>20</sup> As a result, market power of digital labour platforms is concentrated in a few large businesses.<sup>21</sup>

The digital platforms also use their influence over their consumer base to garner support for arguments that their front line workers (the drivers) should not be covered by employment laws providing minimum pay and conditions for workers.<sup>22</sup> Their business model (and the lack of an effective governmental response) has empowered the oligopoly of platform/app controllers to impose terms and conditions on their workforces that define those workers as contractors operating outside of legislation such as the *Fair Work Act*. This explains the inadequate pay and unsafe conditions of work for the ridesharing and delivery riding/driving workforce.<sup>23</sup> They achieve this by exercising contractual power, and rhetorical power to thwart the application of labour laws to their labour engagement practices.

### A Contract Power

In Australia, there are considerable incentives for the digital platforms to avoid classification as employers of those who work at the front line of their businesses.<sup>24</sup> National system employers must afford employees the entitlements in the *Fair Work Act* National Employment Standards, which (in the case of permanent employees) include entitlements to paid annual leave,<sup>25</sup> paid personal carers’ leave,<sup>26</sup> parental leave,<sup>27</sup> paid leave on public holidays,<sup>28</sup> minimum notice upon termination,<sup>29</sup> and

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- 19 Alexandria Sage and Vibhuti Sharma, ‘Uber Loses \$5 Billion, Misses Wall Street Targets Despite Easing Price War’, *Reuters* (online, 9 August 2019) <<https://www.reuters.com/article/us-uber-results-idUSKCN1UY2NG>>; Igor Nossar, ‘Protecting Gig Economy Workers through Regulatory Innovation’ in Peter Sheldon et al (eds), *The Regulation and Management of Workplace Health and Safety: Historical and Emerging Trends* (Routledge, 2020) 115.
- 20 Nossar (n 19) 115; *ILO Report 2021* (n 16) 38, 58.
- 21 Nossar (n 19) 115; *ILO Report 2021* (n 16) 38.
- 22 Nossar (n 19) 115; Elizabeth Pollman and Jordan M Barry, ‘Regulatory Entrepreneurship’ (2017) 90(3) *Southern California Law Review* 383.
- 23 *Interim Report* (n 12) stated that platform work is by nature insecure: at 77.
- 24 We note that Menulog has agreed to experiment with employing a section of its delivery workforce as employees and has been engaged in seeking a specific award to cover employed riders. See *Menulog Pty Ltd* [2021] FWCFCB 4053 (‘*Menulog s 158 Application*’). In *Menulog Pty Ltd* [2022] FWCFCB 5 (Hatcher V-P, Catanzariti V-P and Commissioner O’Neill), it was held that the existing *Road Transport and Distribution Award 2020* covered employed food delivery riders: at [50], [55]. The parties agreed to undertake further consultation and conciliation in respect of this application: at [56]. At the time of writing, no new award had been settled, and the matter remained contentious. See ‘On-Demand Award Would Create “Arbitrary” Schism: Academics’, *Workplace Express* (online, 2 December 2021) [https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&selkey=60713](https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=60713) (‘On-Demand Award Creates Arbitrary Schism’).
- 25 *Fair Work Act 2009* (Cth) s 87.
- 26 *Ibid* ss 96–7.
- 27 *Ibid* ss 67–85.
- 28 *Ibid* ss 114–16.
- 29 *Ibid* s 117.

redundancy pay.<sup>30</sup> An enterprise in the transport industry that engages its drivers as employees must also afford employees the wages and conditions set out in the requirements of the *Passenger Vehicle Transportation Award 2020* (which covers drivers of passenger transport), or the *Road Transport and Distribution Award 2020* (which covers bicycle, motorcycle, car and van couriers). These awards provide for minimum hourly rates of pay which vary according to the classification of the work from \$21.01 to \$26.42,<sup>31</sup> plus penalty rates for night work, overtime and weekend work. Casual employees are entitled to a 25% loading on the minimum rates, and must be paid for a minimum of three<sup>32</sup> or four hours for each engagement.<sup>33</sup> If a transport industry employer decides that they no longer wish to employ a driver, they must be able to justify dismissal on the basis of operational needs, or the employee's own conduct, or else risk a successful unfair dismissal claim under *Fair Work Act* part 3-2. In addition to complying with the *Fair Work Act*, an employer of drivers will need to pay workers' compensation premiums to ensure that their drivers are covered in case of injury or illness arising from their work.<sup>34</sup> They must also make superannuation contributions.<sup>35</sup>

Most of these statutory obligations, however, apply only to workers engaged as employees according to the common law definition of employment.<sup>36</sup> This definition has evolved over decades,<sup>37</sup> and is now expressed in Australia in the multifactorial, or multiple indicia, test.<sup>38</sup> A range of factors are used to assess the terms of the contract between the hirer and the worker to determine whether, on balance, the worker is undertaking work under the control of the hirer in the service of the hirer's business, or is working on their own account providing services to the hirer as an independent contractor.<sup>39</sup> Since it is the terms of the contract between hirer

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30 Ibid s 119.

31 These rates were those applicable prior to award increases announced in June 2021.

32 *Passenger Vehicle Transportation Award 2020* cls 11.2–11.3.

33 See *Road Transport and Distribution Award 2020* cls 11.2–11.3.

34 Workers' compensation is state-based legislation. For the various state Acts governing workers' compensation, see *Workers Compensation Act 1987* (NSW); *Workplace Injury Management and Workers Compensation Act 1998* (NSW); *Workers' Compensation and Rehabilitation Act 2003* (Qld); *Return to Work Act 2014* (SA); *Workers Rehabilitation and Compensation Act 1988* (Tas); *Workers Compensation Act 1958* (Vic); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Workers' Compensation and Injury Management Act 1981* (WA). All state enactments cover employees and some extend coverage to a range of 'deemed' or 'presumed' workers. A study of state workers' compensation schemes is beyond the scope of this article. See Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (27<sup>th</sup> ed, 2019).

35 The *Superannuation Guarantee (Administration) Act 1992* (Cth) imposes obligations on employers to make superannuation contributions in respect of employees and extends the definition of employee to include a person who 'works under a contract that is wholly or principally for the labour of the person': at s 12(3).

36 For detailed explanation of the common law definition of employment see Sappideen, O'Grady and Riley (n 9) 33–53; Riley (n 13) 321–32.

37 See Simon Deakin, 'The Evolution of the Contract of Employment, 1900–1950: The Influence of the Welfare State' in Noel Whiteside and Robert Salais (eds), *Governance, Industry and Labour Markets in Britain and France: The Modernising State in the Mid-Twentieth Century* (Routledge, 1998) 212.

38 See *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 ('*Hollis*').

39 *Hollis* (2001) 207 CLR 21, 38–9 [36]–[40] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). In *Personnel Contracting* [2022] HCA 1, [32], Kiefel CJ, Keane and Edelman JJ criticised the 'checklist'

and worker that are interrogated in this assessment exercise, there is considerable scope for the more powerful of the contracting parties to dictate terms that avoid characterisation of the contract as one of employment.<sup>40</sup>

Evidence from cases decided in a number of jurisdictions shows that (at least until recently) Uber has used a standard form contract for engaging rideshare drivers.<sup>41</sup> Three features of this contract illustrate Uber's exercise of contractual power to secure the labour it needs to operate its rideshare business, without engaging those drivers as employees. The first feature is the assertion, in several clauses of the written contract, that it is not a contract of employment, nor even a contract engaging workers. The Uber contract declares at the outset that Uber is not providing transportation services, nor acting as the drivers' agent in providing transport services to riders.<sup>42</sup> It characterises the contract as one for the provision of telecommunications services by Uber to the driver, to facilitate the driver's operation of their own personal business.<sup>43</sup> The contract warns that in the event that a court or tribunal reviewing the contract determines that the driver is in fact an employee, the driver must indemnify Uber for any cost to Uber arising from that finding.<sup>44</sup> Of course, such a contract clause would be entirely unenforceable in Australia, because it is not possible to contract out of a statutory obligation by making a common law agreement. The clause may however be intended to have an 'in terrorem' effect, frightening drivers away from making any employment-related claims.

The assertions that Uber is not operating in the passenger transport industry is disingenuous, especially given that most of the remaining clauses in the contract deal with matters such as Uber's prerogative to fix the fares charged to riders, and the commissions deducted by Uber before disbursement to the driver. Cases decided in both Australia and the United Kingdom ('UK') have found that Uber is indeed operating a passenger transport business, and it does hire the drivers to work in that business; although to date, no case has found that the Uber rideshare drivers fall within the common law definition of employee. In *Uber BV v Aslam*,<sup>45</sup> the UK Supreme Court held that the drivers fell within the definition of a 'worker' for the purposes of the *Employment Rights Act 1996* (UK) section 230(3), the *National Minimum Wage Act 1998* (UK) section 54(3), and the *Working Time Regulations 1998*, regulation 2(1). Those statutory instruments define coverage to

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approach taken in lower courts and tribunals to applying the multifactorial approach. Nevertheless, it is clear that *Hollis* (2001) 207 CLR 21 continues to provide a useful guide to the factors to be assessed, because in *Jamsek* [2022] HCA 2, the Court considered (in addition to the level of control exerted over the work by the hirer), factors such as the provision of expensive equipment, livery and uniforms, and the right to delegate the work to others. See *Jamsek* [2022] HCA 2, [14]–[35] (Kiefel CJ, Keane and Edelman JJ).

