

# Response<sup>1</sup> to Senate Select Committee on Job Security: *Invitation to provide feedback on the committee's first interim report*

Dr Tom Barratt, Centre for Work + Wellbeing, School of Business and Law, Edith Cowan University  
Dr Caleb Goods, Department of Management & Organisations, The University of Western Australia<sup>2</sup>  
Dr Brett Smith, Department of Management & Organisations, The University of Western Australia  
Mr Rick Sullivan, Discipline of Work and Organisational Studies, The University of Sydney  
Dr Alex Veen, Discipline of Work and Organisational Studies, The University of Sydney

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## Preamble

Drs Barratt, Goods, Smith and Veen & Mr Sullivan (**research team**) thank the committee for the invitation to provide feedback on the recommendations of the Senate Select Committee on Job Security's (**select committee**) First Interim Report. The research team will address each recommendation in sequence, and then make some general comments

### Recommendation 1 – 2.66:

*The committee recommends that the Australian Bureau of Statistics expands its Labour Force Survey to capture quarterly estimates in relation to the number of workers engaged in the on-demand platform sector. These estimates could include the industries and occupations in which they work, the hours they work, their visa status, the nature of their working arrangements relative to other workers, earnings and other demographic characteristics.*

### Response:

The research team argue that the paucity of data on the gig economy makes it difficult to understand the scope, nature and scale of the gig economy, and in turn makes it difficult for policymakers to enact policy settings which meet the needs of various stakeholders.

Related to the oral evidence provided for the committee, one risk of this approach is the imprecision of definitions of what a gig worker is, and how any individual balances 'gig' and non 'gig' work. The research team therefore strongly recommend that any extra questions in the Labour Force Survey be designed to capture precisely the type of gig work the select committee envisages.

The research team, on the basis of their experience of the gig economy and the development of survey tools relevant to gig workers, would be willing to assist in the design of such survey questions.

### Recommendation 2 - 2.67:

*The committee recommends that the Australian Bureau of Statistics enhances its Work-Related*

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<sup>1</sup> This response reflects the expert opinions of the authors, and does not necessarily represent the views of their respective institutions.

<sup>2</sup> Corresponding Author

*Injuries Survey to capture specific information on the number, and types, of injuries and fatalities for workers engaged in the on-demand platform sector.*

### **Response:**

The research team supports this recommendation, while reinforcing the request that the ‘on-demand platform sector’ be precisely defined.

### **Recommendation 3 – 2.68:**

*The committee recommends that Safe Work Australia enhances its national data collection process to capture specific information on the number, and types, of injuries and fatalities for workers engaged in the on-demand platform sector. The committee further recommends that all road crashes involving on-demand workers be officially recognised as workplace incidents and are recorded and investigated as such.*

### **Response:**

The research team notes that in some jurisdictions there have, historically, been barriers in recording work-related road traffic accidents (one form of workplace injury to which gig workers are exposed) as workplace safety issues, rather than as solely road-safety issues, which may have led to under-reporting of gig work safety incidents, and thus support this recommendation.

There is also a need for precision here with regards to when these incidents are counted, as there are some ambiguities about when a worker is in the state of being ‘at work’. The research team would suggest a working definition to include “when a worker is logged into one or more platform’s app and available to receive delivery requests, and when a worker is in the process of travelling to receive or deliver an order, or when a worker is commuting to or from an area where they intend to log into one or more platform’s apps with the purpose of logging into this/these app(s)”.

### **Recommendation 4 – 5.189:**

*The committee recommends that, as a matter of priority, Safe Work Australia develops meaningful, high-level guidelines on the application of the model Work Health and Safety Laws to the on-demand platform (or ‘gig’) sector. The guidance should be aimed at addressing practices that incentivise unsafe behaviour, as well as enforcing compliance with safety rules and obligations. The guidance should not seek to unreasonably circumvent the obligations of on-demand companies through novel interpretations of workers as being a ‘person conducting a business or undertaking’ (PCBU), particularly when such workers in the on-demand sector are engaged in highly dependent or low-leverage work arrangements.*

### **Response:**

The research team endorse this, and suggest that the development of meaningful, high-level guidance be constructed to cover specific segments of the gig economy (e.g., transportation, caring etc) rather than the gig economy *writ large*. The research team also suggest that this meaningful, high-level guidance be created in a consultative manner with relevant stakeholders and would be pleased to assist in such a process.

The research teams also note that a potential interpretation of the model laws (as far as we know legally untested) which may also render the restaurant, rather than the worker or the platform, as being responsible for couriers’ health and safety in the food-delivery segment of the app-based gig economy.

