Submission in Response to the Senate Select Committee on Job Security

March 2021

Maurice Blackburn Lawyers submission to Submission in Response to the Senate Select Committee on Job Security

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Every day, our nation-wide Employment and Industrial Law team supports hundreds of Australian workers who have fallen victim to poor workplace practices by employers.

All Maurice Blackburn contributions to public policy discussions are based on the lived experience of the clients we serve, and our staff who represent them.

Our Submission

Maurice Blackburn is grateful for the opportunity to contribute to this very important public policy conversation.

From our perspective as legal practitioners with expertise in employment and industrial law, we are seeing a reduction in the capacity for people to choose the form of work that would suit them and their family circumstances best, and instead take what's available. For many, this includes accepting insecure work.

Evidence would suggest that many of those who engage in the precarious and insecure work arrangements, mainly through lack of viable alternatives, are from the most vulnerable of Australian cohorts. They include people from immigrant communities (particularly those without residency or work rights), young people, students, women, those with disabilities, older workers, Indigenous Australians, early school leavers and those returning to the workforce.

Engagement in insecure work has moved from being a lifestyle choice for some, to being a last resort for many. While it may provide corporate Australia with flexibility and responsiveness, that comes at the expense of entrenching poverty and powerlessness, and widening inequality.

The 'fissuring' of Australian workplaces through outsourcing and privatisation is leading to widening gaps between those who want work done and those who provide the work. Accountability for the safety, wellbeing and entitlements of workers is being muddied through outsourcing agreements. The capacity for workers to engage in bargaining with those who want the work done is being further diminished through these arrangements.

We argue that the impacts of failing to provide certainty of access to workers' compensation coverage can be devastating to gig economy workers and their families.

Maurice Blackburn argues that existing employment laws are failing those in insecure work. The existing laws simply do not apply, and therefore they cannot be enforced. Existing laws do not provide the sorts of protections for those in insecure work as they do for those in more

traditional employment relationships. Exploitation is rife in employment arrangements which discourage union involvement and instil fear in the minds of those who might speak out about conditions.

More and more countries around the world are recognising that it is untenable for a certain kind of working arrangement to be exempt from workplace protections – especially when that working arrangement is most prevalent amongst their most disadvantaged citizens. We offer a number of suggestions as to how that could be improved in the Australian context.

The COVID-19 crisis has left many Australians shocked at just how precarious their jobs (and income) are. Australia needs policy settings which focus on stable, satisfying employment, with good conditions. We need policies which incentivise employers to prioritise permanent jobs, and de-incentivise the use of temporary and precarious working conditions.

We believe that the work of this Committee is timely and important. We would welcome the opportunity to discuss the contents of our submission in more detail.

Responses to the Terms of Reference

a. The extent and nature of insecure or precarious employment in Australia

Maurice Blackburn is confident that this Inquiry will receive significant input from reputable agencies citing quality analysis which illustrates the trends in employment in Australia – including the emergence of precarious and insecure work.

Figures relating to the popularity and availability of full time, part time, casual and independent contract work have changed continuously over the course of Australia's history since European settlement.

Each employment type has advantages and disadvantages. Many people rely on and enjoy the security of full time work. Some prefer the flexibility of causal employment. Some choose to do on-demand work to supplement other work or study.

From our perspective as legal practitioners with expertise in employment and industrial law, we are seeing a reduction in the capacity for people to choose the form of work that would suit them and their family circumstances best, and instead take what's available. For many, this includes accepting insecure work.

The ACTU has defined insecure work as follows:[1]

> *Insecure work is poor quality work that provides workers with little economic security and little control over their working lives. Indicators of insecure work include:*
>
> *(i) unpredictable, fluctuating pay*
> *(ii) inferior rights and entitlements, including limited or no access to paid leave*
> *(iii) irregular and unpredictable working hours, or working hours that, although regular, are too long or too few and/or non-social or fragmented;*
> *(iv) lack of security and/or uncertainty over the length of the job; and*
> *(v) lack of voice at work on wages, conditions and work organisation.*

The McKell Institute notes that:

> *Labour demand factors have shifted as Australia's economy has become more service-oriented, with industries such as health, education, hospitality, and tourism seeing large increases in employment, all of which involve irregular hours. Currently, four-fifths of employed Australians (that is, 80% of the workforce) work in service industries. This is in contrast to the decline in industries that involve routine manual jobs such as manufacturing (now 7.3% of the total workforce population down from 9.9% ten years ago) and which traditionally held higher numbers of full-time positions.*

In our experience, many of those who engage in the precarious and insecure work arrangements, mainly through lack of viable alternatives, are from the most vulnerable of Australian cohorts. They include people from immigrant communities (particularly those without residency or work rights), young people, students, women, those with disabilities, older workers, Indigenous Australians, early school leavers and those returning to the workforce.

[1] www.actu.org.au/media/125289/Future%20of%20work%20industrial%20options%20paper.pdf: p.3

In many cases, these people fear that speaking out against unequal treatment, or their lack of access to the employment rights other workers enjoy, will hamper their capacity to retain work or find anything better.

The fear of speaking out is a natural extension of the power imbalance that exists between unscrupulous employers and vulnerable employees.

Many of these workers are unaware of the supports that are available to them through unions, consumer advocates or the various information and complaints authorities.

The impact on women in the workplace is worthy of particular focus.

Women make up the backbone of service-oriented industries such as health, disability support, aged care, education, hospitality, and tourism. Many of these workers are hired under casual or fixed term contract arrangements – not on a permanent basis. Many experience under-utilisation due to their contract arrangements not stipulating usual or minimum hours.

This insecurity forms one of the major pillars underpinning the gender wage gap. Unpredictable income and inconsistent superannuation are major contributors to the gap.

Data from the Household, Income and Labour Dynamics in Australia (HILDA) Survey[2] tells us that:

- Men have higher rates of transition from non-employment to full-time employment, while in most years, women have a higher rate of transition from non-employment into part-time employment,
- Men are much more likely than women to move from part-time employment to full-time employment,
- Women have higher rates of transition out of full-time employment, to both non-employment and part-time employment,
- The mean time spent in full-time employment is considerably lower for females,
- Differences between males and females in mean time spent in full-time employment are driven by greater time spent by females in both part-time employment and nonemployment, with greater time in part-time employment accounting for approximately 60–70% of the gap and greater time in non-employment accounting for approximately 30–40% of the gap.