40 *Personnel Contracting* [2022] HCA 1, [59]–[61] (Kiefel CJ, Keane and Edelman JJ). At [162], Gordon J confirmed that the multifactorial test is applied to the binding terms of the contract between the parties, and not to the subsequent conduct of the relationship.

41 See *Uber BV v Aslam* [2017] WLR(D) 809; *Heller v Uber Technologies Inc* [2019] ONCA 1; *Kaseris v Rasier Pacific VOF* [2017] FWC 6610 ('*Kaseris*'). Rasier Pacific VOF, 'Services Agreement' (Contract, 23 December 2015) (copy on file with authors) ('Uber Contract').

42 Uber Contract (n 41) cl 13.1.

43 Ibid.

44 Ibid cl 13.2.

45 [2021] UKSC 5, 10–11 ('*Aslam*').

include both employees and ‘workers’. ‘Worker’ is defined as an individual who works under ‘any other contract ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual’.<sup>46</sup> This somewhat convoluted definition captures the notion of the ‘personal work relationship’ developed in the work of Freedland and Kountouris as a more appropriate focus of protective labour laws than the narrower conception of ‘employment’.<sup>47</sup> It includes any worker who provides their own labour in the service of another’s business undertaking, and excludes any worker who is operating their own business.

In the earliest Australian Fair Work Commission decision on the Uber rideshare contract, Uber’s assertion that its contract was not one for the performance of work was largely accepted,<sup>48</sup> but a more recent full bench decision considering the UberEats food delivery contract has rejected that finding. In *Gupta v Portier Pacific Pty Ltd*,<sup>49</sup> a majority decided that an UberEats food deliverer was engaged under a contract for the provision of work, notwithstanding a similar assertion in her contract that it was a contract for the provision of telecommunication services.<sup>50</sup> It did not find, however, that she was an employee for the purposes of the *Fair Work Act*. A Federal Court application for judicial review of this decision was discontinued when Uber made an acceptable settlement offer to the worker, so we still have no authoritative court decisions in Australia determining this issue.<sup>51</sup>

The second feature of the Uber contract that illustrates Uber’s contract power, and reflects the genuine arrangements of the Uber business model, is that it stipulates many conditions that ensure that the drivers will not meet the common law test for employment status.<sup>52</sup> The drivers must provide and maintain their own vehicles and telecommunication devices; they must not use Uber signage in their vehicles (although evidence on the streets is that many do); and they are not obliged to accept any work. They may also log on and off the app whenever

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46 *Employment Rights Act 1996* (UK) s 230(3)(b).

47 See Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011).

48 See *Kaseris* [2017] FWC 6610.

49 [2020] FWCFB 1698.

50 See *ibid* [44] (Ross P and Hatcher V-P). See also *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807, which also found that Uber drivers were workers, but not employees.

51 See Transcript of Proceedings, *Gupta v Portier Pacific Pty Ltd* (Federal Court of Australia, NSD566/2020, Bromberg, Rangiah and White JJ, 27 November 2020). In August 2021, a group of rideshare drivers commenced action in the Federal Court claiming that Uber was their employer for the purposes of the record keeping requirements in the *Fair Work Act 2009* (Cth) and *Fair Work Regulations 2009* (Cth), but this matter had not been resolved at the time of writing: see Anna Patty, ‘Uber Drivers Launch Test Case in Federal Court’, *Sydney Morning Herald* (online, 2 August 2021) <[www.smh.com.au/business/workplace/uber-drivers-launch-test-case-in-federal-court-20210801-p58es8.html](http://www.smh.com.au/business/workplace/uber-drivers-launch-test-case-in-federal-court-20210801-p58es8.html)>.

52 The Fair Work Commission regularly uses a checklist of indicia provided in one of its own often-cited decisions: *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215, 229–31 [34] (Lawler V-P, Hamilton D-P and Commissioner Bacon). Following *Personnel Contracting* [2022] HCA 1, care should be taken before adopting the ‘mechanistic counting of ticks on a multifactorial checklist’: at [39] (Kiefel CJ, Keane and Edelman JJ).



they wish. These features of the agreement reflect those indicia that signal an independent contractor arrangement.<sup>53</sup> The worker provides their own equipment, so the contract is not for labour only.<sup>54</sup> The worker is not presented (by uniforms and signage) as a manifestation of the hirer's business, so the worker is not seen as an integrated part of the hirer's organisation. And the worker is not subject to the control of the hirer in terms of when they undertake work. These aspects of the business model reflect the fact that Uber can use its technology to exert sufficient control over the drivers that there is no need for the 'bundy clock' of old.<sup>55</sup>

The third feature of the contract demonstrating Uber's power is that, notwithstanding these features indicating that the relationship does not meet the usual indicia for employment, Uber nevertheless asserts a prerogative to control every aspect of the arrangement that influences which party can profit from the work. Uber sets maximum fares. Drivers cannot set their own prices, except to offer a discount, and if they do negotiate a lower fare for a client, Uber still collects its guaranteed 25% commission on the original, Uber-determined fare.<sup>56</sup> Drivers are not permitted to deal directly with riders except to confirm pick-up arrangements, so drivers cannot develop any business goodwill of their own. The drivers remain anonymous; the clients' perception is that Uber is providing the service.<sup>57</sup> Although Uber foreswears any control over whether drivers accept work or not, it does manage a punitive system of blocking drivers from the app for intervals of time if they fail to accept a certain percentage of trips.<sup>58</sup> Uber also asserts a power to discipline drivers who fail to achieve acceptable customer ratings by blocking them from using the app. The UK Supreme Court described this as 'a classic form of subordination that is characteristic of employment relationships'.<sup>59</sup> Unlike in a contemporary Australian employment relationship, however, the drivers have no

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53 See the application of these indicia to a transport industry contract in *Jamsek* [2022] HCA 2, [21]–[35] (Kiefel CJ, Keane and Edelman JJ).

54 Note the significance of the workers' ownership and maintenance of motor vehicles in explaining the difference between the NSW Court of Appeal's findings in *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150, and the High Court of Australia's findings in *Hollis* (2001) 207 CLR 21. In the earlier decision considering the application of a revenue statute to the whole workforce, the fact that many couriers owned and maintained expensive vans was a factor contributing towards a finding they were contractors. In the High Court of Australia decision, which determined whether the tort of a single courier should be sheeted back to the employer under the doctrine of vicarious liability, the fact that the courier brought only his own bicycle to work was a factor contributing to a finding that he was an employee. Ownership of expensive trucks was an influential factor in determining that the drivers were contractors in *Jamsek* [2022] HCA 2, [14]–[16] (Kiefel CJ, Keane and Edelman JJ), [88] (Gageler and Gleeson JJ), [107] (Gordon and Steward JJ).

55 A bundy clock was a mechanical device used to time stamp a worker's entry and exit from the worksite, for the purposes of time keeping. These days, electronic swipe cards are capable of providing the same data for employers.

56 Sebastian Klovig Skelton, 'Uber Drivers Face Real-Terms Pay Cut after Service Fee Hike', *ComputerWeekly* (online, 20 July 2021) <<https://www.computerweekly.com/news/252504250/Uber-drivers-face-real-terms-pay-cut-after-service-fee-hike#:~:text=At%20the%20end%20of%20June,quarter%20of%20every%20fare's%20value>>; *Aslam* [2021] UKSC 5, [94] (Leggatt LJ).

57 *Aslam* [2021] UKSC 5, [100].

58 *Ibid* [18], [97].

59 *Ibid* [99].

right to any warning or reasons before Uber exercises this disciplinary power.<sup>60</sup> An Uber rideshare contract was considered by the District Court in Western Australia in *Oze-Igiehon v Rasier Operations BV*.<sup>61</sup> The Court found that the terms of the contract allowed Uber to refuse drivers access to the app, and to terminate the contract completely, without providing any kind of procedural fairness.

Clearly, Uber (and other platforms like it)<sup>62</sup> are exploiting subordinated labour of drivers, notwithstanding that their contracts forswear any employment or other work relationship. Their contracts are deliberately crafted to create this paradox.

Uber is not the only platform to deliberately draft its contracts to avoid adverse regulatory consequences. For example, the Hungry Panda contract provided to its food delivery cyclists stipulates that the '[c]ontractor warrants and agrees that during the Term it will offer and provide services that are the same as or similar to the Services to persons, business or organisations other than Hungry Panda (Third Party Services)'.<sup>63</sup> This clause is clearly directed towards supporting an assertion that the deliverers do not provide exclusive service to Hungry Panda, thus avoiding another of the factors in the common law test. The clause following this is especially peculiar until one realises that it is deliberately addressed to Victorian workers' compensation laws. The clause states:

If the Contractor operates in Victoria, the Contractor warrants and agrees that it will derive at least 20% of its gross income each year from parties other than HungryPanda for such Third Party Services.<sup>64</sup>

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) section 3(b) and schedule 1, clause 8 provides that owner drivers of vehicles will be deemed to be 'workers' for the purpose of workers' compensation coverage if they drive their own vehicle 'mainly for the purposes of providing transport services to [a] principal', unless Work Safe Victoria has determined that they are carrying on an independent business. Work Safe Victoria published a 'Premium Guideline' effective from 1 July 2014 that stated that in order to be a deemed a worker, an owner driver 'must not earn less than 80 percent of their income from the hirer'.<sup>65</sup> Hungry Panda clearly wishes to avoid any liability under workers' compensation laws, so has included a specific contract clause in its standard form contract, applicable only to workers within Victoria. Media reports suggest that these workers are still riding for Hungry Panda for up to 12 hours a day, most days.<sup>66</sup>

60 *Fair Work Act 2009* (Cth) s 387 lists the requirement for reasons and warnings among factors going to whether a dismissal was relevantly unfair.

