

Working in the 'Gig Economy'

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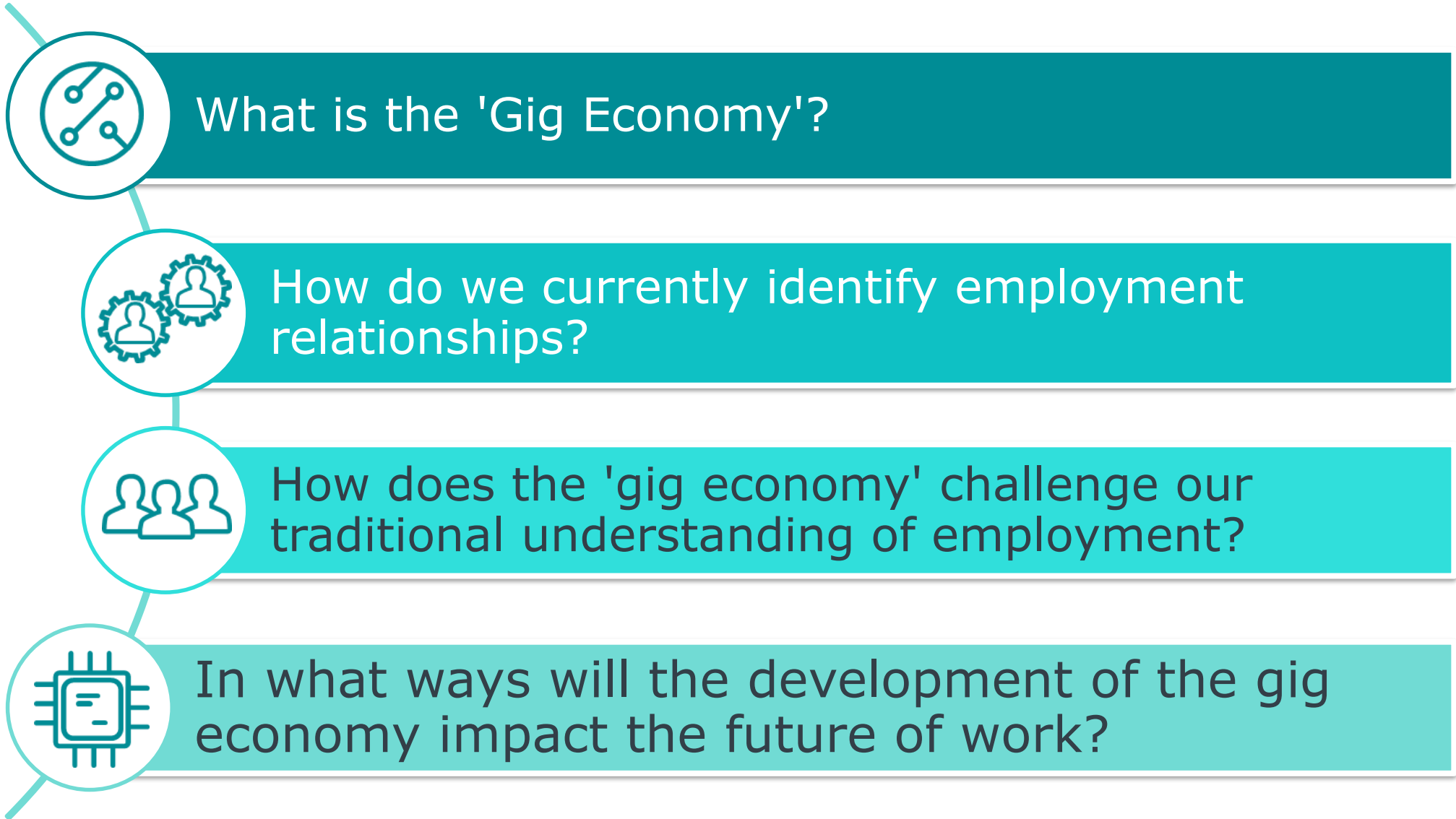
5 SEPTEMBER 2019

GoToWebinar housekeeping

- Facilitator:
 - Carly Hanson, Sector Development Officer, Community Legal Centres Queensland
- Recording:
 - This webinar is being recorded and will be available on the Staff Training page of our website: <https://communitylegalqld.org.au/clc-staff/staff-training-and-cle>
- PowerPoint / webinar materials:
 - Emailed prior to today's session
 - Available to download from Handouts section of GTW control panel
- Questions:
 - Type your questions/comments into question box on GTW control panel OR
 - Raise your hand and we will unmute your microphone
 - Questions will be addressed at the end
- Technical help: sdo@communitylegalqld.org.au or use question box in GTW

Overview

WHAT WE'LL COVER TODAY



What is the 'Gig Economy'?

THE FUTURE OF EMPLOYMENT OR
THE BEGINNING OF THE END?



Employee or independent contractor?