Migrants workers too are overrepresented in insecure working arrangements, and are particularly susceptible to exploitation.

Migrant populations are often the victims of sham contracting arrangements. Recent research[3] tells us that:

> *Temporary migrant workers comprise up to 11% of the Australian labour market. Underpayment within this workforce is both widespread and severe.*

Berg & Farbenblum (2018)[4] in their examination of the exploitation of migrant workers who worked under insecure working arrangements at 7-Eleven, note four main ways that franchisees exploited migrant staff through wage underpayments:

[2] https://melbourneinstitute.unimelb.edu.au/__data/assets/pdf_file/0009/3537441/HILDA-Statistical-report-2020.pdf: p. 60-62
[3] https://www.mwji.org/s/Wage-theft-in-Silence-Report.pdf, p.5

- Claiming a worker is a 'trainee'. This in may involve asking the worker to do unpaid work under the guise of training.
- The 'half pay scam'. This involves employers only recording half the hours worked by an employee into the central payroll system, on the basis that the reporting of all hours worked would put the worker's visa compliance at risk.
- The 'cash back scam'. This involves the employer correctly reporting the number of hours through the central payroll system, but then requiring the employee to pay a portion back in cash.
- The payment of a franchisee's payroll by 7-Elevent head office into the franchisee's own account for distribution to the workers.

Maurice Blackburn also is aware of cases where exploitation occurred via threats to employees' visa status.

In terms of the vulnerability of young migrants, research has indicated that nearly 60% of international students in Australia are paid less than the minimum award rate and some are paid below the minimum wage[5].

In our experience, engagement in insecure work has moved from being a lifestyle choice for some, to being a last resort for many. While it may provide corporate Australia with flexibility and responsiveness, that comes at the expense of entrenching poverty and powerlessness, and widening the gap between the 'haves' and the 'have nots'.

In our response to ToR (c), we examine in more detail the workplace and societal trends which have led to the proliferation of insecure work.

b. The risks of insecure or precarious work exposed or exacerbated by the COVID-19 crisis

All Maurice Blackburn submissions to public policy inquiries are based on the lived experience of the clients we serve. To that end, we restrict our comments in relation to Australia's COVID-19 response to four areas of legal practice in which our clients have been directly impacted by the pandemic. They are:

1. Workplace issues during the crisis,
2. The problem of 'Presenteeism',
3. Working from home arrangements, and
4. Workplace requirements related to vaccination

Australia's response to the crisis would have to be considered one of the best in the world, in terms of restricting loss of life and ensuring that the economy is well placed to recover from the lock-down period.

We see this inquiry as an opportunity to consider how we fortify our society from future events, by strengthening the areas that have proven most vulnerable. We are pleased to share our experiences in the hope that that may inform that process.

1. <u>Workplace issues during the crisis</u>

[4] Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* (advance): p.8 & 9
[5] https://www.theguardian.com/money/2016/feb/17/more-than-60-of-international-students-in-sydney-underpaid-survey?CMP=soc_568

Maurice Blackburn believes that the crisis work conducted early in the pandemic by the Federal Attorney General, the ACTU Secretary and others in developing the blueprint for the JobKeeper program was a great example of what can happen when decision makers are focused on the workers and the economy, not on an ideological outcome.

It was also a great example of cooperative work between a decision maker and representatives of the labour force.

We acknowledge that the speed with which JobKeeper was developed, and the magnitude of the Federal Government's financial commitment at the time, were both very impressive and very appropriate.

Unfortunately, whenever a much needed, major reform is done in a hurry, gaps are likely to appear in the implementation.

Over the past 11 months, Maurice Blackburn's staff have been inundated with calls from workers who have, in various ways, fallen between the cracks of JobKeeper coverage.

We lend our voice to those that believe the National Cabinet could have been more insistent that the 'line in the sand' be drawn in such a way that more Australian tax payers – especially casuals, migrant workers, university staff, Australian staff of foreign owned entities and those in the Arts industry were able to access the benefits.

As the looming cessation of Jobkeeper program reminds us, it is roles most often occupied by women and young people that are most impacted by these decisions.

Our concerns with JobKeeper were not restricted to eligibility. Another large number of calls to our offices from workers indicates that rorting of the system by employers has been widespread. The case study below illustrates how that rorting has been occurring.

Case Study #1

> *Lisa[6] was a permanent full time employee in a Queensland plastic and reconstructive surgery clinic. Her employer asked her to sign a new employment contract, citing the impacts of COVID-19. She declined, but offered to work reduced hours and take annual leave on the other days, or to be stood down on JobKeeper. She was made redundant instead. Our client filed an unfair dismissal application which was settled by Lisa being reinstated, before the case even got to conciliation.*

We would be pleased to share with the Committee more granular detail in relation to the enquiries about JobKeeper we received from clients and the public.

Maurice Blackburn believes that through the pandemic, many Australians will have gained an unpleasant insight into just how marginal or precarious their employment (and income) is.

To us, this is a clear indication that Australia needs policy settings which focus on stable, satisfying employment, with good conditions. We need policies which incentivise employers to prioritise permanent jobs, and de-incentivise the use of temporary and precarious working conditions.

[6] For more detail on this case, see: https://www.couriermail.com.au/truecrimeaustralia/police-courts/sacked-worker-claims-her-position-should-have-been-a-keeper/news-story/cfa84a097025d63735445dd3d354a

The crisis has shown that we need to return to a world of work where employment conditions are the result of genuine negotiation between employers, employees and their representatives.

Maurice Blackburn believes that the work of this Committee affords a unique opportunity to advocate for structural reform where the work of nurses, teachers, drivers, supermarket workers, first responders etc are recognised as the essential workers. These are the roles that the current system disempowers.

During the crisis, the Federal Government showed sympathy and respect for those that had to rely on the JobSeeker safety net, through the provision of additional payments. There seems to be genuine recognition during the COVID crisis that, in the vast majority of cases, it is circumstances beyond the control of the individual that have put them in that position.

This Committee is well positioned to help our Parliament to recognise that, *outside of crisis conditions*, the vast majority of people relying on safety nets are doing so due to circumstances beyond their control.

It would be beneficial to the wellbeing of those individuals, and to our society, if the respect and empathy for people experiencing a period of joblessness extended beyond times of crisis.