61 [2016] WADC 174.

62 The exception is Menulog which is presently contemplating adopting an employment model for some of its workforce: see *Menulog s 158 Application* [2021] FWCFCB 4053; *Menulog Pty Ltd* [2022] FWCFCB 5; 'On-Demand Award Creates Arbitrary Schism' (n 24).

63 See Hungry Panda, 'Contract' (2 February 2021) (copy of extracts on file with authors), cl 4.8.

64 *Ibid*, cl 4.9.

65 See Michael Rawling and Joellen Munton, *Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry* (Report, University of Technology Sydney Faculty of Law, January 2021) 29 ('TEACHO Report').

66 Ursula Malone, 'Hungry Panda Food Delivery Company under Scrutiny over Riders' Insurance, Failure to Report Death to SafeWork NSW', *ABC News* (online, 23 February 2021) <<https://www.abc.net.au/news/2021-02-23/hungry-panda-scrutiny-over-delivery-riders-safety-gig-economy/13182772>>.

In some cases involving on-demand food delivery cyclists, the Fair Work Commission has found that the workers were employees, at least for the purpose of access to unfair dismissal protections.<sup>67</sup> The differences in outcome between different cases reflect differences in the contractual arrangements under review. This is a consequence of focusing on contract terms in determining whether a worker will be protected by employment laws: each contract must be assessed on its own terms, and a finding based on one contract will not provide a precedent in a case involving a different contract. In *Klooger v Foodora Australia Pty Ltd*,<sup>68</sup> a food delivery cyclist who had been blocked from using the app because of his participation in trade union activism was entitled to bring unfair dismissal proceedings, because the terms and performance of his particular engagement indicated a sufficient level of control by Foodora over his work to warrant a finding that he was an employee. In that case, however, Foodora's subsequent insolvency and withdrawal from Australian markets made this a pyrrhic victory. More recently, a single Commissioner held that a Deliveroo food delivery cyclist was an employee for unfair dismissal purposes, because the reality of his working arrangements demonstrated a sufficient level of control by Deliveroo to warrant the finding that he was an employee.<sup>69</sup> For at least part of the time that the worker was engaged, Deliveroo operated a booking system for riders to secure an entitlement to work in a particular territory during particular hours.<sup>70</sup> This looked suspiciously like a rostering system and helped to tip the balance in favour of a finding that the cyclist was an employee.<sup>71</sup>

Deliveroo immediately announced an intention to resist the Commissioner's order for reinstatement and to appeal the decision. It also asserted (through media comment) that its model for engagement of labour respected the 'riders' freedom to decide when to work'.<sup>72</sup> When the assertion of the prerogative to determine the characterisation of the relationship by contracting terms fails, the platforms resort to the power of rhetoric.

## B The Power of Rhetoric

When the platform operators are challenged with accusations that they are exercising contract power to exploit subordinated labour, they typically justify their operations with assertions that they are providing opportunities for flexible and remunerative work to people who do not wish to be engaged as employees. A number of senior managers of road transport platforms were interviewed by the Senate Select Committee on Job Security. When pressed to describe their relationships with their workers, they used the language of partnership and entrepreneurship, and painted pictures of genuinely independent 'go-getters' who

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67 See *Klooger* [2018] FWC 6836; *Franco* [2021] FWC 2818.

68 [2018] FWC 6836.

69 *Franco* [2021] FWC 2818, [137]–[139] (Commissioner Cambridge).

70 *Ibid* [20]–[22].

71 *Ibid* [109].

72 Bonyhady (n 10).

eschew the kind of servitude implicated in employment status.<sup>73</sup> Mr Dominic Taylor, General Manager of Uber Australia, said that

these men and women who are drivers and delivery partners are so entrepreneurial at heart that they understand how to manage their costs through getting the best fuel deal, they understand which cars are going to minimise their maintenance costs, and they're working to ensure that they're taking home as much as they can at the end of the week.<sup>74</sup>

He described them as people with no need to be regular employees, and every reason to prefer a high level of autonomy in their work:

I spend a fair bit of time chatting to drivers, and what always strikes me is the diversity, the range of people that work here. We've got retirees that are using it for an extra bit of money on top of other things. We have students who are doing it on Friday nights and single dads who are using Uber to be able to work when their kids are not with them. What strikes me is that ... it's all around flexibility. To be able to do a new type of work that fits in their lifestyle, where they can work within the needs of their life, whether it be their employment status or whether it be where their children are, is quite a unique proposition.<sup>75</sup>

Matthew Denman, General Manager of Uber Eats in Australia, suggested that the platform provided a valuable service to people facing difficulties in accessing the Australian labour market:

[W]hat drivers and delivery partners tell us is that they've often had difficulty accessing the labour market to get a normal job, and Uber actually helps them earn money and get into the employment market so that they can look for another job.<sup>76</sup>

He described the 'ease of access and the flexibility of the platform' as a 'hugely powerful' and 'transformational' benefit for these people.<sup>77</sup>

Ms Ann Tann, Head of Business Excellence and Legal, Ola Australia and New Zealand also emphasised that Ola drivers valued flexibility, and were often students and others engaged on the platforms as a 'side hustle', not as a serious 'job'.<sup>78</sup>

In addition to claims that the workers themselves want to remain as independent contractors, the platforms also assert that the introduction of regulation requiring them to be treated as employees would reduce employment opportunities. The Dissenting Report by Liberal and National Senators in the Senate Select Committee on Job Security's First Interim Report asserted that such a change of regulation in Geneva, Switzerland, had resulted in UberEats reducing its workforce by 1000 workers from 1300 to 300 drivers.<sup>79</sup>

There are significant real world outcomes from this rhetoric. Through these rhetorical claims, digital labour platforms have largely been successful in justifying their evasion of employment protections. These supposedly 'flexible' but highly insecure contractor arrangements leave their workforces with poor safety

73 The duty to obey is 'one of the most important obligations' which distinguishes employment from other kinds of contracts: Sappideen, O'Grady and Riley (n 9) 199.

74 Evidence to Senate Select Committee on Job Security, Parliament of Australia, Sydney, 12 April 2021, 20.

75 Ibid 17.

76 Ibid 26.

77 Ibid.

78 Ibid 15.

79 *Interim Report* (n 12) 3 [1.15].

outcomes, low rates of pay, and no job security, while allowing the platforms to cut costs,<sup>80</sup> and aggressively compete with and undermine the traditional transport businesses that do comply with labour laws.

### III RIGHTS FOR WORKERS, REGARDLESS OF CLASSIFICATION

The debate about whether on-demand transport workers are, or should be, classified as employees for the purposes of the full range of employment protection laws rages on. Some scholars have presented persuasive arguments that many of these workers are already employees.<sup>81</sup> Others argue that a new definition of ‘worker’, broader than ‘employee’ needs to be developed to ensure that on-demand work is captured within the safety net of labour rights.<sup>82</sup> The argument that the common law definition of employment is no longer fit for purpose is not a new one. Even before the invention of digital platforms to facilitate on-demand engagement, many employers avoided protective employment statutes by exploiting the manipulability of the common law definition of employment in their contracting practices.<sup>83</sup> Now, that kind of exploitation is made even easier by the features of new digital technology that permit the engagement and effective control of a labour force, without requiring their exclusive service.

One of the most convincing of the digital platforms’ arguments against classifying their workers as employees is that the old notion of ‘employment’, and the industrial instruments (such as modern awards) predicated upon the worker falling within the employment category, do expect that an employee will have only one employer at any given time. Even though they might hold down several (often casual) jobs, in any given moment they are working only for one employer. This allows for a finding that one particular employer should bear responsibility for meeting a range of obligations in respect of the worker, at least during that time period. These include the obligation to ensure that the worker receives a prescribed minimum hourly rate of pay, and is covered by a workers’ compensation insurance premium. The platforms argue that it is now possible for on-demand workers to be logged on to accept tasks from several different platforms simultaneously. This is called ‘multi-apping’. Indeed, the delivery rider in *Franco v Deliveroo Pty Ltd* was

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80 *ILO Report 2021* (n 16) 44.

81 Andrew Stewart and Shae McCrystal, ‘Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?’ (2019) 32(1) *Australian Journal of Labour Law* 4.

82 Tess Hardy and Shae McCrystal, ‘Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses’ (2020) 42(3) *Sydney Law Review* 311. For commentary on this option to provide a new category of worker see *Interim Report* (n 12) 156–7. For a range of arguments in favour of expanding the definition of employee and employer in the *Fair Work Act* see *Interim Report* (n 12) 148–52.

