

# Unions NSW Submission

Senate Select Committee on Job Security

9 April 2021

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## Introduction

1. Unions NSW is the peak body for trade unions and union members in New South Wales with 48 affiliated trade unions and Trades and Labour Councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce in both the public and private sectors.
2. Unions NSW and its affiliate unions have a proud history of engaging in the parliamentary process to protect and represent the interests of working people, their families and communities. Unions NSW frequently makes submissions to inquiries involving industrial relations and other issues which may impact members. We welcome the opportunity to make a submission and commend the Senate for establishing the Select Committee to inquire into the impact of insecure and precarious employment on the economy, wages, social cohesion, and workplace rights in Australia (the **Inquiry**).
3. About 42% of the Australian workforce is engaged in non-standard employment, the majority of which is precarious (casual, short-term contracts) and have no access to paid sick leave, annual leave, and unfair dismissal.<sup>1</sup> Precarious categories of employment were initially intended only to address seasonal or operational requirements of business. Instead, insecure work has been used to shift risk and responsibilities from employers to workers. In more severe circumstances employers have 'opted out' of the *Fair Work Act* entirely by disguising employees as independent contractors.
4. The COVID-19 crisis has exposed the prevalence of insecure work and the pressures it places on our communities. Much of the transmission of COVID-19 took place in workplaces with highly casualised workforces, who had no access to paid leave.<sup>2</sup>
5. Unions NSW is concerned by the level of harm perpetuated through insecure and precarious work, which has only been exacerbated by the COVID-19 crisis, as well as the failure of existing laws to adequately protect workers engaged in insecure and precarious work.
6. Unions NSW is also concerned that the perspective and unique plight of migrant workers in Australia as it relates to insecure and precarious work has been overlooked in the past by policy makers. Unions NSW has extensive experience in engaging with migrant communities and advocating for the rights of migrant workers, who currently constitute 11% of our

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<sup>1</sup> The Melbourne Institute (University of Melbourne), *Insecure Forms of Employment: How Pressing a Problem is it in Australia?* (2020) Figure 1 <[https://melbourneinstitute.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0010/3507805/ri2020n28.pdf](https://melbourneinstitute.unimelb.edu.au/__data/assets/pdf_file/0010/3507805/ri2020n28.pdf)>.

<sup>2</sup> Ryan Batchelor, *Insecure Work & Portable Entitlements: A Solution for Australia* (The McKell Institute, January 2021) 6.

workforce<sup>3</sup> and represent the second largest migrant workforce in the world.<sup>4</sup> In particular this submission provides consideration to the positions of international students and Working Holiday Makers who suffer the double standard of seeking employment in a parallel labour market which maintains inadequate compliance with Australian labour laws.

7. Please note this submission is intended to compliment and not supersede any submission from an affiliate union of Unions NSW.

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<sup>3</sup> Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016) 15.

<sup>4</sup> Organisation for Economic Cooperation and Development, *International Migration Outlook 2019* (online edition, 2019) Chapter 3.

## Recommendations

In respect of this inquiry, Unions NSW makes the following recommendations:

- (1) Federal Government to provide welfare support including access to Jobseeker payments for temporary migrants affected by the ongoing COVID-19 crisis.
- (2) Fair Work Commission to amend the Horticulture Industry and Wine Industry awards to abolish piece rates and guarantee a minimum wage to all workers.
- (3) Federal Government to reform the definition of casual employment introduced by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* to reflect the common law definition.
- (4) Federal Government to reform the *Fair Work Act 2009* (Cth) as amended by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* to reduce employer loopholes in respect of 'reasonable grounds' for not making an offer of conversion under ss 66B and 66C.
- (5) Federal Government to reform the *Fair Work Act 2009* (Cth) to amend the changes introduced by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* to allow the Fair Work Commission to arbitrate disputes regarding employee requests for casual conversion.
- (6) Federal Government to extend workers' rights to minimum wages and conditions to all workers including workers within the Gig Economy.
- (7) Federal Government to establish a national portable long service leave scheme across all sectors and industries.
- (8) Federal Government to amend *Fair Work Act 2009* (Cth) to provide for the portability of sick leave, carer's leave and other leave entitlements not paid out at the conclusion of employment.
- (9) Federal Government to develop procurement policies that give preference in tender processes to businesses employing workers in secure jobs when providing government with goods or services.
- (10) Federal Government to review and update approaches to dealing with taxation challenges as a result of the rise of the Gig Economy.
- (11) Treasury to review how and if Gig Economy platforms should be responsible for administering tax collection and superannuation contributions from the earnings of workers using their platforms.

