



Australian Government  
Department of Employment  
and Workplace Relations

# Minimum standards and increased access to dispute resolution for independent contractors (OBPR22-02873)

Annexure A - Supplementary Analysis to Impact Analysis  
Equivalent process

23 August 2023



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## 1. Introduction and key terms

This Impact Analysis Equivalent process and supplementary analysis responds to proposed changes to two pieces of legislation that cover workers in Australia – the *Fair Work Act 2009 (Cth)* (Fair Work Act) and the *Independent Contractors Act 2006 (Cth)* (Independent Contractors Act).

### **The Fair Work Act governs employment relationships in Australia**

Employees are engaged under a *contract of service* and entitled to a safety net of minimum conditions under the Fair Work Act, modern awards and other workplace legislation. By contrast, independent contractors are engaged under a *contract for services*.

The National Employment Standards in the Fair Work Act, together with modern awards and national minimum wage orders provide a safety net of minimum wages and entitlements for national system employees. The Object of the Fair Work Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.<sup>1</sup> The Fair Work Act also provides, for example, employers with access to a range of types of employment to offer their employees, ensuring flexibility in how working time is arranged.

### **The Independent Contractors Act governs contracts for service**

The Independent Contractors Act sets up a national unfair contracts remedy scheme for independent contractors. The principal objects of the Act are to protect the freedom of independent contractors to enter into services contracts, to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial and to prevent interference with the terms of genuine independent contracting arrangements.<sup>2</sup>

### **Most digital platform workers do not receive minimum standards**

Over the past decade, digital platform work has become embedded across the economy in both Australia and internationally. This document will refer to the marketplace of these services as the ‘digital platform economy’ (also known as the gig economy).

There is no universal definition of digital platform work. This document will refer to digital platform workers as persons who use a digital labour platform to find work, and then, are engaged to do paid work through a digital platform.

There are numerous models of digital platform work. While digital platforms can directly hire employees, in most cases they are engaged as independent contractors by a platform, or by another person via a platform. Digital platforms can be loosely categorised as ‘horizontal’ or ‘vertical’ structures, while noting that there are many hybrid models that fall between these categories.<sup>3</sup> ‘Horizontal’ platforms are also known as ‘crowd-work systems’ and facilitate a ‘marketplace’ of transactions between service providers and clients, with varying levels of platform regulation of

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<sup>1</sup> Section 3, *Fair Work Act 2009 (Cth)*.

<sup>2</sup> Section 3, *Independent Contractors Act 2006 (Cth)*.

<sup>3</sup> Department of Premier and Cabinet (DPC), *Report of the Inquiry into the Victorian On-Demand Workforce*, Industrial Relations Victoria, DPC, Victorian Government, 2020, p 15.

these contracting relationships. ‘Vertical’ (or ‘on-demand’) platforms directly allocate tasks to available workers to complete for a client.

Digital platform work is common in passenger transport, food delivery and disability and aged care support services. However, the digital platform economy also includes other types of work such as professional services, ‘odd jobs’ and maintenance, writing and translation, clerical and data entry, creative and multimedia, software development and technology, skilled trades work, sales and marketing support, education and personal services.<sup>4</sup>

These services can provide broader economic benefits through efficiencies in matching buyers and sellers, creating new markets, and innovating to provide improved services. However, independent contracting arrangements operate without many of the protections that apply to employees, such as minimum rates of pay. This is despite many digital platform workers exhibiting characteristics that are ‘employee-like’, including low bargaining power or autonomy over their own work.<sup>5</sup>

Additionally, in some circumstances, the infrastructure of digital labour platforms does not allow workers to set their own prices. This feature is common in sectors such as food delivery and rideshare, where digital labour platforms often set the price for work based on factors such as time, distance and demand.

### **Proposed changes to strengthen protections for certain independent contractors**

The Government proposes to strengthen protections for certain independent contractors with three distinct but inter-related measures:

1. *Minimum standards for independent contractors who are ‘employee-like’*

This Impact Analysis Equivalent process responds to an Australian Government’s 2022 election commitment to empower the Fair Work Commission to set minimum standards for workers in ‘employee-like’ forms of work, including those in the digital platform economy.

2. *Minimum standards in the road transport industry*

An outcome of the Jobs and Skills Summit held on 1-2 September 2022 was to ‘consider allowing the Fair Work Commission to set fair minimum standards to ensure the Road Transport Industry is safe, sustainable and viable’.<sup>6</sup>

3. *Greater protection against unfair contracts for independent contractors*

A further outcome of the Jobs and Skills Summit was to ‘amend relevant legislation to give workers the right to challenge unfair contractual terms’.<sup>7</sup>

The Department of Employment and Workplace Relations (the department) has developed this Impact Analysis Equivalent process and supplementary analysis in accordance with the *Australian*

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<sup>4</sup> P McDonald. et al, *Digital Platform Work in Australia: Prevalence, Nature and Impact (Digital platform work in Australia)*, commissioned by the Victorian Department of Premier and Cabinet, 2019, p 40.

<sup>5</sup> Department of Premier and Cabinet (DPC), *Report of the Inquiry into the Victorian On-Demand Workforce* <https://engage.vic.gov.au/inquiry-on-demand-workforce> Industrial Relations Victoria, DPC, Victorian Government, 2020, pp. 65-69.

<sup>6</sup> Australian Government, *Jobs + Skills Summit: Outcomes 1-2 September*, Australian Government, 2022, p 7.

<sup>7</sup> Australian Government, *Jobs + Skills Summit*, p 6.

*Guide to Policy Impact Analysis* and in consultation with the Office of Impact Analysis in the Department of Prime Minister and Cabinet.

## Terms used throughout this document

The measures assessed in this Impact Analysis Equivalent process and supplementary analysis consider forms of work where there is limited regulation. As such, the measures introduce new concepts, which this document will refer to throughout. Terms used to refer to these concepts for the purposes of the Impact Analysis Equivalent process and supplementary analysis are included in the following table. Where applicable, these are intended to be simplified versions of the definitions that appear in the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023.

Term	Explanation
<b>Deactivation</b>	An action taken by a digital labour platform to prevent a digital platform worker from accessing work via the platform. This is also sometimes referred to as ‘deplatforming’, ‘termination’ or ‘suspension’ from a platform.
<b>Digital labour platform</b>	An online enabled ‘app’, website or system (platform) operated to arrange, allocate or facilitate labour services, where the platform engages independent contractors directly or indirectly, or acts as an intermediary for users, and the platform processes payments for the work.
<b>Digital platform work</b>	Work facilitated by a digital labour platform.
<b>Digital platform worker</b>	Workers who perform digital platform work who are eligible for proposed Fair Work Commission minimum standards. These workers must also be found to have employee-like characteristics, i.e. being paid less than an employee performing comparable work, having less authority over their work or having low bargaining power.
<b>Digital platform economy</b>	The marketplace of on-demand services provided through digital labour platforms. This is also referred to as the ‘gig economy’ or ‘on-demand economy’.
<b>Last-mile delivery</b>	The ‘final step’ in a delivery process when a good is delivered from a delivery hub or warehouse to the end client. For the purposes of this Impact Analysis Equivalent process, this is workers and businesses in the Postal and courier pick-up and delivery services Australian and New Zealand Standard Industrial Classification (ANZSIC) 3-digit industry.
<b>On-demand work</b>	Any work in the labour market being procured ‘on-demand’ (including casual employment and self-employed workers/independent contractors (Victorian Government definition)). <sup>8</sup> This encompasses ‘digital platform work’.

<sup>8</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 11.



<b>Rideshare</b>	Passenger transport services mediated by a digital labour platform that connects a driver and passenger.
<b>Road transport industry</b>	In legislation, this will refer to industries within the meaning of specified road transport modern awards. For the purposes of this Impact Analysis Equivalent process, this refers to workers and businesses in the Road freight transport, and Postal and courier pick-up and delivery services Australian and New Zealand Standard Industrial Classification (ANZSIC) 3-digit industries. This is because as independent contractors are not covered by modern awards, there is no data corresponding to modern award coverage.

## 2. Reviews certified as Impact Analysis Equivalent processes

The department has certified five independent reviews as having undertaken Impact Analysis Equivalent processes and analysis to respond to Impact Analysis question 1 and in part to Impact Analysis question 2:

*Question 1: What is the problem you are trying to solve and what data is available?*

*Question 2: What are the objectives, why is government intervention needed to achieve them, and how will success be measured?*

The independent reviews are:

- The Victorian Government's Inquiry into the Victorian On-Demand Workforce (Victorian Government Inquiry)<sup>9</sup>
- Volume 7 of the report of the Productivity Commission's 5-Year Productivity Inquiry (Productivity Commission Inquiry)<sup>10</sup>
- The inquiry of the Senate Select Committee on Job Security (Job Security Inquiry)<sup>11</sup>
- The Senate Rural and Regional Affairs and Transport References Committee Inquiry into the Importance of a viable, safe, sustainable and efficient road transport industry (Road Transport Inquiry)<sup>12</sup>; and
- The Select Committee on the impact of technological and other change on the future of work and workers in New South Wales (New South Wales Government Inquiry).<sup>13</sup>

### Victorian Government Inquiry

The Victorian Government established the Inquiry into the Victorian On-Demand Workforce in 2018. The Inquiry's Terms of Reference included that it would 'inquire into, consider and report to the Minister for Industrial Relations on the extent and nature of the on-demand economy in Victoria, for the purposes of considering its impact on both the Victorian labour market and Victorian economy more broadly'. The Inquiry commissioned Australia's 'largest ever published survey' on on-demand work in Australia, surveying more than 14,000 people across the nation – *Digital Platform Work in Australia – Prevalence, Nature and Impact* (the 'Victorian National Survey').<sup>14</sup> The Inquiry also

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<sup>9</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*.

<sup>10</sup> Productivity Commission, *5-Year Productivity Inquiry report – Volume 7: A more productive labour market*, Productivity Commission, Australian Government, 2023.

<sup>11</sup> Parliament of Australia, *Senate Select Committee on Job Security*, Parliament of Australia, Australian Government, 2021.

<sup>12</sup> Parliament of Australia, *Senate Rural and Regional Affairs and Transport References Committee – Without Trucks Australia Stops: the development of a viable, safe, sustainable and efficient road transport industry*, Parliament of Australia, Australian Government, 2021.

<sup>13</sup> Parliament of New South Wales (NSW), *Select Committee on the impact of technological and other change on the future of work and workers in New South Wales*, Parliament of NSW, Government of NSW, 2022.

<sup>14</sup> P McDonald et al, *Digital Platform Work in Australia: Prevalence, Nature and Impact (Digital platform work in Australia)*, commissioned by the Victorian Department of Premier and Cabinet, 2019.

considered submissions from over 90 individuals and organisations ahead of publishing its final report in July 2020.<sup>15</sup>

### **Productivity Commission Inquiry**

The Productivity Commission began its most recent 5-Year Productivity Inquiry *Advancing Prosperity* in February 2022. The review considered over 200 submissions and conducted two public hearings on 7 and 8 November 2022. The Productivity Commission's 7th interim report *5-year Productivity Inquiry: A more productive labour market* was published in February 2023 and considered digital platform work in detail.<sup>16</sup>

### **Job Security Inquiry**

The Senate Select Committee on Job Security was established on 2 December 2020 to inquire into the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions, including with reference to 'workplace and consumer trends and the associated impact on employment arrangements in sectors of the economy including the 'gig' and 'on-demand' economy. The Job Security Inquiry's first interim report considered 'on-demand platform work in Australia' and was released in June 2021.<sup>17</sup> The Inquiry's final list of recommendations is in the fourth interim report, *The Job Insecurity Report*, released in February 2022.<sup>18</sup>

### **Road Transport Inquiry**

On 11 September 2019, the Senate moved that the Rural and Regional Affairs and Transport References Committee inquire into the importance of a viable, safe sustainable and efficient road transport industry. The Inquiry's terms of reference included that it would have particular reference to 'the importance of an enforceable minimum award rate and sustainable standards and conditions for all stakeholders in the road transport industry'. The Inquiry published its report *Without Trucks Australia Stops: the development of a viable, safe, sustainable and efficient road transport industry* in August 2021.<sup>19</sup>

### **New South Wales Government Inquiry**

The select committee was established on 24 March 2020 to inquire into and report on the impact of technological and other change on the future of work and workers in New South Wales. The select committee received 53 submissions and held eight hearings in the course of its inquiry. The Inquiry's

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<sup>15</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*.

<sup>16</sup> Productivity Commission, *5-Year Productivity Inquiry report – Volume 7*.

<sup>17</sup> Parliament of Australia, *Senate Select Committee on Job Security - First interim report*.

<sup>18</sup> Parliament of Australia, *Senate Select Committee on Job Security - Fourth interim report: the job insecurity report*, Parliament of Australia, Australian Government, 2022.

<sup>19</sup> Parliament of Australia, *Without Trucks Australia Stops*.

first report *The Gig Economy* was released in April 2022<sup>20</sup> and its second report *Workplace Surveillance and Automation* was released in November 2022.<sup>21</sup>

## Alignment of reviews and Impact Analysis questions

### Question 1: What is the problem you are trying to solve and what data is available?

Together, the five reviews identified an overarching problem of independent contractors having inadequate access to workplace protections and entitlements, to varying degrees. This problem can be categorised as having three broad components:

#### Lack of minimum standards for digital platform workers

The Victorian Government Inquiry and Job Security Inquiry found that while estimates of pay rates in the digital platform economy vary and data is limited, some digital platform workers earn below the equivalent of the minimum wage. The Productivity Commission Inquiry noted that “evidence suggests that the per-take fees offered by some platforms in food delivery may be on average less than the adult minimum wage for casuals based on assumptions about how many tasks were completed per hour and available public data on earnings.” The Productivity Commission Inquiry also acknowledged the difficulty of estimating pay rates in the digital platform economy due to a lack of data, and that in some industries platform workers may earn in excess of the relevant award rate.

In examining digital platform work or ‘on-demand work’ in Victoria, the Victorian Inquiry identified six ‘*aspects of our current system which are not serving us well*’ [which are]:

- *The inherent uncertainty of the work status test (i.e. whether a worker is an employee or independent contractor)*
- *The fragmented and limited nature of advice and support about work status*
- *Inaccessible resolution pathways to determine work status*
- *The emergence and conduct of platforms*
- *High incidences of low-leveraged workers accessing work via platforms and working under ‘borderline’ work status*
- *Inadequate protections for non-employee ‘small business’ platform workers.’<sup>22</sup>*

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<sup>20</sup> Parliament of NSW, *Select Committee on the impact of technological and other change on the future of work and workers in New South Wales – First report: the gig economy*, Parliament of NSW, Government of NSW, 2022.

<sup>21</sup> Parliament of NSW, *Select Committee on the impact of technological and other change on the future of work and workers in New South Wales – Final report: workplace surveillance and automation*, Parliament of NSW, Government of NSW, 2022.

<sup>22</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 185.

The Victorian Government Inquiry found that while work status is pivotal to determining a workers' entitlements, 'some ["borderline"] workers arrangements have features of both employment and self-employed arrangements'.<sup>23</sup> It also found that low-leveraged workers, including those who are low-skilled, more likely to be young and from a migrant background, are prominent in digital platform work.<sup>24</sup> Low-leveraged workers are in a precarious position in the labour market, and while platforms offer opportunities to earn income, there is minimal autonomy over their working arrangements and low income security.<sup>25</sup>

The New South Wales Inquiry found: 'that New South Wales is falling behind other states and comparable nations in developing laws that establish decent work in the gig economy; that the failure to provide gig workers with a minimum wage and other workplace entitlements is increasing inequality in that state; that gig workers currently lack the power to interact and negotiate with on demand platforms as equals in New South Wales; and, that the failure to provide gig workers with access to a low-cost independent tribunal empowered to hear and decide disputes is leading to injustice in New South Wales.'<sup>26</sup>

The Productivity Commission Inquiry also found that while income varies by industry, digital platform workers in occupations such as food delivery and rideshare often have low pay, which can be below the National Minimum Wage.<sup>27</sup> It also found that digital platform workers are exposed to risk in the event of voluntary administration or liquidation as they are considered unsecured creditors.<sup>28</sup> However, the Productivity Commission noted that comparisons of piece rates earned by digital platform rates and employee wages can be difficult and is complicated by a lack of data.<sup>29</sup>

The Productivity Commission Inquiry found that internal and external dispute resolution mechanisms for digital platform workers are poor, and that digital platform workers have limited options to appeal a suspension or termination from a digital platform.<sup>30</sup>

In relation to available data, while the Australian Bureau of Statistics (ABS) has recently introduced a survey module seeking data on digital platform work, it has not yet begun publishing these statistics. The Victorian National Survey remains the most comprehensive data source on digital platform work.

#### Lack of minimum standards for independent contractors in the road transport industry

The Road Transport Inquiry thoroughly considered the impact of the lack of minimum standards applying to independent contractors in the road transport industry, finding that it contributes to inadequate incomes for workers and poor outcomes for road users. The Inquiry found that issues faced by road transport workers include wide disparities in pay rates and unpaid wages, despite high operating costs.<sup>31</sup> It considered the prevalence of long contracting chains in the road transport industry and found that pressures created by the influence of a client at the 'top' of this chain can

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<sup>23</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 192.

<sup>24</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 187.

<sup>25</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 187.

<sup>26</sup> Parliament of NSW, *First report – The gig economy*, p xii.

<sup>27</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, p 143.

<sup>28</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, p 143.

<sup>29</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, pp 151-152.

<sup>30</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, pp 158-163.

<sup>31</sup> Parliament of Australia, *Without trucks Australia stops*, pp 28-34.

lead to road transport workers at the ‘bottom’ having little ability to negotiate prices.<sup>32</sup> It further found that inadequate pay rates create pressures for workers to complete trips quickly to earn an adequate income, which can encourage risk-taking behaviour.<sup>33</sup>

### Barriers to disputing an unfair contract

The Victorian Government Inquiry, Job Security Inquiry and Productivity Commission Inquiry found that independent contractors lack access to dispute resolution over unfair contract terms. The Victorian Inquiry found that ‘existing unfair contracts remedies (in the Independent Contractors Act and Australian Consumer Law) are confusing in their operation and interaction with respect to platform workers... [and] unfair contracts remedies would offer very confined and limited relief and are not sufficient to ensure fairness in work arrangements with platform workers’.<sup>34</sup> The Productivity Commission further found that these existing provisions are ‘only partial in scope and not an accessible mechanism’.<sup>35</sup>

## **Question 2: What are the objectives, why is government intervention needed to achieve them, and how will success be measured?**

Introducing minimum standards for more workers and improving external dispute resolution processes are measures only government intervention can achieve. Each of the reviews identified a need for further regulation, for example:

- The Victorian Government Inquiry identified a ‘compelling case for change’, noting that the growth of digital platforms in Australia has ‘intensified the imperative to ensure our labour market regulation meets the needs of modern ways of working’.<sup>36</sup> It identified ‘six reasons to act now to revise our current system’: the inherent uncertainty of the work status test, the fragmented and limited nature of advice and support about work status, inaccessible resolution pathways to determine work status, the emergence and conduct of platforms, high incidences of low-leveraged workers accessing work via platforms and working under ‘borderline’ work status, and inadequate protections for non-employee ‘small-business’ platform workers.<sup>37</sup>
- The Productivity Commission Inquiry found that ‘given the gaps in, and barriers to using, dispute processes, there are grounds to create more systematic, low-cost and accessible means for parties to seek to resolve problems’.<sup>38</sup> It recommended that the Government empower the Fair Work Commission to resolve disputes including over suspension or termination from a platform, as ‘existing avenues for dispute settlement... do not provide an accessible or systemic solution’, and ‘there is rationale for a new institutional arrangement to serve that role’.<sup>39</sup>

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<sup>32</sup> Parliament of Australia, *Without trucks Australia stops*, August 2021, pp 28-34.

<sup>33</sup> Parliament of Australia, *Without trucks Australia stops*, August 2021, pp 28-29.

<sup>34</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 165.

<sup>35</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, March 2023, p 160.

<sup>36</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 185.

<sup>37</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, pp 185-187.

<sup>38</sup> Productivity Commission, *5-Year Productivity Inquiry report – Volume 7*, p 162.

<sup>39</sup> Productivity Commission, *5-Year Productivity Inquiry report – Volume 7*, p 162.

- The Job Security Inquiry identified a need to regulate digital platform work, finding that ‘Governments cannot continue to rely on courts and tribunals to resolve the current issues in on-demand platform work’, particularly given the growth of these forms of work and likely future expansion.<sup>40</sup>
- Finding that underlying economic and contracting pressures drive poor safety outcomes for road transport workers, the Road Transport Inquiry noted that without addressing these structural issues, ‘efforts by governments, regulators and the road transport sector to improve safety will be in vain.’<sup>41</sup>
- The New South Wales Government Inquiry considered the need for regulatory intervention, finding that international initiatives to regulate the digital platform economy, as well as the findings of the Victorian Government Inquiry and Job Security Inquiry highlight that government action is needed.<sup>42</sup>

Together, the reviews consider all three proposals assessed by this Impact Analysis Equivalent process and made recommendations for government intervention (at either the Commonwealth or state and territory level), presented in Table 1.

Legislating to empower the Fair Work Commission to set minimum standards for ‘employee-like’ workers, including those in the digital platform or ‘gig’ economy was an election commitment made by the Government in its Secure Australian Jobs Plan. The Government further committed, as outcomes of the Jobs and Skills Summit, to consider minimum standards for road transport workers and to amend laws to allow workers to challenge unfair contracts.

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<sup>40</sup> Parliament of Australia, *Senate Select Committee on Job Security - First interim report*, p 163.

<sup>41</sup> Parliament of Australia, *Without Trucks Australia Stops*, p 179.

<sup>42</sup> Parliament of NSW, *First report – The gig economy*, p 28.