2. <u>The problem of 'Presenteeism'</u>

The Federal Department of Health told us from the outset that one of the critical elements of 'flattening the curve' is that we stay home if unwell.[7] This has been repeated to us by academics and experts in infectious disease management.[8]

For most people, this is a 'no brainer'. If you are displaying even mild symptoms of COVID-19, why would you risk spreading that to workmates, fellow commuters etc?

For those that have been diagnosed positive, there are clear directions in place from the various Departments of Health requiring self isolation.[9] The assumption underpinning this advice is that workers have a means of supporting themselves whilst not working.

Over the course of the pandemic response, it became increasingly evident that this is only true of those in workplace arrangements that allow for sick leave.

Research conducted by the McKell Institute[10] shows that there are 2.6 million Australian employees without paid leave entitlements. That figure does not include gig economy workers or contractors. This needs to change if there is to be an expectation that sick people do not show up to work.

The impacts of this became clear during the second wave of COVID-19 transmission in Victoria.

[7] https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-restrictions/easing-of-coronavirus-covid-19-restrictions
[8] See for example: https://www.smh.com.au/business/workplace/if-we-are-sick-we-need-to-stay-at-home-20200513-p54smy.html
[9] See for example: https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expandedpublic-health-act-powers/self-isolation-for-diagnosed-cases-of-covid-19-direction
[10] https://mckellinstitute.org.au/app/uploads/McKell-COVID-19-Initial-Impact-Assessment-on-Workers-.pdf; p.8

Approximately 80% of the transmissions that took place in that second wave occurred at the workplace.[11] Nowhere was this more evident, or disastrous, than in private Aged Care settings.

As the McKell Institute writes:[12]

> *The rapid rise in cases in these facilities is shared between both the residents, and the staff. In analysing the prevalence of underemployment, split shifts, and insecure work — it is possible to draw a link between the nature of employment in the sector and the associated spread of disease. The facilities provided perfect conditions for transmission of the disease, but workers could not sacrifice another shift, nor access paid leave.*

Their analysis goes on to say:

> *Previous studies have shown that "contagious presenteeism" – working while sick with a contagious disease – decreases when employees gain access to paid sick leave.*

Maurice Blackburn applauds the initiatives of State Governments which ensured that casual workers who do not have access to sick leave would be given a lump sum payment if they test positive for coronavirus.

While it was important that State Governments responded to this issue in the short term, we believe there is still a strong need for a longer term, federally driven measure to ensure sick workers do not have to feel that they have to go to work to be able to support their families.

3. Working from home arrangements

For many workers, the various lockdowns led to a requirement to work from home, and for employers to provide the resources necessary for this to happen.

This has led to a range of workplace issues arising, which we bring to the attention of the Committee. Our staff received a number inquiries and complaints on issues such as:

- The need for increased rights to request flexible work arrangements, and the right to appeal a refusal of such requests.
- Questions about employers' responsibility to provide ergonomically safe home workplaces.
- The sufficiency of public IT infrastructure.

We were also made aware of the increased risk of domestic violence that came with working from home arrangements.

A number of workplaces are now looking to entrench a greater proportion of working from home into the day to day work-life of their staff. Long term consideration of issues such as those above is going to be needed.

It is important to remember that many of those who we came to recognise as essential workers during this time were employed under insecure working arrangements – such as

[11] https://mckellinstitute.org.au/app/uploads/McKell-Insecure-Work-Portable-Entitlements.pdf: p.22
[12] Ibid

food delivery services, supermarket staff and care workers – and that access to this new workplace flexibility did not apply to them.

4. Workplace requirements related to vaccination

With the rollout of vaccines, our staff have been receiving a number of questions from employees and their representatives about:

- Whether an employer can make vaccination a condition of employment
- What if the employee has a condition that will be negatively affected by vaccinations?

Clear communication about the impacts of the vaccine roll-out on workplaces are likely to become more and more important over the remainder of 2021.

In summary:

What we, as a country learnt about the risks of insecure or precarious work exposed or exacerbated by the COVID-19 crisis is that it disproportionately impacted Australia's vulnerable workers and families. In its discussion on the homes/families impacted by COVID, the HILDA survey found that:[13]

> *…the defining trait of people in exposed households is that they tend to be in more socioeconomically disadvantaged circumstances. They are more likely to be renting their home, and in particular renting social housing—38.2% of people in exposed households rent, compared with 30.2% of people in other employed households.*
>
> *They have a lower average equivalised income ($46,470 versus $58,020), lower average wealth ($426,348 versus $616,070) and less cash in the bank ($12,533 versus $17,245).*
>
> *Further, they are considerably more likely to be in relative income poverty, to experience financial stress, and to have difficulty raising $3,000 at short notice.*
>
> *Also evident is that people in exposed households have somewhat higher rates of poor general health, poor mental health and disability than people in other employed households.*
>
> *In short, those most badly impacted by the economic shutdown are also those least able to cope with it.*

Maurice Blackburn urges the Committee to consider how Australia – and in particular the Australian working environment - could be better prepared for future crises. A situation where the most vulnerable cohorts are in roles which offer the least support or income security, is clearly unacceptable.

[13] https://melbourneinstitute.unimelb.edu.au/__data/assets/pdf_file/0009/3537441/HILDA-Statistical-report-2020.pdf: p.85

c. Workplace and consumer trends and the associated impact on employment arrangements in sectors of the economy including the 'gig' and 'on-demand' economy

The nature of employment arrangements in Australia and internationally has changed significantly over the last two decades. These changes have seen the use of 'flexible' work arrangements and independent contractors increase across all sectors of the economy.

Workplace issues journalist Lauren Weber wrote in the Wall Street Journal[14] that:

> *Never before have American companies tried so hard to employ so few people.*

It would be difficult to argue that this is not also the case with Australian companies.

The traditional employment form of full time employment with the one employer for the course of a career began to shift in the 1970s and 1980s as business embraced a process of cutting labour costs.

Boston University Economics Professor David Weill coined the term '*the fissured workplace*'[15] to describe how business were walking away from directly employing staff, to utilising a range of other mechanisms to create their workforce. These mechanisms include franchise models, labour hire firms, employment agencies, using on-demand labour platforms, subcontracting arrangements and the like.

The fissured workplace has created several tiers of accountability between those who want the work done, and those who provide the work. For example, where a hotel chain may have, in the past, directly employed cleaners to do the work, they may now tender out the cleaning services and award the tender to the cheapest supplier, or a contracting or labour hire company.