- (12) Treasury to review the corporate tax system to ensure Gig Economy platforms pay their fair share of company tax.

## Extent and Nature of Insecure/Precarious Work

8. The industrial environment in Australia over recent decades has seen increases in productivity and flexibility with the majority of benefits geared towards business. Flexibility has manifested as increasing levels of casualisation, part-time work, short-term contracts and the use of independent contractors, all inherently insecure and precarious forms of work. This has resulted in a significant transfer of risk from employers to workers with workers foregoing job security, paid leave, minimum rates of pay, workplace conditions, workplace insurance and experiencing reduced workplace safety. Australia has an unsecured workforce of 3.3 million<sup>5</sup> with more than two million Australians employed casually.<sup>6</sup> Part-time employment has reached an all time high of 32.3% of total employment, with Australia having the third-highest reliance on part-time work in the OECD.<sup>7</sup>
9. Ambiguity and loopholes in both state and federal legislation have been used to reduce employment standards and conditions under the guise of productivity and flexibility for business and the consumer. For example, Gig Economy workers are engaged as independent contractors in a practice lauded by the industry as flexible and progressive. In reality, these workers are often paid well below minimum wage, shoulder liability for their own tax, insurance and safety requirements and miss out on conditions such as paid sick and annual leave enshrined for employees in the National Employment Standards. The Australian Bureau of Statistics has reported that in August 2020 18% of the Australian workforce were not entitled to paid leave.<sup>8</sup>
10. Precarious work is marred by a level of disorganisation which presents significant barriers to industrial organisation, weakening the ability of workers to demand improved wages and conditions. 14% of all employees belong to a union however only 8% of those are employees without leave entitlements, that is, those in insecure work.<sup>9</sup> Such disorganisation also affects

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<sup>5</sup> Amy Remeikis, 'Australian government won't 'jump to a solution' to help casual workers in coronavirus crisis', *The Guardian* (online), 10 March 2020 <<https://www.theguardian.com/world/2020/mar/10/australian-government-warned-not-to-drag-its-feet-on-help-for-casual-workers-in-coronavirus-crisis>>.

<sup>6</sup> Australian Unions, *Your Rights factsheets – Casual Workers* (February 2020) Australian Unions <[https://www.australianunions.org.au/casual\\_workers\\_factsheet](https://www.australianunions.org.au/casual_workers_factsheet)>.

<sup>7</sup> Dan Nahum and Jim Stanford, '2020 Year-End Labour Market Review: Insecure Work and the Covid-19 Pandemic' (Briefing Paper, The Australia Institute, December 2021) 13; Organisation for Economic Cooperation and Development, *Part-time employment rate* (2020) <<https://data.oecd.org/emp/part-time-employment-rate.htm>>.

<sup>8</sup> Australian Bureau of Statistics, *Working Arrangements* (11 December 2020) <<https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/working-arrangements/aug-2020>>.

<sup>9</sup> Australian Bureau of Statistics, *Trade union membership* (11 December 2020) <<https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/trade-union-membership/latest-release#job-characteristics>>.

the levels of reporting of wage theft. This is explored in a series of reports by Unions NSW which found that fear of dismissal, the ineffectiveness of the Fair Work Ombudsman's eradication strategies, and fear of visa cancellation and deportation for temporary migrant workers are all factors that deter workers in precarious contexts from reporting wage theft.<sup>10</sup>

11. The industrial landscape has further deteriorated during, and as a result of, the COVID-19 pandemic. As of February 2021, the national unemployment rate in New South Wales was 5.8%<sup>11</sup>, and national underemployment was 8.5%.<sup>12</sup> For the purposes of producing this data, the Australian Bureau of Statistics regards an underemployed person as someone who is not fully employed and is looking for and/or available to work more hours.
12. Australia has fared better than many other countries throughout the pandemic. Although over 80% of jobs lost in the initial economic downturn have been recovered, such recovery has been dominated by insecure work.<sup>13</sup> The Centre for Future Work's 2020 Year-End Labour Market Review reported that 60% of all waged jobs created since May 2020 were casual, and over three-quarters of all new jobs were part-time.<sup>14</sup>
13. Those undertaking insecure and precarious work are more vulnerable than ever. Levels of insecure and precarious work will continue to grow unless Government shifts the focus of the industrial relations regime to addressing the risks presented by such work and commit to providing stable and secure employment for all workers in Australia.