83 See Andrew Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15(3) *Australian Journal of Labour Law* 235 (‘Redefining Employment?’); Cameron Roles and Andrew Stewart, ‘The Reach of Labour Regulation: Tackling Sham Contracting’ (2012) 25(3) *Australian Journal of Labour Law* 258.

found to have been working for Uber Eats, Door Dash and Deliveroo at the same time.<sup>84</sup> While it may be unlikely that the same minutes could be used to complete deliveries for more than one app (given the unlikelihood of orders being placed by neighbours with the same restaurant at the same time), it would nevertheless be possible for deliveries to be made for different platforms within the same hour. Commissioner Cambridge saw no obstacle in this argument at least for the purposes of access to unfair dismissal protections. He said that ‘in the context of the modern, rapidly changing workplace’ the fact that Deliveroo permitted ‘riders to work for its competitors and to engage in the multi-apping’ should not be ‘construed as preventing the existence of an employment relationship’.<sup>85</sup>

Multi-apping presents no obvious difficulty in the case of an unfair dismissal claim, brought to challenge a harsh, unjust or unreasonable termination of the work contract. The acceptance of multi-apping would, however, raise considerable complexity for claims based on entitlements to receive minimum award wages, if each of the digital platforms was held – simultaneously – to be an employer of the employee for the same hour. Absent some kind of concept of joint employment, and a means for ascribing proportionate responsibility between multiple employers, award-based claims for wages and other conditions of employment would create considerable complexity.

The platforms have argued that the consequence of finding that their workers are employees for the purposes of compliance with industrial awards would be that they would need to demand exclusive service from their riders, at least for the duration of the minimum shift times stipulated in those awards. They argue that the imposition of exclusive service requirements and rostering would rob the riders themselves of beneficial flexibility in choosing when to work, and would preclude the efficient allocation of labour in a highly competitive market of food delivery businesses.<sup>86</sup> In other words, a finding of employment, with all that it entails, would force this kind of worker engagement into the standard employment model of the twentieth century. There may be very good reasons for doing that, just as there were good reasons for creating permanent employment of waged labourers to replace the on-demand hiring practices of the Hungry Mile in the 19<sup>th</sup> century. The Hungry Mile was the site of docklands in Sydney, where wharf labourers gathered to bid for work unloading ships each day. The name of this place – now redeveloped as the Barangaroo entertainment and casino precinct – acknowledged the workers’ desperate struggle to secure fixed rates of pay, and then weekly wages and secure employment.<sup>87</sup>

But for the purposes of our argument here we will set those reasons aside, and instead investigate how we might modify our present labour laws to accommodate the kind of flexible work systems preferred by the platforms, while still providing

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84 [2021] FWC 2818, [115] (Commissioner Cambridge).

85 Ibid [118].

86 See Bonyhady (n 10).

87 For a comprehensive study of the strikes of the 1890s and the history of Australian trade unionism, see Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Lawbook, 1994).

some essential protections for the labourers themselves. To this end we have identified a set of fundamental interests shared by all workers, regardless of whether they are engaged as employees or contractors. All workers, regardless of their classification, share the following needs: a rate of remuneration that sustains a decent living; safe working conditions and insurance against the risk of workplace injury; job security so that workers cannot lose their livelihood suddenly for a capricious reason; and a form of inexpensive, prompt and accessible dispute resolution when any of these protections are denied. These fundamental interests are interrelated. An adequate rate of remuneration for work supports safe working conditions, because it relieves pressure on the worker to continue working when exhausted and in dangerous conditions. The relationship between the economic conditions of work and safety are well documented in the transport industry.<sup>88</sup> Likewise, the capacity to contest denial of rights in an accessible forum is a vital aspect of any system of regulation designed to protect the interests of ordinary working people who depend upon a regular income for their livelihood. A further fundamental right supports these interests: the right to freedom of association, as recognised by the International Labour Organisation, and encompassing a right to engage in collective bargaining.<sup>89</sup>

We consider these interests in turn, beginning with a consideration of job security, because claims for protection against unfair dismissal have been the catalyst for each of the Australian cases before the Fair Work Commission to date.

### A Protection from Capricious Termination of Work Contracts

It is no coincidence that many of the cases testing the classification of on-demand workers have arisen in the Fair Work Commission as unfair dismissal applications. Notwithstanding their ‘independent contractor’ status, these workers do expect a degree of job security. This is not an unreasonable demand. We have had unfair dismissal protection for employees since 1993 at a federal level, and even earlier in some states of the federation.<sup>90</sup> Since 1998, Australian franchising

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88 Michael Quinlan and Lance Wright, *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission* (Report, October 2008); Takahiko Kudo and Michael H Belzer, ‘The Association between Truck Driver Compensation and Safety Performance’ (2019) 120 *Safety Science* 447; Michael R Faulkner and Michael H Belzer, ‘Returns to Compensation in Trucking: Does Safety Pay?’ (2019) 30(2) *The Economic and Labour Relations Review* 262.

89 See *Freedom of Association and the Protection of the Right to Organise Convention*, opened for signature 9 July 1948, ILO 87 (entered into force 4 July 1950); *Right to Organise and Collective Bargaining Convention*, opened for signature 1 July 1949, ILO 98 (entered into force 18 July 1951). For commentary on international law rights to collective bargaining, see Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 9–27. Collective bargaining rights for gig economy workers are important given that ‘[a] significant characteristic of on-demand platform work is the power imbalance between employing entities and individual workers, in favour of the platforms’: *Interim Report* (n 12) 78. See also Nicholas Saady, ‘Security for Workers in an Insecure World of Work: Establishing Freedom of Association and Collective Bargaining As Fundamental Rights for Australian Workers’ (2021) 49 *Australian Business Law Review* 26.

90 The first unfair dismissal statute was passed in 1973 in South Australia: see *Industrial Relations Act 1972* (SA) s 15(1)(e), discussed in Andrew Stewart ‘The New Unfair Dismissal Jurisdiction in South Australia’ (1986) 28(3) *Journal of Industrial Relations* 367.

laws have included controls on the termination of franchising agreements for the benefit of franchisees, on the rationale that small business people should not be subjected to a capricious withdrawal of their livelihood.<sup>91</sup> These laws were enacted by the Howard Coalition Government after a government-commissioned inquiry discovered opportunistic and unconscionable practices in the industry.<sup>92</sup> The Minister of the day, the Hon Peter Reith, described these reforms as ‘the strongest message ever from the federal parliament to the Australian business community that commercial relations between big and small business must be treated on a fair and reasonable basis’.<sup>93</sup>

The *Independent Contractors Act 2006* (Cth), also enacted by a Coalition government, includes provisions allowing for the rewriting of unfair contract terms,<sup>94</sup> and a common circumstance warranting review of a work contract is that it has not allowed for sufficient notice before the termination of the contract.<sup>95</sup> This legislation had its genesis in earlier provisions in the *Industrial Relations Act 1988* (Cth) sections 127A–127C, which were carried over into the *Workplace Relations Act 1996* (Cth), and these federal provisions were preceded by the enactment of unfair contracts review provisions in the industrial legislation of Australia’s most populous state, New South Wales (‘NSW’).<sup>96</sup> Cases decided under the NSW legislation also often extended contractual notice periods, to allow workers more time to adjust to termination of a work contract.<sup>97</sup>

The *Competition and Consumer Act 2010* (Cth) also contains provisions allowing for the review of contracts made as a consequence of unconscionable dealing.<sup>98</sup> These provisions, dating back to amendments made in 1993 to the former *Trade Practices Act 1974* (Cth), are directed at addressing exploitative conduct by large businesses in their dealings with small businesses.<sup>99</sup>

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91 The Franchising Code of Conduct was first enacted as a schedule to the *Trade Practices (Industry Codes – Franchising) Regulation 1998* (Cth) on 18 June 1998. The present termination provisions are in *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) sch 1 cls 27–8.

92 See the Reid Committee Report: House of Representatives Standing Committee on Industry, Science and Technology, Parliament of Australia, *Finding a Balance Towards Fair Trading in Australia* (Report, May 1997).

93 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1998, 2570 (Peter Reith, Minister for Workplace Relations and Small Business).

94 *Independent Contractors Act 2006* (Cth) s 12.

95 See, eg, *Keldote Pty Ltd v Riteway Transport Pty Ltd* (2008) 176 IR 316; *Keldote Pty Ltd v Riteway Transport Pty Ltd* (2009) 185 IR 155; *Keldote Pty Ltd v Riteway Transport Pty Ltd* (2010) 195 IR 423.

96 The first unfair contracts review provision was enacted as section 88F of the *Industrial Arbitration Act 1940* (NSW): see GD Woods and Paul L Stein, *Harsh and Unconscionable Contracts of Work in New South Wales: Section 88F of the Industrial Arbitration Act (New South Wales)* (Lawbook, 1972). The provision was maintained as section 275 of the *Industrial Relations Act 1991* (NSW) enacted by a Coalition government, and then as section 106 of the *Industrial Relations Act 1996* (NSW) (‘*IR Act*’), enacted by an ALP government.

97 See, eg, *GIO Australia Ltd v O’Donnell* (1996) 70 IR 1; *Westfield Ltd v Helprin* (1997) 82 IR 411; *Canizales v Microsoft Corporation* (2000) 99 IR 426; *Westfield Holdings Ltd v Adams* (2001) 114 IR 241.

98 *Competition and Consumer Act 2010* (Cth) sch 2 ss 20, 22 (prohibiting unconscionable conduct), 243 (allowing for orders varying contracts).

99 See Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 227–34 for an explanation of these provisions in the context of workplace law.



In theory, the federal unfair contracts jurisdiction under the *Independent Contractors Act 2006* (Cth) section 12 is open to on-demand transport workers who are not employees. Likewise, the small business protections from unconscionable dealing in the *Competition and Consumer Act 2010* (Cth) are theoretically available to these workers. In practice, however, a jurisdiction that depends upon bringing a claim in the Federal Court system is inaccessible, given the low incomes of these workers. Like ordinary employees, they can ill afford the cost and delay of litigating proceedings in court. They too need access to a tribunal like the Fair Work Commission, with low filing fees, and access to prompt conciliation and arbitration of complaints.

