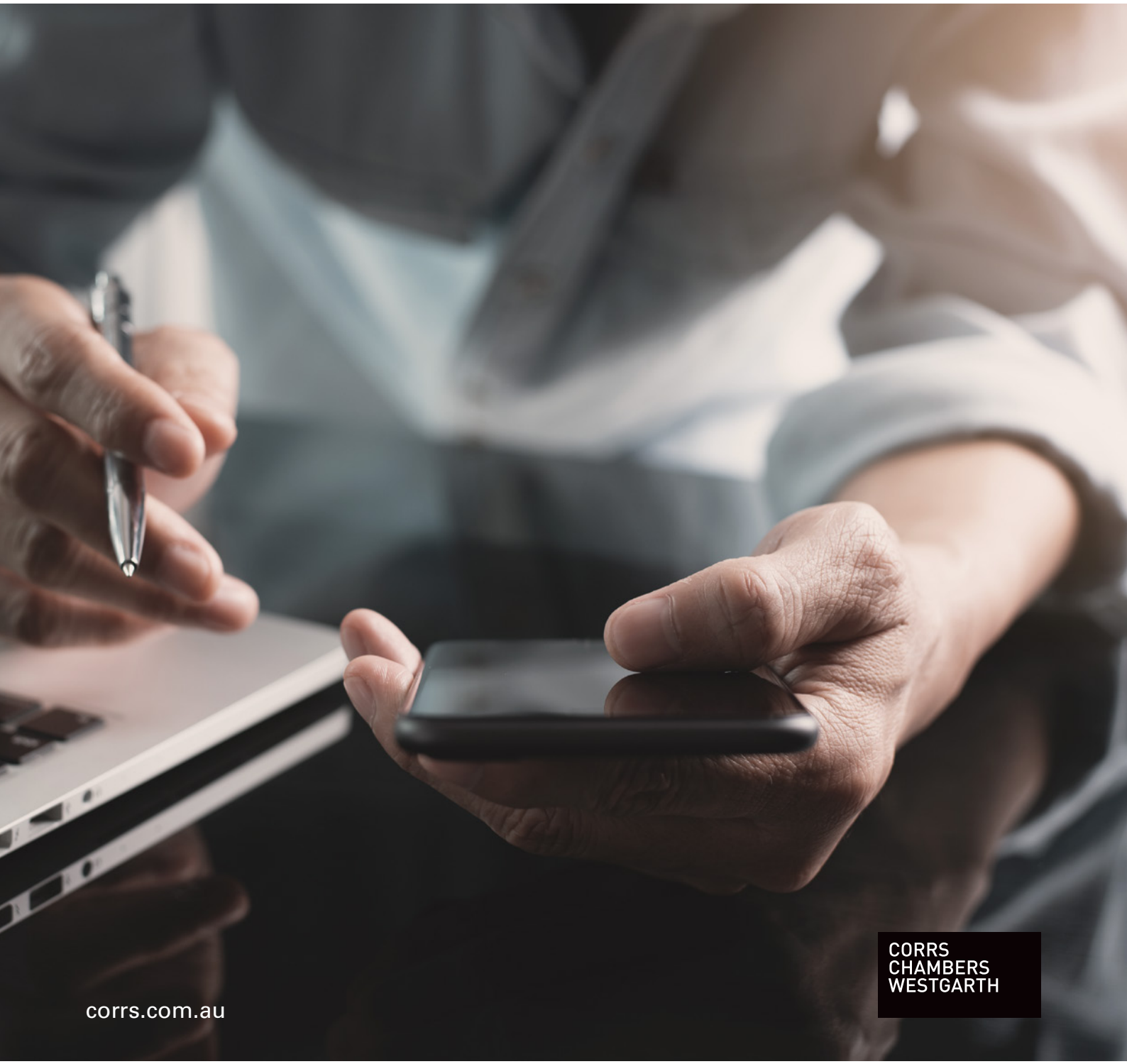
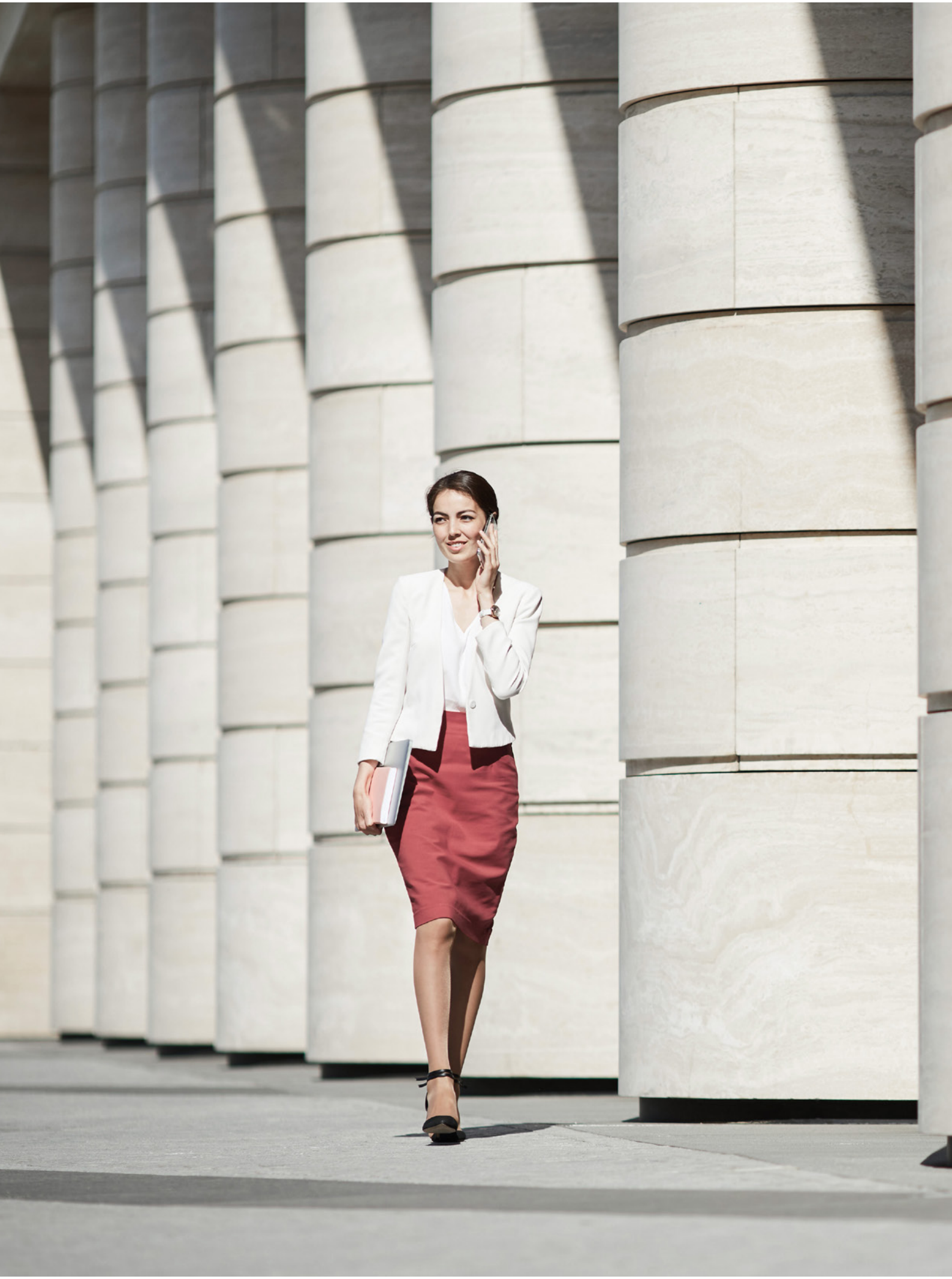
On-demand working and the changing workplace