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<sup>10</sup> See Unions NSW, *Wage Thieves: enforcing minimum wages* (2018); *Wage Theft: The Shadow Market Part One* (2020); *Wage Theft: The Shadow Market Part Two (Horticultural Industry)* (2021).

<sup>11</sup> Australian Bureau of Statistics, *Labour Force, Australia* (18 March 2021) <<https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia/latest-release>>.

<sup>12</sup> *Ibid.*

<sup>13</sup> Dan Nahum and Jim Stanford, above n 7, 1.

<sup>14</sup> *Ibid.*

## Lessons from the Pandemic

14. The COVID-19 crisis has highlighted the risks that insecure work poses to not only individual workers, but the community as a whole.
15. In a January 2021 report, the McKell Institute noted that approximately 80% of COVID-19 transmissions that took place in Victoria's deadly second wave occurred in the workplace, especially in the Aged Care and private security sectors.<sup>15</sup> In analysing the nature of employment in these sectors, being highly insecure and precarious, dominated by casual employees and contractors who often hold multiple jobs, it is clear that workers who do not possess sufficient entitlements such as sick leave are not only a risk to their own health but to the health of the wider community. These workers are put in an impossible position of choosing to slow the spread of COVID-19 or putting food on their tables.
16. The government's introduction of Paid Pandemic Leave was a welcome policy that attempted to mitigate the risk of transmission in highly precarious and insecure industries, however this expired on 29 March 2021. The temporary nature of such leave, especially for industries that have sustained the nation during the ongoing health and economic crisis has drawn back the curtain on the fundamental undervaluing of such work.
17. COVID-19 has exacerbated fundamental inequalities that characterised our industrial landscape prior to the pandemic. As expected, the unsecured workforce was the first to experience financial hardship during the pandemic and subsequent recession. The Centre for Future Work has found that casual workers lost employment at a rate 8 times faster than those in permanent jobs<sup>16</sup>. Those employed part-time lost work 3 times faster than full-time.<sup>17</sup> Insecure self-employed workers, such as those employed in the gig economy, lost work 4 times faster than those in more stable small businesses.<sup>18</sup>
18. Already vulnerable with comparatively low and variable incomes, the government's arbitrary decision to exclude 1.1 million short-tenure casuals from JobKeeper only exacerbated existing inequalities.<sup>19</sup> Restrictive eligibility requirements for essential income support measures during the pandemic and the subsequent abandonment of those who need such assistance the most only confirms the Commonwealth government's dismissive attitude towards the plight of insecure workers.
19. Instead of recognising the inherent vulnerability of those in insecure work, made stark by the pandemic, and taking adequate measures to provide all Australian workers with secure and

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<sup>15</sup> Ryan Batchelor, above n 2, 22.

<sup>16</sup> Dan Nahum and Jim Stanford, above n 7, 1.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, 3.

high-quality jobs to enable them to live healthy lives, policy makers have sought to expand and encourage the use of insecure work practices, further entrenching the inequalities that were only deepened by the pandemic.

## Migrant Workers

20. Migrant workers, traditionally engaged in highly insecure and precarious work, have been severely affected by COVID-19 and government related responses. They have not received any form of financial support during the crisis with many suffering severe financial hardship, despite Australia depending on their labour to sustain economic growth.
21. A 2020 audit of over 3000 job advertisements targeting migrant workers conducted by Unions NSW revealed that not only were 88% of the ads that disclosed the rate of pay offering an hourly rate below the minimum wage, but 51% were also unclear about the nature of the contract and work arrangements.<sup>20</sup>
22. Unions NSW has documented the level of hardship experienced by temporary migrants through a large-scale survey of over 5,000 temporary migrants, which indicated that 65% had lost their job, 23% experienced a reduction in work hours and 43% were skipping meals on a regular basis to survive.<sup>21</sup>
23. This lack of government support led to an increase in other forms of exploitative insecure work such as lengthy unpaid trials or trials paid well below the minimum wage.<sup>22</sup>
24. Such exploitation has been further incentivised by the government's lack of support for working holiday makers in the horticultural industry, which has a preference for vulnerable migrant workers who are easily exploited with insecure, underpaid work in poor conditions.
25. A Unions NSW report titled "Wage Theft: The Shadow Market, Part Two: The Horticulture Industry"<sup>23</sup> revealed that the severe exploitation of workers in the industry has continued throughout the pandemic. This exploitation is founded on piece rate agreements which allow farmers to pay workers according to how much they picked, packed or pruned, or an hourly rate. An already fundamentally insecure form of work, recent reports have cited cases where migrant workers earn as little as \$3 per hour through piecework.<sup>24</sup>
26. Following the outbreak of COVID-19 in Australia, many migrant workers, abandoned by the government, moved from systematic underpayment to unpaid work just to survive. An academic survey conducted by the University of New South Wales (UNSW) and the University