## B Safe Work

The stimulus for much of the attention given to on-demand food delivery workers in recent times has been the shocking number of fatal accidents of riders. There were no fewer than five deaths across the country in three months in 2020.<sup>100</sup> A survey of 160 riders undertaken by the Transport Workers Union in 2019 indicated that 46.5% of riders had been injured at work, or knew someone who had been injured.<sup>101</sup>

It is clear that gig workers in the road transport industry face particularly unsafe working conditions.<sup>102</sup> Low pay rates contribute to unsafe conditions of work. A large body of evidence has established that per kilometre or per delivery rates give road transport truck drivers an incentive to work faster and longer just to earn a decent living.<sup>103</sup> This can be hazardous and lead to poor safety outcomes.<sup>104</sup> On-demand drivers and riders suffer the same pressures as are experienced by owner-drivers in the trucking industry.<sup>105</sup> Like road transport sector work generally, for these riders and rideshare drivers, low rates of pay and per-delivery pay methods are key factors contributing to the lack of safety at work.

Also, the threat of termination for working too slowly is very real for these riders. Diego Franco was terminated by Deliveroo because his delivery times fell below those deemed acceptable by Deliveroo's algorithm for calculating median delivery times.<sup>106</sup> Job insecurity clearly contributes to unsafe work.

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100 Nick Bonyhady and Laura Chung, 'Fifth Food Delivery Driver Dies Following Truck Crash in Central Sydney', *Sydney Morning Herald* (online, 23 November 2020) <[www.smh.com.au/national/nsw/fifth-food-delivery-rider-dies-following-truck-crash-in-central-sydney-20201123-p56h9y.html](http://www.smh.com.au/national/nsw/fifth-food-delivery-rider-dies-following-truck-crash-in-central-sydney-20201123-p56h9y.html)>.

101 See Stephen Johnson, 'Deliveroo Tackles Rider Safety – as Thousands of Workers Complain about Being Injured on the Job – Following the Death of Four Uber Eats Deliverers', *Daily Mail Australia* (online, 16 October 2019) <[www.dailymail.co.uk/news/article-7573137/Uber-Eats-delivery-drivers-killed-forces-Deliveroo-set-safety-panel.html](http://www.dailymail.co.uk/news/article-7573137/Uber-Eats-delivery-drivers-killed-forces-Deliveroo-set-safety-panel.html)>. See *Interim Report* (n 12) 121 for the number of road traffic accidents reported by the major delivery platforms involving gig workers.

102 *Interim Report* (n 12) 100.

103 Michael H Belzer, 'Work-Stress Factors Associated with Truck Crashes: An Exploratory Analysis' (2018) 29(3) *Economic and Labour Relations Review* 289.

104 See Quinlan and Wright (n 88).

105 Michael Rawling and Joellen Riley, 'Urgent Need to Improve Gig Worker Protections', *My Career, Sydney Morning Herald*, (Newspaper, 1 May 2021), 10.

106 *Franco* [2021] FWC 2818, [144] (Commissioner Cambridge).

When workers are injured at work, it appears that they do not (yet) have access to workers' compensation insurance. Most states' workers' compensation systems provide coverage to a wider group of workers than those who fall within the common law definition of 'employment' by 'deeming' or 'presuming' certain kinds of work arrangements to be covered by the legislation, and these usually include contractors who provide labour only, and are not conducting their own businesses.<sup>107</sup> Unfortunately, it is not clear that these deeming provisions apply to rideshare or food delivery drivers because they provide their own vehicles. Two decisions in New South Wales have found that on-demand food delivery drivers could not bring workers compensation claims against the platforms hiring them.<sup>108</sup> Proposals for introducing some kind of insurance scheme, funded by a levy on food delivery fees, followed media attention to a spate of deaths and injuries among drivers towards the end of 2020.<sup>109</sup> A system that effectively requires the riders themselves to fund insurance out of their meagre earnings, and only covers them for medical and funeral costs if they are involved in accidents, is an inadequate response to safety concerns. These workers also need a compensation scheme that provides access to rehabilitation services, income maintenance for time away from work, and facilitates a return to work after recovery.

### C Minimum Rates

Presently, rates of pay for riders are dictated by the platforms. Riders are not genuine entrepreneurs with the power to negotiate their own rates. As one commentator noted, these workers are in the 'economically irrational' position of being 'free' to negotiate with customers, but only for a lower rate than stipulated by the platform.<sup>110</sup> Nor are they industrially organised, and able to collectively bargain agreed rates. It is difficult to determine with any certainty whether the rates presently set by the platforms are capable of generating a minimum wage for riders. According to a report prepared for the Transport Education Audit Compliance Health Organisation ('*TEACHO Report*'), a range of surveys of drivers themselves conducted by the Transport Workers' Union in conjunction with the RideShare Drivers Cooperative suggest that rates paid to drivers are significantly below award rates.<sup>111</sup> These surveys, conducted in 2018 and 2020, found that rates paid

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107 See *Workers Compensation Act 1951* (ACT) ss 8, 11; *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 5, sch 1 cl 2; *Return to Work Act 1986* (NT) s 3B; *Rehabilitation Act 2003* (Qld) s 11(2), sch 2 pt 1 cl 3; *Workers Compensation and Return to Work Act 2014* (SA) s 4(c); *Workers Rehabilitation and Compensation Act 1988* (Tas) s 4B; *Workers Compensation Act 1958* (Vic) s 3(6); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3(b), sch 1 cls 7–8; *Workers Compensation and Injury Management Act 1981* (WA) s 5(b).

108 See *Hassan v Uber Australia Pty Ltd* [2018] NSWWC 21; *Kahin v Uber Australia Pty Ltd* [2020] NSWWC 118.

109 See Lucy Cormack and Nick Bonyhady, 'Food Delivery Levy Proposed to Pay for Workers' Comp for the Gig Economy', *Sydney Morning Herald* (online, 17 December 2020) <[www.smh.com.au/national/nsw/food-delivery-levy-proposed-to-pay-for-workers-comp-for-the-gig-economy-20201216-p56nzo.html](http://www.smh.com.au/national/nsw/food-delivery-levy-proposed-to-pay-for-workers-comp-for-the-gig-economy-20201216-p56nzo.html)>.

110 Anna Patty, 'Uber Eats Drivers "Only Free to Negotiate a Lower Rate of Pay"', *Sydney Morning Herald* (online, 18 November 2019) <[www.smh.com.au/business/workplace/uber-eats-drivers-only-free-to-negotiate-a-lower-rate-of-pay-20191118-p53bnn.html](http://www.smh.com.au/business/workplace/uber-eats-drivers-only-free-to-negotiate-a-lower-rate-of-pay-20191118-p53bnn.html)>.

111 *TEACHO Report* (n 65) 6.

to Uber drivers were well below \$16 per hour, and possibly as little as \$12 per hour, even before taking their costs into account.<sup>112</sup> The same surveys suggest that 60% of rideshare drivers cannot save enough to fund annual leave breaks, or any superannuation savings.<sup>113</sup>

Even these low rates may be overstated in some cases. A study conducted by Bright and Fitzgerald for On Demand Workers Australia and the Transport Workers' Union in 2018 suggested that pay for some drivers is as low as \$6.67 to \$10.50 per hour.<sup>114</sup> More worrying still is the fact that most drivers surveyed claim to have experienced a decrease in their incomes over time.<sup>115</sup>

On the other hand, senior leaders of the food delivery platforms have asserted (in evidence given to the Senate Select Committee on Job Security) that average rates are much higher than this, although still below the \$24.80 hourly rate for casual employees earning minimum wages in Australia. Matthew Denman, General Manager of Uber Eats Australia, told the Senate public hearings that Uber Eats had commissioned research by Accenture, which found that 'at meal times drivers are earning, on average, over \$21 an hour after all costs, including their wait time'.<sup>116</sup> Ed McManus, Chief Executive Officer of Deliveroo in Australia said that the hourly rates paid to riders in March 2021 averaged at \$23.40 per hour, although this was a 'pre cost' rate, not accounting for the riders' expenses.<sup>117</sup>

So where does the truth lie? While rates remain unregulated, it will be a matter of conjecture whether riders are earning a decent level of remuneration from their work. Regulation of rates, however, would ensure that all riders (and not merely the 'median' rider) are adequately remunerated. If rates are already at an appropriate level, it is difficult to see why the platforms would need, or wish, to resist the imposition of a safety net of rates for their riders.

Some commentary has downplayed the importance of rates and conditions in the gig economy on the basis that the majority of the Australian workforce continues to be made up of employees who are covered by the mandatory pay and conditions standards in modern awards and the *Fair Work Act*.<sup>118</sup> The assertion/implication has been that there is only a small, marginal, sub-set of workers engaged in the

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112 RideShare Drivers Co-operative and Transport Workers' Union, 'Survey Conducted for Ride-share Drivers' Co-operative and Transport Workers Union' (Survey, October 2018) cited in *TEACHO Report* (n 65) 6, 39; Ride Share Network and Transport Workers Union, 'Ride Share Driver Survey' (Survey, 2020) cited in *TEACHO Report* (n 65) 6.