**Table 1 - Relevant review recommendations**

Measure	Review	Relevant recommendation(s)
<p><b>Minimum standards for 'employee-like' digital platform workers</b></p>	<p><b>Victorian Government Inquiry</b></p>	<p><b>Recommendation 1</b> - That the Commonwealth Government, in collaboration with state governments and other key stakeholders, lead the delivery of the recommendations in this report regarding the national workplace system.</p>
		<p><b>Recommendation 6</b> - That the FW (Fair Work) Act be amended to:</p> <p>(a) codify work status on the face of relevant legislation (rather than relying on indistinct common law tests)</p> <p>(b) clarify the work status test including by adopting the 'entrepreneurial worker' approach, so that those who work as part of another's enterprise or business are 'employees' and autonomous, 'self-employed' small business workers are covered by commercial laws.</p> <p>(c) provide that the:</p> <p>(i) provision of safety protections and entitlements such as superannuation, training, occupational health and safety and worker consultation is not disincentivised because of the potential impact on work status</p> <p>(ii) party asserting a worker is not an employee, bears the onus of proving work status, and</p> <p>(iii) the relative bargaining positions of each party are expressly considered when determining work status</p>
		<p><b>Recommendation 16</b> – 'That the FWC [Fair Work Commission] work with relevant stakeholders, including platforms and representatives of workers and industry, about the application of modern awards to platform workers, with a view to ensuring fit-for-purpose, fair arrangements that are compatible with work enabled by technology'.</p>
	<p><b>Job Security Inquiry</b></p>	<p><b>First interim report, Recommendation 7</b> – The committee recommends that the Australian Government expands the definitions of 'employment' and 'employee' in the <i>Fair Work Act 2009</i> 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</p>



Measure	Review	Relevant recommendation(s)
		<p data-bbox="611 263 1971 343">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</p> <p data-bbox="611 375 2022 486"><b>First interim report, Recommendation 9</b> - 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:</p> <ul data-bbox="611 534 2016 790" style="list-style-type: none"> <li data-bbox="611 534 1780 566">• adjudicating in cases where there is a dispute in relation to the appropriate status of workers;</li> <li data-bbox="611 598 1937 678">• setting binding minimum standards and conditions in relation to non-standard forms of work, regardless of employment status; and</li> <li data-bbox="611 710 2016 790">• the capacity to resolve disputes (including where necessary through binding decisions) in a low-cost and effective manner.</li> </ul> <p data-bbox="611 821 1982 901">The FWC should be empowered to make determinations and orders for groups and categories of workers, not just individuals.</p> <p data-bbox="611 933 2016 1045"><b>Fourth Report, Recommendation 10</b> – The committee recommends that the Australian Government amends the <i>Fair Work Act 2009</i>, expanding the scope of the Act to encompass all forms of work, and empowering the Fair Work Commission to:</p> <ul data-bbox="611 1093 1691 1268" style="list-style-type: none"> <li data-bbox="611 1093 1691 1125">• determine fair rates and conditions for all categories of workers, including contractors;</li> <li data-bbox="611 1157 1624 1189">• arbitrate on contracts with independent contractors that are unfair or harsh; and</li> <li data-bbox="611 1220 1444 1252">• make orders and determinations for groups or classes of workers.</li> </ul>

Measure	Review	Relevant recommendation(s)
	New South Wales Government Inquiry	<b>Recommendation 1</b> – That the NSW Government commit to greater protections for gig economy workers, regardless of work status.
		<b>Recommendation 2</b> – That the NSW Government establish a tribunal or extend the jurisdiction of the existing tribunal, with the power to set minimum pay and conditions for gig workers that provide labour to on-demand platforms regardless of work status, to the extent permitted by the state’s constitutional authority.
		<b>Recommendation 3</b> – That the NSW Government introduce legislation to extend Chapter 6 of the Industrial Relations Act 1996 to include at least rideshare and food delivery workers as well as those engaged to deliver bread, milk and cream.
		<b>Recommendation 6</b> – ‘That the NSW Government mandate improved transparency between platforms and workers concerning average earnings, most profitable times to work, real time use of the platform, data collection and utilisation, and performance management systems.’
		<b>Recommendation 8</b> – ‘That the NSW Government publicly affirm the right of gig workers to freely associate by joining (or not joining) a union.’
		<b>Recommendation 9</b> – ‘That the NSW Government legislate to establish a system of collective bargaining for workers providing labour to on-demand platforms, to the extent permitted by the state’s constitutional authority.’
		<b>Recommendation 10</b> – ‘That the NSW Government amend Chapter 6 of the Industrial Relations Act 1996 to establish a collective bargaining system that includes rideshare, food delivery and parcel delivery workers.’
		<b>Recommendation 11</b> – ‘That the NSW Government give the tribunal envisaged in recommendation 2 the power to recognise an agreement reached by an on-demand platform and its workers (or their representatives) that improves the minimum conditions a worker is otherwise entitled to.’

Measure	Review	Relevant recommendation(s)
		<p><b>Recommendation 15</b> – ‘That the NSW Government introduce discrete and enforceable codes of conduct for work performed by on-demand platforms in the rideshare, food delivery, parcel delivery and disability care sectors of the gig economy.’</p>
<p><b>Minimum standards for workers in the road transport industry</b></p>	<p><b>Road Transport Inquiry</b></p>	<p><b>Recommendation 1</b> – ‘The committee recommends that the government establishes or empowers an independent body that will, in consultation with industry, set universal and binding standards (including binding standards with respect to pay) which:</p> <ul style="list-style-type: none"> <li>• ensure the safe performance of work and eliminate unsafe economic and contracting practices; and</li> <li>• apply to all road transport supply chain participants, including transport operators, online/on demand operations, and workers (regardless of their employment or work status), and throughout supply chains.</li> </ul> <p>The independent body shall also act as a dispute resolution body providing all road transport industry participants access to comprehensive binding dispute resolution capable of addressing all issues associated with, and general powers to resolve, disputes between some or all supply chain participants.’</p>
		<p><b>Recommendation 2</b> – ‘The committee recommends that the proposed initial priorities of the independent body should include to:</p> <ul style="list-style-type: none"> <li>• ensure that all workers, whether owner drivers or employee drivers, are paid for all work time, including driving and non-driving time, and that any costs or efficiency dividends associated with this change are allocated fairly throughout the supply chain;</li> <li>• institute a system of demurrage rates to help drivers and operators recoup costs for waiting and loading times, and that any costs or efficiency dividends associated with this change are fairly distributed through the supply chain; and</li> </ul>

Measure	Review	Relevant recommendation(s)
		<ul style="list-style-type: none"> <li>establish binding industry payment terms ensuring that all road transport workers and operators are paid in full upon-delivery.’</li> </ul>
Improving access to unfair contracts dispute resolution	Victorian Government Inquiry	<p><b>Recommendation 17</b> – ‘that governments clarify, enhance and streamline existing unfair contracts remedies so that they:</p> <p>a) are accessible to low-leveraged workers</p> <p>b) enable system-wide scrutiny of platforms’ arrangements.</p> <p>c) introduce penalties and compensation to effectively deter unfair contracts</p> <p>d) allow materially similar contracts to be considered together and orders made with respect to current and future arrangements.’</p>
	Productivity Commission Inquiry	<p><b>Recommendation 7.18</b> – ‘The Australian Government should introduce an external, independent dispute resolution function within the Fair Work Commission that can provide conciliation and arbitration services relating to suspension or termination disputes or non-payment of earnings.’</p>
	Job Security Inquiry	<p><b>Fourth Report, Recommendation 11</b> – ‘The committee recommends that the Australian Government support independent contractors who are sole traders by establishing and promoting accessible low-cost pathways for dispute resolution.’</p>
	New South Wales Government Inquiry	<p><b>Recommendation 5</b> – ‘That the NSW Government give the tribunal envisaged in recommendation 2 the power to advise on, oversee and make binding rulings on disputes between gig workers and on-demand platforms, to the extent permitted by the state’s constitutional authority.’</p>

## Principles for measuring success

To implement its election commitment and outcomes of the Jobs and Skills Summit, the Government set five Guiding Principles for reform. The Guiding Principles have been informed by the election commitment and were developed following initial stakeholder roundtable meetings in August 2022.

These Guiding Principles have formed a basis for subsequent stakeholder consultation (see Section 4) and have remained consistent throughout this period. This includes their inclusion in a public consultation paper on the proposed measures.<sup>43</sup> The supplementary analysis taken as part of the Impact Analysis Equivalent process will assess options against these Guiding Principles in addition to considering their regulatory burden.

The proposed changes will be considered effective if they advance each of these guiding principles.

### Guiding Principles

1. Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.
2. All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.
3. Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.
4. The Fair Work Commission should set minimum standards that:
  - are fair, relevant, proportionate, sustainable and responsive
  - reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with
  - mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market
5. The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.

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<sup>43</sup> Department of Employment and Workplace Relations (DEWR), *Employee-like' forms of work and stronger protections for independent contractors: Consultation paper*, DEWR, Australian Government, 2023.

### 3. Background

#### Legislative framework applying to independent contractors

#### **A worker's status as an independent contractor or employee is currently determined at common law**

The common law test to determine an individual's work status is set out in the High Court's decisions in *ZG Operations v Jamsek (Jamsek)*<sup>44</sup> and *CFMMEU v Personnel Contracting (Personnel Contracting)*.<sup>45</sup> The test provides that where the terms of a working relationship are comprehensively provided for in a written contract, and the contract is not a sham or otherwise varied or waived by subsequent conduct, the nature of the relationship is determined by reference to the rights and obligations established by the contract. If the contractual terms illustrate that the parties have entered into a relationship of independent contracting rather than employment, no further inquiry, including into the parties' subsequent practices, is relevant or required.

This is in contrast to the 'multi-factorial' test set out in a considerable body of case law (including *Stevens v Brodribb Sawmilling Co Pty Ltd*<sup>46</sup> and *Hollis v Vabu*<sup>47</sup>) and previously thought by many to be the correct test in determining whether a relationship was one of employment or of principal and contractor. Where courts applied a multifactorial test, a worker's status was determined having regard to the 'totality of the relationship' after considering multiple factors including, but not limited to, the terms of their contract. No criterion was decisive. This 'multi-factorial test' evolved over time and included consideration of various indicia including things like control and authority over work, and whether the worker could delegate work, was required to wear a uniform or be responsible for providing and maintaining their own tools and equipment (see Figure 1 for a non-exhaustive list).

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<sup>44</sup> *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

<sup>45</sup> *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1.

<sup>46</sup> *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] 160 CLR 16

<sup>47</sup> *Hollis v Vabu Pty Ltd* [2001] HCA 44.

Figure 1 – Non-exhaustive list – multi-factor test

EMPLOYEE	factor	INDEPENDENT CONTRACTOR
Perform under direction and control of employer	<i>control</i>	High level of control over how work is performed
Hours of work usually standard or set	<i>time</i>	Decides what hours are worked to complete task
Bears little or no financial risk	<i>risk</i>	Bears risk for profit/loss and liability for work quality
Paid regularly in accordance with award or agreement	<i>pay</i>	Will invoice for work completed
Skilled or unskilled work	<i>skill</i>	Generally more highly skilled profession or trade
Requirement to wear uniforms or logos of employer	<i>uniforms</i>	No requirement for uniform of other business
Work generally performed at business premises	<i>location</i>	Work performed at own premises or otherwise
Worker presented as part of the business	<i>business</i>	Worker presented as running own business
Goodwill generated by worker lies with business	<i>goodwill</i>	Goodwill etc. typically lie with worker
Restriction on ability to delegate or sub-contract work	<i>delegation</i>	Generally entitled to delegate or sub-contract

The decisions in *Jamsek* and *Personnel Contracting* most significantly impact those workers who, prior to these two decisions, were on the border between employment and independent contracting. These workers are more likely to be those with low bargaining power who do not genuinely run their own business. As a result of the contract-centric approach espoused in *Jamsek* and *Personnel Contracting*, these workers are now more likely to be found to be independent contractors than under the multi-factorial test previously applied.

## The Independent Contractors Act regulates independent contractors

The Independent Contractors Act applies to services contracts to which an independent contractor is a party, if the contract relates to the performance of work by the independent contractor. The Act broadly operates to:

- exclude certain state and territory laws (Part 2)
- set out protections from unfair contracts (Part 3).

The remaining provisions of the Act set out preliminary matters (Part 1), transitional provisions (Part 5) and regulation-making powers (Part 6).

The Explanatory Memorandum to the Independent Contractors Bill 2006 states that the legislation aims to ‘enshrine the freedom of independent contractors to enter into arrangements that are primarily commercial relationships, free from prescriptive workplace relations regulation.’<sup>48</sup> This was a departure from previous federal and state arrangements, which provided unfair contract protections to independent contractors within workplace relations legislation.

<sup>48</sup> Explanatory Memorandum, Independent Contractors Bill 2006, p 1.

## Independent contractors can access limited dispute resolution about workplace issues

Disputes can arise between independent contractors and the entities that engage them over workplace matters. For disputes about unfair contractual terms in a services contract, independent contractors currently have access to two Commonwealth unfair contracts jurisdictions under the Independent Contractors Act and the Australian Consumer Law. Common law contractual remedies and equitable remedies may also apply.

### Independent Contractors Act

Under Part 3 of the Independent Contractors Act, independent contractors can apply to the court to review a contract for services on the grounds that it is 'unfair' or 'harsh'. If the court determines that a term is unfair or harsh, it can make an order setting aside or varying the contract.

The Independent Contractors Act provides that an 'unfairness ground' in relation to a services contract includes circumstances where 'the contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work'. However, these provisions have not been successful in ensuring that employee-like workers within the scope of the proposed measures receive remuneration at rates that an employee performing similar work would receive.

Recent data from the Federal Court of Australia indicates that, as at 27 April 2023, there have been 68 applications to dispute an unfair contract term made under section 12 of the Independent Contractors Act since the commencement of that Act. Only three applications have been successful or partially successful.

In relation to digital platform workers, the Productivity Commission Inquiry noted that applicants to this jurisdiction incur their own costs, and that digital platform workers are unlikely to have the financial resources or knowledge to access these provisions.<sup>49</sup>

### Australian Consumer Law

The Australian Consumer Law (Schedule 2, *Competition and Consumer Act 2010*) enables small businesses (including independent contractors) to dispute unfair terms in standard form contracts. Unlike Part 3 of the Independent Contractors Act, these provisions do not deal with the price payable under the contract.

The Government recently passed the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* which made unfair contractual terms unlawful and introduced a civil penalties regime.

### A lack of clear avenues to dispute an unfair contract termination

The Productivity Commission Inquiry noted that workplace disputes between platforms and workers may relate to suspension or termination decisions. Stakeholder consultation (see Section 3) also indicated that this is a common dispute category. However, it is unclear if the court can generally

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<sup>49</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, p 160.



order remedies in relation to unfair termination disputes under the existing unfair contracts provisions.<sup>50</sup>

## There is some existing regulation of road transport work

At the national level, the *Heavy Vehicle National Law* and regulations regulate heavy vehicles over 4.5 tonnes gross vehicle mass and apply in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria.<sup>51</sup> The objects of the Heavy Vehicle National Law include that it should facilitate and regulate the use of heavy vehicles to promote public safety, manage impacts on the environment, roads and public amenities, promote industry productivity and efficiency, and encourage and promote productive, efficient, innovative and safe business practices.<sup>52</sup> Workplace matters within the scope of this regulation include rest time, work hours and work diary requirements, however do not include minimum pay rates.

Until its abolition in 2016, the Road Safety Remuneration Tribunal could set enforceable road safety remuneration orders covering matters including minimum pay and conditions for road transport workers (including independent contractors), approve collective agreements and resolve disputes. The system covered road transport drivers, employers, hirers and supply chain participants in the road transport industry and operated from 2012 to 2016.

While federal minimum standards-setting mechanisms no longer exist, there is some state-based regulation of minimum standards:

- Chapter 6 of the *Industrial Relations Act 1996* (NSW) allows the New South Wales Industrial Relations Commission to set binding minimum terms and conditions under a contract determination for contracts of carriage (i.e. for the transportation of goods by means of a motor vehicle or bicycle in the course of a business of transporting goods) and contracts of bailment (generally covering public taxis and public hire vehicles).
- Victoria publishes guidance rates and costs schedules for certain groups of owner drivers, including courier or messenger owner drivers who supply a 1 tonne van,<sup>53</sup> under the *Owner Drivers and Forestry Contractors Act 2005* (Vic). Victoria also requires hirers that engage an owner driver for 30 days or more to provide the owner driver with the relevant rates and costs schedule.
- In Western Australia, the *Owner-Drivers (Contracts and Disputes Act 2007)* (WA) applies to owner-drivers of freight vehicles over 4.5 tonnes. It sets out guidelines for setting appropriate pay rates and allows for collective bargaining between a group of owner-drivers and hirers in certain circumstances.

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<sup>50</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, p 160.

<sup>51</sup> National Heavy Vehicle Regulator (NHVR), *Heavy Vehicle National Law and Regulations*, NHVR website, n.d., accessed 16 June 2023.

<sup>52</sup> *Heavy Vehicle National Law Act 2012* (Qld), s 3.

<sup>53</sup> Department of Premier and Cabinet (DPC), *Transport Industry Council, Rates and costs schedule 2022-23: 1 Tonne Van, Courier/Messenger: Road Transport and Distribution Award 2020 Category 2*, Industrial Relations Victoria, DPC, 2022.

- Under Queensland’s *Industrial Relations and Other Legislation Amendment Act 2022 (Qld)*, Chapter 10A would allow the Queensland Industrial Relations Commission to set minimum standards for ‘independent courier drivers’. Chapter 10A would commence on proclamation, which has not yet occurred.

## Emerging state-based regulation of the digital platform economy

Some states and territories are moving towards regulation of digital platform work:

- Victoria introduced its Voluntary Fair Conduct and Accountability Standards<sup>54</sup> for on-demand platforms, which commenced operating on 1 May 2023. The Victorian Government indicates that ‘Phase 2’ of this process will include introducing legislation to implement the standards.<sup>55</sup>
- Queensland’s proposed regulation of independent courier drivers could include digital platform workers providing food delivery or other couriership services.
- The New South Wales Government committed to ‘modernise laws to respond to the gig economy’. This includes extending Chapter 6 of the *Industrial Relations Act 1996* (NSW) to include gig economy workers in the transport industry, introduce workers compensation benefits for gig workers and establish a portable entitlements scheme.<sup>56</sup>

## Available data

### Digital platforms

Data on the digital platform workforce in Australia is sparse. The ABS has begun work on the collection of this data, however the initial findings will not be released until the end of 2023.<sup>57</sup>

The ABS publishes data on the number of workers and independent contractors in Australia, with recent estimates showing that there are 13.6 million workers in Australia and 1.1 million independent contractors (8.3 per cent of all employed persons).<sup>58</sup> However, this estimate of 1.1 million independent contractors refers to people who are independent contractors in their *main job* (job in which most hours are usually worked). By contrast, evidence suggests that the majority of digital platform workers engage in digital platform work as a second job. The Victorian National Survey found that only 2.7 per cent of current platform workers derive all of their income from their digital platform work, with the vast majority (80.7 per cent) reporting that digital platform work

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<sup>54</sup> Department of Premier and Cabinet (DPC), *Voluntary Fair Conduct and Accountability Standards for Platforms*, Industrial Relations Victoria, DPC, Victorian Government, 2022.

<sup>55</sup> Department of Premier (DPC), *Roadmap to introducing Victorian Standards for the Gig Workforce and Gig Worker Support Service*, Industrial Relations Victoria, DPC, Victorian Government, 2022.

<sup>56</sup> Parliament of New South Wales (NSW), *2023 ALP election policy costings – Modernise laws to respond to the gig economy*, Parliamentary Budget Office, NSW Parliament, 2023.

<sup>57</sup> Australian Bureau of Statistics (2021), *Employment arrangements – Labour Statistics: Concepts, Sources and Methods* ABS Website, accessed 29 May 2023.

<sup>58</sup> Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2022*

makes up less than half of their total annual income.<sup>59</sup> The ABS measure of independent contractors, which refers to people who are independent contractors in their main job, is therefore problematic to use to estimate the digital platform economy.

In the absence of ABS data on the digital platform economy, a number of groups have made their own estimates of the size of the digital platform economy. These are summarised in Table 2 below.

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<sup>59</sup> P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact](#) (Digital platform work in Australia)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 5.

**Table 2 - Summary of different estimates of size of the digital platform economy**

Source	Estimate	Year of estimate	Definition	Notes
Victorian National Survey <sup>60</sup>	<p><b>7.1 per cent</b></p> <p>Equates to 909,500 workers</p>	March/April 2019	Survey respondents who are currently working (or offering to work) through a digital platform or have done so within the last 12 months.	<ul style="list-style-type: none"> <li>• This survey was informed by an extensive literature review and similar surveys undertaken in Europe. The sample of over 14,000 useable responses was representative of the Australian population in relation to gender, age, and State/Territory.</li> <li>• This estimate is likely an overestimate of people who are currently working in the digital platform economy because: <ul style="list-style-type: none"> <li>○ it is based on those who had worked sometime in the last 12 months including many who are not currently working in the digital platform economy.</li> <li>○ the sample over-represented respondents with a university qualification and respondents living in major cities, both of which are groups that are more likely to work in the digital platform economy.</li> </ul> </li> </ul>

<sup>60</sup> P McDonald et al., 'Digital Platform Work in Australia: Prevalence, Nature and Impact (Digital platform work in Australia)', commissioned by the Victorian Department of Premier and Cabinet, 2019.

Industry Super <sup>61</sup>	<b>275,000</b>	2019	Unclear - appears to have been estimated using the Victorian National Survey, Uber estimates of their workforce and their own analysis.	
Actuaries Institute <sup>62</sup>	<b>250,000</b> Equates to 2.0 per cent of workforce	2019	Estimate is based on Uber's self-reported estimate of 60,000 workers in 2019 and the market share of Uber from the Victorian National Survey of 22.7 per cent.	<ul style="list-style-type: none"> <li>This survey used transaction data from electronic bank transactions to identify a sample of 8,008 digital platform economy workers and 1 million digital platform consumers to quantify the digital platform economy's rise in terms of growth.</li> <li>This data only looked at workers who engaged in digital platform economy work in 2018 or 2019 with at least one of the five following platforms: Didi, Freelancer, Ola, Uber, and Uber Eats. As such, it is likely an underestimate and not a representative sample of all digital platform workers.</li> </ul>
The Association of Superannuation Funds of Australia <sup>63</sup>	<b>150,000</b>	2018	Number of 'regular' gig workers. Estimate is derived from worker numbers from discrete platforms. Where regular workers cannot be identified, they have been derived from the data available.	<ul style="list-style-type: none"> <li>This was an increase of 50 per cent from its estimate in the previous year (of 100,000 workers).</li> </ul>

<sup>61</sup> T Samardzija et al., 'Extending the super guarantee to gig workers', Industry Super Australia, 2023.

<sup>62</sup> Actuaries Institute, 'The rise of the gig economy and its impact on the Australian workforce', Green paper, December 2020, p. 5.

<sup>63</sup> A Craston, 'Superannuation and the Changing Nature of Work: Discussion Paper', The Association of Superannuation Funds of Australia, 2017, p. 4.

Uber <sup>64</sup>	<b>150,000</b>	2023	Number of workers who work on Uber or Uber Eats.	<ul style="list-style-type: none"> <li>This is Uber's own estimate of its workforce. This has increased from an estimate of 60,000 in 2019.</li> </ul>
Airtasker <sup>65</sup>	<b>148,000</b>	2022	Number of individual users who have completed a task.	<ul style="list-style-type: none"> <li>This is Airtasker's own estimate of its workforce.</li> </ul>
HILDA Report <sup>66</sup>	<b>0.8 per cent</b> Equates to roughly 100,000 workers	2020	Number of people who worked via a digital platform in the last 4 weeks.	<ul style="list-style-type: none"> <li>The HILDA survey undercounts migrants. As this is a group that has been identified as more likely to participate in the digital platform economy (the Victorian National Survey noted that temporary residents are 3 times more likely to be a current platform worker than Australian citizens)<sup>67</sup>, this suggests the digital platform worker estimate is also an undercount.</li> </ul>

<sup>64</sup> Uber, 'Elevating the voices of 150,000 Australian gig workers', March 2023, <https://www.uber.com/en-AU/newsroom/flexibility-works/>, [accessed 7 June 2023].

<sup>65</sup> Airtasker, 'Annual Report FY22', Airtasker Limited, 2022.

<sup>66</sup> R Wilkins et al., 'The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 20', Melbourne Institute: Applied Economic & Social Research, University of Melbourne, 2022, p. 89.

<sup>67</sup> P McDonald et al., 'Digital Platform Work in Australia: Prevalence, Nature and Impact (Digital platform work in Australia)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 3.

Table 2 above shows that there are a range of estimates from different groups on the number of digital platform workers in the Australian economy. These estimates range from 0.8 per cent of the workforce, or approximately 100,000 workers (HILDA), to 7.1 per cent of the workforce, or 909,500 workers (Victorian National Survey).