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<sup>20</sup> Unions NSW (2020), above n 10, 7.

<sup>21</sup> Unions NSW, 'No Worker Left Behind: Support Equal Access to Welfare for Temporary Migrants' (Report, 2020) 4.

<sup>22</sup> Unions NSW (2020), above n 10, 16.

<sup>23</sup> Unions NSW (2021), above n 10.

<sup>24</sup> Edward Cavanough and Connor Wherrett, 'Wage theft and other labour infringements in the NSW Mid-North Coast's berry harvest', The McKell Institute, 2019/20.

of Technology Sydney (UTS) on the impact of COVID-19 on temporary migrants, found that 29% of backpackers reported since 1 March 2020, they had performed work in return for food and housing rather than wages.<sup>25</sup>

27. The high rotation of migrant workers and the discrimination and exploitation these workers experience is linked to Australia's economic stagnation. Unions NSW believes that the current migration system currently operating in Australia is cultivating a class of temporary visa holders who are exceedingly vulnerable.<sup>26</sup>

28. The COVID-19 crisis has only intensified the severe levels of exploitation experienced by migrant workers. The lack of assistance by the government encourages and enables further employment abuse, driving vulnerable migrants deeper into precarious and insecure forms of work just to survive.

**Recommendation:** Federal Government to provide welfare support including access to Jobseeker payments for temporary migrants affected by the ongoing COVID-19 crisis.

**Recommendation:** Fair Work Commission to amend the Horticulture Industry and Wine Industry awards to abolish piece rates and guarantee a minimum wage to all workers.

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<sup>25</sup> Laurie Berg and Bassina Farbenblum, 'As if We Weren't Humans: The Abandonment of Temporary Migrants in Australia during COVID-19' (October 11, 2020).

<sup>26</sup> Senator Kim Carr, 'Speech on the Migration Legislation Amendment (2017 Measures No. 4) Regulations' (Speech delivered at in the Australian Senate, Parliament House, Canberra, 5 December 2017) cited in Chris F. Wright and Stephen Clibborn, 'A guest-worker state? The declining power and agency of migrant labour in Australia' (2020) 31 *The Economic and Labour Relations Review* 34, 51.

## Application of Existing Laws and Instruments

29. With only minor exception, Australia's state and federal workplace laws are ill-equipped to adequately protect workers engaged in insecure and precarious work.
30. The Australian industrial relations system is currently built on the back of 'flexibility' for business which has resulted in increasing levels of insecure work. Flexibility has led to a growing group of workers taking on the risk of business and forgoing the core benefits of employment like job security, paid leave and in the case of independent contractors, minimum rates of pay and workplace insurance.

## Casuals and recent passage of the Omnibus Act

31. The recent passage of *the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (the **Omnibus Act**) is another symptom of this and removes workplace rights for some casuals and increases insecure employment. This insecurity will commensurately add an element of convenience for employers conducting their business who would have the power to define any job as casual at the point of employment. In practical terms, workers may become "stuck" as a casual, notwithstanding changes to their pattern of working if the employer can assert they made no commitment to providing continuing and indefinite work.
32. Provisions of the Omnibus Act pertaining to the definition of casual employment are fundamentally flawed. Whilst Unions NSW supports a statutory definition of casual employment, should be one which accurately reflects the common law definition that has evolved over time. By contrast, the definition of a casual employee in s15A of the Omnibus Act appears to be a reaction to the Federal Court's 2020 finding in *Workpac v Rossato [2020] FCAFC 84 (Rossato)* that it is imperative to look at whether there was a firm advance commitment in assessing the nature of an employment relationship. Ultimately *Rossato* recognised the entitlement to various forms of leave for employees wrongly classified as casual.
33. The *Rossato* decision was not a new interpretation of law, nor was it the first-time large business risked penalties for contravening workplace laws. However, given the size of the breach found and potential cost to many of the Government's biggest supporters, it appears the inclusion of the s15A definition is a poor attempt to retrospectively overturn the Federal Court's decision.
34. The adverse impact of the new definition in s15A is not adequately compensated by the Omnibus Act's new casual conversion provisions which – whilst superficially requiring an