Under the traditional model, the hotel would:

- Probably employ the cleaners under full time, permanent arrangements
- Control the tasks of the cleaners
- Direct the work of the cleaners
- Accept responsibility for upholding the employment relationship with the cleaners, including ensuring compliance with workplace laws and employee entitlements
- Accept responsibility for the provision of a safe environment in which the cleaners can work.

Under the fissured workplace model, the hotel may contract a services company, through a competitive tender process, to provide the cleaning services. That company may then engage a labour hire firm to source independent contractors to do the work.

In this situation, there are several tiers of accountability separating the work of the cleaners from those that want the work done. Similarly, there are several tiers of accountability separating the employment conditions of the workers, from those for whom the work is done.

Maurice Blackburn has long argued that there needs to be a more streamlined and direct accountability structure between the company that wants the work done (in this case the hotel) and those who do the work. This accountability structure needs to include

[14] https://www.wsj.com/articles/the-end-of-employees-1486050443
[15] *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve it (2014)*

responsibility for the health and wellbeing of the workers, and responsibility for ensuring that workers are receiving their full entitlements.

Importantly, under the fissured workplace model, the capacity for the workers to bargain directly with those that want the work done is removed.

Nowhere is this change more pronounced than in the gig-economy.

Many gig workers in Australia are classified as independent contractors - in other words, as self employed entrepreneurs.

The distinction between employees and independent contractors arose in the 19th century as a means of determining whether one person should be liable for the torts of another[16]. Over the years the Courts have developed various common law tests in order to distinguish independent contractors from employees.[17]

These tests have often been criticised for their complexity, uncertainty in application, and ability to be manipulated in order to achieve a desired outcome. The ambiguity in the common law test has led to a number of legal disputes over the rights and entitlements of workers that turn on the application of a test, the results of which cannot be predicted with certainty.

Maurice Blackburn submits that some gig economy businesses are attempting to exploit this uncertainty by wrongly classifying workers as independent contractors to avoid industrial obligations they would have if they utilised direct employment relationships. This is discussed more under Term of Reference (e).

The practice of misclassifying employees appears to be more prevalent in some industries than in others. The Fair Work Building Commission has estimated that up to 13 percent of self-defined contractors in the building and construction industry may be misclassified.[18] In 2011 a targeted audit of 102 employers in the cleaning services, hair and beauty and call-centre industries by the Fair Work Ombudsman assessed 23% of enterprises as misclassifying employees.[19]

In its report on its inquiry into Corporate Avoidance of the Fair Work Act, the Senate Education and Employment References Committee noted that for a large class of workers:

> *There is also no security of income, no insurance for the worker in case of accident, no superannuation, no personal, annual or paid leave of any description.*[20]

Previous inquiries have estimated that approximately 17 percent of workers are not covered by the protections of the *Fair Work Act* because they are either independent contractors or business owners.[21]

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[16] See ACE Insurance Ltd v Trifunovski (includes Corrigendum dated 18 November 2011) [2011] FCA 1204 (25 October 2011) Perram J at [25] and ACE Insurance Limited v Trifunovski [2013] FCAFC 3 (25 January 2013) Buchannan J at [14].

[17] Presently, in Australia, the common law test applied by the Courts is set out in the High Court decision in *Hollis v Vabu Pty Ltd [2001]* HCA 44; 207 CLR 21; 75 ALJR 1356; 181 ALR 263

[18] FWBC 2012, Working Arrangements in the Building and Construction industry - further research resulting from the 2011 Sham Contracting Inquiry, December.

[19] 2011, Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries, November.

[20] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report/c08, section 8.2.

The executive summary of the report into Victoria's On-Demand Workforce[22] tells us that:

> *The 'work status' of platform workers and the consequences that flow for the workers, businesses and the labour market, is the issue that sits at the heart of this Inquiry.*
>
> *Work status impacts on entitlements, protections and obligations under superannuation laws, health and safety, insurance for work injuries and tax.*
>
> *By comparison, there are only limited purpose-built protections or entitlements for individual 'self employed' workers or 'independent contractors'. Many 'independent contractors' are genuinely autonomous, self-employed workers who choose this way of working. But an increased number of work arrangements are 'borderline'.*
>
> *And sometimes, the 'choice' of work status and the arrangements lies primarily in the hands of only one of the parties to the arrangement.*

Workers who are not covered by the Fair Work Act, including independent contractors, are not entitled to minimum rates of pay, annual leave, personal leave, unfair dismissal and collective bargaining rights.

The lack of statutory entitlements for independent contractors means they can be engaged at a lower cost to an employer than if they were to employ the same person as an employee.

The effects of employers engaging in this contracting behaviour are clear:

- It leads to insecure and unfair working arrangements for workers;
- Costs are shifted from the business to the independent contractor or the taxpayer. For example, independent contractors are usually required to cover the cost of their own sick leave and annual leave; and
- It presents an unfair competitive advantage over businesses that do not employ such tactics and encourages a race to the bottom on wages and conditions.

In our experience, such contracting arrangements are more likely to occur in industries and entities where:

- There is a pronounced power or status difference between the worker and the employer;
- There is a general custom or industry practice to utilise insecure forms of work;
- The business operates within a highly competitive industry, where the employer feels that the only option to save costs is through cutting corners on staff wages and benefits;
- The workers feel powerless to do anything about it, through fear of losing their jobs or residential status; and
- There is competition for the jobs on offer.

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[21] Productivity Commission Inquiry Report, Workplace Relations Framework, Volume 1, 30 November 2015 at page 107
[22] https://engage.vic.gov.au/download_file/view/29834/2303; p.1 & 2

As mentioned earlier, many of those who engage in the gig economy are from the most vulnerable of Australian cohorts. They include immigrant communities and particularly those without residency or work rights, young people, students, women, those with disabilities, older workers, Indigenous Australians, early school leavers and those returning to the workforce.

The vulnerability of many on-demand workers often places them at a distinct disadvantage in accessing their workplace rights. This is typified by:

- Non-engagement with unions or forms of workforce organisation;
- The on-demand business engaging the worker having significantly more resources than the worker;
- Not questioning inappropriate behaviours of businesses through fear of retribution, or not being able to find alternative work; and
- Not seeking external information on entitlements.