SOME PLAYERS IN THE GIG ECONOMY

The Airtasker logo, featuring a white icon of a person with a checkmark and the word "Airtasker" in white text on a blue background.The freelancer logo, featuring a blue stylized bird icon and the word "freelancer" in a bold, italicized, black font.The Uber Eats logo, featuring the word "Uber" in white and "Eats" in green on a black background.The deliveroo logo, featuring a white icon of a hand holding a fork and the word "deliveroo" in white text on a teal background.The MENULOG logo, featuring a green icon of a chef's hat and the word "MENULOG" in white text on a green background.The DiDi logo, featuring a white icon of a stylized "D" and the word "DiDi" in white text on an orange background.The SIDEKICKER logo, featuring a blue icon of a stylized "S" and the word "SIDEKICKER" in bold, black text.The Uber logo, featuring the word "Uber" in white text on a black background.The OLA logo, featuring a black icon of a stylized "O" with a yellow center and the word "OLA" in bold, black text.

The Past and the Present

THE CURRENT APPROACH TO
IDENTIFYING EMPLOYMENT
RELATIONSHIPS



Employment or independent contractor?

WHY DOES IT MATTER?



Employee or independent contractor?

CURRENT APPROACH

The question of whether a worker is an employee or an independent contractor is “rooted fundamentally in the difference between a person who serves his employer in his, the employer’s, business, and a person who carries on a trade or business of his own”

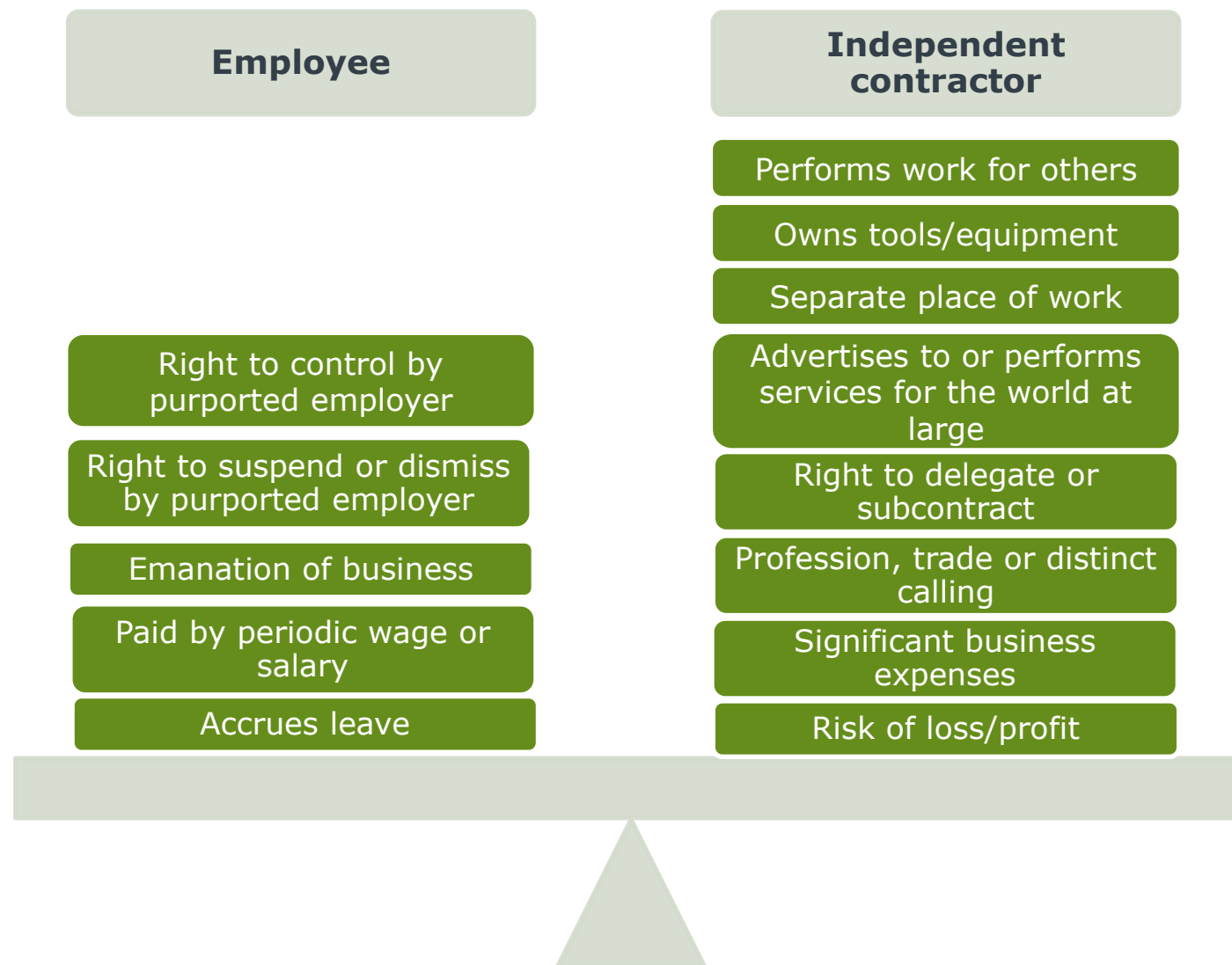
Hollis v Vabu (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at [40], citing Windeyer J in *Marshall v Whittaker’s Building Supply Co* (1963) 109 CLR 210 at 217)

“...it is important to approach the matter by asking the question: “is the person an employee?”, rather than: “is the person conducting a business?”