113 See *TEACHO Report* (n 65) 6.

114 S Bright and A Fitzgerald, 'Survey Conducted for the On-Demand Workers Australia' (Survey, 2018), cited in *TEACHO Report* (n 65) 6. See also Paul Karp, 'Food Delivery Bike Couriers in Australia Being Underpaid by Up to \$322 a Week', *The Guardian* (online, 20 November 2019) <[www.theguardian.com/australia-news/2019/nov/20/food-delivery-bike-couriers-in-australia-being-underpaid-by-up-to-322-a-week](http://www.theguardian.com/australia-news/2019/nov/20/food-delivery-bike-couriers-in-australia-being-underpaid-by-up-to-322-a-week)>.

115 Delivery Riders Alliance and the Transport Workers Union, 'Food Delivery Rider/Driver Survey' (Survey, 2020) cited in *TEACHO Report* (n 65) 6–7; Bright and Fitzgerald (n 114) cited in *TEACHO Report* (n 65) 6–7.

116 Evidence to Senate Select Committee on Job Security, Parliament of Australia, Sydney, 12 April 2021, 18.

117 Ibid 28.

118 See, eg, David Peetz, 'Self-Employment and Casual Work Aren't Increasing but So Many Jobs are Insecure: What's Going On?', *The Conversation* (online, 3 August 2018) <<https://theconversation.com/self-employment-and-casual-work-arent-increasing-but-so-many-jobs-are-insecure-whats-going-on-100668>>.

gig economy. However, the Australian gig economy workforce is sizeable and growing. The Actuaries Institute has stated that the gig economy workforce ‘may be as large as 250,000 workers’.<sup>119</sup> Many of these workers (around 19% of gig workers) are engaged in the road transport industry.<sup>120</sup> Thus, the issue of rates of pay is important for a significant number of gig economy workers labouring in that industry. As noted above, ensuring adequate minimum rates of pay is also important to support safe working conditions.

While it may be more challenging to ensure decent incomes than to provide protection from capricious termination, it is not impossible. The *Franco v Deliveroo* decision revealed that Deliveroo’s algorithms enabled it to calculate average expected delivery times. It must be possible to estimate the amount of time that a delivery is likely to take, given the kilometres between restaurants and their in-home diners, and the customary waiting times for food to be made ready for collection, to ensure that a delivery fee is charged that is sufficient to reward the driver with a fair rate of pay. The pertinent question is, who should be authorised to set that rate? Must it be left to the platform? Should it rather be subject to collective bargaining between the platforms and an association of riders? Or should rates be determined by an independent tribunal? These questions are considered in Part IV.

#### D Access to Affordable and Prompt Dispute Resolution

As already noted above, access to an affordable tribunal to deal with disputes over contract terminations is essential in any form of regulation of this kind of work. The right to challenge a contract termination is not enough. It is necessary that a challenge can be brought within the same kinds of time frames, and with as little expense, as an application for unfair dismissal before the Fair Work Commission. Filing fees for unfair dismissal applications are \$74.90.<sup>121</sup> Applications on a relatively simple form must be lodged within 21 days of the termination taking effect.<sup>122</sup> And the first step for attempting resolution of a complaint is to call the parties together in an informal conference that will, hopefully, resolve any misunderstandings and open a path for restoration of the relationship.<sup>123</sup> This is,

119 *Interim Report* (n 12) 17. In the United States, 22% of the working-aged population have offered a good or service through a digital platform and one-third of them derive 40% or more of their income from platform work: *ILO Report 2021* (n 16) 49.

120 *Interim Report* (n 12) 24. A report commissioned by Uber has claimed that Uber Eats has created 59,000 delivery rider opportunities: Accenture, *Making Delivery Work for Everyone* (Report, March 2021) 7. Previous reports in the press also indicated that there were around 60,000 Uber rideshare drivers: Anna Patty and Nick Bonyhady, ‘Fair Work Deliver for Uber with Driver Ruling’, *Sydney Morning Herald* (Sydney, 22 April 2020); see also *Interim Report* (n 12) 34. If these estimates are true, that would give Uber a workforce of around 120,000 in Australia. This would make Uber the second largest employer in Australia: Adam Creighton, ‘Uber Takes Bigger Slice of Jobs Market’, *The Australian* (online, 6 April 2021) <<https://www.theaustralian.com.au/nation/uber-takes-bigger-slice-of-jobs-market/news-story/17b1dbfc1a0d84481c2e7601823d6e9e>>.

121 See ‘Lodge an Application’, *Fair Work Commission* (Web Page, 20 December 2021) <<https://www.fwc.gov.au/disputes-at-work/how-the-commission-works/lodge-an-application#:~:text=The%20current%20application%20fee%20is,this%20in%20with%20your%20application>>. Filing fees are adjusted annually: *Fair Work Regulations 2009* (Cth) reg 3.02.

122 *Fair Work Act 2009* (Cth) s 394(2).

123 *Ibid* ss 397–8.

however, a very human process. An algorithm is unlikely to manage this process effectively, so the platforms will need to ensure that they engage personnel who can handle human interactions.

#### IV A NEW MODEL

Part III outlined the essential rights that all on-demand workers need, and deserve. How are they best delivered? It is not enough to identify essential rights of on-demand workers. We now need to elaborate an appropriate regulatory infrastructure to ensure those rights are implemented. As noted above, some scholars have called for the enactment of a broader definition of employment in the *Fair Work Act 2009* (Cth),<sup>124</sup> but these calls have largely been ignored by the incumbent federal Government. No steps in this direction were taken in the Government's so-called 'Omnibus Bill' purporting to deal comprehensively with present concerns.<sup>125</sup> While the *Fair Work Act* continues to rely on the current common law definition of employment, on-demand workers remain in a poorly regulated wilderness.

Proposals to expand the coverage of the *Fair Work Act* by enacting a broader definition of employment certainly warrant serious consideration, but it is not entirely clear that a new definition would necessarily resolve the problems identified in this article. The platform operators continue to wield contract power. The High Court of Australia recently affirmed the primacy of the express contract between parties to an employment relationship, and went so far as to say that it was not within the courts' constitutional remit to regard any disparity in bargaining power when interpreting the terms of a contract.<sup>126</sup> While all focus of regulation is on the form of the contract, it is a short path for the platforms to redraft their contracts, and adjust their arrangements, to avoid falling within any extended definition.<sup>127</sup> While ever any statutory definition in the *Fair Work Act* needs to delineate those workers who should be covered by modern awards from those outside of the award system, it will necessarily describe the kinds of work arrangements that can satisfy the demands of rostering arrangements and minimum shifts. We cannot

124 See Stewart, 'Redefining Employment?' (n 83); *Interim Report* (n 12) 148–52.

125 See Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth). See also the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth). In the end, this enactment abandoned all but its reforms to the regulation of casual work. See Andrew Stewart et al. 'The (Omni)bus that Broke Down: Changes to Casual Employment and the Remnants of the Coalition's Industrial Relations Agenda' (2021) 34(3) *Australian Journal of Labour Law* 132.

126 See *WorkPac Pty Ltd v Rossato* (2021) 309 IR 89, 105 [63] (Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ).

127 Michael Rawling and Sarah Kaine, 'How to Stop Workers Being Exploited in the Gig Economy', *The Conversation* (online, 5 October 2018) <<https://theconversation.com/how-to-stop-workers-being-exploited-in-the-gig-economy-103673>>; Michael Kaine, 'Celebrations in Foodora Case May Be Short-Lived', *Sydney Morning Herald* (online, 12 November 2018) <<https://www.smh.com.au/national/celebrations-in-foodora-case-may-be-short-lived-20181112-p50fjq.html>>; Supratim Adhikari, 'Old Labour Laws "Don't Work in Gig Economy"', *The Australian* (online, 12 February 2019) <<https://www.theaustralian.com.au/business/technology/old-labour-laws-dont-work-in-gig-economy/news-story/ee8e937ff27155ed823eea1359f86aec>>.

forget some of the objections of the workers themselves to the prospect of capture within what they perceive as an antiquated institution of tied employment. The award system has evolved largely with the needs of permanent employees in mind. Some surveyed rideshare drivers have expressed a preference for retaining their independent contractor status, rather than being roped into exclusive employment. For instance, one survey conducted by the Transport Workers' Union found that only 47.6% of on-demand workers desired employment status.<sup>128</sup> Some of this may be because they have been beguiled by the platforms' rhetoric, but some is likely to reflect a genuine preference for the contemporary 'portfolio' style of working patterns, where workers manage several often disparate activities in the course of their working lives.

Fortunately, effective labour market regulation is not dependent upon defining all objects of regulation as subjugated employees.<sup>129</sup> Australian transport workers in the heavy vehicle industry and conventional passenger transport (taxis and hire cars) are already familiar with forms of regulation that provide for minimum rates and conditions of work for non-employed workers. In particular, two key best practice regulatory initiatives – one in NSW and one at the federal level – have operated to regulate forms of work outside of employment to provide for rights and entitlements of road transport workers. These are chapter 6 of the *Industrial Relations Act 1996* (NSW) (which is still in operation today) and the Road Safety Remuneration Tribunal, which operated for a brief time at the federal level but was abandoned for political reasons.<sup>130</sup> The *TEACHO Report*<sup>131</sup> outlines these two proposals in greater detail; however, a summary of the key elements of these two schemes is provided here.