In many cases, these people fear that speaking out against unequal treatment, or their lack of access to the employment rights other workers enjoy, will hamper their capacity to retain work or find anything better.

The fear of speaking out is a natural extension of the power imbalance that exists between unscrupulous employers and vulnerable employees.

Many gig economy workers are unaware of the supports that are available to them through unions, consumer advocates or the various information and complaints authorities.

The present regulatory and legal environment places most of the responsibility on workers for addressing exploitation in the on-demand economy. Mainly this is done through making a complaint to the Fair Work Ombudsman or seeking the assistance of a union or community group.

The Fair Work Ombudsman has shown some willingness to bring test cases regarding on-demand workers.[23] However, the Fair Work Ombudsman does not have the resources to address all the legal and regulatory issues that arise from the on-demand economy.

Maurice Blackburn encourages the Committee to give consideration to the importance of the funding of test cases.

One of the most high profile test cases involving an on-demand business was the unfair dismissal case brought by Josh Klooger against Foodora[24]. The test case was filed and conducted with the support of the Transport Workers Union (TWU).

Without the support of organisations such as the TWU, individual on-demand economy workers are unlikely to be able to bring legal cases that test the real legal status of their engagement. This is for a number of reasons including;

- Many workers in the on-demand economy are unable to afford the costs of litigation;
- Many workers in the on-demand economy are unaware of what they are entitled to and those that are may be afraid to speak up for fear of reprisals;

[23] https://www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/june-2018/20180612-foodora-litigation
[24] [2018] FWC 6836, ref https://www.fwc.gov.au/documents/decisionssigned/html/2018fwc6836.htm

- The costs of pursuing unpaid entitlements arising from misclassification often exceed the amounts owed; and
- Businesses that operate in the on-demand economy have a strong monetary incentive to avoid an adverse decision from a Court or Tribunal that might set a precedent. This means they can and do spend large sums of money defending litigation and settling litigation where they perceive they will be unsuccessful.

Unions, like all organisations, have limited resources. Test cases against on-demand economy businesses are expensive and resource intensive. On-demand businesses have a strong incentive to spend significant resources defending these cases.

Unions who take on test cases against on-demand businesses are providing a significant public good. Such cases help expose businesses who are misclassifying employees and provide more certainty in the law.

These test cases have wider benefits than to those bringing the case. If the Court or Tribunal declares workers previously classified as independent contractors to be employees then this may mean increased tax revenue and increased payments of workers compensation premiums.

Businesses who comply with the law are able to compete on a level playing field without being undercut by unlawful sham contracting.

On-demand workers who receive increased wages and remuneration are more likely to spend that money in the Australian economy than the multi-national on-demand businesses that pay them. This increased economic activity also benefits the broader community.

Despite the public good provided by test cases arising from the on demand-economy, unions receive no public funding to assist with the costs of bringing these cases. Often, the costs to a union of bringing a test case against an on-demand business would vastly exceed any amounts recovered by the union.[25]

Maurice Blackburn submits that the Committee should formally recognise the public good provided by unions who bring claims to recover entitlements from misclassified on-demand workers by providing funding for test cases.

In summary, the workplace and consumer trends of the past twenty years have led to increasing incidences of wage theft, growing underemployment, a low wages crisis, and a consistent gender pay gap. Maurice Blackburn submits that these are all signs that the power imbalance in Australian workplaces has worsened.

d. The aspirations of Australians including income and housing security, and dignity in retirement

It would be hardly surprising that an individual's income and housing security, and dignity in retirement would be linked to that individual's experience in the workforce.

In their Key Observations, the Retirement Income Review[26] found that:

[25] Legal costs are not usually recoverable in cases under the *Fair Work Act 2009*.
[26] https://treasury.gov.au/sites/default/files/2021-02/p2020-100554-udcomplete-report.docx: p.19

> *…..an individual's superannuation balance, and retirement income, largely reflects the extent of their engagement in the workforce, both income and years worked. Those on higher incomes make more superannuation contributions and have larger superannuation balances. For example, the gap in superannuation balances at retirement between men and women is the accumulation of economic disadvantages faced by women in working life, particularly the gap in earnings and time spent in the workforce.*

It would also hardly be surprising that the likelihood of an individual owning a home would be linked to that individual's experience in the workforce.

Research by the Australian Housing and Urban Research Institute[27] tells us that:

> *Casualisation and temporary employment has remained a feature of the Australian labour market to the present day, although ABS labour force data (2018b) indicates that the level of such casualisation has changed little since that formative era of labour force disruption. Such change must have an impact on the ability of younger households (who have borne the brunt of casualisation) to become owners. Many simply could not and still cannot get a loan while on a casual employment income.*

It is self evident that insecure work excludes people from housing security and reduces the likelihood of dignity/comfort in retirement.

The combination of insecure work, stagnated wage growth and housing unaffordability (both in terms of rental cost and purchase cost) work in tandem to entrench poverty – both during an individual's working life as well as in retirement.

The Retirement Incomes Review found that:[28]

> *One in eight households aged 65 and over are renters and around 48 per cent of renters experience income poverty (ABS, 2019n). Single renter households have even higher rates of income poverty — in excess of 60 per cent.*

Australians are currently living under a broad public policy and ideological framework which is aimed at making things easier for business, at the expense of workers, often under the guise of post-COVID recovery. This includes:

- Removing barriers that protect consumers from poor lending processes and making access to debt easier;
- IR changes which perpetuate the power asymmetry in the employer/employee relationship and further lock in low wage growth;
- Expecting consumers to fund their own way through the pandemic through encouraging early access to their retirement savings; and
- Continuing to freeze increases in the superannuation guarantee rate, during a period of unparalleled wage stagnation.

Who wins out of all these initiatives?

Maurice Blackburn encourages the Committee to consider what would need to happen in order to have Australians' quality of life in retirement perceived as a human right.

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[27] https://www.ahuri.edu.au/__data/assets/pdf_file/0021/61239/AHURI-Final-Report-328-Australian-home-ownership-past-reflections-future-directions.pdf: p.24
[28] https://treasury.gov.au/sites/default/files/2021-02/p2020-100554-udcomplete-report.docx: p.140

Australia has reached a point in its history whereby basic principles such as equality, diversity, respect, compassion and inclusion can no longer be taken for granted. Maurice Blackburn believes that it is only through the documentation and agreement of our human rights that individuals will be able to hold institutions – including government and corporate Australia – to account.