Whitby v ZG Operations Australia Pty Ltd [2018] FCA 1934 at [126] (Thawley J).

Employee or independent contractor?

INDICIA

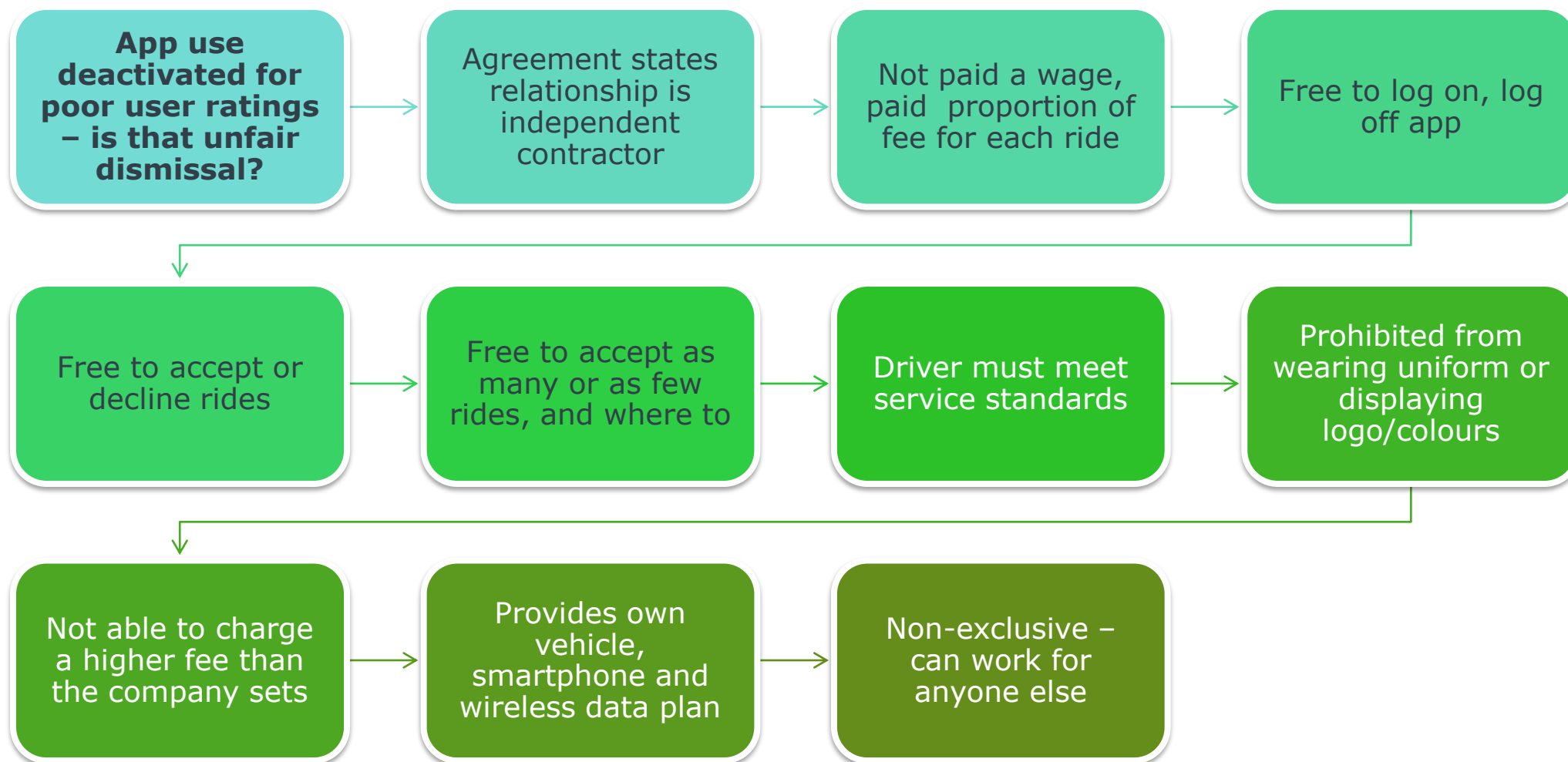


The Disruption of Technology

CHALLENGES IN APPLYING THE
ESTABLISHED EMPLOYMENT FRAMEWORK
TO GIG ECONOMY WORKERS



A client comes to you...