The New South Wales Government's 2022 inquiry into the digital platform economy compiled estimates of the digital platform economy from other sources, including digital platforms themselves, but noted that the New South Wales Government does not collect data on the number of digital platform economy workers in New South Wales, or their wage rates.<sup>68</sup>

Most of these estimates are also before the onset of COVID-19. There is not readily available information about the changes to the digital platform economy since the COVID-19 pandemic and how the size of the digital platform workforce may have changed since then. However, Uber indicated in 2023 that more than 150,000 rideshare and food delivery workers use the Uber platform to work each month.<sup>69</sup>

Most of the estimates in Table 2 are based at least in part on the Victorian Government Inquiry. Given the sample size and robustness of this estimate, this is the starting point for the estimate of digital platform workers that the department has adopted. However, in the costing below, we have made several adjustments to make sure that this estimate is as fit-for-purpose as possible. These include downgrading the estimate of digital platform workers to exclude those who engage in digital platform work less than once a month; accounting for hours worked of different occupations (which range from 3 to 15 hours per week on average); and accounting for weeks worked in a year (estimated at 44.8 weeks in a year, less than the 52 weeks assumed for full-time permanent workers). These adjustments have been made at a granular level for occupations, where data allows.

The Victorian National Survey<sup>70</sup> found that digital platform workers perform the following types of work on digital platforms:

- Transport and food delivery (18.6%)
- Professional services (16.9%)
- Odd jobs and maintenance work (11.5%)
- Writing and translation (9.0%)
- Clerical and data entry (7.8%)
- Creative and multimedia (7.7%)
- Software development and technology (7.2%)

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<sup>68</sup> Parliament of New South Wales (NSW), *Select Committee on the impact of technological and other change on the future of work and workers in New South Wales*, Parliament of NSW, Government of NSW, 2022, accessed 22 June 2023, p. 6.

<sup>69</sup> Uber, 'Flexibility works', <https://www.uber.com/au/en/u/gig-reform/>, accessed 28 June 2023.

<sup>70</sup> P McDonald et al., 'Digital Platform Work in Australia: Prevalence, Nature and Impact (Digital platform work in Australia)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 40.

- Caring (7.0%)
- Skilled trades work (5.8%)
- Sales and marketing support (5.0%)
- Education (1.2%)
- Personal services (0.9%)

## Road transport

There are multiple definitions of the road transport industry, with implications for estimates of its size. The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 defines the road transport industry by reference to modern award coverage, including the Road Transport and Distribution Award 2020, the Road Transport (Long Distance Operations) Award 2020, the Waste Management Award (2020), the Transport (Cash in Transit) Award 2020 and the Passenger Vehicle Transportation Award (2020)<sup>71</sup>. However, as independent contractors are not covered by awards, there is no available data corresponding to this definition.

Due to these data limitations, the department will use the ABS' detailed industry classification system called the Australian and New Zealand Standard Industrial Classification (ANZSIC) for the purposes of this supplementary analysis. Industries are classified as falling under a 1, 2, 3, or 4-digit classification, with 1 being the least detailed, and 4 being the most. 'Road transport' is an ABS defined 2-digit industry, however throughout this Impact Analysis Equivalent the department uses the phrase 'road transport' to denote workers and businesses in the 2-digit Road transport, and Postal and courier pick-up and delivery services industries. The Postal and courier pick-up and delivery services industry is included, as it is in scope of the policy. The 2-digit Road transport industry will include some workers who are out of scope, e.g. taxi and tram drivers, but it is not possible to disaggregate the industry further with available data. As such, the number of businesses and workers affected will likely be an overestimate.

Unlike the digital platform workforce, workers in the road transport sector are likely to be independent contractors in their main job, and therefore are captured in ABS data. As outlined in the section on digital platforms, the latest data shows that in Australia there are 1.1 million workers who are independent contractors in their main job (8.3 per cent of all employed persons).<sup>72</sup> Looking specifically at the road transport sector, in August 2022 there were 57,200 independent contractors, which represented 15.6 per cent of the road transport sector workforce.

The ABS also publish data on the number of businesses in each industry, however, there is no data on the number of businesses that engage independent contractors. In June 2022, there were 140,974 businesses in the road transport sector, with the majority (71.6 per cent) of these non-employing.<sup>73</sup> As these business counts only provide data on whether a business has employees, these non-

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<sup>71</sup> While not including the transport of passengers by electric tramway, monorail or light rail (paragraph 4.2(c)).

<sup>72</sup> ABS, *Characteristics of Employment, August 2022*.

<sup>73</sup> ABS, *Counts of Australian Businesses, including Entries and Exits, July 2018 to June 2022*



employing businesses could be engaging independent contractors, and therefore be in scope of the proposed policy.

Throughout this Impact Analysis Equivalent process, the department has estimated costs on a per business basis where there is not data available on number of businesses affected.

## 4. Consultation

The department conducted an extensive consultation process on the measures considered by this Impact Analysis Equivalent process and supplementary analysis. This process included targeted and public consultation taking place between August 2022 and August 2023.

As consultation examined sensitive topics such as stakeholders’ business structures, consultation discussions and written submissions are confidential. Confidentiality was essential to allow stakeholders to share information with the department to inform policy development. The supplementary analysis will consider broad de-identified views put forward by stakeholders, while maintaining their confidentiality.

### Timeline of consultation

Consultation took place over several stages, as displayed in Table 3. These more formal stages of consultation are in addition to informal, ad-hoc discussions held with stakeholders throughout this period.

**Table 3 - Stages of consultation**

Stage	Timeframe	Description
1	26 August 2022 to March 2023	<p>Initial discussions to understand stakeholders’ high-level positions on the following measures:</p> <ul style="list-style-type: none"> <li>• Empower the Fair Work Commission to set standards for ‘employee-like’ workers.</li> <li>• Consider allowing the Fair Work Commission to set minimum standards for workers in the road transport industry.</li> <li>• Consider the most appropriate definition of ‘employee’ under the Fair Work Act.</li> <li>• Consider the right kinds of protections for independent contractors, including</li> </ul>

Stage	Timeframe	Description
		the capacity to challenge unfair contract terms.
2	24 March to 6 April 2023	Public consultation seeking written submissions in response to a one-page summary of the proposals published on the department's webpage. <sup>74</sup> This process was part of broader consultation on workplace relations measures planned for introduction in the second half of 2023. Bilateral and group discussions held with stakeholders to discuss responses to the on-page summary.
3	13 April to 23 May 2023	Public consultation seeking further written submission in response to a consultation paper entitled 'Employee-like forms of work and stronger protections for independent contractors'. <sup>75</sup> Bilateral and group discussions held with stakeholders to discuss responses to the consultation paper.
4	8 June 2023	The Minister convened a National Workplace Relations Consultative Committee meeting and a Meeting of Ministers to discuss the measures being considered for introduction in the second half of 2023.
5	16 June 2023	Confidential briefings and discussion on the details of the measures being considered for introduction in the second half of 2023 were held by the Department with key business and union representatives.
6	16 – 18 August 2023	Confidential consultation on draft legislation occurred prior to introduction to the Parliament with state and territory officials and members of the Council on

<sup>74</sup> Department of Employment and Workplace Relations (DEWR), *2023 Workplace Relations Reform Consultations*, DEWR, Australian Government, 2023.

<sup>75</sup> Department of Employment and Workplace Relations (DEWR), *Employee-like' forms of work and stronger protections for independent contractors: Consultation paper*, DEWR, Australian Government, 2023.

Stage	Timeframe	Description
		Industrial Legislation, which is a subcommittee of the National Workplace Relations Consultative Committee. <sup>76</sup>

## Number of consultation participants

The department has met with 92 stakeholders to discuss the 3 measures – Employee-like, road transport and unfair contracts, and received written submissions from 101 stakeholders, as displayed in Table 4. In addition to these numbers, the department conducted a technical consultation on draft legislation with state and territory officials and members of the Council on Industrial Legislation.

**Table 4 - Number of consultation participants**

Stakeholder category <sup>77</sup>	Stakeholders met with	Written submissions
Digital platforms	13	9
Other businesses and business/ industry representatives	25	41
Unions and worker representatives	5	10
Academics and community organisations	24	23
Australian Government agencies	17	4
State and territory governments	8	7
Individual citizens	-	7
<b>Total</b>	<b>92</b>	<b>101</b>

## Key themes from consultation

Key views raised by broad stakeholder groups are summarised below. This feedback has been used to shape policy options to address the problems identified by the independent reviews. Further information on how stakeholder views have formed each option is in Section 5.

### Minimum standards for digital platform workers

Stakeholders generally supported the concept of national minimum standards for digital platform workers, particularly in the food delivery, rideshare and ‘care’ sectors. However, views diverged on how to implement minimum standards, with key feedback outlined below.

<sup>76</sup> Australian Government, *National Workplace Relations Consultative Council*, [www.directory.gov.au](http://www.directory.gov.au), 2023, accessed 13 June 2023.

<sup>77</sup> While not included in these figures, some peak bodies (for example, union or business peak bodies) chose to invite affiliate organisations to consultation meetings.

Digital labour platforms and other businesses supported minimum rates of pay and some other protections for their workers such as dispute resolution. However, these stakeholders did not want changes that would significantly disrupt their business models, stifle innovation or reduce flexibility for workers. In particular, they opposed any changes that would deem their workers to be employees or require them to adopt minimum standards that mirror award conditions (for example, minimum shift lengths). Some businesses criticised changes that would extend beyond minimum rates of pay, such as agreement-making.

Unions, worker representatives and academics also supported minimum standards, including those that extend beyond minimum rates of pay. For example, some stakeholders in this group called for measures to improve the transparency of algorithmic decision-making affecting workers, remedies for suspension from a platform and access to collective bargaining processes, including the ability to take protected industrial action.

Some stakeholders, particularly represented amongst state and territory governments, unions and worker representatives and academics called for a statutory definition of employee as an essential component of implementing the employee-like commitment. These stakeholders considered that a potential adverse outcome of providing minimum standards to employee-like workers could be to incentivise the use of independent contractors instead of employees, leading to a cohort of workers losing access to the safety net and protections that employment provides. As the common law definition of employee does not assess the totality of the relationship, they raised concern that this could result in businesses shifting from employing to contracting models on a large-scale. These stakeholders argued that a statutory definition of employment that considers the totality of the relationship rather than focusing on the terms of the contract would help to ensure that workers are appropriately classified as an employee or independent contractor.

However, digital platforms and other businesses generally opposed any change to the current common law definition of employee, arguing that the common law definition provides certainty and that change could result in the reclassification of their workers as employees.

## **Minimum standards in the road transport industry**

Unions and academics strongly advocated for minimum standards in the road transport industry. Additionally, some road transport organisations expressed support for confined minimum standards, particularly following an industry roundtable held in August 2022 where participants agreed to principles for a 'safe, sustainable and fair road transport industry'. During consultation, some road transport stakeholders also expressed that while this would increase the regulatory burden for some road transport businesses, it is a necessary step to ensure the fairness and viability of the industry.

Most businesses opposed changes that would resemble a return to the former Road Safety Remuneration Tribunal model. In particular, they emphasised the need for guardrails to safeguard driver viability, supported by appropriate contractual chain arrangements, and for extensive industry consultation before introducing minimum standards for road transport workers.

## **Access to dispute resolution over unfair contracts**

Unions and academics generally supported improving access to dispute resolution over unfair contracts by introducing a Fair Work Commission jurisdiction. Some businesses noted that the existing unfair contract provisions in the Independent Contractors Act and Australian Consumer Law are sufficient, while acknowledging that they have been rarely used.

## 5. What policy options have been considered?

### Summary of reform options

This Impact Analysis Equivalent process assesses options to i) extend minimum standards to more workers, and ii) improve access to dispute resolution of unfair contracts. Together, these measures would strengthen protections for independent contractors in Australia.

**Table 5 – Options for extending minimum standards to more workers**

Extending minimum standards to more workers			
Option 1	Option 2	Option 3	Option 4
Status quo	Empower the Fair Work Commission to set minimum standards for employee-like digital platform workers.	Empower the Fair Work Commission to set minimum standards for employee-like digital platform workers and road transport workers	Empower the Fair Work Commission to set minimum standards for employee-like digital platform workers and road transport workers with an interpretive principle in the Fair Work Act for the terms ‘employee’ and ‘employment’.

**Table 6 – Options for improving access to dispute resolution of unfair contractors**

Improving access to dispute resolution of unfair contracts		
Option 1	Option 2	Option 3
Status quo	Allow the Fair Work Commission to resolve disputes about unfair contracts for digital platform workers and road transport workers	Allow the Fair Work Commission to resolve disputes about unfair contracts for independent contractors

## Minimum standards

### Option 1: Status quo

This option will preserve the current arrangements that apply to independent contractors, as detailed in Section 3.

### Option 2: Minimum standards for employee-like digital platform workers

This option would implement the Government's election commitment to introduce minimum standards for employee-like workers, including those in the digital platform economy. Stakeholders supported introducing minimum standards for employee-like digital platform workers during consultation, including digital platform businesses that this measure would directly impact. Providing minimum standards to employee-like digital platform workers was also recommended by the following independent reviews (full list in Section 2):

- **Job Security Inquiry, Fourth Report, Recommendation 10**, 'The committee recommends that the Australian Government amends the *Fair Work Act 2009*, expanding the scope of the Act to encompass all forms of work, and empowering the Fair Work Commission to... determine fair rates and conditions for all categories of workers, including contractors...and make orders and determinations for groups or classes of workers.'<sup>78</sup>
- **New South Wales Government Inquiry, Recommendation 1**, 'That the NSW Government commit to greater protections for gig economy workers, regardless of work status.'<sup>79</sup>
- **New South Wales Government Inquiry, Recommendation 2**, 'That the NSW Government establish a tribunal or extend the jurisdiction of the existing tribunal, with the power to set minimum pay and conditions for gig workers that provide labour to on demand platforms regardless of work status, to the extent permitted by the state's constitutional authority.'<sup>80</sup>

An amendment to the Fair Work Act would empower the Fair Work Commission to set minimum standards for classes of employee-like digital platform workers by issuing a minimum standards order. The Fair Work Commission would also be able to issue guidance-only standards. Regulations would be able to adjust the scope of the jurisdiction to include or exclude certain types of work, sectors or specific platforms.

Independent contractors who are well paid and have a high degree of control and autonomy over their work, such as skilled tradespeople who use online marketplaces to advertise services, are not intended to be covered by this proposal. The Fair Work Act would limit the Fair Work Commission's powers to set minimum standards to digital platform workers who are 'employee-like', defined as

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<sup>78</sup> Parliament of Australia, *Senate Select Committee on Job Security - Fourth interim report: the job insecurity report*, Parliament of Australia, Australian Government, 2022, p xix.

<sup>79</sup> Parliament of New South Wales (NSW), *Select Committee on the impact of technological and other change on the future of work and workers in New South Wales*, Parliament of NSW, Government of NSW, 2022, p 46.

<sup>80</sup> Parliament of New South Wales (NSW), *Select Committee on the impact of technological and other change on the future of work and workers in New South Wales*, Parliament of NSW, Government of NSW, 2022, p 47.

workers who satisfy one or more of the following: being paid less than employees performing similar work, having low authority over their work, or having low bargaining power.

### *Legislated 'guardrails'*

Most stakeholders agreed that there is a need for minimum standards to ensure fairness for employee-like digital platform workers. An additional view was that any changes should not disturb certain benefits that the digital platform economy provides to workers, particularly flexibility over the hours and times of day they work. These considerations have helped inform the development of proposed 'guardrails', that would be legislated, to guide Fair Work Commission's decision-making. This will ensure that the proposal can establish a safety net of minimum standards for certain cohorts of digital platform workers, without fundamentally shifting the nature of contracting across the economy nor jeopardising the benefits workers enjoy from this work.

In determining the standards that should apply to a cohort of workers, the Fair Work Commission's decision making would be balanced by the following proposed 'guardrails' set out in the Fair Work Act:

- Requiring the Fair Work Commission to first be satisfied that classes of workers are employee-like before considering minimum standards.
- A 'Minimum Standards Objective' ('Objective'). The Objective would direct the Fair Work Commission on the factors it must consider in setting minimum standards. The Objective will include factors such as the need for standards to be clear, fair, recognise workers' perspectives, not to change the form of workers' engagement, be tailored to the industry and type of work and not unreasonably impact competition, business viability and the economy.
- Flexibility to set mandatory or non-binding guidance standards.
- Prohibiting the Fair Work Commission from setting standards on certain matters, such as those that would change a worker's status away from independent contracting.
- Limiting applications for minimum standards orders to be made by registered employee organisations, registered employer organisations, digital labour platforms and the Minister, with the capacity for the Fair Work Commission to set standards on its own motion.

Consistent with its existing functions in relation to modern awards, the Fair Work Commission will also be obliged to follow rules of procedural fairness by ensuring persons covered by a prospective Minimum Standards Order have the opportunity to be involved in informing its deliberations, such as via consultation, conferences and responding to draft orders. There will also be provisions for Minimum Standards Orders to be varied or revoked (processes that mirror the adoption of standards in the first place) to ensure the body of standards remains up-to-date and fit for purpose.

### *Content of standards*

The Fair Work Act will include a non-exhaustive list of matters that the Fair Work Commission may include in the content of Minimum Standards Orders. These will include payment terms, record-



keeping, insurance, consultation and cost recovery, though actual standards will depend on the application at hand. The Fair Work Commission would be able to make Minimum Standards Orders that are either mandatory or guidance only. A mandatory Minimum Standards Order would override the mandatory terms of applicable state and territory laws to the extent of any inconsistency.

To further ensure that digital platform workers could continue to benefit from the flexibility of working on a digital platform, the Fair Work Act would also list matters that the Fair Work Commission could not make standards in relation to, including overtime rates, rostering arrangements, and terms that would change the form of engagement of the workers covered by the order. This responds to a key concern raised by digital platform businesses during consultation about the need for workers to be able to retain choice over their hours and times of work, and for minimum standards not to alter their form of engagement.

### *Consent agreements*

Some stakeholders, including those representing workers, and academics raised that the proposed Fair Work Commission jurisdiction should enable collective agreements to be struck covering digital platform workers. Others, including digital platform businesses, were less supportive of collective agreement-making functions. To address these concerns, this option would allow agreements to be made by consent only, with no power to compel parties to negotiate an agreement. Legislation will also place limitations on the content of a collective agreement, including matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the agreement.

Where registered employee organisations and digital labour platforms choose to negotiate consent-based collective agreements, these may be registered with the Fair Work Commission. Where a Minimum Standards Order applies to the covered workers, the more beneficial provision would apply. The agreement-making framework would be supported by a limited exemption to the *Competition and Consumer Act 2010*.

### *Dispute resolution and protection from unfair deactivation<sup>81</sup>*

The Fair Work Commission will be empowered to deal with disputes about matters arising under a Minimum Standards Order in a similar fashion to how it deals with other matters under the Fair Work framework, e.g. by conciliation, mediation and where possible, arbitration (subject to constitutional limits).

Employee-like digital platform workers who have worked under a services contract on a regular basis for at least 6 months will be able to dispute unfair 'deactivation' from a digital labour platform. Digital labour platforms will be required to hold a valid reason for the deactivation and to follow a process set out in a Digital Labour Platform Deactivation Code to be made by legislative instrument. For example, without pre-empting the content of the code, this could include using internal dispute resolution processes in the first instance.

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<sup>81</sup> While some of the independent reviews raised the need to provide protections from deactivation or unfair contract terminations as part of unfair contracts changes, these options include deactivation and unfair termination protections as part of the minimum standards measures.

If the Fair Work Commission determines that a 'deactivation' is unfair, it will be able to order reinstatement to a digital labour platform and where appropriate, make an order to restore lost pay. This responds to concerns raised by stakeholders representing workers about the need to mitigate the power imbalance that allows platforms to arbitrarily deactivate a worker without meaningful recourse.

### **Option 3: Minimum standards for digital platform workers and road transport workers**

This proposal would implement Option 2, in addition to the Jobs and Skills Summit outcome regarding the road transport industry. It also responds to the recommendation of the Road Transport Inquiry to:

**Recommendation 1** – 'The committee recommends that the government establishes or empowers an independent body that will, in consultation with industry, set universal and binding standards (including binding standards with respect to pay) which:

- ensure the safe performance of work and eliminate unsafe economic and contracting practices; and
- apply to all road transport supply chain participants, including transport operators, online/on demand operations, and workers (regardless of their employment or work status), and throughout supply chains.

The independent body shall also act as a dispute resolution body providing all road transport industry participants access to comprehensive binding dispute resolution capable of addressing all issues associated with, and general powers to resolve, disputes between some or all supply chain participants.'

Worker representatives and academics generally supported providing the Fair Work Commission with broad powers to set minimum standards in the road transport industry. Some road transport organisations have expressed support for confined minimum standards, particularly following an industry roundtable held in August 2022. However, employers and business representatives are largely opposed to a model that would resemble the former Road Safety Remuneration Tribunal.

Amendments to the Fair Work Act would empower the Fair Work Commission to set minimum standards in the road transport industry. As with Option 2, the terms of road transport Minimum Standards Orders would override the mandatory terms of state and territory laws to the extent of any inconsistency.

As with Option 2, this option would include a process for registered organisations and transport companies to make consent collective agreements covering road transport contractors engaged by the company. The Fair Work Commission will have the function of registering these consent agreements. Agreements will only be permitted to be made by consent, with no framework to take protected industrial action. Agreements will not be able to deal with purely commercial matters that do not have implications for labour. Where a Minimum Standards Order applies and an agreement is made, the more beneficial arrangement will apply.

Road transport workers would have access to a limited unfair contract termination jurisdiction, similar to the 'deactivation' protections for digital platform workers. The Fair Work Commission will be able to order remedies including compensation and reinstatement.

To respond to stakeholder concerns about the need for strong industry consultation before introducing minimum standards, this option would include strong checks and balances in legislation, particularly:

- The Fair Work Commission would be required to issue a notice of intent to make an order, along with the draft order. The notice of intent to make an order must then have been in place for at least 24 months to allow parties to consider the order and make submissions to the Fair Work Commission before it becomes mandatory.
- If the Fair Work Commission revises the draft order following or during the 24 month consultation period, it will be required to publish another notice of intent and consult for at least a further 12 months on the revised draft order.
- Road Transport Minimum Standards Orders and consent agreements would not be able to deal with certain matters including purely commercial matters that do not affect the terms and conditions of regulated workers covered by the order, matters that would change the form of engagement of the regulated workers, work health and safety matters or matters comprehensively dealt with by the Heavy Vehicle National Law.
- The Fair Work Commission would be required to convene a Road Transport Advisory Group. The Group would be required to have representatives from organisations that are entitled to represent road transport contractors and those that are entitled to represent road transport businesses, appointed by the Minister for Employment and Workplace Relations. The Group would provide a forum for industry stakeholders to discuss emerging issues, identify areas where there is common ground for action and make recommendations to the Fair Work Commission about making minimum standards.
- An Expert Panel for the road transport industry would also be established within Fair Work Commission to ensure it has access to the necessary industry expertise and ensure decisions across the sector are consistent.
- Additional legislative guardrails would apply where the Fair Work Commission is considering making a Minimum Standards Order. This includes that in addition to considering the Minimum Standards Objective, the Fair Work Commission would need to consider a Road Transport Objective.
- Before making a Minimum Standards Order, the Fair Work Commission would also need to take into account that it:
  - has genuinely engaged with the parties to be covered by an order
  - has consulted the Road Transport Advisory group
  - followed other legislated consultation processes
  - has had regard to the commercial realities of the road transport industry; and

- is satisfied that a mandatory minimum standards order would not unduly impact viability and competitiveness of owner-drivers or similar persons.
- As a ‘failsafe’ mechanism, regulations may empower the Fair Work Commission to conduct a merits review of a Road Transport Minimum Standards Order.