### **Recommendation 5 – 5.190:**

*The committee recommends that the Australian Government urgently clarifies, by way of regulation,*

*which persons or entities owe a duty of care as a person conducting a business or undertaking (PCBU) under the Model Work Health and Safety laws in relation to individual support workers engaged through on-demand platforms like Mable. The law should dictate that:*

*a platform that engages individual workers to provide support work under the NDIS or similar schemes, and makes money from the arrangement, is a PCBU and owes a duty of care to that worker, regardless of that worker's work status (employee or contractor), or their visa status; and that individual care recipients, such as NDIS participants, are not a PCBU in relation to that worker.*

### **Response:**

The research team are not experts on this matter and wish to remain silent regarding this recommendation.

### **Recommendation 6 – 5.191:**

*The committee recommends that the Australian Government works with state and territory governments to lead the reform of state-based workers' compensation schemes so that they extend to platform workers, regardless of their visa or work status, and require platform companies to pay workers' compensation premiums for these workers.*

### **Response:**

The research team endorse the importance of these workers being able to access workers' compensation schemes in the case of injury or death, as we recommended in our submission.

The research team note that there are complexities in whether independent contractors who are not platform workers would want to be a part of the workers' compensation scheme (e.g., a sole trader plumbing business) and so questions of definition remain vitally important so that such a rule does not have unintended consequences.

The research team also note that many gig workers are unable to materially influence their rates of pay, so requiring platforms to pay for such schemes may result in workers foregoing increases in piece rates, or having piece rates diminished, as a result of platforms being compelled to pay for these premiums.

### **Recommendation 7 – 6.123:**

*The committee recommends that the Australian Government expands the definitions of 'employment' and 'employee' in the Fair Work Act 2009 to capture new and evolving forms of work. In addition to an expanded definition of 'employment' and 'employee' under the Fair Work Act, there should be a mechanism by which the Fair Work Commission can extend coverage of those rights when necessary to workers falling outside the expanded definition of employment, including low-leveraged and highly dependent workers so they can be provided with standards and protections under the Act.*

### **Response:**

The research team expresses reservations about such a change without wider reform of the Fair Work Act more generally. While we see why this change would be appealing, it would also have wide-reaching consequences beyond the gig economy and change many existing practices across the economy. As such, the research team recommends careful consideration to which workers the Australian Government would want to protect here and determine relevant criteria to which any new definitions would apply.

Another consideration is the capacity of platforms to engage in contractual drafting in response to any legislative reform, meaning that while this approach may work in the short term, there are broader structural issues which need to be addressed in terms of platforms' claimed desire for flexibility, workers' need for their own form of flexibility, power imbalances and exploitative (or otherwise) work practices.

### **Recommendation 8 – 6.124:**

*The Committee recommends that the Australian Government investigates options for a Federal regulator to be empowered to request data from platforms that employ and contract workers, including:*

*pay rates;*

*hours worked;*

*other conditions governing that work; and*

*other relevant information needed to appropriately monitor safety, competition and labour rights.*

### **Response:**

The research team endorse this, as it is congruent with our recommendation in our submission that government create a mechanism for transparency around earnings to better understand the economic pressures that these workers face. As per our oral evidence, this should be reported in a time- and space-sensitive manner, accounting for fluctuations in earnings at different times of year, different days of the weeks, different times of day in different locations.

### **Recommendation 9 – 6.125:**

*The committee recommends that the Australian Government gives the Fair Work Commission (FWC) broad powers to resolve disputes and make orders for minimum standards and conditions in relation to all forms of work. The expanded remit of the FWC would include:*

*adjudicating in cases where there is a dispute in relation to the appropriate status of workers;*

*setting binding minimum standards and conditions in relation to non-standard forms of work, regardless of employment status; and*

*the capacity to resolve disputes (including where necessary through binding decisions) in a low-cost and effective manner.*

*The FWC should be empowered to make determinations and orders for groups and categories of workers, not just individuals.*

### **Response:**

The research team endorse this recommendation as a way of the state regulating minimum conditions of the gig economy in a manner which, according to our research, Australian consumers broadly support. This recommendation, above all others, would reflect government determining what is and is not acceptable within the gig economy, rather than subject workers to falling off a cliff and into an unregulated wilderness, to paraphrase the Interim Report. We expand upon this point in our general comment below.

### **Recommendation 10 – 6.126:**

*The committee recommends that the Australian Government empowers the Fair Work Commission (FWC) to provide pathways to permanency via arbitrations for casual conversion. Any disputes with regards to work status, contractual arrangements, or casual conversion should be able to be arbitrated via a low-cost, accessible process, whether via the FWC or another body, to ensure workers are able to practically enforce their rights, and both workers and employers can have matters adjudicated quickly.*

## **Response:**

This recommendation moves outside the scope of our expertise, and as such, we wish to remain silent on this recommendation.