*Is the worker an
employee?*

VOTE NOW



Kaseris v Rasier Pacific V.O.F [2017] FWC 6610



1ST UBER DECISION

RATE YOUR RIDE



Unfair dismissal claim

- Services Agreement terminated due to Mr Kaseris' poor passenger rating

Relevant facts

- Drivers accepted T&Cs in Services Agreement before they could accept trip requests
- Drivers could log on and log off the app as they wished, accept or reject trip requests from riders at any time, and work at any location
- Drivers paid a service fee to Uber, which was taken from the fare
- Drivers must meet service standards
- Drivers provides own vehicle, smartphone and wireless data
- Drivers not required, in fact prohibited, from wearing uniform or displaying Uber brand

Conclusion

- **No employment relationship between Mr Kaseris and Uber exists**

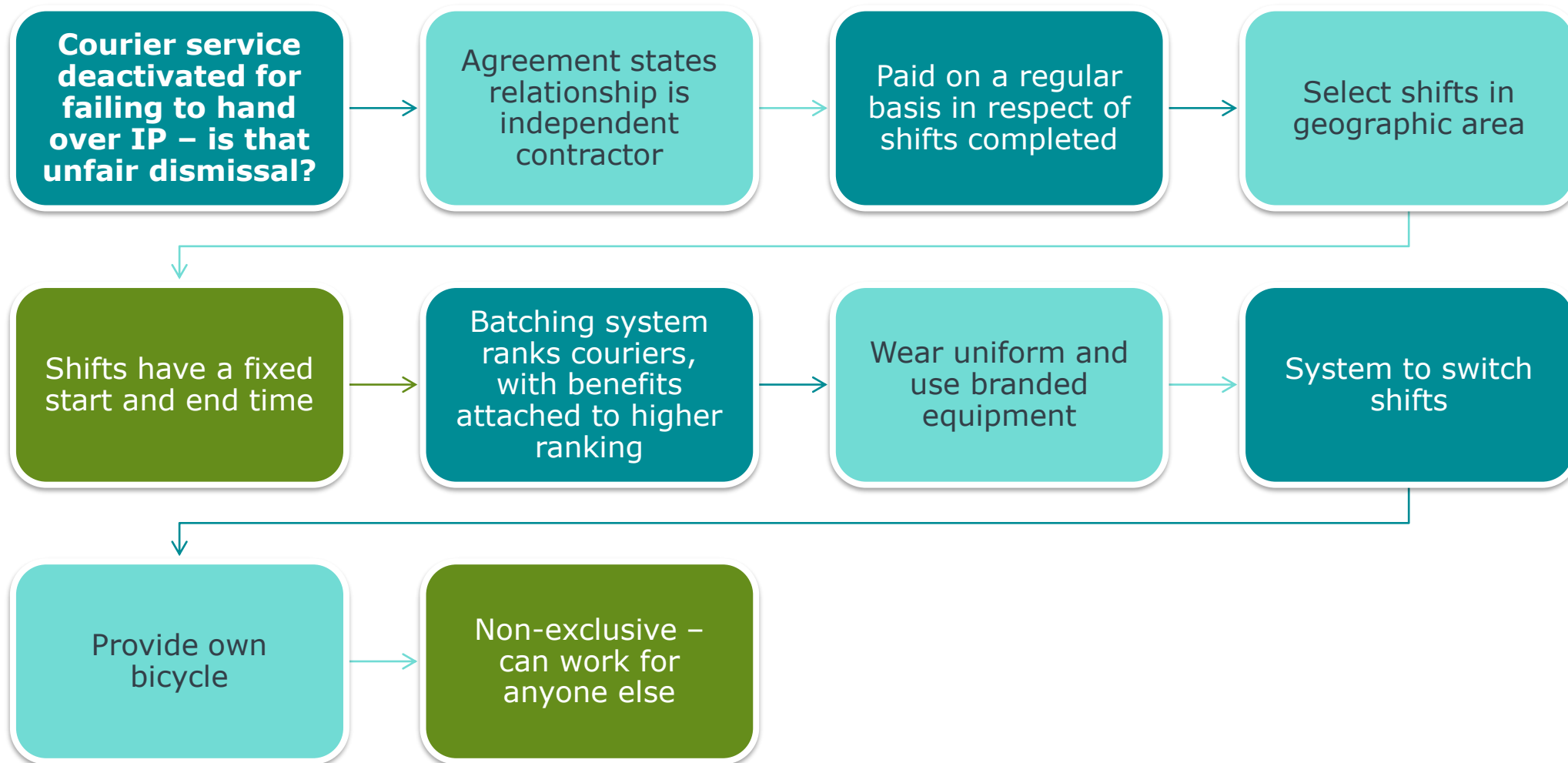
Unfair dismissal claim

- Pallage alleged he was dismissed for breaching Uber's community standards as a result of customer complaints

Conclusion

- No employment relationship between Mr Pallage and Uber
- Consistent with earlier FWC decision

A client comes to you...



*Is the worker an
employee?*

VOTE NOW



Klooger v FOODORA Australia Pty Ltd [2018] FWC 6836

FOODORA DECISION



Unfair dismissal claim

- Contract terminated after refusing to transfer ownership of intellectual property to Foodora, being the Telegram chat group

Relevant facts


- Paid hourly rate
- Logged into app, selected shifts in geographical location with start and end times
- Performed (and paid for) additional duties as "Rider Captain" including helping others arrange shift swaps
- Substitution scheme
- Batching system which ranked delivery drivers/riders, with higher ranking individuals receiving access to shifts earlier in the week
- Required to wear Foodora uniform and use Foodora branded equipment

Conclusion

- **Employment relationship existed between Mr Klooger and Foodora**

Indicia: Employee or independent contractor?