This gradual, consultative, and evidence-based approach to standard setting, with industry views taken into account at each stage of the process, will minimise the risk of potential negative outcomes where minimum standards are not informed by genuine engagement with owner drivers or do not reflect the commercial realities of the sectors of the industry to which they apply. These were key criticisms of the former Road Safety Remuneration Tribunal. The 2016 Review of the Road Safety Remuneration System concluded that the two orders made by the Road Safety Remuneration Tribunal would result in a net cost to the economy of over \$2 billion over 15 years from 2023.<sup>82</sup> By contrast, this option includes legislative guardrails and institutional arrangements (i.e. the establishment of an Expert Panel and Advisory Group) that would ensure that the Fair Work Commission responds to commercial realities and the views of owner-drivers and industry.

#### **Option 4: Minimum standards for digital platform workers and road transport workers with an interpretive principle in the Fair Work Act**

This option would implement Option 3, with an additional amendment to introduce an interpretive principle that applies to determining the ordinary meaning of ‘employee’ and ‘employment’ under the Fair Work Act. This option responds to significant stakeholder feedback raised during consultation about the need to move away from the current contract-centric common law definition of employment. It also responds to Recommendation 6 of the Victorian On-Demand Inquiry.

This is an important measure to improve the operation of proposed minimum standards. In particular, it would clarify the distinction between workers that are eligible for protections and entitlements under the Fair Work Act and those eligible for new minimum standards under Options 2 and 3.

The interpretive principle would no longer require a focus in most cases on contractual terms (the approach espoused by the High Court’s decisions in *Personnel Contracting* and *Jamsek*) when determining a workers’ status as an employee or independent contractor. The principle would instead allow decision makers to consider the totality of the relationship. This would include the way the contract is performed in practice, in addition to the contractual terms governing the relationship. In practice, the intention is to reinstate a test that more closely reflects the multi-factorial test prior to the decisions in *Jamsek* and *Personnel Contracting*.

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<sup>82</sup> PricewaterhouseCoopers (PwC), *Review of the Road Safety Remuneration System: Final Report*, report to the Australian Government Department of Employment, PwC, 2016, p iv.

## **Improving access to unfair contracts protections**

### **Option 1: Status quo**

The unfair contracts provisions in the Independent Contractors Act and Australian Consumer Law outlined in the background section would remain unchanged.

### **Option 2: Allow the Fair Work Commission to resolve disputes about unfair contracts for digital platform and road transport workers**

The Fair Work Commission would be able to deal with unfair contracts disputes under the existing unfair contracts provisions by an amendment to the Fair Work Act. Compared to a court, the Fair Work Act provides low-cost and accessible dispute resolution. The Fair Work Commission will be able to deal with unfair contracts claims by conciliation, mediation or compulsory arbitration, subject to constitutional limitations. If it finds that a contract term is unfair, it will be able to make orders varying or voiding all or part of the contract to remedy the unfairness.

Under this option, the Fair Work Commission would be able to resolve unfair contracts disputes from digital platform and road transport workers only.

Eligibility to make an unfair contracts application to the Fair Work Commission would be further limited by a high income threshold. The high income threshold will be set out in regulations. It will be set at a level that takes into account the high income threshold in the Fair Work Act for employees, and factors in the additional costs faced by independent contractors compared to employees. The intent of the high income threshold is to ensure that the policy addresses low-leveraged independent contractors who lack the means to apply to a court for dispute resolution. Independent contractors whose incomes are above this threshold will continue to be able to apply to a court to dispute an unfair contract under the Independent Contractors Act.

### **Option 3: Allow the Fair Work Commission to resolve disputes about unfair contracts for all independent contractors**

This option would take the same approach as under Option 2 but expand eligibility to make a dispute about unfair contracts at the Fair Work Commission available to any independent contractor, subject to a high income threshold.

## 6. What is the likely net benefit of each option?

This supplementary analysis assesses each option against their:

- **regulatory burden** under the Australian Government's Regulatory Burden Measurement framework; and
- consistency with the **Guiding Principles** for the development of the Government's commitments, as presented in Section 2.

### Who will the options impact?

Key groups that the options are likely to impact are:

- **Independent contractors**
- **Businesses that engage independent contractors**
- **Consumers**
- **Third party businesses in the digital platform economy (such as restaurants)**
- **Government.**

The specific impacts of each option on these groups is explored in further detail in the following sections.

### Independent contractors

Independent contractors are the primary intended beneficiaries of the proposed options. The options consider protections for different groups of independent contractors. Unfair contracts protections are proposed for all independent contractors, while minimum standards are only proposed in relation to digital platform workers who are employee-like and road transport workers (shown in Figure 2).

Figure 2 – Protections considered for groups of independent contractors



There are 1.1 million people who work as independent contractors in their main job in Australia.<sup>83</sup> This represents 8.3 per cent of all employed people and has remained broadly stable over the last decade. The majority of independent contractors are:

- **Male** (69.5 per cent of all independent contractors),
- **Older** (55.5 per cent of independent contractors are 45 years or older, compared to 36.3 per cent for all employees),
- **Full time** (59.8 per cent, although this is lower than the proportion of all employees, at 69.3 per cent), and
- **Able to work on multiple active contracts at the same time** (70.5 per cent).

Independent contractors were more likely to be multiple job holders (11.4 per cent compared to 6.0 per cent for all employees).

More than half of all independent contractors were employed as Technician and trade worker (27.2 per cent) and Professional (26.9 per cent) occupations.

The largest 3 industries that independent contractors are employed in are the Construction industry (28.2 per cent), the Professional, scientific and technical services industry (15.7 per cent), or the Health care and social assistance industry (12.3 per cent). In the Construction industry, 25.1 per cent of all workers are independent contractors.

<sup>83</sup> All data for independent contractors in this section is from Australian Bureau of Statistics (ABS), *Characteristics of Employment, August 2022*, [TableBuilder].

The Transport, postal and warehousing industry has a higher than average incidence of independent contractors – 12.5 per cent of all employed persons in this industry are independent contractors, compared with 8.3 per cent for all industries.

#### Employee-like digital platform workers

The Government's 'employee-like' commitment intends to directly benefit employee-like digital platform workers by providing them with minimum standards for their work. The options also consider providing these workers with improved dispute resolution processes in the event of their 'deactivation' from a platform.

The Victorian National Survey found that digital platform workers are more likely to be:

- **Young** (11.0 per cent of those aged 18-34 worked through digital platforms within the last 12 months, the highest incidence of all age groups),
- **Male** (9.1 per cent of all men had worked through a digital platform in the last 12 months, compared to 5.0 per cent of women),
  - However, workers in **caring**, clerical and data entry, sales and marketing support and writing and translation services **were more likely to be women**.
- **Work in a major city** rather than in regional and remote areas,
- From a **non-English speaking background** (13.0 per cent had worked through a digital platform in the last 12 months, compared to 5.6 per cent from an English speaking background).
- **Temporary or permanent residents** (3 times and 1.7 times more likely to have worked through a digital platform in the last year than Australian citizens); and
- **Aboriginal or Torres Strait Islander** (16.9 per cent had worked through a digital platform in the last 12 months, compared to 6.8 per cent of non-Aboriginal and Torres Strait Islander people).

Over a third (35.2 per cent) of digital platform workers worked across multiple platforms.<sup>84</sup> 11.4 per cent were registered on 4 or more platforms, and 3 of the most used platforms were for rideshare or food delivery.

Most digital platform workers do not earn all their income from digital platform work and may use this work to supplement income earned elsewhere. The Victorian National Survey found that only 15.4 per cent of digital platform workers were reliant on this income, with a further 24.5 per cent saying that it was 'an important part of overall income, but not essential'.<sup>85</sup> Reliance on income earned through digital platforms is likely to be higher for employee-like digital platform workers. For

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<sup>84</sup> P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 3.

<sup>85</sup> P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 30.



example, the Victorian National Survey found that transport and food delivery drivers were much more likely to say that they earned all their income from digital platform work.<sup>86</sup>

### Road transport workers

The Government's Jobs and Skills Summit outcome in relation to road transport workers would benefit independent contractors working in the road transport industry, subject to appropriate checks and balances.

In August 2022 (latest available data) there were 367,300 workers in the road transport sector. Of these, 57,400 (or 15.6 per cent) were independent contractors.<sup>87</sup> Independent contractors in this sector are more likely to be:

- **Born overseas** (67.7 per cent compared to 36.4 per cent of all independent contractors),
- **Male** (96.3 per cent compared to 69.5 per cent of all independent contractors),
- **Full time** (75.5 per cent compared to 59.8 per cent of all independent contractors),
- Employed as a **Machinery operators and drivers** (69.9 per cent compared to 7.6 per cent of all independent contractors),
- **Reside in a capital city** (75.3 per cent compared to 69.4 per cent of all independent contractors).

Independent contractors in this sector are more likely to have authority over their own work (55.6 per cent versus 38.4 per cent for all independent contractors). 48.6 per cent of independent contractors in these industries are able to work on multiple active contracts at once, lower than the 70.5 per cent recorded for all independent contractors.

## Digital labour platform businesses

Introducing minimum standards for digital platform workers will have a regulatory impact on the digital labour platforms that engage them.

Given that the content of minimum standards will depend on the decision-making of the independent Fair Work Commission, it is difficult to estimate the impact that minimum standards for digital platform workers will have on businesses. There are a few different types of businesses that may be affected:

- Digital platform businesses e.g. Uber, DoorDash, Mable
- Businesses that use digital platform workers as part of their operations e.g. restaurants who offer delivery via DoorDash/Uber Eats

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<sup>86</sup> P McDonald et al., '[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 30.

<sup>87</sup> Australian Bureau of Statistics (ABS), '[Characteristics of Employment, August 2022](#)', [TableBuilder].

- Businesses who are competitors or work in similar industries e.g. taxi drivers, delivery drivers, caring workers.

The first group of digital platform businesses have been consulted extensively. As indicated in Section 4, stakeholders in this group generally supported the concept of national minimum standards for digital platform workers, with views diverging on how to implement minimum standards. This is the group for whom there will be the most direct cost impact of minimum standards for digital platform workers. The costs to this group of businesses are the focus of this Impact Analysis Equivalent process.

The second group of businesses that use digital platforms as part of their operations is more difficult to find data on. The department is not aware of data that shows how many businesses use digital platforms as part of their work. Depending on the extent to which digital platform businesses choose to pass on costs, introducing minimum standards may increase the cost to these businesses of using digital platforms to reach consumers. However, without data available on how many businesses this will affect and how costs may be impacted, the department is unable to make an estimate of the size of this flow-on effect.

The third group of competitor businesses is even more difficult to quantify. There may be flow-on effects affecting the competitive advantage of different types of labour and employee relationships with the introduction of minimum standards for digital platform workers. However, these effects are not able to be modelled and as such the department is unable to make an estimate of the size of these potential effects.

## **Entities engaging road transport workers**

Introducing minimum standards for road transport workers will have a regulatory impact on the entities that engage them.

As outlined in the available data section above, the ABS produces data on businesses in Australia however, it does not go into detail on the employment relationships that business may have (beyond a headcount of number of employees). Given that these statistics would not capture how many businesses use independent contractors, or the nature of these contracts, the department is unable to provide accurate information on the number of businesses that may be impacted by these legislated changes.

There is data available on the number of businesses in specific industries. Two industries within scope of the policies outlined in this document are the Road transport (2-digit ANZSIC code 46) and Postal and courier pick-up and delivery services (2-digit ANZSIC code 51) industries. In June 2022, there were 98,216 actively trading businesses in the Road transport industry, and 67,867 of those (69.1 per cent) were non-employing businesses. In June 2022, there were 42,758 actively trading businesses in the Postal and courier pick-up and delivery services industry, and 33,089 (77.4 per cent) of those were non-employing businesses. This means that within these 2 industries, there were 140,974 businesses actively trading as at June 2022, including 100,956 which did not have employees.

## Consumers (of digital platform and road transport services)

The Actuaries Institute used ‘transaction data’ to estimate that consumers spent \$6.3 billion in the digital platform economy in 2019, growing nine-fold since 2015. However this is relatively small when compared with other sectors.<sup>88</sup> At the national level, it is estimated that 46 per cent of Australian residents have used at least one digital platform as a consumer.<sup>89</sup> The Actuaries Institute found that the COVID-19 pandemic had a significant impact on consumption in the digital platform economy. For example, in October 2020, economic activity in the meal delivery sector was up more than 100 per cent and private transport was down 20 per cent compared to the pre-COVID-19 period.<sup>90</sup>

More recent data published by digital platform businesses suggests that consumption in the digital platform economy is strong. For example, a 2022 report released by Uber indicated that 40 per cent of respondents to a poll had used the Uber app in the last two years and estimated that Uber and Uber Eats produced \$6.6 billion in consumer surplus for Australians in 2021.<sup>91</sup>

The Productivity Commission outlined the benefits of digital platforms to consumers in their latest productivity review.<sup>92</sup> These included improving consumer choice and providing better quality and variety of services (through increased competition in the sector). Digital platforms deliver better matching between suppliers and consumers through reducing transaction costs, simplifying search functions, intuitive algorithms, and real-time pricing, all of which can deliver a better experience for consumers.

NDIS participants and other clients of care-related services are a growing group of consumers in the digital platform economy. With regard to the care sector, the Productivity Commission stated *‘some digital platforms have underpinned greater consumer empowerment, improving the quality of service. In aged and disability care, platforms allow people to choose individual carers. This reduces people’s search costs in finding carers that meet their preferences and that understand their care requirements, without the need to re-familiarise with a new carer.’*<sup>93</sup>

## Government

The options would have a direct impact on:

- The Fair Work Commission, which will implement the new jurisdiction including by setting minimum standards and resolving unfair contracts disputes; and
- The Fair Work Ombudsman, which will provide information and advice on the changes and enforce compliance with minimum standards orders.

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<sup>88</sup> Actuaries Institute, *‘The rise of the gig economy and its impact on the Australian workforce’*, Green paper, 2020.

<sup>89</sup> Actuaries Institute, *‘The rise of the gig economy and its impact on the Australian workforce’*, Green paper, 2020, p. 15.

<sup>90</sup> Actuaries Institute, *‘The rise of the gig economy and its impact on the Australian workforce’*, Green paper, 2020, pp. 31-32.

<sup>91</sup> Uber, *‘The Impact of Uber in Australia, 2022’*.

<sup>92</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, p. 136.

<sup>93</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, p. 138.

Applying minimum standards to digital platform workers providing aged care and NDIS support services could also have a further impact on the Government funding arrangements for these sectors, depending on the final content of the minimum standard.

## **Minimum standards**

### **Scenarios for estimating net benefits**

The options to introduce minimum standards for certain cohorts of independent contractors would require the Fair Work Commission to i) determine the cohort that an order setting minimum standards will apply to, and ii) the content of any minimum standards, including pay rates. The net impact therefore would depend on a decision of the independent Fair Work Commission, guided by factors set in legislation. This is likely to be a highly complex and detailed process, and include a consideration of actual pay rates, costs incurred by workers, the views of the parties and other relevant economic considerations.

Therefore, the department has assessed the impact that would occur under scenarios detailed under each option. The department chose likely scenarios based on key areas of concern raised during consultation, while noting that impacts may be felt in sectors outside of these scenarios.

## Digital platform workers

### Scenario 1 – Rideshare and food (and other goods) delivery workers

#### **Estimated cohort size – 150,000**

This group consists of workers performing rideshare, taxi services, food delivery, or other goods delivery via digital platforms. Examples of platforms in this space include Uber, Uber Eats, Ola Cabs, Taxify, and Sherpa. During consultation, digital platforms engaging transport and food delivery workers, unions, state and territory governments, academics and others identified this group as a key cohort requiring minimum standards.

The Victorian Government survey identified that ‘transport and food delivery’ workers make up 18.6 per cent (or 121,300 workers) of all digital platform workers (department estimates based on the Victorian Government Inquiry). However, Uber has recently identified that it engages 150,000\* rideshare and food delivery workers, who work at least once a month.

We have therefore used the 150,000 estimate for the number of food delivery drivers and rideshare. While Uber is not the only digital platform in transport and food delivery, it is the largest (with 22.7 per cent of digital platform workers performing work via Uber, compared with 8.2 per cent working via Deliveroo, and 7.2 per cent working via Ola at the time of the Victorian National Survey). Additionally, transport and food delivery workers had a high likelihood of working on three platforms, or four or more platforms, so it is likely that there is significant overlap between those workers who work for Uber and who work for other similar platforms e.g. DoorDash, Ola, Didi.\*\*

\* Uber, 'Elevating the voices of 150,000 Australian gig workers', March 2023, <https://www.uber.com/en-AU/newsroom/flexibility-works/>, [accessed 26 June 2023].

\*\* McDonald, P. et al., 'Digital Platform Work in Australia: Prevalence, Nature and Impact (Digital platform work in Australia)', commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 15, 18.

### Scenario 2 – ‘Care’ workers

#### **Estimates of cohort size – 16,300 workers or 2.5 per cent of all current digital platform workers (department estimates based on the Victorian Government Inquiry)**

During consultation, aged care and NDIS support services delivered through digital platforms were also identified as an area of primary concern. The number of workers covered by any Minimum Standards Order that the Fair Work Commission may set will be dependent on the scope of the order/s.

The Victorian National Survey identified that 7.0 per cent of all digital platform workers performed ‘caring’ work. However, the survey defined this group broadly, including workers performing aged or disability care, as well as workers who would not be within a scope of a likely order, i.e. those providing pet services, babysitting, and nanny services. The department has therefore excluded 4.5 per cent of digital platform workers, which is the proportion of survey respondents who had engaged via MadPaws, a pet sitting platform. This results in an estimate of 2.5 per cent of digital platform workers who perform ‘caring’ work, or 16,300 workers. Mable estimated its own workforce size at 10,000 workers in 2021.\* After considering that there are other digital platforms operating in this sector, and that some workers are likely to use multiple platforms to seek work, this estimate appears to be consistent with the Mable data.

\*Mable Technologies, 'Pre-Budget 2021 Submission', 2021, [https://treasury.gov.au/sites/default/files/2021-05/171663\\_mable\\_technologies\\_0.pdf](https://treasury.gov.au/sites/default/files/2021-05/171663_mable_technologies_0.pdf).

## Road transport workers

### Scenario 3 - Last-mile delivery workers

#### *Estimated cohort size – 19,100*

Unlike digital platform gig workers, data on these workers is available from the ABS. They are part of the Transport, postal and warehousing industry (ANZSIC category I) which employed 698,200 people in August 2022 (5.2 per cent of all workers). The Postal and courier pick-up and delivery services sub-industry employed 99,000 workers, of which 19,100 were independent contractors. As in the estimates above, not all independent contractors will be impacted by the proposed changes and as such, this figure is an upper limit of those affected by the policy.

The department has identified the ‘last mile courier’ sector as a likely area of action for mandatory standards. This assumption is due to its competition with parts of the gig economy, in addition to feedback from road transport stakeholders during consultation that there may be a higher proportion of contractors with low bargaining power in this sector.

### Option 1: Status quo

The minimum standards options propose introducing minimum standards for employee-like digital platform workers and independent contractors in the road transport industry, and to include an interpretive principle in the Fair Work Act applying to determining the meaning of ‘employee’ and ‘employment’. The impacts in this option consider the status quo in relation to these measures.

#### Digital platform economy

There are no existing minimum standards applying to digital platform workers. However, the state - based regulation of road transport and/or digital platform work described in section 3 means that there is an existing regulatory burden in relevant states. This regulatory burden is expected to be the greatest for businesses that operate across multiple states and which must comply with multiple regulations.

#### Pay rates

There is limited data available from the ABS on the earnings of independent contractors. The Victorian National Survey includes evidence on earnings for digital platform workers. It is worth noting that the payment structure for digital platform workers tends to be quite different to a traditional employment payment design, with 59.0 per cent of current platform workers reporting that they are paid by completed task or job, 22.0 per cent being paid for the time or hours they work, 5.1 per cent receiving a fixed daily/weekly/monthly income and 7.6 per cent being paid by some combination of some or all of the above.<sup>94</sup> Current platform workers were also asked to estimate approximately how much per hour they usually got paid for tasks undertaken through their main digital platform, but a significant proportion (40.0 per cent) answered ‘I don’t know’ to this

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<sup>94</sup> P McDonald, et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)’, commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 18.

question.<sup>95</sup> As such, the following earnings data should be treated with caution as a significant proportion of platform workers were unable to estimate their earnings, and it is unclear whether this group may have skewed the average earnings up or down.

For those current platform workers who estimated their hourly income, the median response for pre-tax dollars was \$25.00 and the mean was \$32.16.<sup>96</sup>

For transport and food delivery workers, the trimmed mean hourly rate was \$22.19. For care workers, the trimmed mean hourly rate was \$21.60. For comparison, at the time of the survey the casual National Minimum Wage rate was \$23.66.

During consultation, stakeholders raised concerns about digital platform workers generally earning less than they would if they were employees performing similar work. For these 3 types of work, the award rates for a casual employee as at April 2019 (the time of the Victorian National Survey) were all above the average hourly rates reported by digital platform workers. These are averages and do not reflect the individual situations of every worker – but on average, digital platforms are likely to be worse off than if they were entitled to minimum rates of pay set at a level similar to the casual hourly rate under the relevant award. Conversely, the status quo appears to have an economic benefit to digital platform businesses, who pay lower labour costs than if they were an employer and were bound by the relevant award. The department has estimated the cost of increasing the wage to the relevant award rate under Option 2.

### Prevalence of ‘deactivations’

Digital platform workers can have their access to a digital platform ‘deactivated’ without notice and with limited avenues to dispute the action.<sup>97</sup> Unfortunately no data exists at present on how often digital platform workers have their access to a digital platform ‘deactivated’. The ABS’ *Participation, Job Search and Mobility* publication includes data on the number of people who were dismissed from their job over the year. This was only 26,100 people, or 0.2 per cent of all workers, in February 2022, and this cohort made up only 5.0 per cent of all workers who lost their job for a range of involuntary reasons.<sup>98</sup> In the absence of data on the prevalence of digital platform deactivations, we have considered that this proportion of 0.2 per cent can be applied to digital platform workers to estimate how many may face deactivations, noting the differences in legislative protections between the 2 groups.

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<sup>95</sup> P McDonald, et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)’, commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 19.

<sup>96</sup> P McDonald, et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact \(Digital platform work in Australia\)](#)’, commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 18.

Note also that this earnings data does not account for costs of operation e.g. petrol, car or bike maintenance.

<sup>97</sup> Parliament of Australia, *Senate Select Committee on Job Security - First interim report*, Select Committee on Job Security, June 2021 p 79.

<sup>98</sup> Australia Bureau of Statistics (ABS), [Participation, Job Search and Mobility, February 2022](#) [TableBuilder].

## Consumers and third party businesses

Consumers can benefit from the innovation, efficiency and often lower prices provided by the digital platform economy.<sup>99</sup> Consumer benefits specific to the scenarios for analysis include:

- **Rideshare services** – consumers benefit from improved reliability, better matching and ability to see fixed prices ahead of the trip, compared to taxi services.<sup>100</sup> A report by Deloitte Access Economics found that using 2016 service levels, consumers saved \$31 million per year by using rideshare, and that consumers had an annual benefit of \$49.6 million.<sup>101</sup>
- **Food delivery services** – consumers (as well as third party businesses) benefit from lower delivery prices. The Victorian Government Inquiry cited evidence stating that on-demand food delivery workers can be less than half the cost of engaging an employee to perform the same work.<sup>102</sup>
- **Care services** – the Productivity Commission’s Study Report on Aged Care Employment found that care services provided through digital platforms can provide benefits for clients including through improved services (for example, as independent contractors have a business incentive to deliver quality services to attract more customers), allowing consumers to choose workers that better meet their diverse needs, and improve clients’ continuity of care by directly sourcing personal care workers or nurses through platforms.<sup>103</sup>

## Road transport

As indicated in Section 3, businesses operating in the road transport industry, including those engaging independent contractors, currently have to comply with the National Heavy Vehicle Law and Regulations, as well as certain state-based regulations. In New South Wales, this includes minimum standards applying to some road transport independent contractors, in addition to agreement-making and dispute resolution rights.