## **Recommendation 11 – 6.127:**

*The committee recommends that the Australian Government provide greater protections for independent contractors who are sole traders by establishing an accessible low-cost national tribunal to advise on, oversee, and make rulings relating to employment relationships involving low-leveraged independent contractors, such as those in the rideshare and other platform sectors.*

## **Response:**

The research team's view is that, should the predominant mode of worker engagement in the gig economy remain independent contracting arrangements, that an accessible, low-cost tribunal would help provide workers with voice.

However, we retain two reservations about the recommendation as drafted.

- Firstly, we believe that such a tribunal should be industry specific, so as to retain expertise specific to the industry. This may result in different tribunals for road transport of goods and people, and of disability support workers etc.
- Secondly, we believe jurisdiction to make decisions as to employment status should remain with the Fair Work Commission, and that such a tribunal should resolve workplace disputes once issues of worker categorisation have been resolved.

## **Recommendation 12 – 6.152:**

*The committee recommends that the Joint Standing Committee on the National Disability Insurance Scheme give specific consideration to the following matters related to platform-based work in the disability sector as part of its current inquiry into the NDIS Workforce and its ongoing examination of the operation and performance of the NDIS:*

*the prevalence of platform-based work in the sector, and the growing and evolving nature of this business model;*

*the prevalence of independent contracting through platforms;*

*the characteristics of independent contractors providing support work through platforms like Mable;*

*the extent to which workers rely on this income, or have other sources of income;*

*the typical earnings, insurance coverage, superannuation and access to leave and other entitlements available to these workers;*

*the adequacy of training and support provided to workers;*

*issues associated with safety, risk, and liability under Work Health and Safety laws; and*

*issues relating to the potential for NDIS recipients to be classified as persons conducting a business or undertaking (PCBUs) under existing Work Health and Safety laws.*

### **Recommendation 13 – 6.153:**

*Taking into account the findings of any relevant inquiries, the committee recommends that the Australian Government considers regulatory options that would ensure support workers engaged to provide services funded through the National Disability Insurance Scheme are provided with fair pay and conditions, including those engaged through on-demand platforms.*

### **Recommendation 14 – 6.154:**

*The committee recommends that the Australian Government considers working with states and territories to design a national scheme that connects and extends the current state and territory schemes to provide portable long service leave, sick leave and other leave entitlements, and portable training entitlements, to all workers delivering services under the National Disability Insurance Scheme.*

### **Response to Recommendations 12-14:**

The research team's expertise does not extend to the NDIS or care sector, and as such we remain silent on the appropriateness of these recommendations.

### **Recommendation 15 – 6.155:**

*The committee recommends that the Australian Government works through the Council on Federal Financial Relations to achieve an intergovernmental agreement that government procurements must require companies engaged by the Federal and state and territory governments to provide minimum standards of pay, safety and insurance, workers' compensation and basic protections for workers.*

### **Response:**

The research team believe that while such high-level statements are admirable, and there is a benefit to using the purchasing power of the state to create a 'high road' with regards to employment pay and conditions, it remains contentious as to how to determine and enforce "minimum standards of pay, safety and insurance, workers' compensation and basic protections".

### **General Comments:**

We thank the select committee for the invitation to respond to these recommendations. Overall, the recommendations to which we have expressed a supportive view will help measure and regulate the gig economy, however the Australian Government chooses to define it. The research team therefore recommends a broader examination of the gig economy, its benefits (in terms of offering opportunities for paid work and consumer surpluses among others) and its drawbacks (with the potential downgrading of working conditions, worker exploitation and *in extremis* worker deaths), and what degree of risk regulators are comfortable with workers facing.

One area which is not considered within these recommendations is the growing role, both inside and outside of the gig economy, of the growing use of dehumanised management practices in the form of algorithmic management. The impact of this technological development remains under-investigated yet raises significant questions about equity, fairness and voice at work. It further has direct implications for collective bargaining, workplace discrimination, as well as debates as to what constitutes decent (or indecent) work. We ask the select committee to be mindful of the practical implications of these recommendations in light of this emerging technological development.

There are further broader questions which the growth of the gig economy raises about the appropriateness of the current employment relations system to deal with these questions. We have categorisation tests that, in their design, could not have envisaged such arrangements as are now common in the gig economy. The emergence of these novel work arrangements (and forms of

contracts) also highlights some of the rigidities in the current Modern Award system as a largely stand-alone approach to setting and maintaining working standards (outside of EBA negotiations). This is not to advocate for the removal of this system and invite the higgling of the market, but rather, re-imagining the safety net and social security system inside and outside the domain of work in Australia, so that the new reality of work (of which the gig economy forms a part) can continue to meet the needs and objectives of the Australian economy and society.

These issues must be considered not theoretically or ideologically, but in a manner which is grounded in many of the labour market experiences and vulnerabilities that many gig workers face. These are the parameters and debates the research team believe regulators need to engage with so that gig work is appropriately regulated to meet economic, social and cultural goals.