UBER AND FOODORA DECISIONS

Indicia	<i>Kaseris</i>	Uber	<i>Pallage</i>	Uber	<i>Klooger</i>	
Control	↓		↓		✓	
Capital investment	✓		✓		↓	
Delegation / subcontracting	-		x		✓	
Contract indicated independent contractor	✓		✓		✓	
Capacity to suspend/dismiss	-		✓		✓	
Mode of remuneration	-		Completion of tasks		Completion of shifts	
Separate place of work	-		-		x	
Right to work for others	✓		✓		✓	
Presentation as part of the business	x		x		✓	
Tax and Insurance	x		x		x	
Paid leave	x		-		x	
Profession, trade or distinct calling	-		-		x	
Goodwill or reputation damage	✓		-		✓	
Business expenses	-		-		-	

Fair Work Ombudsman Investigation

Finalised report in June 2019



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graph TD; A[Finalised report in June 2019] --> B[Concluded Uber and its drivers are not in an employment relationship]; B --> C[Consistent with Fair Work Commission decisions]; C --> D[Investigation only into Uber, not the gig economy];
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Concluded Uber and its drivers are not in an employment relationship

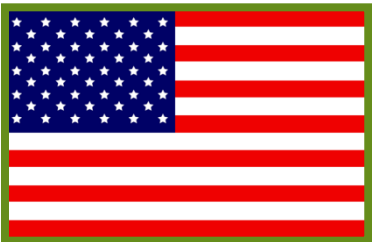
Consistent with Fair Work Commission decisions

Investigation only into Uber, not the gig economy

Uber Around the World



'Worker' relationship between Uber and its drivers



Entitled to minimum wage and workers comp. in NY,
fighting for 'employee' status in California



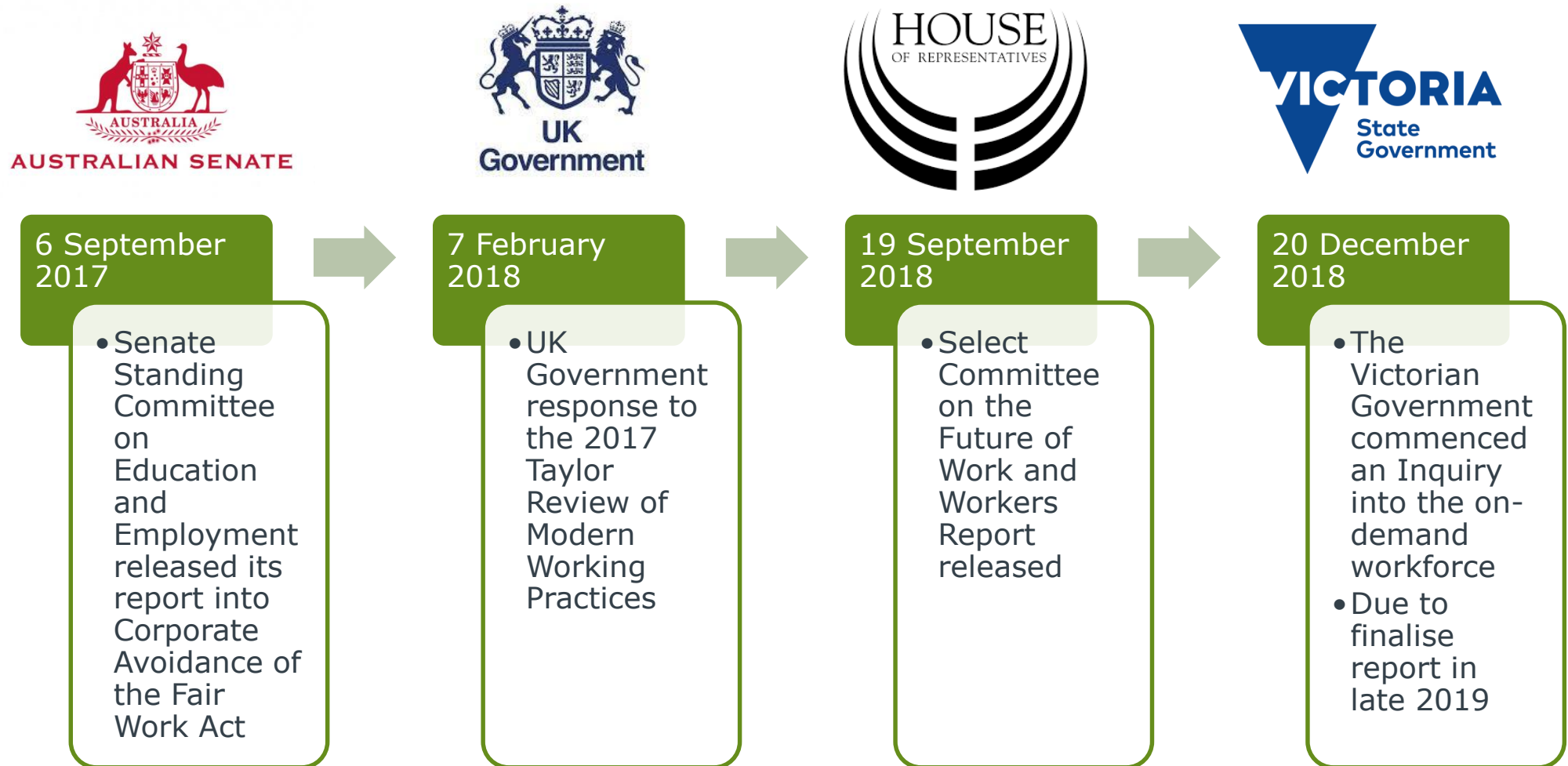
3rd way – new category of "worker"