As mentioned in the section above on digital platform work, estimates of earnings for independent contractors are limited. The department has used the methodology created by PWC in a regulatory impact statement for the establishment of the Road Safety Tribunal in 2011. While the road transport policy outlined in this document is very different to that costed by PWC, the methodology of using income bands from Census data is one the department has adopted. This provides an estimate of median weekly earnings for the cohort in scope of the policy.

Census Tablebuilder data does not provide detailed information on form of employment (i.e. whether a worker was an employee, independent contractor, or another business operator). In the

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<sup>99</sup> Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, pp 136-140.

<sup>100</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 97; Productivity Commission, *5-Year Productivity Inquiry – Volume 7*, p 136.

<sup>101</sup> Deloitte Access Economics, ‘Economic Effects of Ridesharing in Australia, cited in Victorian Government, *Report of the Inquiry into the Victorian On-Demand Workforce*’, Industrial Relations Victoria, Department of Premier and Cabinet, 2020, p. 97.

<sup>102</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 84.

<sup>103</sup> Productivity Commission, *Aged Care Employment: Study Report*, Productivity Commission, Australian Government, 2022, p 100.



absence of this data the department has used owner managers in unincorporated and incorporated enterprises without employees as a proxy for independent contractors. The ABS description of each of these forms of employment share many similarities:

- Owner-managers of incorporated or unincorporated enterprises without employees are people who operate their own enterprise or engages independently in a professions or trade.
- Independent contractors are persons who operate their own business, and contract to perform services for others without having the legal status of an employee.

ABS data shows that the majority (69.6 per cent) of independent contractors were owner managers without employees.<sup>104</sup> A further 20.4 per cent were owner-managers with employees, but as these workers are unlikely to be in scope of the proposed policy, their earnings have not been considered in the average earnings outlined below.

Earnings data in the Census is only available in weekly income ranges, making the construction of an hourly earnings rate problematic. The department has restricted the population to full-time workers only, to control for the lower weekly wages that those working part time would record. As the majority of independent contractors in the road transport sector work full-time (75.5 per cent) this method is also the most likely scenario. The median income band has been calculated for this population, giving a median weekly wage range of \$1,000-\$1,249 per week for owner managers in the road transport sector in 2021.

### Interpretive principle

Option 4 proposes including an interpretive principle in the Fair Work Act applying to the meaning of 'employee' and 'employment'. The principle would require a Court, in determining a workers' status as an employee or independent contractor, to have regard to the totality of the relationship. This would not affect a significant number of workers and businesses and is unlikely to impact digital platform workers, noting that under the multi-factorial test previously applied in determining a workers' status, workers in the digital platform economy were generally not found to be employees. Instead, it would ensure a fairer test applies where a Court is required to determine the status of a small number of workers on the fringes between employment and independent contracting who may have been determined to be employees under the multi-factorial test previously applied by Courts.

There is no clear data showing the number of workers in this cohort. However, the department has arrived at an estimate of a maximum number of workers in this category based on the likely characteristics of these workers. These may include being engaged by a single business for a long period, working regular hours, while not having authority over their own work.

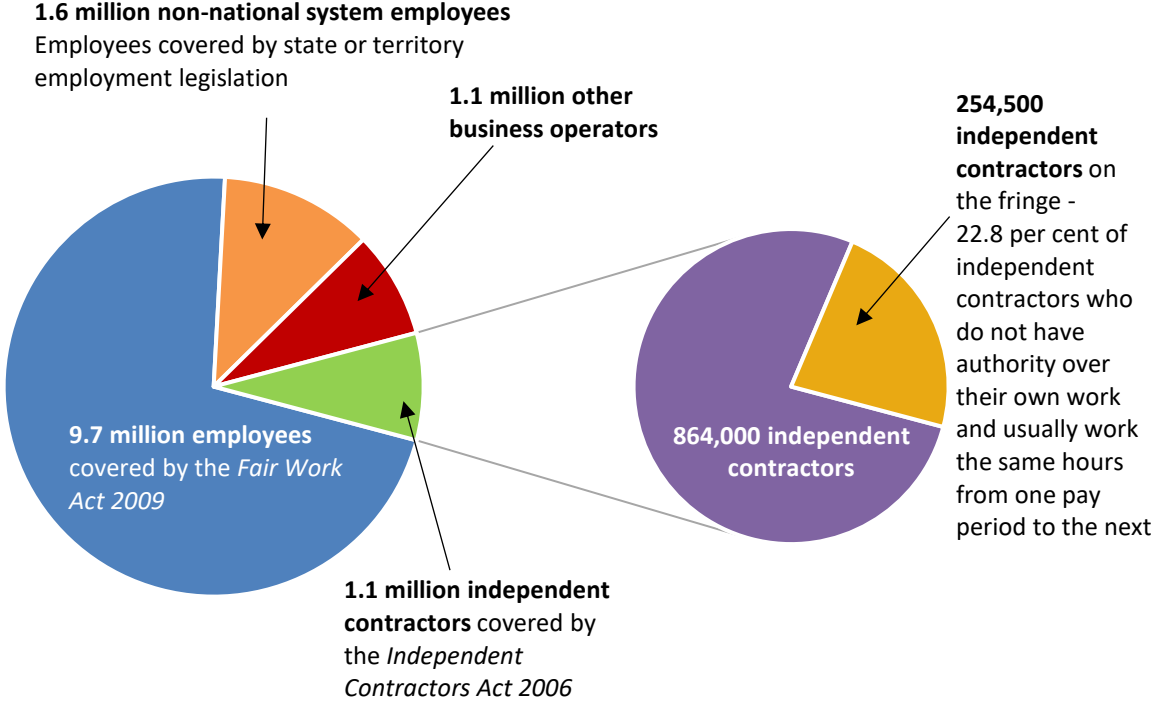
The department has estimated the size of a possible cohort of workers on the fringes of employment and independent contracting by defining this group as independent contractors who did not have authority over their own work and who usually worked the same hours from one pay period to the next. This is a group of **254,500 workers**, or 22.8 per cent of the total 1.1 million independent

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<sup>104</sup> Australian Bureau of Statistics (ABS), *Characteristics of Employment, August 2022* [TableBuilder]

contractors.<sup>105</sup> As this figure is considered to be an upper bound, it is possible that the actual number of workers who would be impacted by this proposal will be much lower.

Figure 3 – Estimates of workers who could be impacted by an interpretive principle in the Fair Work Act (ABS, *Characteristics of Employment, August 2022*, published and unpublished Tablebuilder data)



The status quo is relatively new, following the High Court’s 2022 decisions in *Jamsek* and *Personnel Contracting*. As this decision was handed down recently, it is difficult to examine whether there has been any impact on the number or proportion of independent contractors. The proportion of independent contractors in Australia has been broadly stable over the last 10 years, with latest data showing that the proportion of independent contractors stood at 8.3 per cent in August 2022.<sup>106</sup> However, the incidence of independent contractors may increase in future. For example, Professor Andrew Stewart predicts that while independent contractors currently comprise approximately 8 per cent of all employed persons, it is likely to gradually increase, given the experience of other countries with ‘weak’ definitions of employment.<sup>107</sup>

<sup>105</sup> Australian Bureau of Statistics (ABS), *Characteristics of Employment, August 2022* [TableBuilder].  
<sup>106</sup> Australian Bureau of Statistics (ABS), *Characteristics of Employment, August 2022* [TableBuilder]. Data is for form of employment in main job.  
<sup>107</sup> Andrew Stewart, ‘Tackling Insecure Work: Assessing the Albanese Government’s Reform Agenda’, speech given at Melbourne Law School, May 8, 2023.

**Table 7 – Consistency with Guiding Principles – Option 1**

Guiding Principle	Rating	Explanation
Australia’s workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Poor	Australia’s workplace relations system developed prior to the digital platform economy. The emergence of new forms of digital platform work has created a cohort of workers who are employee-like but cannot access protections and entitlements under the workplace relations system. Current regulatory frameworks in Australia have not been capable of providing these to these workers. As a result, the ability of the status quo to meet this guiding principle is poor.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Poor	National regulation does not allow for the extension of minimum standards or dispute resolution to workers who are not classified as employees. The current common law definition of employment relies heavily on the terms of the workers’ contract, rather than focusing on the totality of the relationship.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Poor	Unlike businesses engaging independent contractors, businesses that engage employees are subject to a comprehensive system of employment regulation, including the requirement to pay minimum wages. This undermines even competition between businesses offering similar services, including digital platforms that engage employees and ‘traditional’ employing businesses in the same sector. Due to this uneven competition, the rating for this guiding principle is poor.
The Fair Work Commission should set minimum standards that:	Poor	The Fair Work Commission cannot set minimum standards for digital platform or road transport workers under the status quo.

<ul style="list-style-type: none"> <li>• are fair, relevant, proportionate, sustainable and responsive</li> <li>• reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with</li> <li>• mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market</li> </ul>		
<p>The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.</p>	<p>Poor</p>	<p>There is no standard-setting framework under the status quo.</p>

## Option 2: Empower the Fair Work Commission to set minimum standards for digital platform workers

### Direct regulatory impacts

#### Compliance

##### Compliance with minimum standards

The compliance cost of introducing minimum standards will fall on digital platform businesses. This cost will be estimated as a comparison to the baseline established under the Status Quo Option, which is **nil**.

The department estimates that digital platform businesses are likely to face the following compliance costs under Option 2:

- Initial costs of ensuring that contracts and systems are compliant with new minimum standards.
- Ongoing compliance costs of record-keeping and ensuring compliance with varied standards

There is no existing data on the number of digital platform businesses in the digital platform economy. Therefore, the compliance cost is expressed as a cost per business.

As technology companies, digital platforms are likely to have robust IT systems to implement new minimum standards. They are also likely to have standard form contracts applying to their workers. Therefore, the department assumes that the likely regulatory cost of ensuring compliance with new minimum standards will include:

- Understanding new obligations and regulation.
- Updating their service contract and other documents to ensure it incorporates new minimum standards. This process is also likely to look at other necessary steps the business needs to take, such as updating websites and their app to ensure that information on pay rates is accurate.
- The cost of updating IT systems (such as algorithms setting pay rates for workers) to ensure compliance with new minimum standards.

#### *Understanding new obligations*

There are no publicly available estimates of how long it would take businesses to understand new obligations. Taking into account that there are different orders that could be made which could range from those that may be simpler to understand, to those that may be more complicated, the department estimates that it would take a business on average 20 hours to understand their new obligations. These 20 hours of work are likely to be undertaken by a legal professional. This estimate factors in that the Fair Work Commission is likely to take some time to make a Minimum Standards Order, and that prior to making an Order, the Fair Work Commission would consult with affected

entities including digital platforms. Digital platform businesses would be able to access fact sheets and other information published on the Fair Work Commission and Fair Work Ombudsman's website.

#### *Updating contracts and other key documents*

Given this is a new jurisdiction, there is no publicly available documentation available on how long it would take business to update contracts and key documents to comply with Minimum Standards Orders. The different types of orders, different levels of maturity of platforms and different business models also make it challenging to accurately estimate. Given this complexity, the department assumes that as an initial cost, it would take a business 100 hours to ensure their contracts and processes (for example services contracts provided to workers) are compliant with the new minimum standards that are implemented. This is a deliberately generous estimate given the highly variable costs that may be involved in responding to a new type of Minimum Standards Order. It may well cost less depending on the specific circumstances, such as the terms of the Minimum Standards Order.

This work is also estimated to be undertaken by a legal professional. The estimate that this will take a legal professional 100 hours factors in that compliance with minimum standards is likely to be a significant change to these businesses' existing arrangements, and that ensuring that contracts and processes are compliant will be a complex task. If standards are varied in the future, this cost is likely to be significantly lower and primarily involve ensuring compliance with a new pay rate. The department estimates that this will take 10 hours every time a Minimum Standards Order is varied given that it will be a less complex task to update documentation for an order already in place.

#### *Updating IT systems*

Again, there is no publicly available documentation available on the likely regulatory burden for updating IT systems in response to Minimum Standards Orders. Discussion with the department's IT team indicates that it is challenging to provide an accurate estimate of the hours required to update IT systems, as it will depend on a number of factors, including the complexity of the IT systems, whether the IT systems already deal with the concepts in the Minimum Standards Orders, and whether the digital platform has responded to similar regulatory environments overseas.

For example, if a platform simply needs to update a minimum hourly rate where it already sets one, the amount of time taken will be minimal. However, if the platform needs to incorporate a completely new element into a complex system it could potentially take weeks of work from a team of coders. This was supported by feedback from platforms during consultation, including that the implementation cost of minimum standards would depend on the extent to which it differs from their existing business model. They also advised that it could take a long period of time to update systems to implement any changes.

The department's costing assumptions are based on minimum standards introducing changes that would not fundamentally shift platforms' business models. Given the views put forward by platforms, if these changes were more significant, compliance costs would be likely to be higher.

Given these uncertainties, and noting that the provisions are not intended to change the nature of the worker's engagement, the department estimates that on average, it will take 200 hours (or around 2.5 weeks of two IT professionals) of IT work to implement new minimum standards per digital platform business. As with the cost of ensuring that systems and processes are compliant with new minimum standards, system updates in response to a new Minimum Standards Order are likely to be a more significant change to existing arrangements than updating in response to an order being varied. When updating systems to implement variations to minimum standards (for example, changes to minimum rates), this will be estimated to take 20 hours per variation. This work will also be undertaken by an IT professional.

#### *Relevant pay rates for costing*

The Office of Impact Analysis provides an hourly rate of \$79.63 for 'work related labour rates'.<sup>108</sup> This rate takes into account an average worker's wage and other business costs associated with employing that worker (an extra 75 per cent loading is added to the base wage to reflect these costs). Given that IT and legal professionals often have a higher average wage, the department has taken the methodology of the Office of Impact Analysis and applied it to the average hourly earnings of IT and legal professionals (i.e. inflating the average hourly wage by 75 per cent). For all other workers, the department has used the Office of Impact Analysis hourly rate of \$79.63.

The department has also used the cost of senior legal and ICT professionals engaged directly by a business. Not all of the work to implement these measures would necessarily need to be undertaken by senior legal or ICT professionals. However, the use of a higher rate recognises that while some platforms may be able to comply with Minimum Standards Orders at a lower cost using in-house or more junior professionals, others will need to engage the services of third-party services such as a legal firm and this may incur a higher cost. The assumptions around the number of hours taken and the seniority of the professionals used intends to balance these different scenarios and provide an average cost for the purposes of estimating the regulatory impact.

For IT professionals, the department has used the weekly wages of a full-time ICT manager, using *ABS Employee Earnings and Hours, May 2021* data (\$3,100.10 per week), and divided that by 35 hours (the number of hours that denotes a full-time worker by the ABS) to get an average hourly rate of \$88.57. Applying the 75 per cent loading to that figure gives an average business cost of \$155.01 per hour for an IT professional. This aligns with the average annual salaries for a range of IT professionals published by Hudson, e.g. platform developers have annual salaries of \$141,000 per year (which equates to an hourly wage of \$77.47). These rates are also broadly consistent with the range of rates that the department pays to ICT professionals engaged to write applications or update online platforms for the department.

To estimate the hourly earnings for an appropriate legal professional, the department has used annual salaries for senior corporate lawyers from Mahlab.<sup>109</sup> These gave average annual salaries of approximately \$190,000-\$260,000 for senior corporate lawyers with 8-10 years' experience. These approximate average salaries were corroborated by the department's internal lawyers. Using the published mode of \$245,000 for senior corporate lawyers in Sydney, and applying a similar methodology as above, the department divided the annual salary of \$245,000 by 52 and then again

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<sup>108</sup> Office of Impact Assessment, *Guidance Note, Regulatory Burden Measurement Framework*, p 11

<sup>109</sup> *Mahlab Report*, July 2022, salary for a corporate lawyer in Sydney with 8-10 years' experience.

by 35 to calculate an hourly wage of \$134.62. Then applying the 75 per cent loading the department estimates that the hourly work related labour rate of employing a senior corporate lawyer to be \$235.58.

As above, it is estimated that the Fair Work Commission would set the first Minimum Standards Orders to be implemented in 2025-26, and then vary these every 3 years, the department estimates that each business would face **\$7,018.20** as an annual cost, averaged over the next 10 years.

**Table 8 - Compliance costs over 10 years**

Year	Understanding new obligations	Updating contract and other documents	Updating IT systems	Total
<b>2025-26</b>	= \$235.58 x 20 hrs = \$4,711.54	= \$235.58 x 100 hrs = \$23,557.69	= \$155.01 x 200 hrs = \$31,001.00	\$59,270.23
<b>2028-29</b>	Nil	= \$235.58 x 10 hr = \$2,355.77	= \$155.01 x 20 hrs = \$3,100.10	\$5,455.87
<b>2031-32</b>	Nil	= \$235.58 x 10 hr = \$2,355.77	= \$155.01 x 20 hrs = \$3,100.10	\$5,455.87
<b>TOTAL</b>	\$4,711.54	\$28,269.23	\$37,201.20	\$70,181.97
<b>Yearly average (10 years)</b>	\$471.15	\$2,826.92	\$3,720.12	<b>\$7,018.20</b>

#### Compliance with deactivation disputes

There are additional regulatory costs for businesses engaging digital platform workers who will be able to dispute an unfair contract termination or 'deactivation' at the Fair Work Commission. These businesses would face costs associated with implementing new policies and procedures to ensure that terminations of contracts are compliant. For example, this may include steps to afford the other party procedural fairness.

Consistent with the approach taken above for the cost of compliance with a new Minimum Standards Order, the department estimates that it would take a business 20 hours to understand the new obligations and a further 100 hours to develop policies and procedures to ensure that future contract terminations are compliant. The number of hours taken is intended to provide an average level of regulatory burden, but it is likely that the time taken would vary depending on the final form of the deactivation code, the Fair Work Commission's approach to implementation and platform's current approaches to deactivation. This work would be undertaken by a legal professional at the rates outlined above. These would be a one-off cost to businesses.

$$= (20 \text{ hours} \times \$235.58) + (100 \text{ hours} \times \$235.58)$$



= \$4,711.54 + \$23,557.69

= **\$28,269.23 per business.**

There is no available data on how many digital platforms engage independent contractors. The per business cost is estimated as \$28,269.23, including time to understand new obligations and to implement policies and procedures to ensure that any contract terminations are compliant.

This cost will be in addition to the \$59,270.23 compliance cost referred to in Table 8, which is expected to come into effect in 2025-26.

## **Economic**

### Economic impact of minimum standards

Despite the benefits that digital platform work has brought to workers, businesses and consumers, this model sees legal and operational risk transferred from business to individual workers, while leading to some workers operating at below the equivalent of national minimum wage.

Introducing minimum standards for digital platform workers will have a direct financial impact on:

- **digital platform businesses** who will have to pay minimum pay rates and entitlements.
- **digital platform workers** who will receive minimum pay rates and entitlements.

Depending on the action taken by these businesses in the face of increased labour costs, it is likely that at least part of this cost will be passed on to the consumers of these platforms. The Actuaries Institute estimated in 2019 that consumers spent \$6.3 billion in the gig economy, and 46 per cent of Australian residents are estimated to have used at least one digital platform as a consumer.<sup>110</sup> It will be up to each digital platform to decide how much of these costs they absorb and how much they pass onto consumers through higher prices. This depends on a range of complex factors and the interactions between them, including the profit margins of the digital platforms and various elasticities. It is therefore not possible to estimate how this cost may flow on to consumers.

The department anticipates that there would be an initial impact to these parties created by moving from the status quo to introducing minimum standards, and then further ongoing costs as these standards are varied in the future. Over the next 10 years, the department estimates that the total impact would be \$4.0 billion in a wage bill plus \$96,700.70 per business (initial and ongoing costs). As we do not know how many businesses will be impacted by this policy change, we cannot sum these 2 figures. This is the costs to digital platform businesses and benefits to digital platform workers.

### Estimated number of digital platform workers

The number of digital platform workers has been estimated based on the Victorian National Survey by using the proportion of people who had worked or offered services through digital platforms in

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<sup>110</sup> Actuaries Institute, The rise of the gig economy and its impact on the Australian workforce, Green paper, December 2020, p. 14.

the last 12 months (7.1 per cent as at April 2019),<sup>111</sup> applying it to the number of employed persons at the time this survey was conducted, i.e. April 2019 (12,810,563 persons),<sup>112</sup> and then discounting this estimate by the proportion of digital platform workers who worked less than once a month (28.3 per cent).<sup>113</sup>

Number of digital platform workers = 7.1% x 12,810,563 x (100% – 28.3%)  
 = **652,147 digital platform workers** (as at April 2019)

Likely scenarios

Food delivery, rideshare, and caring workers are primary areas of focus and consistent with the requirement for workers to be employee-like. Therefore, we consider it a likely scenario that the Fair Work Commission would choose to prioritise setting minimum standards for these cohorts. As such, we have estimated the wage bill of granting minimum standards in the form of the relevant casual award rates for these groups of digital platform workers. The awards listed below in Table 9 are the most appropriate awards in the department’s analysis. There is no data available about how many employees are engaged at each level, so we have chosen level 2 for the purpose of this analysis as a comparator rate. The Fair Work Commission may also account for additional factors when setting minimum standards, for example, independent contractors bear their own operating costs and pay their own superannuation. The actual costs will depend on the decision-making of the Fair Work Commission.

**Table 9 – Estimated average hourly pay rates for digital platform workers, compared to award rates, April 2019**

	Food delivery	Rideshare	Care (aged care or disability support)
Hourly casual wage under relevant award <sup>114</sup>	\$25.28 Restaurant Industry Award, Employee Level 2 <sup>115</sup>	\$26.14 Passenger Vehicle Transportation Award, Grade 2 Employee <sup>116</sup>	\$26.99 Social, Community, Home Care and Disability Services

<sup>111</sup> P McDonald. et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact](#) (Digital platform work in Australia)’, commissioned by the Victorian Department of Premier and Cabinet, 2019.

<sup>112</sup> ABS, [Labour Force, May 2023](#), using the seasonally adjusted estimate for April 2019.

<sup>113</sup> P McDonald et al., ‘[Digital Platform Work in Australia: Prevalence, Nature and Impact](#) (Digital platform work in Australia)’, commissioned by the Victorian Department of Premier and Cabinet, 2019, p. 7.

<sup>114</sup> Calculated using the Fair Work Ombudsman [Pay and Conditions Tool](#) (PACT), with a calculation date of 1 April 2019.

<sup>115</sup> Schedule B – Classification Structure and Definitions, [Restaurant Industry Award](#), as at April 2019. Level 2 – means an employee who has not achieve the appropriate level of training and who is engaged in a variety of tasks, including “performing delivery duties”

<sup>116</sup> Schedule B – Classifications, [Passenger Vehicle Transportation Award](#), as at April 2019. Grade 2 employees include a driver of a motor vehicle, limousine or hire car capable of carrying less than 8 persons and used for hire or reward but excluding motor vehicles used for private purposes.