employer to make an offer to a casual employee who has been employed for 12 months and has worked a regular pattern of hours for at least the last 6 months<sup>27</sup> – grant employers significant leeway to avoid making an offer<sup>28</sup>. The “reasonable grounds” for not making such an offer outlined in s66C(2) of the Omnibus Act creates a convenient loophole to release employers from a requirement to provide their workers with security. The unfairness of this provision is compounded by the apparent absence of an avenue for arbitration to dispute that decision. These new patterns are designed exclusively to allow businesses to operate flexibly and would operate to the significant detriment of all sorts of workers who are unable to obtain other employment. Particularly in the current environment, where many households are still feeling the financial effects of the COVID-19 pandemic, further exacerbated by the end of JobKeeper support, these provisions are likely to have deep impacts on communities, individuals’ mental health and social security resources.

35. The practical effects of such provisions remain to be seen, however there is no doubt that the passage of the Omnibus Act presents a deep threat to already vulnerable workers and serves to entrench and increase the prevalence of insecure and precarious employment. The Bill is proof of the government’s commitment to further entrench insecure work to benefit business, instead of taking measures to ensure all workers in Australia have access to stable and decent work.

**Recommendation:** Federal Government to reform the definition of casual employment in the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* to reflect the common law definition.

**Recommendation:** Federal Government to reform the *Fair Work Act 2009 (Cth)* as amended by the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* to reduce employer loopholes in respect of ‘reasonable grounds’ for not making an offer of conversion under ss 66B and 66C.

**Recommendation:** Federal Government to reform the *Fair Work Act 2009* to amend the changes introduced by the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* to allow the Fair Work Commission to arbitrate disputes regarding employee requests for casual conversion.

## On-Demand/Gig economy

36. Unions NSW understands the on-demand or gig economy (for the purposes of this submission, the Gig Economy) refers to a landscape of digitally enabled companies (including

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<sup>27</sup> *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Act 2021* (Cth) s 66B.

<sup>28</sup> *Ibid* s 66C.

multinational corporations) who use websites and/or mobile apps to pair workers with temporary “gigs” (tasks or jobs) performed both online and offline on demand. The nature of the relationship between the platform and the worker is contentious, problematic and precarious. Whilst platforms argue they are merely an intermediary facilitating a relationship within an electronic marketplace between a contracted worker and a consumer, it is clear there is an employment relationship with commensurate duties owed to the worker and to the purchaser. This may be seen particularly clearly in respect of work such as electrical trades, which must meet an industry standard or comply with licencing requirements.

37. The Gig Economy is underpinned by five key features:

- a) Work is fragmented into specific individual tasks or jobs and workers are engaged on a task-by-task basis with no guarantees of continuous work.
- b) Work is performed by individual workers but may be commissioned by an individual or business.
- c) Labour transactions between workers and individuals and businesses are facilitated by a for-profit company who charges users for this service. These transactions are performed through web-based applications which are managed and controlled by the for-profit company.
- d) Workers are treated as independent contractors by the facilitating companies and are not afforded any employment protections or minimum standards in the performance of their work.
- e) The price charged for each job is set by the facilitating company or by the commissioning customer. Payment is collected through the platform, and compensation (net of the platform’s margin) is then disbursed to the worker.

38. Gig Economy work is varied and spans an increasing cross-section of industries. Most recognisably, the Gig Economy includes rideshare platforms like Uber and Ola, and food delivery platforms such as Deliveroo, Menulog and Uber Eats. However, the Gig Economy also encompasses:

- a) platforms such as Hireup and Mable connecting care providers (i.e. aged care and disability support workers) with those requiring these services;
- b) platforms facilitating accommodation like Airbnb and Stayz;
- c) home cleaning services via platforms including Whizz and Helping;
- d) online marketplaces for hand-crafted goods such as Etsy;
- e) platforms like Airtasker and Freelancer which facilitate more varied and ad hoc work; and

- f) new entrant to the Australian market Amazon Flex, which operates in a similar manner to rideshare but for deliveries.
39. The Gig Economy makes up a small but growing proportion of the overall labour market. In August 2020, independent contractors accounted for 8.2% of the Australian workforce and it is most likely gig workers comprise a subset of this number.<sup>29</sup> However, the Gig Economy has a strong influence on the demand for worker flexibility and insecure employees through the competitive pressure firms that utilise of gig labour place on those which use traditional employment arrangements.
40. In light of the COVID-19 pandemic, which both increased demand for many services offered, and represented a relatively accessible form of income for many who had lost other jobs, it is anticipated a greater portion of the workforce in Australia are now participants in the Gig Economy.