Where to from here?

CHALLENGES AND OPPORTUNITIES
PRESENTED BY THE EMERGENCE OF
THE DIGITAL ECONOMY



Inquiries into the Future of Work



Recent developments in Queensland that may impact 'Gig Economy' workers



Qld Government's Office of Industrial Relations (OIR)

OIR Consultation on Work Comp. Expansion

- Consultation process conducted by the OIR on 'possible extension of workers' compensation coverage to certain gig economy workers'
- Finished on 5 July, a report is expected later this year
- 24 submissions in total, including from the QLS, Ola, Uber, the TWU, CCIQ and the Taxi Industry. Support for the proposal is mixed with some suggesting it is 'premature'



Parliamentary Committee for Education, Employment and Small Business

Inquiry into 'Wage Theft' in Queensland

- Parliamentary Committee made 17 recommendations following inquiry into combatting 'wage theft'
- Palaszczuk Government gave 'in-principle' support to the 6 recommendations within its jurisdiction (including criminalisation)
- The Government has yet to provide further details of when it will seek further feedback or legislate to implement the recommendations

Shift in regulation?

THE MANY POTENTIAL PATHS FORWARD

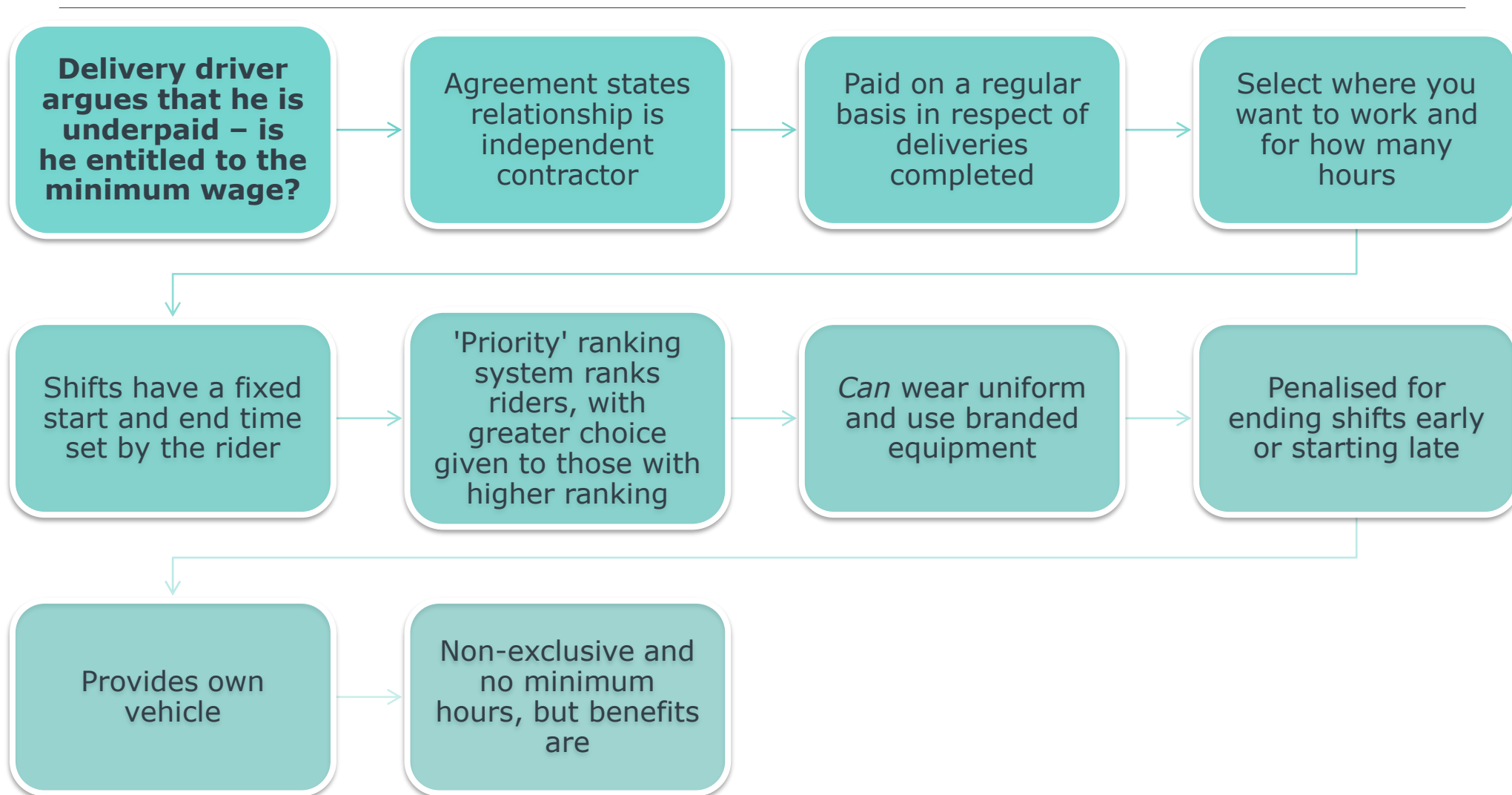
Enforce or
expand
the
current
regime?