			Industry Award, Home Care Employee Level 2 <sup>117</sup>
Average hourly wage for digital platform workers (Victorian National Survey)	\$22.19	\$22.19	\$21.60
Hourly pay gap (\$)	\$3.09	\$3.95	\$5.39

### Estimate of weeks worked in a year

The Victorian Government Inquiry found that 27.5 per cent of current digital platform workers engaged with their digital platform at least a few times per week, 24.4 per cent engaged about once a week, 19.8 per cent engaged less than once a week but at least once a month, and 28.3 per cent engaged less than once a month.<sup>118</sup> This data is not disaggregated by occupation.

In our estimate of number of gig workers, we have already excluded the group of 28.3 per cent of digital platform workers who engaged with digital platforms less than once a month. We have estimated the number of weeks worked for each of the other 3 groups and weighted these accordingly. For those who worked at least a few times per week, we assumed they worked 52 weeks in the year. For those who worked about once a week, we also assumed they worked 52 weeks in a year. For those who worked less than once a week but at least once a month, we assumed they worked 26 weeks in a year.

Applying these assumptions and proportions gives us an estimate of average weeks worked in a year below:

$$= (27.5\% / 71.7\% \times 52 \text{ weeks}) + (24.4\% / 71.7\% \times 52 \text{ weeks}) + (19.8\% / 71.7\% \times 26 \text{ weeks})$$

**= 44.8 weeks in a year**

### Adjustment of pay gap to reflect 2023 earnings

As the earnings data available is from 2019, we have adjusted the pay gap between the earnings of digital platform workers and the relevant award to be aligned with the Annual Wage Review decisions from 2019-2023. The increases to award wages were 3.0 per cent in 2019, 1.75 per cent in 2020, 2.5 per cent in 2021, and 5.75 per cent in 2023. In 2022, award wages increased by 4.5 per cent but were subject to a \$40 per week minimum increase. For the award rates listed in Table 5 above,

<sup>117</sup> Schedule E – Classification Definitions – Home Care Employees, Social, Community, Home Care and Disability Services Industry Award, as at April 2019. Home Care Employee Level 2 - Indicative but not exclusive tasks include: the provision of personal care, supervising daily hygiene, laying out clothes and assisting in dressing, make beds, tidy rooms, preparation and cooking of meals and assistance with meals, dry cleaning, perform gardening duties, undertake basic repairs, clean, fitting and removal of aids and appliances, monitoring medications, fitting and changing of catheters, assistance with communication, accompanying clients on outings, domestics assistance and organising appointments.

<sup>118</sup> DPC, Report of the Inquiry into the Victorian On-Demand Workforce, p. 40.

increases ranged from 4.6 per cent to 4.8 per cent. This assumes that both the earnings of digital platform workers and the relevant award rates increased at the same rate from 2019 to 2023, so the pay gap remains proportionate.

For food delivery drivers and rideshare, the average pay gap of \$3.52 has therefore been adjusted to become **\$4.19**. For caring workers, the pay gap of \$5.39 has been adjusted to become **\$6.40**.

#### Food delivery drivers and rideshare

As indicated in the 'scenarios for impact analysis', the estimated cohort size for this group is 150,000.

The annual cost of Option 2 is calculated as follows:

= 150,000 x average difference in hourly wage x average hours worked by transport and food delivery workers x estimate of weeks worked in a year

= 150,000 x \$4.19 x 14.5 hours x 44.8 weeks

= 150,000 workers x \$2,721.22 per worker

**= \$408,182,524.64 (0.04 per cent of total wage bill)<sup>119</sup>**

Uber has also noted that only 7 per cent of drivers and delivery people use the platform for what resembles full-time work (38 hours per week and 48 weeks per year).<sup>120</sup> However, there is no data publicly available on average weeks per year worked by Uber drivers and delivery people. We have therefore used the estimate of weeks worked in a year from the Victorian National Survey, noting this may well be an overestimate.

#### Care (aged care or disability support)

As set out in the 'scenarios for estimating net benefits', the estimated cohort size is 16,304 workers. The annual cost of Option 2 with regard to caring workers is calculated as follows:

= proportion of digital platform workers in 'caring', excluding those in pet caring platforms x number of digital platform workers x average difference in hourly wage x average hours worked by caring workers x estimate of weeks worked in a year

= (7.0% - 4.5%) x 652,147 x \$6.40 x 8.6 x 44.8 weeks

= 2.5% x 652,147 workers x \$2,468.64 per worker

= 16,304 workers x \$2,468.64 per worker

**= \$40,247,864.99 (0.004 per cent of total wage bill)<sup>121</sup>**

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<sup>119</sup> ABS, *Australian National Accounts: National Income, Expenditure and Product, March 2023*. Calculated using compensation of employees – wages and salaries, seasonally adjusted data.

<sup>120</sup> Uber, 'Flexibility works', March 2023.

<sup>121</sup> Australian Bureau of Statistics (ABS), *Australian National Accounts: National Income, Expenditure and Product, March 2023*, ABS website, June 2023. Calculated using compensation of employees – wages and salaries, seasonally adjusted data.

## Total

The number of workers covered by Fair Work Commission's Minimum Standards Orders will be dependent on the scope of the orders, for example, only food delivery drivers, rideshare drivers or personal support carers. We consider that a likely scenario is that transport and food delivery workers and caring sector workers are 2 of the primary areas of concern, so we have used the cost of these two worker groups as an indicative estimate of the wage bill.

The annual cost of Option 2, adding the above 2 totals together, is:

= \$408,182,524.64 + \$40,247,864.99

**= \$448,430,389.63 (0.04 per cent of total wage bill)<sup>122</sup>**

## Initial one-off impact of introducing minimum standards

This option assumes that a hypothetical minimum standard set by the Fair Work Commission would be set at award rates. Under this option, workers will receive a benefit of \$448.4 million in 2023. The cost to business will be a transfer of their previous benefit to workers, and therefore a cost of \$448.4 million per year. This is only the cost of the additional wages that may be paid to digital platform workers. As previously stated, the department cannot estimate the total compliance costs to all businesses as data on the number of digital platform businesses is unavailable.

Given the assumption that the Fair Work Commission will make a maximum of 3 orders per year, and that there are 3 broad sectors that are likely to be within the scope of the Fair Work Commission's decision-making, the Impact Analysis estimates that a maximum impact will be that of introducing minimum standards covering all of these workers in the first year of the jurisdiction's operation. However, the Fair Work Commission may choose to consider fewer matters or to limit a standard to only certain workers within a sector (for example, only food delivery workers who deliver food by bicycle).

If the Fair Work Commission makes 3 Minimum Standards Orders one year after the jurisdiction commences, to be implemented the following financial year (i.e. based on a 1 July 2024 commencement the first order would be made on 1 July 2025), this initial impact would be in the 2025-2026 Financial Year. The department has adjusted the figure for 2023 to account for the forecast inflation for 2025-26.<sup>123</sup> The estimated impact in 2025-26 is:

- Benefit of \$472.3 million for digital platform workers
- Cost of \$472.3 million to businesses.

This is in addition to the additional compliance costs estimated to be \$87,539.46 per business (the estimated \$59,270.23 cost of complying with minimum standards and \$28,269.23 of complying with deactivation protections in 2025-26) for digital platform businesses

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<sup>122</sup> Australian Bureau of Statistics (ABS), *Australian National Accounts: National Income, Expenditure and Product, March 2023*. Calculated using compensation of employees – wages and salaries, seasonally adjusted data.

<sup>123</sup> Budget 2023-24 CPI forecast for 2025-26

Given the prevalence of low pay rates in digital platform work, this is likely to have a significant benefit to the economic security and livelihoods of the relevant workers. For digital platforms, many of which are large businesses and generally supported the introduction of minimum rates of pay during consultation, these costs will need to be absorbed. These businesses would likely be able to pass on some of these costs through higher prices for consumers or third-party businesses. This may have further effects for the competitiveness of digital platforms who currently rely on lower labour costs to generate a competitive advantage in their industries. Absorption of higher labour costs may have flow-on effects for the total business costs.

### Ongoing costs

The department assumes that parties will apply for a variation to a Minimum Standards Order, on average, every 3 years. Similar to the content of initial standards, the impact of varying a Minimum Standards Order will depend on the parties and the Fair Work Commission's decision-making. The department has estimated the cost of an increase in minimum pay rates in line with inflation. This assumes that the increases to minimum pay rates will maintain the real value of wages for these workers. However, this figure will depend on the actions of the parties, economic conditions such as inflation at the time of the variation, and the decision-making of the independent Fair Work Commission.

The 2023-24 Budget papers forecast that inflation is likely to ease in the coming years, with the Consumer Price Index (CPI) forecasted to fall to 3¼ per cent in 2023-24, 2¾ per cent in 2024-25, and 2½ per cent in 2025-26 and 2026-27.<sup>124</sup> Given that initial minimum standards are anticipated in 2025-26, variations could occur in 2028-29 and 2031-32. The Impact Analysis will assume that all 3 hypothetical Minimum Standards Orders are varied in that year. While not an indication of a possible inflation rate in 2028-29, the department will use the furthest forecast CPI rate of 2½ per cent as an estimated figure for a possible increase in each year from 2025-26 onwards, with an inflation adjustment of 7.7 per cent in 2028-29 (2 ½ per cent compounded over 3 years). Over the next 10 years, there would be a further possible increase in standards in 2031-32 of 7.7 per cent (again using the compounded rate). It is difficult to forecast inflation rates several years in advance, but in the long-term inflation is expected to return to the Reserve Bank of Australia's inflation target of 2-3 per cent. Given the estimates of inflation do not affect the expected wage bill cost until 2028-29, the 2.5 per cent per year forecast is as robust of an inflation forecast as is achievable.

Using the initial impact estimated, this would suggest that there would be a future economic impact in the form of increased wages to workers of:

- \$472.3 million in 2025-26
- \$508.6 million in 2028-29
- \$547.7 million in 2031-32.

This results in an average annual increase in wages over the next 10 years of \$403.8 million.

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<sup>124</sup> Treasury, Budget 2023-24, Budget Paper 1, Table 1.1.

## Economic impact of deactivation disputes

While there is no available data on the cost to digital platform workers of having their contract terminated, in an employment context job loss can result in significant financial hardship in addition to mental and physical health impacts.<sup>125</sup> As digital platform workers can work for multiple platforms, the impact of a contract termination is not the equivalent of a job loss for employees. However, those that are more dependent on platform work for income are more likely to experience significant costs following a deactivation.

Introducing deactivation disputes is likely to have a social and economic benefit for digital platform workers. This includes improved security of income and protection from job loss for the independent contractors that make a successful application to the Fair Work Commission. There are also likely to be flow-on benefits, particularly that legislated protections are likely to discourage unfair terminations from occurring in the first place.

The impact of deactivation rights on digital platform businesses is likely to be compliance-related rather than economic.

There is no data available on how often digital platform workers have their access to a digital platform 'deactivated'. Applying the proportion of all workers who were dismissed from their job (0.2 per cent) to the estimate of the number of digital platform workers gives an estimate of 1,273 digital platform workers per year who may have their accounts deactivated.<sup>126</sup> This may not be reflective of the true number of digital platform deactivations due to the difference in legislative protection between dismissal of employees and deactivations of independent contractors, as well as their different characteristics. In addition, digital platform workers who are deactivated from one platform may still be able to engage with other platforms.

Under this option these estimated 1,273 digital platform workers will be able to make an application to the Fair Work Commission to dispute their deactivation. The introduction of these proposed protections may also encourage digital platform businesses to ensure that any 'deactivations' are fair (for example, reviewing reasons for deactivation, developing clear guidelines and processes), which may reduce the number of deactivations that occur.

## Broader economic impacts

Estimating the economic impacts of workplace relations reforms is difficult. Specific outcomes are dependent on the approach that independent parties, such as employers, unions, and the Fair Work Commission, take to the provisions. Assumptions would need to be made about the behaviour and decisions of independent parties, as well as the interaction between various other measures being considered and other government reforms. It is also difficult to isolate the impact of these measures from other externalities, such as changes in the economic climate. Accordingly, the department is unable to estimate these flow-on costs, consistent with the approach for other recent legislation, such as the Secure Jobs, Better Pay Act 2022 and the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021.

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<sup>125</sup> D Lancaster, *The financial cost of job loss in Australia*, Reserve Bank of Australia, 2021.

<sup>126</sup> Australian Bureau of Statistics (ABS), *Participation, Job Search and Mobility, February 2022*, [TableBuilder].

While the department is unable to robustly estimate the flow-on costs of this policy due to the reasons mentioned earlier, it is assumed that the introduction of minimum standards would lead to a more reliable income stream and an increase to weekly income for digital platform workers. This could assist digital platform workers to meet elevated living costs, which may also provide a boost to their local economies.

## Competition

The emerging digital platform economy allows for the engagement of contractors at scale to meet growing consumer demand for services, without the obligations of an employer. These resulting lower labour costs give digital labour platforms their competitive edge compared to traditional businesses. Evidence provided to the Victorian Government Inquiry indicated that using non-employee digital platform workers to deliver food to consumers can cost half to two thirds the price of employee labour due to a lack of minimum standards.<sup>127</sup> This can have a competitive impact on businesses that directly engage employees, who are entitled to minimum pay rates and other employee entitlements.<sup>128</sup>

By giving the Fair Work Commission the power to set standards for workers engaged by platforms, businesses would have the opportunity to compete on a more level playing field, in relation to labour costs. For example, Hireup, a major digital platform in the care sector, engages its workers as employees. This shows that it is possible for a digital platform to operate in the care sector with employee costs. Hireup states that it pays award aligned pay,<sup>129</sup> and the minimum hourly wage for support workers at the time of the Victorian National Survey was \$30.98, excluding super.<sup>130</sup> The introduction of minimum standards for digital platforms competing with employing businesses such as Hireup may help to facilitate fairer competition by leveling the costs of engaging employees compared to independent contractors.

There is a risk that the impact of compliance with minimum standards may lead to some digital labour platforms exiting the Australian market and a reduction in new entrants due to their inability to absorb or manage the additional costs in a sustainable manner. The implications for firm productivity will depend on a variety of factors, including the extent to which businesses are able to plan and adapt to the changes, and the extent to which costs are passed onto consumers or businesses partnering with digital platforms. The Minimum Standards Objective will require the Fair Work Commission to actively consider the potential impacts of minimum standards on businesses (including their viability), which will help to mitigate this risk.

Additionally, the purpose of this measure is to provide fair terms and conditions for digital platform workers. If platforms find that they are unable to operate within the parameters of fair minimum standards, it may not be appropriate for them to operate and in turn compete with platforms that do. It should also be noted that digital platforms have also exited the market under the status quo, as has been shown by Deliveroo and Milk Run's recent closures.

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<sup>127</sup> Department of Premier and Cabinet (DPC), *Report of the Inquiry into the Victorian On-Demand Workforce*, DPC website, n.d. p 84.

<sup>128</sup> DPC, *Report of the Inquiry into the Victorian On-Demand Workforce*, p 84.

<sup>129</sup> Hireup, 'Support worker pay rates', 2023.

<sup>130</sup> Department of Premier and Cabinet (DPC), *Report of the Inquiry into the Victorian On-Demand Workforce*, p. 89.



## Employment

During consultation, some stakeholders raised concerns that minimum standards could lead to job losses for employee-like digital platform workers. However, these concerns appear to be premised on minimum standards containing matters that could impact workers' method of engagement, such as the inclusion of overtime rates or rostering arrangements. Stakeholders raised concerns that these types of entitlements could impact on workers' ability to choose when to work and would risk platforms needing to move towards an employment-like rostering model. By requiring platforms to provide workers with minimum shifts and engagement times, platforms may need to limit the number of workers they engage to ensure they can meet these commitments.

The current policy model addresses these concerns. Following stakeholder consultation, the legislation would provide that the Fair Work Commission must not include terms about rostering or overtime arrangements in minimum standards orders. The legislation would also contain an explicit requirement that minimum standards orders do not contain terms that would change the form of the engagement of regulated workers.

## Consumers and third-party businesses of food delivery and rideshare services

If subject to a minimum standards order that increases their operating costs, digital platform businesses may pass on some of this cost to consumers and/or third-party businesses (for example, restaurants that use digital platforms to connect with workers to deliver food to consumers). The size of this impact would depend on the decisions of individual businesses. If prices become significantly higher, it is possible that consumers will reduce consumption from digital platform businesses. However, the Fair Work Commission is required to make balanced decisions, having regard to factors such as the need to avoid unreasonable adverse impacts on business viability and the national economy, which would help to mitigate this impact.

## Clients of care services provided through digital platforms

Recent commentary has suggested that proposed minimum standards may raise costs in the NDIS.<sup>131</sup> However, the department has assumed that the Fair Work Commission would set minimum pay rates at a level similar to existing award rates. The NDIS' Disability Support Worker Cost Model already accounts for applicable award rates, and other direct on-costs such as superannuation and leave entitlements.<sup>132</sup>

As a result of this existing price model, this measure is unlikely to have a significant budgetary impact if the Fair Work Commission sets rates that are similar to the relevant award. Beyond pay rates, minimum standards may support a level playing field in the sector, for example specifying the obligations that platforms may owe to the workers that use the platforms, such as insurance.

In addition, the use of independent contractors in aged care and the NDIS, including those engaged through digital labour platforms, is growing.<sup>133</sup> The introduction of minimum rates of pay may help to

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<sup>131</sup> For example – Marin-Guzman, D. Industry says Labor gig worker laws will drive up NDIS costs, Australian Financial Review, 2023, p. 4.

<sup>132</sup> National Disability Insurance Scheme (NDIS), Disability Support Worker Cost Model – Assumptions and methodology 2022-23, 2022.

<sup>133</sup> Australian Government Productivity Commission, *Aged Care Employment*, 2022, p 2.

attract more workers to the sector, which is an objective of the Government's Aged Care Workforce Strategy.<sup>134</sup> This would be likely to have a positive impact on the quality and availability of services for clients.

### **Distributional impacts**

Digital platform workers do not receive minimum standards. This has a higher impact on temporary visa holders, unemployed people and students who are highly represented in the cohort of digital platform workers. While the digital platform economy is generally male-dominated, women are overrepresented in care-related work.

There may also be stronger impacts on some cohorts of consumers. During consultation, some stakeholders raised that minimum standards would have a stronger impact on regional and remote areas, where markets are smaller, and on consumers with limited mobility who rely on the convenience of services in the digital platform economy.

### **Impact on government**

The options would impact the Government through increased tax revenue due to increased wages of workers in the sector as well as through an increased burden on the Fair Work Commission and Fair Work Ombudsman. This burden is likely to have the strongest impact on the Fair Work Commission as the primary Government body implementing the proposals.

#### *Fair Work Commission*

Under the proposal to introduce minimum standards for digital platform workers, the Fair Work Commission would be required to consider applications for minimum standards applying to eligible cohorts of workers, determine the standards that should apply (if any) and make enforceable orders setting these standards. The Fair Work Commission would be required to set its priorities for standards-setting over time, including priority cohorts, balanced by its existing caseload. As the primary agency implementing the proposed measures, the Government will provide the Fair Work Commission with resourcing to ensure it can meet its new functions.

#### *Fair Work Ombudsman*

The Fair Work Ombudsman would be required to educate and advise businesses and workers of their new rights and obligations under the proposal, and to enforce new minimum standards.

#### *Government funding for aged care and NDIS*

The Government has significant financial responsibility in the aged care and NDIS sectors. However, as indicated above, existing price regulation suggests that there is unlikely to be a significant increase in costs.

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<sup>134</sup> Australian Government, *A Matter of Care: Australia's Aged Care Workforce Strategy, Report of the Aged Care Workforce Strategy Taskforce*, 2018; McDonald, F. *Unacceptable Risks: The Dangers of Gig Models of Care and Support Work*, The Centre for Future Work at the Australia Institute, 2023, pp 20-22.

Summary of impacts

Compared to the status quo, Option 2 is estimated to deliver \$4.0 billion dollars in increased wages for workers over 10 years. This amounts to \$403.8 million per year. In addition, compliance costs are set out below.

Regulatory burden estimates

**Table 10 – Average annual regulatory costs (from business as usual)**

Average annual regulatory costs (from business as usual)				
Option	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 2</b>	Nil	\$9,845.12 per business in compliance costs <sup>135</sup>	Nil	\$9,845.12 per business

**Table 11 – Total regulatory costs over 10 years (from business as usual)**

Total regulatory costs over 10 years (from business as usual)				
Option	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 2</b>	Nil	\$98,451.20 per business	Nil	\$98,451.20 per business

<sup>135</sup> This figure is the estimated direct increase in compliance costs to affected businesses as a result of the proposal. Due to data constraints that do not allow for an estimate of the total number of businesses impacted by Option 2, this is expressed as a per business cost. This figure is an average annualised cost over 10 years.

**Table 12 – Consistency with guiding principles – Option 2**

Guiding Principle	Rating	Explanation
<p>Australia’s workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.</p>	<p>Good</p>	<p>This option would ensure that Australia’s workplace relations system can provide minimum standards to digital platform workers, responding to the emergence of new forms of work in the digital platform economy.</p>
<p>All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.</p>	<p>Fair</p>	<p>This option expands access to minimum standards and dispute resolution, including around deactivation, for digital platform workers. Stakeholder consultation and the independent reviews found these workers to be a key cohort in need of minimum rights and protections. However, this option does not address road transport independent contractors, which independent reviews and stakeholder consultation identified as being a cohort in need of minimum standards.</p> <p>In addition, this option will not address the common law definition of employment. By not assessing the totality of the relationship when determining whether a worker is an employee, this may result in some workers being inappropriately classified as independent contractors. Independent reviews and stakeholder consultation identified that addressing the current heavy reliance on contractual terms under the common law definition as being an essential measure to ensure fairness for workers. In addition, without addressing the common law definition, introducing minimum standards may have the unintended consequence of businesses shifting from an employment to independent contracting model.</p> <p>Recognising that this option addresses the key cohort where a lack of minimum standards has been identified as an issue, while not addressing</p>

		the heavy reliance on contractual terms established by the current common law definition, the rating for this option is fair.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Fair	<p>As indicated in the ‘competition’ section above, this would improve fair competition between businesses in sectors with new minimum standards. The measure will help to ensure that certain digital labour platforms do not have an unfair advantage over employing businesses or other businesses (including digital labour platforms) that engage independent contractors under fairer terms and conditions. This will help to facilitate competition on the quality of services rather than lower labour costs.</p> <p>However, other independent contractors, including road transport businesses that compete with digital platforms will not be in scope of regulation. As such, the rating is fair.</p>
<p>The Fair Work Commission should set minimum standards that:</p> <ul style="list-style-type: none"> <li>• are fair, relevant, proportionate, sustainable and responsive</li> <li>• reflect workers’ independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with</li> <li>• mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market</li> </ul>	Fair	<p>This option would allow the Fair Work Commission to set minimum standards for digital platform workers, while being guided by a Minimum Standards Objective. Without addressing the current common law definition of employment, there is a risk that minimum standards for digital platform workers could result in the unintended consequence of businesses shifting from an employment to contracting model. This would have a negative impact on employees.</p>

<p>The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.</p>	<p>Good</p>	<p>Parties would be able to participate in matters relating to minimum standards for digital platform workers. The Fair Work Commission would consider the views of affected parties in addition to being guided by a Minimum Standards Objective in legislation.</p>
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## Option 3: Empower the Fair Work Commission to set minimum standards for digital platform workers and road transport workers

As the impacts for introducing minimum standards for digital platform workers are presented under Option 2, this section will not repeat the methodology used to calculate these costs and will only refer to the additional road transport cohort.

### Compliance

#### Compliance with minimum standards

For road transport workers, the department will use the same methodology as under Option 2, with some adaptations.

The compliance cost of introducing minimum standards will fall on businesses who will need to comply with the new standards. This cost will be estimated as a comparison to the baseline established under the Status Quo Option, which was **nil**.