Australia is the only western democracy without a national Human Rights Act, Bill of Rights or Charter of Rights[29].

We believe that a Charter should achieve two important things:

> i. Require governments to consider people's human rights when creating new laws and policies and also when delivering services.
>
> ii. Provide a means for people to hold the government to account when it fails to do so[30].

The embedding of a Bill or Charter of Human Rights in legislation means that Australians would be provided with a means to address some of the current shortfalls and inequalities in the way retirement income is administered.

A prime example of this is in how the current system disadvantages women.

It has been pointed out that[31]:

> *….all pillars of the retirement system (age pension, home, savings) focus on the household except for superannuation which focuses on individual accounts.*

Often, it is women's individual superannuation that takes a secondary prioritisation to the household's combined wealth in the accumulation of retirement savings.

Women are retiring with an average super balance $90,000 lower than men. Factors contributing to this include broken work patterns, lower wages, insecure employment and multiple and often part time jobs.

Women regularly participate in the types of employment relationships where superannuation non-payment or under-payment are most likely to occur – such as in low paid industries, cash-in-hand positions, labour hire processes and those susceptible to sham contracting arrangements[32].

Maurice Blackburn highly recommends to the Committee work currently being undertaken by Per Capita and the ASU, specifically in relation to the gender inequality which is ingrained in the superannuation system. In their report 'Not So Super, For Women'[33], the authors note that:

> *…the superannuation system is systematically biased against half the population. Women are simply not being assisted by super towards a reasonable standard of living in retirement. Women's superannuation balances at retirement are 47% lower*

[29] Refer Australian Lawyers Alliance https://www.lawyersalliance.com.au/documents/item/1618; p.9
[30] Derived from: https://charterofrights.org.au/charter-of-rights
[31] https://www.investmentmagazine.com.au/2020/02/bell-no-room-for-opinion-in-retirement-review/
[32] See for example https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/Wages
[33] https://percapita.org.au/wp-content/uploads/2018/05/Not-So-Super_FINAL-v2-2.pdf; p.6

> *than men's. As a result, women are far more likely to experience poverty in retirement in their old age. Superannuation is failing women*.

The report goes on to say:

> *Sadly, and unnecessarily, women's retirement income in Australia has taken on the features of a wicked problem. It arises thanks to a confluence of diverse circumstances: an inadequate age pension, overrepresentation in lower paid occupations, the gender pay gap, no super at low pay levels, effective marginal tax rates, carer responsibilities, unpaid domestic work, the complexity of the super system and frequency of changes to it, age discrimination, unaffordable housing, longer lives, poor financial literacy, cost/ availability of childcare, relationship breakdowns and casualised work.*

In perceiving quality of life in retirement as a human rights issue, Australians that are most at risk of poor outcomes from the current process for accumulating retirement income – including those in insecure work - would come into sharp focus.

Maurice Blackburn submits that this would be a worthy recommendation from the Committee.

e. The effectiveness, application and enforcement of existing laws, regulations, the industrial relations system and other relevant policies

From our experience in representing workers in various courts and tribunals, Maurice Blackburn argues that there currently is no effectiveness, application and enforcement of existing laws, regulations, within the industrial relations system for those in insecure work. The existing laws do not apply, and therefore they cannot be enforced. Existing laws do not provide the sorts of protections for those in insecure work as they do for those in more traditional employment relationships.

Nowhere is this more pronounced than for workers in the on-demand economy.

While the ranks of independent contractors include some genuinely entrepreneurial workers, increasingly they also include low paid, vulnerable workers, who are 'dependent' on one engager (so-called 'dependent contractors')[34], or who may work for a number of engagers ('independent contractors') but are entirely reliant on their own labour to support themselves and their families.

Despite undertaking work which in every other aspect has the hallmarks of a direct employment relationship, these low paid, vulnerable workers who are engaged as independent contractors are denied access to basic minimum labour standards and institutionalised collective bargaining.

These arrangements strike at the fundamentals of what Australians associate with work – regular pay, ongoing employment, protection and fair conditions, and the opportunity for advancement.

Sham contracting arrangements and insecure work are creating a generation of workers who:

- are not being paid superannuation, and will therefore not benefit from superannuation benefits at retirement;

[34] See for example Australian Council of Trade Unions, *'Lives on Hold: Unlocking the Potential of Australia's Workforce*' (Report, Independent Inquiry into Insecure Work in Australia, 2012) 15–16.

- may be uninsured or underinsured in the event of accident or mishap (see our response to ToR (f));
- have no security of income;
- do not have the safety net of minimum hourly earnings; and
- are not covered for personal, sick, parental or other forms of leave.

Maurice Blackburn believes there are several adjustments that could be made to the current legislative and regulatory regime, in order to make it more effective for those in precarious work.

Maurice Blackburn believes that the definition of employee needs to be extended by legislation to be broader than the present definition at common law.

International experience can help inform this process.

In February of this year, the Supreme Court of the United Kingdom unanimously dismissed an appeal by rideshare platform Uber against an employment tribunal ruling that its drivers should be classed as workers. The ruling gives Uber drivers access to the minimum wage and paid annual leave.

The ruling distinguished 'independent contractor' from 'worker' from 'employee'.

In media commentary:[35]

> *The court concluded that the drivers were workers because of Uber's level of control over them, including setting fares and not informing them of a passenger's destination until they were picked up.*
>
> *It ruled that Uber must consider drivers as workers from the time they log on to the app, until they log off.*

These concepts of 'control of the work and control of fares' are similar to what has been established in the USA (see below).

Spain appears to be the first European jurisdiction set to legislate that platform workers should be given employee status. The same legislation will also give unions the right to access algorithms used by companies such as Uber to manage their workforce[36]. This would also clear the way for collective bargaining between the drivers and Uber.

Media reports indicate that this may have wider ramifications in Europe:[37]

> *Last month there were two significant developments concerning the gig economy: the EU's executive body, the European Commission, announced a consultation over the rights of platform-based workers which will probably lead to legislation and the UK's supreme court ruled Uber employees were workers and not self-employed.*

In August 2018 the Supreme Court of California handed down a decision adopting the 'ABC test' for determining whether workers were independent contractors or employees. The case follows other jurisdictions in America also adopting the ABC test.