#### Independent Contractors

41. Companies participating in the Gig Economy have claimed they are not businesses who employ workers to perform service or produce goods. Rather, these entities argue they are technology platforms who provide 'lead generation' to workers.
42. Unfortunately, certain aspects of the Gig Economy have created an environment in which workers can be exploited, as platforms and would-be employers can treat individuals as independent contractors and not employees. The work of genuine independent contractors is governed by commercial rather than employment legislation, providing platforms a loophole through which they can bypass requirements for minimum pay and conditions enjoyed by other workers. This status also narrows avenues available for workers to pursue disputes and seek remedies such as for unfair dismissal, workers compensation and wage theft.
43. In most cases, these 'independent contractors' do not have the sufficient control over their work location, hours, uniforms or pricing that would demonstrate they are true contractors and the platform exercises at least the same, if not more, control than an employer.
44. The distinction between independent contractor and employee is often unclear. On the one hand, workers in the Gig Economy can choose their hours of work and what jobs they want to perform which provides a large degree of individual control over their work. This flexibility is not dissimilar to that available for casual employees and those working under labour hire arrangements. On the other hand, workers in the Gig Economy have limited bargaining power, are dependent on the company's platform for the allocation of work and have little

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<sup>29</sup> Australian Bureau of Statistics, above n 8.

control (depending on the work type and platform) over setting their own prices, meaning their work is highly insecure,

45. Tinkering around the edges of the definitions of independent contractor and employee will not solve this problem. Unscrupulous employers will continue to find loopholes and arguments to opt out of employment obligations and for this reason Unions NSW considers it crucial that the provisions outlined in paragraph 48 of this submission are included in industrial relations reforms to clarify and address the legal fiction around workers in the Gig Economy and provide greater certainty and security in employment.
46. In addition to and compounded upon underpayment of workers in the Gig Economy is the non-payment of superannuation contributions on behalf of these workers. Sarah Kaine, from the University of Technology Sydney's Business School, notes that when these workers reach retirement, they will likely need to rely on social security to receive an acceptable retirement income.<sup>30</sup>

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<sup>30</sup> 'Can the gig economy last?', *The Signal* (ABC, 29 August 2019) <<https://www.abc.net.au/radio/programs/thesignal/gig-economy-collapse/11458526>> 00:07:38.

## What should the Federal Government do?

### Fundamental minimum entitlements

47. Presently, permanent, fixed-term and casual employees have rights and entitlements which vary significantly in respect of access to paid leave, unfair dismissal and job security. Different again are the rights of independent contractors (typically performing work under an Australian Business Number) who do not benefit from the National Employment Standards prescribed in the *Fair Work Act*.
48. Unions NSW believes industrial relations reform needs to set minimum standards for all those who perform work (whether employee or independent contractor) and guarantee a minimum set of pay and conditions comprised of:
  - a) a requirement to be paid at least the minimum hourly wage (currently \$19.84 for adults)<sup>31</sup>;
  - b) workers' compensation insurance;
  - c) paid leave entitlements;
  - d) legislated superannuation contributions; and
  - e) the right to join a union and bargain collectively.
49. Unions NSW strongly opposes the creation of a third classification or inferior category of worker. Exploitation of insecure workers already occurs on a large scale and any new category of worker would only give greater license to employers and business owners to undermine the rights of workers and perpetuate further insecurity. Rather, Unions NSW recommends the enforcement of greater protections within the current system by establishing a minimum set of pay and conditions for all workers, regardless of their formal employment status and especially including those operating in the Gig Economy.

**Recommendation:** Federal Government to extend workers' rights to minimum wages and conditions to all workers including workers within the Gig Economy.

### Portable Leave Entitlements

50. It is imperative that Australian workers have a stronger safety net for future major disruptions (such as a pandemics) and in the event Australia does experience significant job losses due to economic crises. It is Unions NSW's belief that all workers – irrespective of sector or type of employment – should be able to access sick and annual leave, including when they change employer.