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

In 1979, following a report commissioned by the Minister for Labour and Industry in the Askin Liberal Government in 1967 (and delivered by the NSW Industrial Relations Commission in 1970),<sup>132</sup> the NSW Parliament enacted amendments to the *Industrial Arbitration Act 1940* (NSW) which provided access to conciliation and arbitration for owner-drivers.<sup>133</sup> These provisions were maintained and expanded when the Greiner NSW Liberal Government enacted the *Industrial Relations Act 1991* (NSW).<sup>134</sup> The provisions were also preserved by the Carr

128 Transport Workers' Union, Submission No 30 to Legislative Council Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales, Parliament of New South Wales, *Inquiry into Impact of Technological and Other Change on the Future of Work and Workers in New South Wales* (14 October 2020) 16.

129 See *ILO Report 2021* (n 16) 210.

130 See Rawling, Johnstone and Nossar (n 17).

131 See *TEACHO Report* (n 65) 18–23.

132 Industrial Commission of New South Wales, *Section 88E of the Industrial Arbitration Relations Act, 1940–1968 in so far as it concerns Drivers of Taxi-cabs, Private Hire Cars, Motor Omnibuses, Public Motor Vehicles and Lorry Owner Drivers* (Report, 23 February 1970). Part C of the report examined lorry owner-drivers and found evidence of a connection between owner driver rates (and methods of pay) and the ability of those drivers to perform their work safely: at vol 2 [30.24].

133 *Industrial Arbitration (Amendment) Act 1979* (NSW).

134 *Industrial Relations Act 1991* (NSW) ch 6 ss 660–700.

Labor Government when it enacted the *Industrial Relations Act 1996* (NSW).<sup>135</sup> So this scheme has enjoyed bipartisan political support for four decades.<sup>136</sup>

The aspects of chapter 6 regulation that would prove useful for the regulation of on-demand platform-based work include the system for making and registering ‘contract determinations’ and ‘contract agreements’ to fix remuneration and other contract terms; protection from capricious contract termination;<sup>137</sup> and access to a simple and affordable dispute resolution system.<sup>138</sup> The system of ‘contract determinations’ and ‘contract agreements’ govern the direct contractor driver-principal relationship in a range of industry subsectors.<sup>139</sup> Each contract determination provides for minimum rates and conditions tailored to the particular sector.<sup>140</sup> Minimum rates take account of all costs incurred by owner-drivers in providing road transport services.

Groups of owner-drivers are able to negotiate terms and conditions above the minimum rates set by contract determinations, by making ‘contract agreements’ which are registered with the NSW Industrial Relations Commission.<sup>141</sup> Contract determinations and agreements provide a range of terms and conditions for the engagement of owner drivers, not only pay rates.<sup>142</sup> Owner-drivers can be represented by a relevant union in these negotiations.<sup>143</sup>

Most importantly, chapter 6 provides owner drivers access to a convenient enforcement regime by extending the enforcement provisions applying to employees to contract drivers.<sup>144</sup> Evidence shows that direct hirers of contractor drivers have relatively good compliance rates with chapter 6 instruments,<sup>145</sup> and both owner-drivers and the businesses who engage them enjoy certainty.<sup>146</sup>

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135 Chapter 6 was specifically exempted from the federal takeover of independent contractor regulation by the *Independent Contractors Act 2006* (Cth). See at s 7(2)(b)(i); Transport Workers’ Union, Submission No 32 to Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Inquiry into Opportunities to Consolidate Tribunals in NSW* (25 November 2011) 8; Sarah Kaine and Michael Rawling, “Comprehensive Campaigning” in the NSW Transport Industry: Bridging the Divide between Regulation and Union Organizing’ (2010) 52(2) *Journal of Industrial Relations* 183, 191; Michael Rawling et al, *Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness* (Draft Report, 29 November 2017) 41, indicating that chapter 6 has received support at the federal level of government as well.

136 *TEACHO Report* (n 65) 19.

137 *IR Act 1996* (NSW) s 314.

138 Ibid ch 6 pt 4; Igor Nossar and Michael Rawling (2017), *The Australian Safe Rates Approach* (Report, Unpublished ILO Archives, 2017) 3 (copy on file with authors).

139 Michael Rawling and Sarah Kaine, ‘Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers’ (2012) 25(3) *Australian Journal of Labour Law* 237, 248 (‘Regulating Supply Chains’); Quinlan and Wright (n 88) 74.

140 See, eg, *Application by Transport Worker’s Union of New South Wales, Industrial Organisation of Employees* [2017] IRC 105.

141 *IR Act 1996* (NSW) ch 6 pt 3.

142 Ibid ss 312–13, 322.

143 Ibid ch 6 pt 5 ss 333–42.

144 Ibid ch 6 pt 6 ss 343–4.

145 See *TEACHO Report* (n 65) 19; Quinlan and Wright (n 88) 29; Rawling and Kaine, ‘Regulating Supply Chains’ (n 139) 248–9.

146 Rawling and Kaine, ‘Regulating Supply Chains’ (n 139) 249.

Many long term contract agreements have been negotiated between the Transport Workers' Union and large transport companies.<sup>147</sup>

Given the application of chapter 6 to a wide range of contract drivers (including taxi drivers) it is perhaps surprising that it has not yet been found to cover rideshare drivers, or food delivery cyclists. There is no specific mention of rideshare drivers in the legislation.<sup>148</sup> Food delivery cyclists are likely to be excluded presently, because 'a contract of carriage' is said not to include a contract 'for the delivery of meals by couriers to homes or other premises for consumption'.<sup>149</sup> The *TEACHO Report* suggests a reason for this exclusion:

No doubt when this legislation was first enacted any person delivering meals to homes would have been a 'meals on wheels' charity worker, or an employed servant of a restaurant or other meal provider. Bread and milk delivery drivers were already deemed to be employees for the purposes of the *IR Act* by Schedule 1, cl 1(a) and (e). The existence of today's fleets of delivery workers picking up food from restaurants for delivery to customers was unimaginable when this legislation was enacted. Nevertheless, these are the very kind of workers who Chapter 6 was designed to protect. If *IR Act* s 309(4) were amended to remove the exclusion of these workers from this scheme, on demand [road transport] workers in NSW might be covered by this scheme.<sup>150</sup>

Amendment of this State scheme would not, however, solve the problem nationally. All state-based solutions are susceptible to further expansion of federal jurisdiction over all industrial matters. Most state industrial laws were overridden by federal law,<sup>151</sup> first by the Work Choices amendments in 2006, and subsequently by the *Fair Work Act 2009* (Cth).<sup>152</sup> The Work Choices reforms applied federal law to all incorporated private sector employers, and the Fair Work legislation followed suit. All states except Western Australia have subsequently referred power over industrial matters to the Commonwealth, in respect of unincorporated private sector employers.<sup>153</sup> Since the expansion of federal power, the NSW system cannot regulate the working conditions of employed drivers because these workers all fall within the definition of a 'national system employee' in the *Fair Work Act 2009* (Cth) section 13. Chapter 6 also lacks any measures to regulate participants in road transport supply chains. Contract determinations are confined in their

147 *TEACHO Report* (n 65) 19. A broad 'trade practices' exemption is included in chapter 6 which specifically authorises for the purposes of the *Competition and Consumer Act 2010* (Cth) s 51 (and the *Trade Practices Act 1974* (Cth) sch 1 pt 1 ('*Competition Code of New South Wales*')) the exercise of tribunal powers under chapter 6, anything done by a person in order to comply with a contract determination, including entering into and doing anything preparatory or incidental to the determination, and anything done under a contract agreement: *IR Act 1996* (NSW) s 310A.

148 *TEACHO Report* (n 65) 19–20.

149 *IR Act 1996* (NSW) s 309(4)(i).

150 *TEACHO Report* (n 65) 20.

151 Due to the operation of section 109 of the *Australian Constitution*.

152 See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) sch 1 s 9 which added section 7C to the *Workplace Relations Act 1996* (Cth); *Fair Work Act 2009* (Cth) s 26; *Independent Contractors Act 2006* (Cth) s 7. For an explanation of the constitutional aspects of this federal takeover of industrial matters, see Rosemary Owens, 'Unfinished Constitutional Business: Building a National System to Regulate Work' (2009) 22(3) *Australian Journal of Labour Law* 258.

153 Note that Victoria referred power over industrial matters to the Commonwealth in 1997, following the enactment of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).



application to direct hirer/owner driver arrangements. In any event, chapter 6 does not cover any road transport work outside of NSW.<sup>154</sup> A new federal scheme of regulation is needed to overcome the limited reach of the NSW legislation.<sup>155</sup> For a brief time, Australia experimented with this kind of regulation in the Road Safety Remuneration Tribunal ('RSRT').

## B The Road Safety Remuneration Tribunal

The RSRT was perhaps the most comprehensive initiative to address 'the root causes of pressures on the road transport industry'<sup>156</sup> and provided legislative protections for all road transport workers around Australia – regardless of their work status. The RSRT is a suitable model for the adaptation to the on-demand sector despite its abolition. The tribunal was abolished for reasons of political expediency:<sup>157</sup> '[t]here was no lack of evidence for the need for the tribunal or indeed any lack of evidence that it could be effective'.<sup>158</sup>

It was established following a 2008 review of safety problems in the road transport industry, headed by the National Transport Commission in 2008. The review found evidence of a link between remuneration systems for drivers and road safety outcomes and recommended the establishment of a national scheme to mandate the provision of safe rates for all transport workers, employees and owner drivers alike.<sup>159</sup> The review recommended that these rates should be set by a newly established specialised tribunal, charged with oversight of the relationship between remuneration rates and safety concerns in the transport industry. The review recommended other key elements of the scheme, including adequate enforcement of orders; obligations on parties higher up the supply chain when drivers were not paid their proper entitlements; and a system of penalties that would escalate for repeated failure to observe mandated pay rates.<sup>160</sup> The *Road Safety Remuneration Act 2012* (Cth) ('*RSR Act*') established the RSRT.<sup>161</sup> The RSRT operated from 1 July 2012 until April 2016, when it was dissolved by the *Road Safety Remuneration Repeal Act 2016* (Cth).<sup>162</sup>

The *TEACHO Report* summarises the objects and functions of the *RSR Act*:<sup>163</sup>

The principal object of the *RSR Act* was to promote safety and fairness in the [road transport] industry.<sup>164</sup> The RSRT's role in meeting this principal object was to address the relationship between pay and safety in the [road transport] industry by, amongst other things, developing and applying reasonable and enforceable

154 Rawling and Kaine, 'Regulating Supply Chains' (n 139) 249.

155 *TEACHO Report* (n 65) 20.