[35] https://www.theguardian.com/technology/2021/feb/19/uber-drivers-workers-uk-supreme-court-rules-rights
[36] See for example: https://www.wsj.com/articles/uber-and-peers-face-defeat-in-spanish-struggle-over-courier-employment-11615511842
[37] https://www.personneltoday.com/hr/spain-to-be-first-in-eu-to-give-gig-economy-workers-employee-rights/

According to the 'ABC test', in order for a worker to be an independent contractor all three of the following criteria must be satisfied:

A. that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
B. that the worker performs work that is outside the usual course of the hiring entity's business; and
C. that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[38]

If the worker does not satisfy all three criteria then he/she is deemed to be an employee.

Maurice Blackburn believes that the above test should be inserted into Australian industrial and other legislation that uses the common law definition of employee as a means of determining whether a worker is an employee or contractor.

Maurice Blackburn further believes that the above test should apply *in addition to* the common law definition so that if a worker meets either test they will be classified as an employee.

There is likely to be significant overlap between the ABC test and the common law definition. However, Maurice Blackburn believes that the ABC test is simpler to apply, is likely to apply to many dependent contractors and would remove some of the ambiguity caused by the common law definition.

The ABC test is also likely to cover a larger number of workers than the common law definition which would give a greater number of workers access to the protections and rights in the Fair Work Act including collective bargaining rights.

Maurice Blackburn also believes that, in parallel with the introduction of the ABC test, the Fair Work Commission should be given the power to arbitrate pay and conditions for independent contractors. This would reduce the incentive to classify workers as independent contractors and therefore reduce misclassification in the on-demand economy.[39]

We note below some adjustments that could be made to existing legislation which could go some way toward ensuring that those in insecure work are covered by workplace laws.

In relation to Vicarious Liability

A common reason that businesses seek to improperly classify workers as independent contractors is to avoid vicarious liability for the actions of those workers. Maurice Blackburn encourages the Committee to advocate for legislation making parties who engage workers vicariously liable for the actions of those workers if the workers meet the ABC test.

In relation to deeming provisions in the Fair Work Act

[38] *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*
[39] This change may also require an amendment to the Competition and Consumer Act 2010 (CC Act) to exempt independent contractors who engage in collective bargaining in the Fair Work Commission from the anti-competitive conduct provisions of the CCA.

Maurice Blackburn also believes that this Inquiry could include a recommendation that the Federal Government amend the Fair Work Act to include a provision deeming workers who do not satisfy the ABC test to be employees.

The Fair Work Act does not currently contain an extended definition of the term 'employee' and relies on the common law definition.

In relation to the powers of the Fair Work Commission to arbitrate minimum standards:

We encourage the Committee to recommend that the Fair Work Commission be given the power to arbitrate minimum standards for independent contractors.

If independent contractors are entitled to conditions like minimum rates of pay, annual leave, sick leave and unfair dismissal protection this would greatly reduce the economic incentive to misclassify workers as independent contractors.

The international experience noted above indicates that Australia is not alone in recognising that current workplace laws simply do not provide sufficient protections for those engaged in insecure work. The Australian community has come to expect that certain entitlements should come with work – access to superannuation, access to accident compensation, minimum wages, fair pay for overtime, sick leave etc.

That a major portion of Australian workers do not enjoy these basic entitlements, and are unable to have these rights protected under law, does not meet with community expectations.

That current laws do not protect our most vulnerable workers, who are over-represented in insecure work arrangements, is clearly unacceptable.

f. Accident compensation schemes, payroll, federal and state and territory taxes

The recent report into Victoria's On-Demand Workforce[40], in relation to workplace insurances, found that:

- *There is uncertainty about accident and injury insurance, including the operation of WorkCover, for non-employee platform workers in Victoria.*
- *Some platforms provide insurance for workplace accidents and injuries but it is not always clear or obvious which work based activities are covered and these schemes may involve additional fees for the worker.*
- *Platform workers who work 'on the road' may be eligible for (Transport Accident Commission (TAC) benefits, as would any Victorian who is in an accident involving a vehicle. It is not ideal that rideshare or food delivery workers in particular may be reliant on a default (transport accident) as opposed to worker designed scheme.*
- *It is evident that on-demand workers may be eligible under a patchwork of schemes.*
- *The outcome is that platform workers are often uncertain about insurance and may have inferior or inadequate insurance for work based injuries.*
- *The Inquiry considers that the Victorian Government resolve any ambiguity around the operation of WorkCover for non-employee workers and ensure that platform workers receive appropriate protections.*
- *Greater clarity, consistency and simplicity in approach for 'work status' across different regulatory frameworks would reduce uncertainty. The Inquiry is cognisant*

[40] https://engage.vic.gov.au/download_file/view/29834/2303; para 6.3.6, p.120

that each regulatory framework has distinct policy imperatives. These factors should all be considered and balanced as part of a broader review of 'work status' across the statute books.

Maurice Blackburn believes that a similarly ambiguous legislative environment exists in other States and Territories in relation to whether gig workers are adequately covered by Workcover and other workplace insurances.

The impacts of failing to provide certainty of coverage can be devastating to gig economy workers and their families.

In addition to resulting in unfair treatment of vulnerable workers, depriving workers of legislative safeguards is likely to lead to increased costs to the public purse. For example, injuries that should have been covered by workers compensation will instead be covered by Medicare, and workers who missed out on superannuation will instead be forced to rely on the pension in retirement.

The impact of this is not only felt by the workers. The various State/Territory Workcover schemes are being deprived of premium income they would otherwise have received. Governments may also be losing tax revenue from lost payroll, company and income tax as a direct result of misclassification of workers.

Maurice Blackburn notes that the Queensland government recently conducted an inquiry[41] into a possible extension of workers' compensation coverage to certain gig economy workers.

That inquiry resulted from a landmark report by Professor David Peetz on the operation of the Queensland Workers Compensation Scheme.[42] Chapter 10 of that report is dedicated to the changing nature of work and the gig economy.

The Peetz Report made several relevant recommendations, including:

> *Recommendation 10.1:*
>
> *The coverage of the [Workers' Compensation and Rehabilitation Act 2003] should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and specify that it applied where at least two parties were in Queensland at the time the work was undertaken.*
>
> *Recommendation 10.2:*
>
> *Intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income reported by the intermediaries or agencies*

The resultant inquiry heard that in order to achieve the key objectives of Queensland's workers' compensation and rehabilitation scheme, the scheme must be extended to include those workers who currently sit outside its coverage.