The department estimates that businesses are likely to face the following compliance costs under Option 3:

- Initial costs of ensuring that contracts, payroll systems and other arrangements are compliant with new minimum standards.
- Ongoing costs of ensuring compliance with varied standards.
- Ongoing administrative costs to comply with record-keeping requirements.

#### Initial costs

The department estimates that it would take a business 20 hours to understand their new obligations. Businesses would be able to contact the Fair Work Ombudsman for free advice about their new obligations, in addition to accessing fact sheets and other information published on the Fair Work Ombudsman's website.

The department assumes that it would take a business a maximum of 100 hours to update and ensure their service contract or contracts are compliant with the new minimum standards, with more time required within that range for a larger business with multiple contracts. If standards are varied in the future, this cost is likely to be significantly lower. For example, it may simply involve ensuring compliance with a new pay rate. The department estimates that this will take 10 hours every time a Minimum Standards Order is varied.

As outlined in Option 2, the department has used a higher labour cost for legal professionals who will be assumed to perform work to ensure that platforms understand new obligations, update contracts and other documents and to ensure compliance with new termination of contract protections. In all other estimated costs, the department has used the default labour cost of **\$79.63** according to the Office of Impact Analysis' Regulatory Burden Measurement Framework. The department's assumptions in relation to costs incurred by digital platforms to upgrade IT systems has not been applied in the context of road transport businesses, on the basis that these systems are likely to be

less complex and relatively less central to the conduct of the road transport businesses compared to digital platform businesses.

The department assumes that road transport minimum standards will take longer than the minimum standards for employee-like digital platform workers under Option 2. This is because of the additional legislative checks to ensure that road transport minimum standards are gradual and subject to robust consultation with industry. In particular, the longer process required for the Fair Work Commission to make a road transport minimum standards order is likely to extend this timeframe.

The department estimates that the Fair Work Commission would issue its first notice of intent to make an order in 2025-26. As businesses can choose whether or not to adopt non-binding draft orders, we have not costed the impact during the draft order period. Following consultation on the draft order, the department estimates that 2 years after the notice of intent was issued, the Fair Work Commission would be likely to revise the draft order. The department considers a revision of the order to be a likely scenario due to the novelty of the standards and diversity of views amongst road transport stakeholders.

Following the revision of the draft road transport order, the Fair Work Commission would be required to undertake another consultation period for a minimum of 12 months. Based on this timeline, we have estimated that the Fair Work Commission would implement the first mandatory Minimum Standards Orders in 2028-29, and then vary these every 4 years. In addition the Fair Work Commission is not required to accept applications to make minimum standards orders and is not required to make a draft order mandatory.

The department estimates that each business would face **\$3,062.50** as an average annual cost, averaged over the next 10 years. The number of businesses that may be affected by this policy cannot be derived, as while the ABS provides data on businesses and the number of employees they have, it does not indicate how many businesses engage independent contractors and as such would be affected by the proposed policy. For this reason, the department has chosen to represent regulatory costs to businesses on a per business basis.

**Table 13 – Costs per business**

Year	Understanding new obligations	Updating contract and other documents	Total
<b>2028-29</b>	= \$235.58 x 20 hrs = \$4,711.54	= \$235.58 x 100 hrs = \$23,557.69	\$28,269.23
<b>2032-33</b>	Nil	= \$235.58 x 10 hrs = \$2,355.77	\$2,355.77
<b>TOTAL</b>	<b>\$4,711.54</b>	<b>\$25,913.46</b>	<b>\$30,625.00</b>



Ongoing costs – record-keeping

The department assumes that minimum standards would include a record-keeping component. It is unlikely that this would present a significant burden on businesses. The department estimates that it would take one worker in a business 15 minutes per worker every two weeks to prepare records detailing their payment. Over a year, this would occur 26 times. This is different to the cost estimate for digital platforms as it is assumed digital platforms will include record keeping in their IT system updates, whereas road transport businesses are less likely to have complex IT systems.

**Table 15 – Ongoing compliance cost per worker per business**

Compliance cost (per worker)
= \$79.63 x 15 minutes x 26
= \$517.60 per year

As above, it is expected that this cost will come into effect in 2028-29 and be incurred every year from 2028-29 onwards. This gives a ten-year total cost of \$2,587.98 and an average annual cost of \$258.80.

Compliance with unfair contract termination protections

There are additional regulatory costs for businesses engaging road transport workers who will be able to dispute an unfair contract termination at the Fair Work Commission. These costs would include implementing new policies and procedures to ensure that terminations of contracts are compliant. For example, this may include steps to afford the other party procedural fairness.

Consistent with the assumptions set out in Option 2, the department estimates that it would take a business 20 hours to understand the new obligations and a further 100 hours to develop policies and procedures to ensure that future contract terminations are compliant. This work would be undertaken by a legal professional. This cost is expected to be incurred only once.

There is no available data on how many businesses engage independent contractors. However, the per business cost is estimated as \$28,269.23, including time to understand new obligations and to implement policies and procedures to ensure that any contract terminations are compliant.

$$= (20 \text{ hours} \times \$235.58) + (100 \text{ hours} \times \$235.58)$$

$$= \$4,711.54 + \$23,557.69$$

$$= \mathbf{\$28,269.23 \text{ per business engaging independent contractors.}}$$

Total compliance costs

The department estimates that the total impact would be a maximum business cost of \$5,889.42 per business and \$258.80 per worker per year over 10 years (combination of the initial and ongoing costs).

This figure is calculated by adding the initial costs of \$30,625.00 per business to the ongoing costs of record keeping of \$2,587.98 per worker (total cost over the ten years), and the compliance with unfair contract termination protections of \$28,269.23 per business. This totals to \$58,894.23 per business plus \$2,587.98 per worker, giving an average annualised estimate of \$5,889.42 per business and \$258.80 per worker.

#### Economic impact of minimum standards

Introducing minimum standards for road transport workers will have a direct economic impact on:

- **entities engaging independent contractors providing road transport services** who will have to pay minimum pay rates and entitlements.
- **independent contractors providing road transport services** who will receive minimum pay rates and entitlements.

The department has estimated the impact of the Fair Work Commission issuing a hypothetical order to set pay rates for a subset of last mile delivery workers at the level of the permanent full-time employee rate under the Road Transport and Distribution Award 2020. This is an illustrative example to show the difference in pay rates between the award rates and minimum standards. The actual costs will depend on the decisions that are made by the Fair Work Commission. However, as indicated in 'Scenario 3', the department estimates that this cohort is likely to become the subject of a Fair Work Commission road transport minimum standards order. This is due to its competition with the digital platform economy and feedback received during stakeholder consultation suggesting that this may be a priority cohort for minimum standards. Consequently, this cohort has been chosen to estimate the impacts of the regulation.

There is also no data available on how many employees work at specific pay points of the award, so Transport Worker Grades 1 and 2 has been used as a comparator as a potential option for the minimum standards. The permanent employee hourly rate has been used rather than the casual hourly rate due to additional checks and balances applying to the proposed road transport jurisdiction, compared to those applying to digital platform workers. In particular, as legislation would provide that the Fair Work Commission must be satisfied that any Road Transport Order would not unduly impact viability in the road transport industry, a lower estimated rate is appropriate. Additionally, independent contractors in this sector are much more likely to be working full-time, in a manner closer to a permanent employee.

Given that the median rate of pay for full-time last mile delivery owner managers without employees<sup>136</sup> is \$1,000-\$1,249, and that the full-time permanent weekly award rates over the same period were \$818.30 - \$838.90, the department has also compared the full-time casual weekly award rate to the median earnings derived from the Census (see table below). Both the permanent and casual full-time weekly award rate is lower than the median earnings of owner managers in the last

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<sup>136</sup> 'last mile delivery' here is defined as the Postal and courier pick-up and delivery services industry.

mile delivery sector,<sup>137</sup> although at least one-sixth (18.5 per cent) of this cohort had weekly earnings below the full-time permanent weekly award rate.

**Table 16 – full-time weekly pay rates for owner-managers in the last mile delivery industry**

Relevant standard or estimate of rates paid	Minimum weekly full-time rate for employees under the Road Transport and Distribution Award 2020	Minimum weekly full-time rate for employees under the Road Transport and Distribution Award 2020	Estimate of average weekly full-time rate for workers in last mile delivery contractors who are owner managers of unincorporated and incorporated enterprises without employees
Weekly rate of pay	\$818.30 (permanent) \$1,022.88 (casual) Transport Worker Grade 1 (courier – foot or bicycle)	\$838.90 (permanent) \$1,048.63 (casual) Transport Worker Grade 2 (driver)	\$1,000-\$1,249

However, Census data shows that 1,900 full-time owner managers without employees working in the last mile delivery sector currently receive less than the permanent full-time award rate of \$838.90. This amounts to 18.5 per cent of full-time owner managers without employees in the last mile delivery sector who recorded income in 2021. Due to the varied nature of part-time worker hours, the department is unable to determine how many are currently being paid less than the relevant award rate. Instead the proportion of full-time workers who were paid below the award has been applied to the number of part-time independent contractors in the last mile delivery sector.

The average annual cost to entities engaging last mile delivery independent contractors has been estimated using the follow formula:

$$= (\text{Full-time weekly permanent employee pay rates under the Road Transport and Distribution Award 2020} - \text{upper band of full-time weekly pay rates for independent contractors who work in the last mile delivery sector but are paid less than the award}) \times (\text{number of full-time last mile delivery workers who are independent contractors and paid less than the award} + (18.5\% \times \text{number of part-time independent contractors in the last mile delivery sector})) \times 52 \text{ weeks}$$

<sup>137</sup> It should be noted that the median hours worked for owner managers in the last mile delivery sector exceed the full-time hours noted in the award (40-44 hours per week compared to 38 hours). As such, the negative wage gap between these earnings and the award may be larger than an hourly comparison would estimate.

$$= (\$838.90 - \$799) \times (1,900 + 1,000) \times 52^{138}$$

= at least **\$5,988,946.60 per year**

This amounts to 0.0006 per cent of Australia’s total wage bill.

Using the initial impact estimated, and adjusting for inflation as in Option 2, this would suggest that there would be an annual maximum further economic impact in the form of increased wages to workers of:

- \$7.5 million from 2028-29 to 2031-32<sup>139</sup>
- \$8.3 million in 2032-33.<sup>140</sup>

In addition, this option would allow the Fair Work Commission to consider advisory standards. The Victorian Government’s guidance rates (referred to above) are relevant here as an example of the types of content that may be included. Guidance rates vary according to the type of vehicle driven and work conducted but would not have a direct economic impact.

Table 17 below shows the expected costs of the wage bill in the next 10 years. As mentioned above, we expect the Fair Work Commission to implement the first mandatory Minimum Standard Orders in 2028-29, and then vary these in 2032-33.

**Table 17 - Expected costs of wage bill of Option 3**

Year	Wage bill
2028-29 to 2031-32	\$7,538,100.70
2032-33	\$8,320,652.72
<b>TOTAL</b>	<b>\$38,473,055.50</b>
<b>Yearly average (10 years)</b>	<b>\$3,847,305.55</b>

### Broader economic impacts

While not included in costings, there are likely to be further economic impacts in the road transport industry. For example, the Fair Work Commission will have the option of making non-binding guideline standards for the road transport industry, in consultation with industry stakeholders to

<sup>138</sup> Note that these figures have been rounded for ease of reading. Unrounded figures have been used for calculations in this section which may affect totals.

<sup>139</sup> This figure includes the 2021-22 AWR decision increase of \$40 per week for relevant award rates, and the 2022-23 AWR decision increase of 5.75 per cent, and a further increase of 2.75 per cent (the forecast inflation rate in 2024-25), and 2.5 per cent (the forecast inflation rate) from 2025-26 to 2028-29 when the minimum standards are predicted to take effect.

<sup>140</sup> This figure assumes the Fair Work Commission makes an update to the award to reflect the projected rate of inflation over the period from 2028-29 to 2032-33.

identify areas of agreement. This could have the potential to drive behaviour, while not presenting direct costs.

Non-binding standards on matters such as pay can indirectly impact workers by improving the information available to them about operating costs or assisting them in contract negotiations. Workers across the road transport industry may also be indirectly impacted as greater attention is given to the working conditions of transport workers.

#### Consumers

As in Option 2, depending on the action taken by these businesses in the face of increased labour costs, it is likely that at least part of this cost will be passed on to the consumers of businesses operating in the road transport industry. In addition, as road transport is a derived cost for many types of goods, there may be flow-on impacts to other goods and services in other industries. As such, the costs outlined in this scenario are likely to be borne by consumers and businesses, including down the supply chain, however it will be up to each business to decide how much of these costs they absorb.

#### Impact on workers

As mentioned in Option 2, the department is unable to estimate and quantify the flow-on costs of an increased wage bill. However, the department assumes that the introduction of minimum standards outlined in Option 3 may lead to a more reliable income stream and an increase to weekly income for road transport workers. This added income security and increases to pay would allow road transport workers meet elevated living costs which may provide a boost to their local economies.

Independent contractors in the road transport industry are more likely to be male, work full-time, and born overseas when compared to all independent contractors. Given that much of the road transport industry is located in or passes through regional Australia, improving incomes for road transport workers may have a positive flow on impact to regional economies.

In addition, improved working conditions may attract more workers to road transport, which would respond to a key need of the industry. Australian logistics companies have identified the difficulty of attracting and retaining workers as a key issue facing the road transport industry. For example, a 2021 report by Australian Industry Standards found that there is a lack of new entrants to the industry, with a higher average age (45.6) than other major industries and an ageing rate that is 2.2 times faster than other industries.<sup>141</sup> Road transport industry representatives have raised concerns that there will be a workforce supply crisis in the next 10 to 15 years as these workers retire and demand for the industry increases.

#### Cost to government

As under Option 2, this option would have an impact on the Fair Work Commission and Fair Work Ombudsman and there would be an increase in income tax revenue collected.

#### *Fair Work Commission*

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<sup>141</sup> Australian Industry Standards, *Industry Outlook: transport and logistics*, 2021.

Under the proposals to introduce minimum standards for digital platform workers and road transport workers, the Fair Work Commission would consider applications for minimum standards applying to eligible cohorts of workers, determine the standards that should apply (if any) and make enforceable orders setting these standards (with more checks and balances for road transport workers). The Fair Work Commission would also need to consult with road transport stakeholders, including to consider guideline standards for other areas in the road transport industry.

*Fair Work Ombudsman*

The Fair Work Ombudsman would be required to educate and advise businesses and workers of their new rights and obligations under the proposal, and to enforce new minimum standards.

Summary of impacts

Compared to the status quo, Option 3 is estimated to deliver \$4.1 billion dollars in increased wages for workers over a ten year period. This amounts to \$407.7 million per year. In addition, compliance costs are set out below.

Regulatory burden estimates

**Table 18 – Average annual regulatory costs (from business as usual)**

Average annual regulatory costs (from business as usual)				
Option	Independent contractors	Business <sup>142</sup>	Community organisations	Total change in costs
<b>Option 3</b>	Nil	<ul style="list-style-type: none"> <li><b>Road transport businesses</b> \$5,889.42 - compliance cost per business impacted by Option 3 + \$258.80 per worker (ongoing compliance per affected road transport worker)</li> <li><b>Digital platform businesses</b> \$9,845.12 – compliance cost per business impacted by Option 2</li> </ul>	Nil	\$5,889.42 per business + \$258.80 per worker, or \$9,845.12 per business

<sup>142</sup> This figure is the estimated direct increase in compliance costs to affected businesses as a result of the proposal. Due to data constraints that do not allow for an estimate of the total number of businesses impacted by the options, this is expressed as a per business and per worker cost. Only businesses within the scope of each option will be impacted by these estimated costs, including digital platform businesses and businesses engaged affected road transport workers.

**Table 19 – Total regulatory costs across the 10 years (from business as usual)**

Total regulatory costs across the 10 years (from business as usual)				
Option	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 3</b>	Nil	<ul style="list-style-type: none"> <li>• <b>Road transport businesses</b> \$58,894.23 - compliance cost per business impacted by Option 3 + \$2,587.98 per worker (Ongoing compliance per affected road transport worker)</li> <li>• <b>Digital platform businesses</b> \$98,451.20 - compliance cost per business impacted by Option 2</li> </ul>	Nil	\$58,894.23 per business + \$2,587.98 per worker, or \$98,451.20 per business

Table 20 – Consistency with Guiding Principles – Option 3

Guiding Principle	Rating	Justification
<p>Australia’s workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.</p>	<p>Good</p>	<p>This option would ensure that Australia’s workplace relations system can provide minimum standards to digital platform workers, responding to the emergence of new forms of work in the gig economy.</p>
<p>All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.</p>	<p>Fair</p>	<p>By allowing the Fair Work Commission to set minimum standards for both road transport and digital platform workers, as well as including ‘deactivation’ and unfair contract termination protections, this option expands access to minimum rights and protections. Although it does not extend minimum standards to all workers, it addresses the needs of sectors where a lack of minimum standards has been identified as a concern while not regulating other sectors where there is less of a need. When combined with the unfair contracts preferred option (to allow the Fair Work Commission to resolve disputes for independent contractors), the options will ensure that a level of protection is provided to independent contractors more broadly.</p> <p>However, this option will not address the common law definition of employment. By not assessing the totality of the relationship when determining whether a worker is an employee, this may result in some workers being inappropriately classified as independent contractors. Independent reviews and stakeholder consultation identified that addressing the current heavy reliance on contractual terms under the common law definition as being an essential measure to ensure fairness for workers. In addition, without addressing the common law definition, introducing minimum standards may have the unintended consequence of encouraging businesses to draft contracts with a view to avoiding relationships of employment.</p>



		<p>Recognising that this option addresses cohorts where a lack of minimum standards has been identified as an issue, while not addressing the heavy reliance on contractual terms established by the current common law definition, the rating for this option is fair.</p>
<p>Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.</p>	<p>Good</p>	<p>This option would facilitate fair competition between businesses that employ workers and digital platforms that engage independent contractors. It would also allow for fair competition between digital platforms and non-digital businesses that engage independent contractors in the road transport industry.</p>
<p>The Fair Work Commission should set minimum standards that:</p> <ul style="list-style-type: none"> <li>• are fair, relevant, proportionate, sustainable and responsive</li> <li>• reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with</li> <li>• mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market</li> </ul>	<p>Good</p>	<p>This option would allow the Fair Work Commission to set minimum standards for employee-like digital platform workers and road transport workers.</p> <p>The Minimum Standards Objective and Road Transport Objective will help to ensure that any standards reflect the criteria set out in this Guiding Principle.</p> <p>This is noting that without addressing the current common law definition of employment, there is a risk that minimum standards for digital platform workers and road transport workers could result in businesses shifting from an employment to contracting model. However, as this option will ensure that the Fair Work Commission can set minimum standards addressing the criteria set in this guiding principle, the rating is 'good'.</p>

<p>The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.</p>	<p>Good</p>	<p>Parties would be able to participate in matters relating to minimum standards for employee-like digital platform workers. The Fair Work Commission would consider the views of affected parties in addition to being guided by a Minimum Standards Objective in legislation.</p>
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## **Option 4: Empower the Fair Work Commission to set minimum standards for digital platform workers and road transport workers, with an interpretive principle**

This option includes all **impacts estimated under option 3, with the following additional costs:**

### **Compliance**

Businesses engaging independent contractors who are on the fringe of employment and independent contracting would face an initial cost to determine whether their engagement as an independent contractor rather than employee is compliant. The department has not estimated costs for businesses engaging workers who are not in this cohort, as they are likely to already have clarity about the work status of their workers.

For businesses engaging such workers, the department considers there would be a one-off cost of reviewing the contract applying to their workers, with regard to the totality of the employment relationship. For example, this could include reviewing the reality of the working arrangement and contractual terms governing the relationship. As the ABS does not publish data on the number of businesses that engage independent contractors, it is not possible to determine the number of businesses that would be impacted. Instead, the regulatory burden is estimated on a per business basis.

### Business cost for existing workers on the fringes

Different businesses will have a different mix of contracting arrangements, with some using the same standard contract terms for most or all workers and some using a mixture of different contracts. Given the variety of arrangements, and that the interpretive principle seeks to return to what was commonly understood to be the common law test less than 2 years ago, the department estimates that it would take a senior corporate lawyer 10 hours to determine whether the service contract a business is using is compliant. The department has used the senior corporate lawyer costs identified in Option 2 of the Minimum Standards options, which is \$235.58 per hour.

### *Cost per business*

= Time required x labour cost

= 10 hours x \$235.58<sup>143</sup>

= **\$2,355.77 per business**

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<sup>143</sup> The department has conducted this analysis using an hourly rate that is more detailed than the 2 decimal point rate outlined here. This results in minor differences between the per business cost outlined here, and what would be calculated by multiplying the figures as they appear in this section.

As it is expected that each affected business will need to do this assessment once for its workforce, rather than individually for each worker, this cost has been considered as a per business cost. It is expected that this cost will only need to occur once, which means the average annual cost per business is \$235.58.

**Ensuring workers are appropriately classified as employees or independent contractors**

The change would benefit those of the estimated 254,500 workers on the fringe of employment and independent contracting whose work status may have been impacted by the contract-centric approach set out in *Jamsek and Personnel Contracting*. The number of workers whose work status is likely to be affected by the measure is not likely to be significant, demonstrated by the fact that the number of independent contractors has not yet significantly changed following the High Court’s 2022 decisions.

The primary benefit will be that a fairer test will apply where a Court is required to determine whether a relationship is one of employment or of principal and contractor. Decision makers will be able to have regard to the practical reality of the relationship, and not simply what has been formally agreed. This will discourage businesses from attempting to avoid a relationship of employment via carefully drafted contracts and ensure that workers are classified appropriately in the future.

**Impact on Government**

This option may have a minor budgetary impact as the Government collects more tax per employee than per independent contractor. As the cohort of workers likely to be impacted by this option is small, any revenue increase is likely to be very minor.

**Summary of impacts**

Compared to the status quo, Option 4 is estimated to deliver \$4.1 billion dollars in increased wages for workers over ten years. This amounts to \$407.7 million per year, which represents 0.04 per cent of the total wage bill.

**Regulatory burden estimates**

**Table 21 – Average annual regulatory costs (from business as usual)**

Option	Average annual regulatory costs (from business as usual)			
	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 4</b>	Nil	<ul style="list-style-type: none"> <li>\$235.58 per business impacted by Option 4 only</li> <li><b>Digital platform businesses</b> – maximum of \$10,080.70 –</li> </ul>	Nil	\$235.58 per business, or up to \$6,125.00 per business + \$258.80 per worker, or up to \$10,080.70 per business

	Average annual regulatory costs (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
		<p>compliance cost per business impacted by Option 2 and Option 4.<sup>144</sup></p> <ul style="list-style-type: none"> <li>• <b>Road transport businesses</b> – maximum of \$6,125.00 - compliance cost per business impacted by Option 3 and Option 4 + \$258.80 per worker (ongoing compliance per affected road transport worker).</li> </ul>		

**Table 22 – Total regulatory costs over 10 years (from business as usual)**

	Total regulatory costs over 10 years (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 4</b>	Nil	<ul style="list-style-type: none"> <li>• \$2,355.77 per business impacted by Option 4 only</li> </ul>	Nil	\$2,355.77 per business, or up to \$100,806.97 for digital platform

<sup>144</sup> Data constraints do not allow for an estimate of the types of business engaging workers whose status is on the margins of employment and independent contracting. The department considers that the majority of businesses impacted by an interpretive principle would not also be impacted by proposed minimum standards. The maximum of \$10,080.70 per digital platform business or \$6,125.00 + \$258.80 per worker per road transport business is to account for the possibility that a business would engage workers whose status is uncertain and also become subject to a minimum standards order. This figure includes the maximum initial compliance cost for businesses to implement minimum standards (\$9,845.12 or \$5,889.42 plus \$258.80 per worker) with the additional \$235.58 estimate of complying with a new interpretive principle. This would only be an initial cost as businesses clarify their new obligations. While it is not likely that an existing digital platform business would be impacted by this option, these costings account for the maximum possible costs a business would face (for example, for a new digital platform which engages workers who are more likely to be found employees under a new interpretive principle).