156 *Ibid.*

157 Rawling, Johnstone and Nossar (n 17).

158 *TEACHO Report* (n 65) 20–1.

159 Quinlan and Wright (n 88) 61.

160 Nossar and Rawling (n 138) 10 citing Quinlan and Wright (n 88). Following these findings, a Safe Rates Advisory Group was established to advise the federal government on the implementation of these recommendations: at 10.

161 *Road Safety Remuneration Act 2012* (Cth) ss 2, 79 ('*RSR Act*').

162 Nossar and Rawling (n 138) 10.

163 *TEACHO Report* (n 65) 21.

164 *RSR Act 2012* (Cth) s 3.

standards throughout the [road transport] supply chain to ensure the safety of road transport workers.<sup>165</sup> The main functions of the RSRT were: making road safety remuneration orders; approving road transport collective agreements; and dealing with disputes between road transport industry participants.<sup>166</sup>

Most importantly, all of these provisions relating to orders, agreements and disputes applied to all road transport participants, whether or not the drivers were engaged as employees or independent contractors with their own ABN or incorporated business.<sup>167</sup> The Commonwealth relied on its broad range of constitutional powers to achieve this coverage.<sup>168</sup>

### 1 Road Safety Remuneration Orders

If it had continued in operation, the RSRT could have continued to make orders to deal with any matter deemed appropriate to ensure safety,<sup>169</sup> including:

- Minimum remuneration for drivers (whether employees or contractors);
- Payment for loading and waiting times;
- Limits on loads;
- Methods and terms of payment; and
- Any means for eliminating ‘remuneration-related incentives, pressures and practices that contribute to unsafe working practices’.<sup>170</sup>

These kinds of conditions are equally appropriate for on-demand road transport workers. On-demand road transport workers also need minimum pay rates to address sub-standard market rates; they need payment for waiting time given they spend significant unpaid time waiting to pick up deliveries; and they would significantly benefit from provisions which reduce incentives to work unsafely.

### 2 RSRT Collective Agreements

The RSRT gave contractor drivers access to a collective bargaining system, without treating them as employees.<sup>171</sup> The *RSR Act* provided the critical bargaining

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165 Ibid. Jennifer Acton, ‘Complementary Jurisdictions: The Road Safety Remuneration Tribunal and Occupational Health and Safety Laws’ (Speech, Australian Council of Trade Unions OHS/Workers’ Compensation Conference, 6 September 2012) 2, archived at <[https://web.archive.org/web/20160329225230/http://www.rsrt.gov.au/default/assets/File/Speeches/Acton%20P\\_6%20Sept%202012.pdf](https://web.archive.org/web/20160329225230/http://www.rsrt.gov.au/default/assets/File/Speeches/Acton%20P_6%20Sept%202012.pdf)>.

166 *RSR Act 2012* (Cth) s 80; Acton (n 165) 2.

167 Rawling and Kaine, ‘Regulating Supply Chains’ (n 139) 252.

168 *RSR Act 2012* (Cth) ss 27(3), 9.

169 Ibid s 27(1).

170 Ibid s 27(2). In its time the Road Safety Remuneration Tribunal made two orders, the Road Safety Remuneration Tribunal, *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014* (PR350280, 17 December 2013) and the Road Safety Remuneration Tribunal, *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* (PR350441, 18 December 2015). A cost-benefit analysis commissioned by a federal Coalition government bent on abolishing the tribunal found that it was anticipated that the first two orders made by the RSRT would result in a 10% and 18% reduction in heavy vehicle crashes, respectively: PricewaterhouseCoopers, *Review of the Road Safety Remuneration System* (Report, Department of Employment, Commonwealth of Australia, January 2016) 83, 86.

171 Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) 149.

infrastructure. Foremost, the Act created both a mechanism for the enforcement of collective agreements and a safety net of minimum remuneration and related conditions (in the form of the RSRT orders) against which those agreements could be negotiated.<sup>172</sup> If it had survived, the RSRT could have approved collective agreements following bargaining by worker collectives (including the unions representing them) and hirers.<sup>173</sup> Approval made agreements binding and enforceable. Bargaining in pursuit of such an agreement was exempt from trade practices prohibitions on anti-competitive conduct.<sup>174</sup>

### 3 *RSRT Dispute Resolution*

The RSRT was empowered to employ a similar range of dispute resolution techniques as the Fair Work Commission. It could supervise mediation or conciliation, make its own recommendations, and so long as the parties agreed, it could perform a function as arbitrator of disputes. The RSRT was able to deal with disputes about pay or any other condition of work that influenced whether the work would be carried out in an unsafe manner. It could also deal with disputes involving the practices of other parties in the supply chain (such as the major clients) where those practices exerted pressure on a direct hirer to provide unsafe pay rates and conditions of work. The RSRT could also deal with disputes brought by drivers who were punished for refusal to accept unsafe conditions of work.<sup>175</sup>

### 4 *Compliance and Enforcement*

The role of supervising compliance with the *RSR Act* and orders of the RSRT was given to the Fair Work Ombudsman ('FWO'), and the FWO could use all of its powers of investigation and inspection to perform this role.<sup>176</sup> The FWO could also take representative proceedings on behalf of any drivers affected by a breach of the *RSR Act* or RSRT orders, as could any relevant union.<sup>177</sup>

## C A Model Suitable for On-Demand Road Transport Work

The various components of the RSRT legislative scheme described above align closely with the fundamental interests outlined in Part III. The RSRT scheme provided a means for ensuring decent pay and working conditions for all workers, promoting safe work practices, supporting job security, and dealing efficiently with disputes.

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172 Ibid.

173 *RSR Act 2012* (Cth) s 33. Such an approval might have only been made where an order that applied to the relevant drivers was in effect; a majority of the drivers approved of the agreement and would have been better off overall under the agreement than under the order; and there was an agreement method for adjusting pay levels (where the agreement operated for more than 1 year): at s 34.

174 That is, anything done by a participating hirer or contractor driver in bargaining or in accordance with an approved agreement was specifically authorised for the purposes of sub-section 51(1) of the *Competition and Consumer Act 2010* (Cth): *RSR Act 2012* (Cth) s 37A.

175 *RSR Act 2012* (Cth) ss 40–3.

176 Ibid ss 73–4.

177 Ibid ss 46, 73, 78.

The fog of words used by the platforms in their contract documentation and their rhetorical justifications for their business models should not be allowed to obfuscate the reality of the work performed by the vulnerable workers engaged by those platforms. In truth, these workers perform the same or very similar work to that undertaken by other road transport workers and they are subject to the same or similar work pressures and safety issues experienced by other road transport workers. As such, these on-demand workers are best seen as belonging to the same category as other road transport workers. It is a dangerous furphy to categorise these workers as part of a separate gig economy. The powerful digital platforms use this language to evade regulation and obscure the urgent need to provide decent labour protections for vulnerable on-demand road transport workers. If we cut through the rhetorical spin and focus on the reality of the work performed, it becomes patently obvious that all road transport workers, no matter how they are engaged (whether through digital or conventional means) require a similar set of legal protections. The best, most comprehensive, and most suitable suite of legal powers designed to address the root causes of exploitation of road transport workers were to be found in the *RSR Act*. It provides the most appropriate model for the federal Parliament to use to design a contemporary, industry-specific scheme of legislative regulation for the Australian road transport industry which would cover all road transport contractor and employee drivers including those engaged through a digital platform or phone app.

## V CONCLUSION

Powerful road transport digital platforms have wielded their considerable resources to exploit a vulnerable workforce of road transport on-demand workers labouring on Australian soil. As they have done in other jurisdictions, these businesses continue to use their contractual and rhetorical power to push their regulation avoidance strategy as a key part of how they conduct their businesses in Australia. To date, Australian Parliaments have failed to adequately address the power and resources of these global digital platforms. A robust, national legislative scheme is required to meet the considerable challenges and evasive strategies of these powerful digital platforms. For reasons explained in this article, the RSRT provides a local but world-leading model consisting of a suite of legally enforceable protections that might be adapted to ensure adequate pay and safe conditions for road transport on-demand workers. This form of regulation would provide those protections to both workers engaged as both employees and contractors and thus effectively neutralise the platform enterprises' main regulatory avoidance strategy. Any more piecemeal, or meagre, response may mean the power of these platforms continues to prevail over the interest of Australian citizens (especially those holding traditional values of decency at work) in ending extreme exploitation of vulnerable workers. Continued government inaction necessarily entails the unilateral dominance of the platforms and the steady return of working conditions similar to those of the Hungry Mile experienced by waterside workers in the 19<sup>th</sup> century.