Clarify or
expand
the
definition
of
employee?

Create a
new
category
of worker?

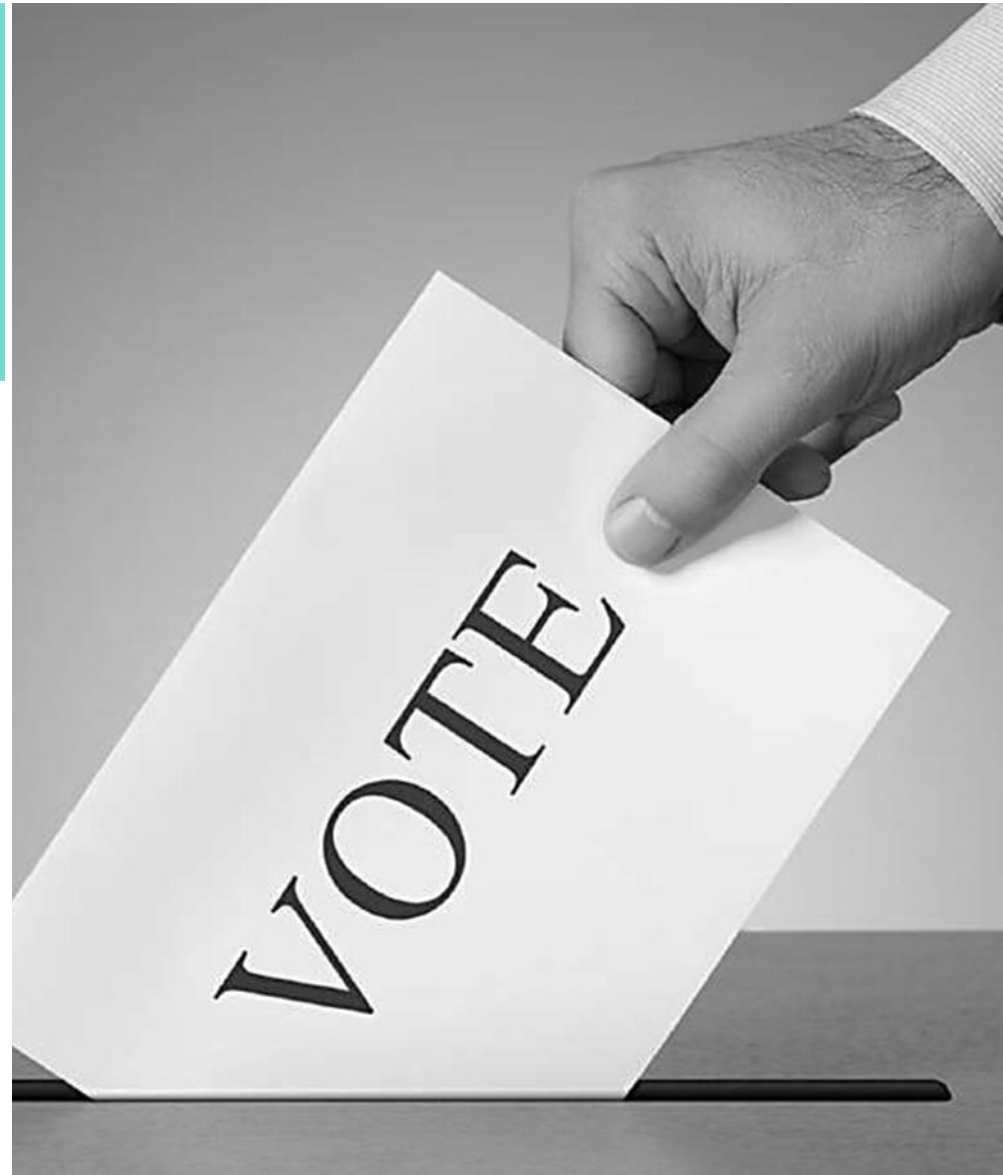
Change
the
bargaining
rules?