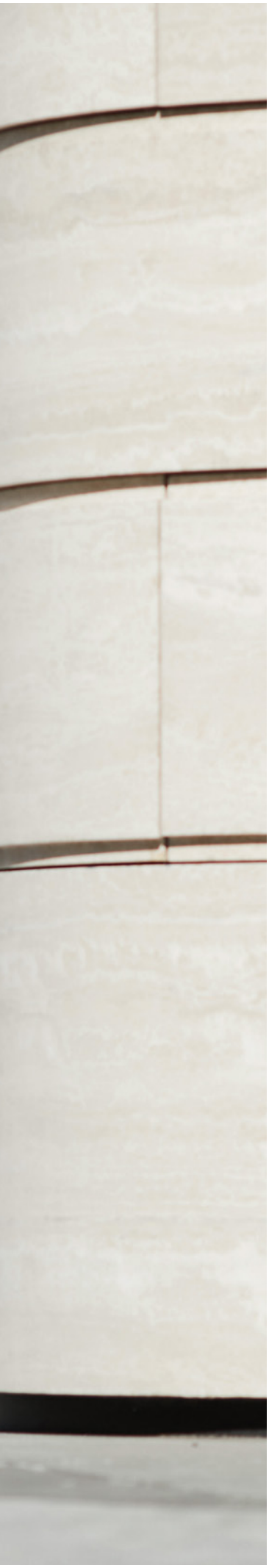
August 2020



CORRS CHAMBERS WESTGARTH

corrs.com.au





Contents

Introduction

Even before COVID-19, the work environment in Australia and elsewhere was in a state of transformation. This was driven by profound social, economic, demographic and technological changes, and posed major challenges for the traditional ways in which work is regulated, and for the institutions associated with such regulation – including legislators, courts, regulators, trade unions, employer associations and industrial tribunals. Pre-pandemic, traditional, labour-intensive industries and occupations were either shrinking or offered many fewer job opportunities than in the past. Workers could expect to change employer and, indeed career, on an increasing number of occasions over the course of their working lives.