[41] https://www.worksafe.qld.gov.au/news/2019/submissions-invited-possible-extension-of-workers-compensation-coverage-for-certain-gig-economy
[42] https://www.worksafe.qld.gov.au/__data/assets/pdf_file/0021/24087/workers-compensation-scheme-5-year-review-report.pdf

Maurice Blackburn agrees with the following option, which was presented as the preferred option for change in the papers relating to that inquiry:

> *Amend the Workers' Compensation and Rehabilitation Act 2003 to extend workers' compensation coverage to gig workers and require intermediary businesses[43] to pay premiums.*

This proposed change is clearly in line with the recommendations made by Professor Peetz.

The provisions under this option, as described in the documentation, included:

- *That the Act would be changed to extend the coverage of the workers' compensation scheme to gig workers and consequently require intermediaries to pay workers' compensation premiums to cover the cost of this coverage.*
- *That workers' compensation coverage would only be extended to those defined as gig workers. That means that this option will only apply where the intermediary has a level of control or influence over the work, cost or conditions of work being performed by the gig worker.*
- *That gig workers would be deemed to be 'workers' for the purposes of the Act. The option could prescribe that a gig worker is a 'worker' by amending the Act to define a 'gig worker' as a person introduced by an intermediary to perform work under a contract (other than a contract of service) for another person.*
- *That the term 'intermediary' would be expressly defined in the Act to capture in-scope workers.*
- *That gig workers would have access to the same no-fault statutory workers' compensation entitlements and access to common law damages under the Act as a worker.*

Maurice Blackburn commends these provisions as potentially workable across State/Territory schemes, and welcomes the commitment to equality of access to justice.

The key benefits of the above option to gig workers, as described in the inquiry materials, were listed as:

- *Fair and equal access to same level of compensation and access to common law damages for work-related injuries as workers.*
- *Improved timeliness of medical intervention for work-related injuries.*
- *Improved durable return to work outcomes.*
- *Improved work health and safety outcomes.*
- *Early medical intervention and enhanced benefits structures also improve secondary psychological impacts on the worker and their family.*

The Queensland inquiry selected the above option as its preferred model on the basis that it would:

- *protect gig workers who are particularly vulnerable by providing fair and equal access to workers' compensation rights and entitlements in Queensland;*
- *improve injured workers' chances of achieving a durable return to work following injury;*

[43] The RIS for that inquiry defined an intermediary business as a person, or a group of persons, who facilitates the introduction of a person to another person for the purpose of the first person entering into an agreement with the other person to do work for the person. This would include a platform used by workers to find work.

- *support the flexibility offered by the gig economy (which is a strong driver of participation and job satisfaction of many gig workers), by not altering or limiting the way in which Intermediaries operate;*
- *provide a level playing field by ensuring gig businesses pay the same proportion of costs on workers' compensation as current employers pay in the industry that the intermediary is working in;*
- *reduce cost-shifting to the community—in particular, to the public health system or a worker's private medical insurance (if any) to recover from the injury; and*
- *result in improved work health and safety outcomes due to the incentivisation of workers' compensation insurance premiums to improve performance.*

The inquiry heard that any costs to business resulting from implementing the above would be relatively small, and that the imposition of those costs merely places intermediaries in line with businesses who are actually employing staff, thereby producing a market more conducive to competition.

It is important that any legislative change should provide certainty for when workers' compensation coverage will commence and cease; and what constitutes a journey claim or when is a 'gig worker' on a recess. For example, if 'gig worker' is at home with her/his app turned on, receives and accepts a job, is walking out to her/his car and falls down stairs (internal or external to property) – is she/he covered? This scenario, for a worker under a traditional employment structure, would be determined by where the property boundary is, however this may not be appropriate if the 'gig worker' is already considered 'on the clock' by accepting the job.

Since the consultation period for the Queensland inquiry expired, Maurice Blackburn has been unable to find documented outcomes from that process. We continue to hold the Queensland Government in high esteem for conducting the review and starting the conversation about how to ensure gig workers receive the same entitlements to workplace safety and injury support as every other worker. We continue to advocate that other States and Territories start a similar conversation to that which is happening in Queensland.

We believe this Committee is well placed to advocate for these changes nation-wide.

g. The interaction of government agencies and procurement policies with insecure work and the 'on-demand' economy

Maurice Blackburn is particularly concerned that the employment environment in the disability, aged care, childcare and health sectors make them increasingly susceptible to sham contracting arrangements. These industries have relevant commonalities:

- Providers are heavily reliant on government subsidies provided to service users
- Providers are heavily reliant on vulnerable cohorts to make up their workforce.

Chronic underfunding of these sectors has led service providers to cut corners in order to stay in business. This, combined with a workforce largely drawn from marginalised cohorts has led to widespread cases of underpayment and exploitation.

For example, a recent inquiry into Market Readiness[44] by the Joint Standing Committee on the National Disability Insurance Scheme found that:

[44]https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MarketReadiness/Report

> *The committee is concerned that there are currently virtually no incentives to choose a career in the disability support sector. Submitters who have worked for a very long time in the sector described how working conditions have dramatically deteriorated under the NDIS. In short, they reported a rise in underemployment and insecure work arrangements, inadequate wages and no prospect of professional development opportunities. Under these conditions, it is hard to imagine how to retain highly experienced and qualified workers and attract new workers, including young people entering the workforce.*[45]

Ethical employers in the sector are drawing on their own resources in order to continue service provision and look after their staff. Less ethical employers are exploiting a marginalised workforce, through the provision of lesser wages and conditions.

Nowhere in the information provided to potential NDIS service providers[46] does it mention any requirement that the organisation must have a good track record in satisfying employment and industrial relations requirements.

These requirements should be central to any government procurement process for the provision of services/staff.

Of increasing concern is the 'Uberisation' of the disability, aged care and healthcare workforces. The direct connection between, for example, NDIS participants and independent workers means that there is even less chance of workers receiving minimum entitlements.

We believe that these are important matters for consideration by the Committee.

h. Any related matters.

No response to this Term of Reference

[45]https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/MarketReadiness/~/media/Committees/ndis_ctte/MarketReadiness/report.pdf, p.45
[46] https://providertoolkit.ndis.gov.au/26-key-registration-requirements