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<sup>31</sup> Fair Work Ombudsman, *Minimum Wages* (July 2020) < <https://www.fairwork.gov.au/pay/minimum-wages>>.

51. Currently, particular industries in Australia allow workers to transfer their accrued long service leave entitlements when they move from employer to employer. These industries include:
- a) building and construction;
  - b) coal mining;
  - c) stevedoring; and
  - d) contract cleaning.
52. Unions NSW understands these provisions were developed because of the nature of workers in these industries to work within one industry for a long time, but not work with a single employer for a long period. However, such an argument could now be made for the majority of industries operating in Australia. According to the HILDA survey the average worker is expected to change their employment every 3.4 years.<sup>32</sup> For this reason it is likely that most workers today will never become eligible to access their entitlement to long service leave. The current system is antiquated and grossly unfair as it allows for only a minority of workers to benefit from long service leave entitlements. To ensure that every worker continues to receive their entitlement to long service leave, portable long service leave should be immediately extended to all workers.
53. Earlier this year, the Victorian government passed legislation allowing for workers in the community services, contract cleaning and security industries to accrue their long service leave entitlements throughout their time working in the industry, rather than the time they spend working for a single employer.
54. Unions NSW supports the Victorian approach. However, a provision for portable leave should not be limited to long service leave. The Federal Government should implement similar provisions allowing for portability of sick, carer's leave and other leave entitlements that are not currently paid out at the conclusion of employment. This would serve as a particularly valuable way of benefitting women, who are often forced to change jobs more frequently than men and as such have limited entitlements to paid leave. This is due to a higher likelihood of taking extended and often unpaid breaks from employment and disproportionately high carer's responsibilities compared to men. Providing for portable leave entitlements will support women who are returning to the workforce after having children and strengthen overall workforce participation.
55. Providing for portable leave entitlements will also benefit employers and workers by removing workers' hesitations to change employer and will better facilitate the labour

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<sup>32</sup> McCrindle, *Job mobility in Australia* (2020) <<https://mccrindle.com.au/insights/blog/job-mobility-australia/>>.

mobility particularly during this important period as Australia's economy recovers from the COVID-19 related recession.

**Recommendation:** Federal Government to establish a national portable long service leave scheme across all sectors and industries.

**Recommendation:** Federal Government to amend *Fair Work Act 2009* (Cth) to provide for the portability of sick leave, carer's leave and other leave entitlements not paid out at the conclusion of employment.

## Procurement

56. The government has a duty to promote best practice around secure work and set standards through its own procurement practices. Presently, it is estimated that the Australian Public Service's market for outsourced labour has doubled in the past five years, currently worth over \$5 billion per year.<sup>33</sup>
57. Unions NSW calls for the development of Federal Government procurement policies that give financial advantage in tender processes to business employing workers in secure jobs.
58. By adopting a holistic approach to assessing tenders for any good or service that spends taxpayers' money, with an emphasis on secure, quality and local jobs, government purchasing can promote job security and better wage and labour standards.
59. In practice this would mean a procurement policy that requires commitment from suppliers to such things as a preference for permanent employment, a clear avoidance of exploitative gig work practices, job and pay security at change of contract, drawing on local employment pools, the payment of prevailing wages underpinned by a living wage, indexed wage parity for outsourced staff, registered enterprise agreements, trained Health and Safety Representatives, union rights agreements, a right to conciliation and arbitration of disputes, paid domestic violence leave and the right for workers in government supply chains to bargain across the supply chain.
60. Contractors in government supply chains must commit to full and transparent reporting of the adherence to minimum labour standards and the nature of their sub-contracting relationship with other suppliers.
61. Lead contractors at the top of government supply chains should take responsibility for any breaches found in those supply chains. Therefore, each breach should also be treated as if

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<sup>33</sup> Markus Mannheim, 'Federal Government spending \$5 billion per year on contractors as gig economy grows inside public service', *ABC News* (online), 10 September 2020, < <https://www.abc.net.au/news/2020-09-10/contractors-and-the-public-service-gig-economy/12647956>>.

carried out by the contractor at the top of the supply chain, along with the breaching company.

62. If the Federal Government is serious about promoting security of employment it is essential that internal tendering and procurement processes reflect this commitment. This, in turn, will indirectly flow over and influence market standards.