A client comes to you...



*Is the worker an
employee?*

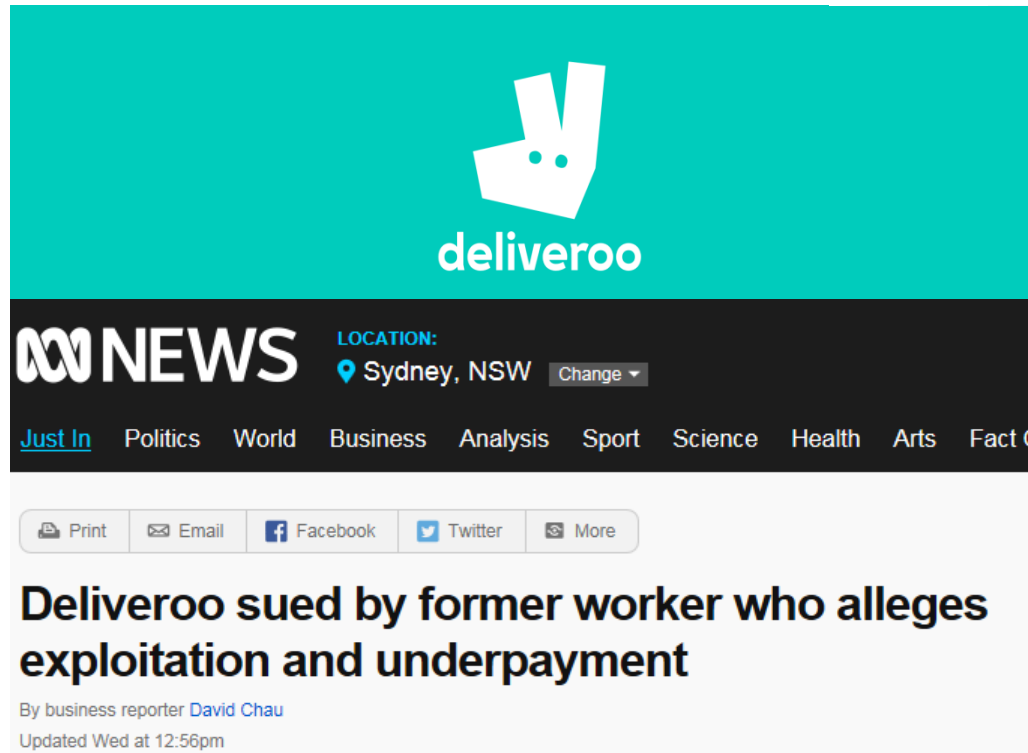
VOTE NOW



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Recent Developments

***RHIND V DELIVEROO
AUSTRALIA PTY LTD***



The screenshot shows a news article from ABC News. At the top is the Deliveroo logo on a teal background. Below it is the ABC News logo and a location selector set to 'Sydney, NSW'. A navigation bar contains links for 'Just In', 'Politics', 'World', 'Business', 'Analysis', 'Sport', 'Science', 'Health', 'Arts', and 'Fact C'. Social media sharing options for Print, Email, Facebook, Twitter, and More are visible. The headline reads 'Deliveroo sued by former worker who alleges exploitation and underpayment'. The byline is 'By business reporter David Chau' and it is dated 'Updated Wed at 12:56pm'.

deliveroo

ABC NEWS LOCATION: Sydney, NSW [Change](#)

[Just In](#) Politics World Business Analysis Sport Science Health Arts Fact C

[Print](#) [Email](#) [Facebook](#) [Twitter](#) [More](#)

Deliveroo sued by former worker who alleges exploitation and underpayment

By business reporter [David Chau](#)
Updated Wed at 12:56pm



Role of unions in the gig economy

THE NEW FRONTIER FOR UNIONISM



Ride Share Drivers United

Ride Share Drivers United



Formed January 2016



"Alt-unionism"



Change in collective bargaining rules?



Unions **NSW**

 **Airtasker**

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Trouble on the horizon or a potential new dawn?

The Sydney Morning Herald

'Flattening out': Have we hit peak Uber Eats as consumers return to restaurants?

By [Cara Waters](#)
July 12, 2019 — 12.00am



Growth in the online takeaway food sector, which is dominated by Uber Eats and Deliveroo, grew by a mere 4 per cent in May, a far cry from heady growth rates of up to 56 per cent in 2016 as more

 DOORDASH

Takeaways from today's presentation

1

- It is unlikely that there will be any significant change in approach by Australian Courts and Tribunals

2

- Possible that "employee" in the Fair Work Act might be expanded at some point in the future

3

- If an intermediate category were introduced, unclear what entitlements and protections would accrue

4

- Industry bargaining rules are not likely to change in this term of Parliament

Takeaways from today's presentation

FUTURE OF WORK



Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.

DEPUTY PRESIDENT GOSTENCNIK IN *KASERIS v RASIER PACIFIC VOF* [2017] FWC 6610 at [66]

Questions?



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