Total regulatory costs over 10 years (from business as usual)				
Option	Independent contractors	Business	Community organisations	Total change in costs
		<ul style="list-style-type: none"> <li>• <b>Digital platform businesses</b> <ul style="list-style-type: none"> <li>- maximum of \$100,806.97</li> <li>- compliance cost per business impacted by Option 2 and Option 4.<sup>145</sup></li> </ul> </li> <li>• <b>Road transport businesses</b> <ul style="list-style-type: none"> <li>- maximum of \$61,250.00 per business + \$2,587.98 per worker</li> </ul> </li> </ul>		businesses, or up to \$61,250.00 + \$2,587.98 per worker for road transport business

<sup>145</sup> Data constraints do not allow for an estimate of the types of business engaging workers whose status is on the margins of employment and independent contracting. The department considers that the majority of businesses impacted by an interpretive principle would not also be impacted by proposed minimum standards. The maximum of \$100,806.97 per digital platform business or \$61,250.00 + \$2,587.98 per worker per road transport business is to account for the possibility that a business would engage workers whose status is uncertain and also become subject to a minimum standards order. This figure includes the maximum initial compliance cost for businesses to implement minimum standards (\$98,451.20 or \$58,894.23 + \$2,587.98 per worker) with the additional \$2,355.77 estimate of complying with a new interpretive principle. This would only be an initial cost as businesses clarify their new obligations. While it is not likely that an existing digital platform business would be impacted by this option, these costings account for the maximum possible costs a business would face (for example, for a new digital platform which engages workers who are more likely to be found employees under a new interpretive principle).

**Table 23 – Consistency with Guiding Principles – Option 4**

Guiding Principle	Rating	Explanation
Australia’s workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Good	This option would ensure that Australia’s workplace relations system can provide minimum standards to digital platform workers, responding to the emergence of new forms of work in the gig economy.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Good	By allowing the Fair Work Commission to set minimum standards for both road transport and digital platform workers, as well as including ‘deactivation’ and unfair contract termination protections, this option further expands access to minimum rights and protections. Although it does not extend minimum standards to all workers, it addresses the needs of sectors where a lack of minimum standards has been identified as a concern while not regulating other sectors where there is less of a need. When combined with the unfair contracts preferred option (to allow the Fair Work Commission to resolve disputes for independent contractors), the options will ensure that a level of protection is provided to independent contractors more broadly.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Good	This option would facilitate fair competition between businesses that employ workers and digital platforms that engage independent contractors. It would also allow for fair competition between digital platforms and non-digital businesses that engage independent contractors in the road transport industry.
<p>The Fair Work Commission should set minimum standards that:</p> <ul style="list-style-type: none"> <li>• are fair, relevant, proportionate, sustainable and responsive</li> <li>• reflect workers’ independence and flexible working arrangements, for example choosing which tasks to</li> </ul>	Good	<p>This option would allow the Fair Work Commission to set minimum standards for digital platform workers, while being guided by a Minimum Standards Objective.</p> <p>Introducing an interpretive principle into the Fair Work Act will help to prevent unintended consequences arising from businesses restructuring their operations towards an independent contracting model.</p>

<p>accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with</p> <ul style="list-style-type: none"> <li>mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market</li> </ul>		
<p>The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.</p>	<p>Good</p>	<p>Parties would be able to participate in matters relating to minimum standards for digital platform workers. The Fair Work Commission would consider the views of affected parties in addition to being guided by a Minimum Standards Objective in legislation.</p>



## Access to dispute resolution of unfair contracts

### Option 1: Status quo

Under the status quo, independent contractors can challenge unfair contracts under the Independent Contractors Act or the Australian Consumer Law by applying to the court, as outlined in Section 3.

#### Prevalence of unfair contracts

There is no data on the prevalence of unfair contracts, outside of anecdotal evidence. Data provided by the Federal Court shows that independent contractors only made 68 unfair contract terms applications from the introduction of the Independent Contractors Act from 2006 to 2023, with most of these matters being discontinued or withdrawn.

As the current provisions in the Independent Contractors Act do not provide a simple and low-cost method for resolving any disputes relating to unfair contracts, it is likely that the majority of unfair contracts go unchallenged, or unresolved. This is especially true as the presence of an unfair contract term set by one party to the contract suggests that there is an imbalance in bargaining power between the parties. The impacts of working under unchallenged unfair contract terms can include low pay rates and inadequate protections (for example, around dispute resolution), which can harm workers' livelihoods.

#### Cost of disputing an unfair contract

As outlined above, there is a lack of data around the prevalence of unfair contracts. The cost of making an application to a court is highly variable, as it depends on the specific circumstances of the application and the conduct of the parties. While this cost cannot be quantified, compared to a tribunal, court applications are costly. For example, the relevant filing fee for independent contractors in the Federal Circuit and Family Court of Australia is \$735.<sup>146</sup> When including further costs, such as engaging a lawyer and additional court fees, court applications can be prohibitive. This is particularly the case where they relate to unfair terms imposed on low-paid workers.

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<sup>146</sup> <sup>75</sup> Federal Circuit and Family Court of Australia, “, Federal Circuit and Family Court of Australia website, n.d..].

## Summary of impacts

**Table 24 – Consistency with Guiding Principles – Option 1**

Guiding Principle	Rating	Justification
Australia’s workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Poor	The emergence of the gig economy has created a group of employee-like digital platform workers without protections from de-activation. This compares to employees who have legislated protections from unfair dismissal or dismissal on discriminatory grounds.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Poor	While there are unfair contracts provisions in the Independent Contractors Act and Australian Consumer Law, independent contractors rarely access these protections. Independent contractors have few dispute resolution options before applying to a court which can be prohibitively costly.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Poor	Businesses (including businesses that engage employees) can experience unfair competition with businesses that set unfair terms for their workers, that are in the business’ advantage.
The Fair Work Commission should set minimum standards that: <ul style="list-style-type: none"> <li>are fair, relevant, proportionate, sustainable and responsive</li> </ul>	N/A	This factor relates to standard-setting and is out of scope of this option.

<ul style="list-style-type: none"> <li>• reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with</li> <li>• mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market</li> </ul>		
<p>The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.</p>	<p>N/A</p>	<p>This factor relates to standard-setting and is out of scope of this option.</p>

## Option 2: Allow the Fair Work Commission to resolve disputes about unfair contracts for digital platform workers and road transport workers

This option would deliver a more cost-effective process for independent contractors to challenge unfair contracts. However, it will otherwise have limited impacts given that it will simply involve providing a role for the Fair Work Commission to settle disputes about existing unfair contracts protections.

### Lower costs of dispute resolution

These workers (whose earnings fall below a high income threshold) would benefit from low-cost and accessible dispute resolution, compared to the status quo of needing to apply to the court. For example, Fair Work Commission application fees in 2022-23 are \$77.80 (which changes on 1 July each year).<sup>147</sup> By comparison, the relevant filing fee for independent contractors in the Federal Circuit and Family Court of Australia is \$735.<sup>148</sup> This will result in savings for applicants and respondents and produce a jurisdiction that is more effective in providing remedies for unfair contractual terms than the Independent Contractors Act.

As indicated in the status quo option, there is no data on the prevalence of unfair contracts. To estimate the number of independent contractors that may benefit from the changes, the department sought data on comparable jurisdictions in the Fair Work Commission to estimate the number of applications to dispute an unfair contract. The closest available comparators were dispute resolution relating to unfair dismissals and general protection dismissals, which the department does not consider to be equivalent jurisdictions. This data was, however, useful to estimate the costs of deactivation and unfair contract termination disputes under the minimum standards options.

### Regulatory impacts

The Office of Impact Analysis's Guidance Note on the Regulatory Burden Measurement Framework advises that certain costs are excluded from the Regulatory Burden Measurement Framework and are not required to be considered when quantifying an estimate of burden. Relevantly, this includes 'Non-compliance and enforcement costs', including costs incurred in court and tribunal processes.

In accordance with this advice, regulatory costs associated with the dispute resolution through the workplace tribunal, the Fair Work Commission', are not included in the costings. Specific outcomes may depend on the approach that independent parties – such as employers, unions and the Fair Work Commission – take in response to the provisions.

Employers and employees will only utilise the Fair Work Commission's dispute resolution processes in circumstances where a party is of the view that an action taken by another party is not consistent with their legislative obligations – for example if an independent contractor believes that their contract has unfair provisions. The time and financial cost would vary from dispute to dispute but

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<sup>147</sup> Fair Work Commission, *Fees and costs*, FWC website, n.d., .

<sup>148</sup> Federal Circuit and Family Court of Australia, *General federal law fees*, Federal Circuit and Family Court of Australia website, n.d. <https://www.fcfcfa.gov.au/gfl/gfl-fees> .

noting that the Fair Work Commission is a tribunal it would be lower cost and quicker than court processes.

As this is a new policy, there is no available data on the rate at which disputes would occur as a result of allowing the Fair Work Commission to rule on these matters, or the resource cost and the time taken to resolve such disputes.

Given the inherent uncertainty in how independent parties will respond to the unfair contracts policy, and also uncertainty in the extent to which the best available comparators (unfair and general protections dismissal), the department has determined that estimations of the dispute costs would not be sufficiently robust to contain a meaningful estimate of the costs.

### Distributional impacts

By improving access to dispute resolution, the proposal would benefit workers who face barriers to equal negotiating power, including women, people with disability and migrant workers.

As outlined, the proposed changes would impact digital platform and Road transport workers. While these groups are not homogenous, they both have higher rates of migrant and male workers (for a detailed breakdown of these cohorts please see pages 42-44). Migrant workers especially are more likely to be underpaid or subject to unfair working conditions.<sup>149</sup>

### Encouraging fairer contracts

There may be further flow-on benefits for independent contractors. Improving access to dispute resolution may create a real or perceived higher likelihood that an independent contractor would make a dispute against a business alleging that their contract is unfair. This may influence behaviour by encouraging businesses to ensure that their contracts do not contain unfair terms, which could result in more favourable contractual terms for independent contractors. This could include higher incomes or improved working conditions for this cohort.

### Impact on Government

The Fair Work Commission will have responsibility for implementing the option. This includes receiving, managing and considering applications for unfair contract dispute resolution.

Limiting the capacity to deal with unfair contract applications to identified areas of need in the road transport sector and (in relation to deactivation protections) the digital platform sector means that expected application numbers are relatively small. A high-income threshold applying to both unfair contract terms disputes and termination claims will further confine the scope of the jurisdiction.

The courts may see a very small number of additional matters under the new provisions as there will be an appeal rights from decisions made by the Fair Work Commission. However, as outlined above, the cost of taking court action under the provisions is prohibitively expensive for the types of disputes, so the increase is likely to be negligible.

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<sup>149</sup> For example, see Coates, B., Wiltshire, T. and Reysenbach, T., 'Short-changed: How to stop the exploitation of migrant workers in Australia', the Grattan Institute, 2023.

Summary of impacts

Regulatory burden estimates

**Table 25 – Average annual regulatory costs (from business as usual)**

	Average annual regulatory costs (from business as usual)			
Option	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 2</b>	Nil	Nil	Nil	Nil

Table 26 – Consistency with Guiding Principles – Option 2

Guiding Principle	Rating	Justification
Australia’s workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Good	This option would ensure that the workplace relations system can provide digital platform workers and road transport workers with access to unfair contracts dispute resolution. This ensures that workers in new forms of work in the digital platform economy have access to dispute resolution.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Fair	<p>This option improves access to dispute resolution of unfair contracts for independent contractors in the road transport sector and digital platform workers. The impact of this option would not be significant as it does not introduce new protections, but instead reduces cost barriers to accessing existing protections. While this improves dispute resolution for a cohort of independent contractors, it does not extend access to dispute resolution beyond digital platform workers and road transport workers.</p> <p>Due to the low expected impact and limited cohort of workers with improved access to dispute resolution, this option’s consistency with the Guiding Principles is ‘fair’.</p>
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Fair	This option could make competition fairer between businesses competing in the road transport sector and digital platform economy by helping to ensure that businesses in these sectors do not gain an unfair advantage from deliberately setting unfair contractual terms. However, this impact is not expected to be significant as the measure proposes to improve access to existing protections. As such, the rating is ‘fair’.
<p>The Fair Work Commission should set minimum standards that:</p> <ul style="list-style-type: none"> <li>are fair, relevant, proportionate, sustainable and responsive</li> </ul>	N/A	This factor relates to standard-setting and is out of scope of this option.

<ul style="list-style-type: none"> <li>• reflect workers' independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with</li> <li>• mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market</li> </ul>		
<p>The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.</p>	<p>N/A</p>	<p>This factor relates to standard-setting and is out of scope of this option.</p>



**Option 3: Allow the Fair Work Commission to resolve disputes about unfair contracts for all independent contractors, subject to a high income threshold**

The impacts under this option would be as under Option 2 but applied to a broader cohort of independent contractors.

**Independent contractors**

There are 1.1 million independent contractors, of which those with incomes below a proposed high income threshold would become eligible to dispute an unfair contract at the Fair Work Commission.

**Businesses engaging independent contractors**

As under Option 2, the regulatory cost of this measure is nil.

**Summary of impacts**

The flow on impacts, such as distributional impacts, improving fairness and costs to government, are likely to be similar to those outlined in Option 2, but applicable to a broader range of independent contractors.

**Regulatory burden estimates**

**Table 27 – Average annual regulatory costs (from business as usual)**

Option	Average annual regulatory costs (from business as usual)			
	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 3</b>	Nil	Nil	Nil	Nil

**Table 28 – Consistency with Guiding Principles – Option 3**

Guiding Principle	Rating	Justification
Australia’s workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Good	This option would ensure that the workplace relations system can provide all independent contractors (subject to a high income threshold) access to appropriate protections and dispute resolution.
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Good	This option provides all independent contractors (subject to a high income threshold) with improved access to dispute unfair contracts. This significantly improves access to rights and protections for workers, regardless of their work status.
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Good	This option would increase the fairness of competition by helping to ensure that businesses in any sector do not gain an unfair advantage from deliberately setting unfair contractual terms.
<p>The Fair Work Commission should set minimum standards that:</p> <ul style="list-style-type: none"> <li>• are fair, relevant, proportionate, sustainable and responsive</li> <li>• reflect workers’ independence and flexible working</li> </ul>	N/A	This factor relates to standard-setting and is out of scope of this option.

<p>arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with</p> <ul style="list-style-type: none"> <li>mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market</li> </ul>		
<p>The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.</p>	<p>N/A</p>	<p>This factor relates to standard-setting and is out of scope of this option.</p>

## 7. Preferred options and implementation plan

### Preferred options

The preferred minimum standards option is **Option 4** (minimum standards for digital platform workers and road transport workers, with an interpretive principle to determine the meaning of ‘employee’ and ‘employment’). For improving access to dispute resolution of unfair contracts, the preferred option is **Option 3**. The department considers these options to have the best net benefit, defined as their consistency with the guiding principles balanced by the estimated regulatory burden.

### Summary of impacts

#### Minimum standards

**Table 29 – Average annual wage increases for workers (from business as usual)**

Average annual wage increases for workers (from business as usual)				
Option	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 1 (Status Quo)</b>	Nil	Nil	Nil	Nil
<b>Option 2</b>	\$403,803,268.07 per year	Nil	Nil	\$403,803,268.07 per year
<b>Option 3</b>	\$407,650,573.62 per year	Nil	Nil	\$407,650,573.62 per year
<b>Option 4</b>	\$407,650,573.62 per year	Nil	Nil	\$407,650,573.62 per year

**Table 30 – Average annual regulatory costs (from business as usual)**

Average annual regulatory costs (from business as usual)				
Option	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 1 (Status Quo)</b>	Nil	Nil	Nil	Nil
<b>Option 2</b>	Nil	\$9,845.12 per business	Nil	\$9,845.12 per business

Option	Average annual regulatory costs (from business as usual)			
	Independent contractors	Business	Community organisations	Total change in costs
<b>Option 3</b>	Nil	\$5,889.42 per business + \$258.80 per worker, or \$9,845.12 per business	Nil	\$5,889.42 per business + \$258.80 per worker, or \$9,845.12 per business
<b>Option 4</b>	Nil	\$235.58 per business, or up to \$6,125.00 per business + \$258.80 per worker, or up to \$10,080.70 per business <sup>150</sup>	Nil	\$235.58 per business, or up to \$6,125.00 per business + \$258.80 per worker, or up to \$10,080.70 per business

**Table 31 – Consistency of each option with Guiding Principles**

Guiding Principle	Option 1	Option 2	Option 3	Option 4
Australia’s workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Poor	Good	Good	Good
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Poor	Fair	Fair	Good
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Poor	Fair	Good	Good
The Fair Work Commission should set minimum standards that: <ul style="list-style-type: none"> <li>are fair, relevant, proportionate, sustainable and responsive</li> <li>reflect workers’ independence and flexible working arrangements, for</li> </ul>	Poor	Fair	Good	Good

<sup>150</sup> Further detail is included under Section 6, Option 4 (Minimum Standards).

<p>example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with</p> <ul style="list-style-type: none"> <li>mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market</li> </ul>				
The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.	Poor	Good	Good	Good

## Access to dispute resolution for unfair contracts

Table 32 – Average annual regulatory costs (from business as usual)

Option	Average annual regulatory costs (from business as usual)			
	Independent contractors	Business	Community organisations	Total change in costs
Option 1	Nil	Nil	Nil	Nil
Option 2	Nil	Nil	Nil	Nil
Option 3	Nil	Nil	Nil	Nil

Table 33 – Consistency of each option with Guiding Principles

Guiding Principle	Option 1	Option 2	Option 3
Australia's workplace relations system must reflect modern working arrangements and be capable of evolving with emerging forms of work and business practices.	Poor	Good	Good
All workers should have access to minimum rights and protections regardless of whether they are characterised as an employee or an independent contractor, including access to freedom of association and dispute resolution.	Poor	Fair	Good
Businesses should benefit from a level playing field among industry participants while promoting competition and innovation.	Poor	Fair	Good

<p>The Fair Work Commission should set minimum standards that:</p> <ul style="list-style-type: none"> <li>• are fair, relevant, proportionate, sustainable and responsive</li> <li>• reflect workers’ independence and flexible working arrangements, for example choosing which tasks to accept and refuse, how to undertake their work, where and when they work, and which businesses to contract with</li> <li>• mitigate to the greatest extent possible unintended consequences for workers, businesses, consumers and other aspects of the labour market</li> </ul>	N/A	N/A	N/A
<p>The standard-setting framework should be accessible, transparent, fair and offer a high degree of certainty to affected parties.</p>	N/A	N/A	N/A

## Implementation

The Government will introduce legislation to amend the Fair Work Act. The amendments to the Fair Work Act will:

- Establish new powers for the Fair Work Commission to set minimum standards and resolve disputes about ‘deactivation’ or unfair contract termination for digital platform workers and road transport workers
- Establish a Road Transport Expert Panel in the Fair Work Commission
- Establish a Road Transport Advisory Group in the Fair Work Commission comprised of worker and business representatives to issue recommendations to the Expert Panel to assist in the standard setting process
- Introduce an interpretive principle for determining the meaning of ‘employee’ and ‘employment’; and
- Allow the Fair Work Commission to deal with unfair contracts disputes.

These legislative amendments to the Fair Work Act will be implemented through the Fair Work Amendment (Closing Loopholes) Bill 2023, with a proposed commencement of 1 July 2024.

## Role of the Fair Work Commission

Depending on the passage of legislation, there would be a 6-month period starting on 1 January 2024 allowing the Fair Work Commission to set up the jurisdiction. Following the commencement of the

jurisdiction, it would begin considering applications for minimum standards, registering consent collective agreements or considering applications for remedy for an unfair contract term or unfair contract termination or deactivation. Fair Work Commission Members would be supported by Fair Work Commission staff to provide case management, administrative and research functions.

## **Minimum standards for digital platform workers and road transport**

The Fair Work Commission will determine priority cohorts for minimum standards through research and consultation. It would accept applications or begin matters on its own motion. Once a matter has commenced, the Fair Work Commission will accept submissions from parties to a matter, including relevant businesses and their representatives and workers and their representatives. After considering evidence and the views of parties, the Fair Work Commission may make a binding order setting minimum standards.

A new Road Transport Expert Panel will also be established in the Fair Work Commission, with the capacity to set priorities in relation to the making of orders, based on consultation with the Advisory Group.

The Fair Work Commission will also be empowered to register consent collective agreements in relation to digital platform workers and road transport workers.

## **Disputes in relation to unfair contracts, unfair contract terminations and 'deactivation'**

The Fair Work Commission will accept applications from individual independent contractors and their representatives to dispute an unfair contract term. Consistent with other dispute resolution jurisdictions in the Fair Work Commission, applicants will be required to pay an application fee. The Fair Work Commission will be able to deal with unfair contracts claims by conciliation, mediation or compulsory arbitration.

Limiting the capacity to deal with unfair contract termination claims to identified areas of need within the road transport sector and (in relation to deactivation protections) the digital platform sector will mean that the impact of the introduction of these protections on the application numbers in the Fair Work Commission is expected to be relatively small. A high-income threshold applying to both unfair contract disputes and termination claims will further confine the scope of the jurisdiction.

## **Role of the Fair Work Ombudsman**

The Fair Work Ombudsman will have responsibility for educating and assisting independent contractors and businesses engaging independent contractors on their new rights and obligations. It will also be empowered to enforce new minimum standards, including through litigation. As an independent statutory body, the Fair Work Ombudsman will develop its own policies and procedures to meet these new responsibilities.



## 8. How will you evaluate your chosen options against the success metrics?

The metrics for success will be the ability of the chosen options to meet the guiding principles. The department will monitor the operation of the new jurisdiction, including by monitoring Fair Work Commission matters and providing legal and policy advice to Government to ensure it is working as intended. Similar to its involvement in the Fair Work Commission's Annual Wage Review, the department will prepare submissions to minimum standards application processes and participate in hearings as required.

The ABS began collecting information on digital platform workers in the Multi-Purpose Household survey from 2022-23 and expects to, in time, introduce a dedicated module within the 'Characteristics of Employment' supplementary topic in the Labour Force Survey.<sup>151</sup> The forthcoming publication of this data will assist the department to monitor the implementation of the proposed measures and their impact on digital platform workers.

Any further initiatives to improve data collection relating to the digital platform economy, road transport industry and unfair contracts would need to be balanced against the introduction of new regulatory burdens on individuals and businesses. For example, imposing reporting requirements on independent contractors and entities that they contract with would improve data on this cohort, however, would also introduce a new burden.

The department will monitor the implementation of the measures, including in consultation with the Fair Work Commission and the Fair Work Ombudsman. After it has been in operation for two years, the department will undertake an evaluation of the operation of the provisions. This is likely to look at matters such as the number of Minimum Standards Orders, agreements and dispute applications, and an assessment of the extent to which the changes have advanced the guiding principles.

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<sup>151</sup> Australian Bureau of Statistics (ABS), *Employment arrangements – Labour Statistics: Concepts, Sources and Methods*, ABS, Australian Government, 2021, .