**Recommendation:** Federal Government to develop procurement policies that give preference in tender processes to businesses employing workers in secure jobs when providing government with goods or services.

### Tax and Economic Considerations

63. At the core of any government's concern and ability to function effectively its liquidity, including the payment of taxes by citizens. Accordingly, maintaining the highest employment rate possible and universal adherence to tax obligations should be a top priority both now and into the future.
64. A decline in regular and systemic employment due to the rise in precarious and insecure work will affect the current government taxation model, as fewer employed people paying income tax is highly likely to lead to a growth in the number of citizens requiring government-funded social services such as welfare and housing. A decrease in employment will also result in reduced payroll tax revenue for the Federal and State governments.
65. Gig Economy platforms have a history of minimising tax obligations. For example, when Foodora withdrew from the Australian market in 2018, one of its many debts was to Revenue NSW for over \$500,000 in payroll tax owed under the *Payroll Tax Act 2007* (NSW).<sup>34</sup>
66. Unions NSW understands the Federal Treasury has sought to engage with industry about how to consistently tax participants of the Gig Economy.<sup>35</sup> While this is indeed important to ensure tax compliance is easier for individuals working in the gig economy and provide greater transparency, the real issue is taxation compliance from the platforms themselves. In 2018 Uber Australia made a gross profit of \$785 million, yet paid a mere \$8.5 million in tax.<sup>36</sup> Most of Uber's profit was transferred offshore, facilitated by corporate tax loopholes that Treasury is content to keep open, and instead focuses on vulnerable individuals' whose labour has generated such profits. Although there has yet to be any meaningful reform

<sup>34</sup> David Chau, 'Foodora unable to repay Australian debts, as it owes \$28 million 'loan' to German parent company', *ABC News* (online), 29 August 2018, <https://www.abc.net.au/news/2018-08-29/foodora-unable-pay-australian-debt-owe-28m-loan-to-delivery-hero/10179184>.

<sup>35</sup> Commonwealth of Australia Treasury, 'Tackling the black economy: A sharing economy reporting regime' (A consultation paper in response to the Black Economy Taskforce Final Report, January 2019) 2.

<sup>36</sup> Michael Bailey, 'Uber Australia grosses \$785m, pays \$8.5m tax', *Australian Financial Review* (online), 2 May 2019, <https://www.afr.com/technology/uber-australia-makes-785m-pays-8-5m-tax-20190501-p51j62>.

**Recommendation:** Federal Government to review and update approaches to dealing with taxation challenges as a result of the rise of the Gig Economy.

**Recommendation:** Treasury to review how and if Gig Economy platforms should be responsible for administering tax collection and superannuation contributions from the earnings of workers using their platforms.

**Recommendation:** Treasury to review corporate tax system to ensure Gig Economy platforms pay their fair share of company tax.

## Conclusion

67. Developments in our industrial relations system over the last few decades have seen increases in productivity and flexibility with the majority of benefits geared towards business. The boundaries of work are becoming less clear<sup>37</sup> and labour progressively less secure.
68. As employers and companies take advantage of new technologies and modes of work, we have witnessed a general shift of liability from employer to worker, particularly in respect of taxation obligations and the duties of WHS.
69. In the face of substantial change ahead, unions are calling for a significant reduction in the casualisation of the workforce and recommend a safety net for all workers which will allow workers in particularly low paid industries to move across and between industries most greatly affected by the rise in technological advancement. The COVID-19 pandemic has demonstrated it is not in government's interest to have less people in jobs paying less tax and more people requiring government assistance. Collaboration between industry, unions, workers, and the government is needed to find and maintain an equitable balance.
70. It is inevitable that precarious and insecure work will continue to grow in number of participants and sectors covered. In light of this, all workers in Australia must be granted the basic rights set out in paragraph 48 such that irrespective of whether a worker is labelled an employee or contractor, they can receive the fundamental minimum entitlements and have a safety net that cannot be undercut by any other method.<sup>38</sup>

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<sup>37</sup> Klaus Schwab, 'The fourth Industrial Revolution: What It Means and How to Respond', *Foreign Affairs* (online), 12 December 2015, <<https://www.foreignaffairs.com/articles/2015-12-12/fourth-industrial-revolution>>.

<sup>38</sup> Industrial Relations Victoria, *Report of the Inquiry into the Victorian On-Demand Workforce* (June 2020) 100.