Working patterns were undergoing fundamental change. Traditional nine-to-five work arrangements were, in what appeared to be, terminal decline. More and more women were entering the workforce, and more and more people were working from home for all or part of the time.

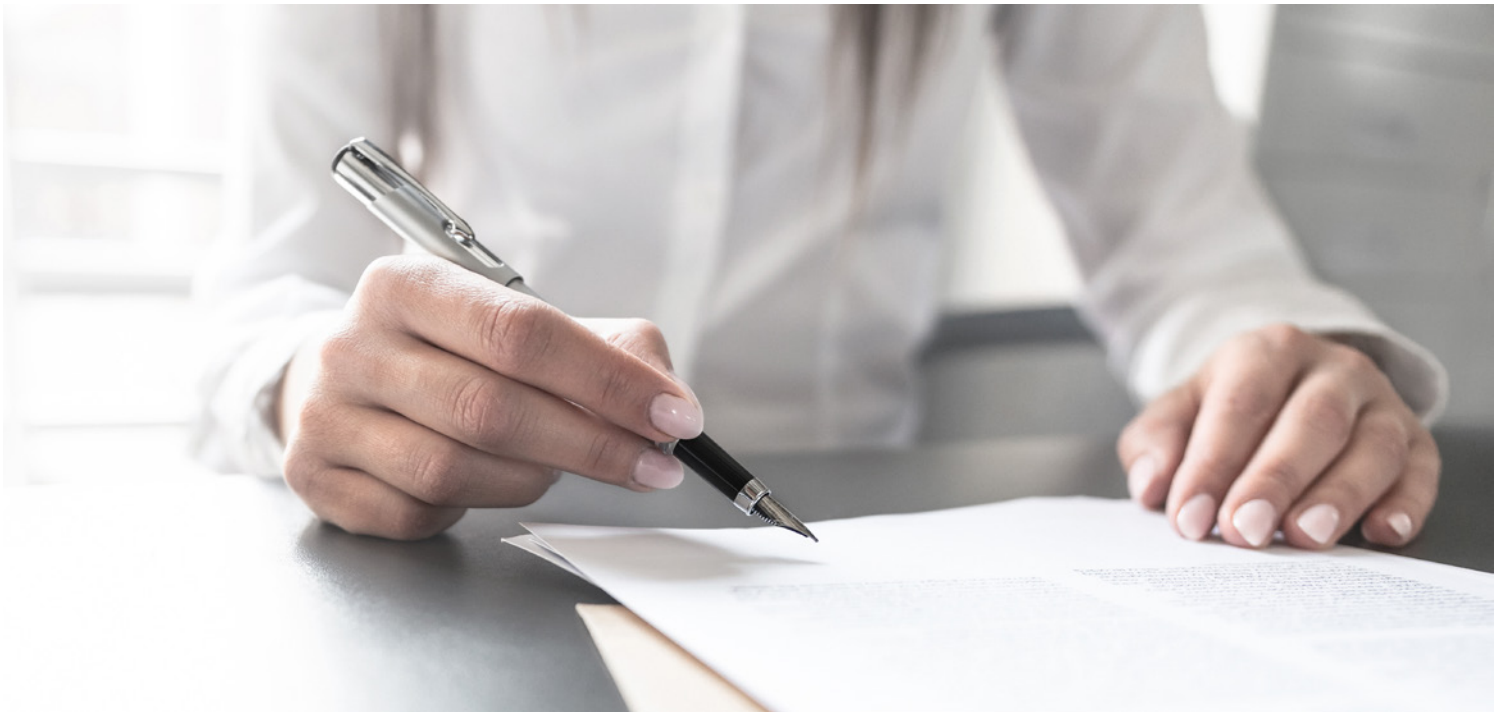
Significant numbers of workers were engaged on a casual or part-time basis – sometimes by choice, but often because continuing and/or full-time work was not available. Many individuals, from force of circumstance or choice, were in business on their own account.

Post-pandemic, the need for, and pace of, change is likely to be even greater than before.

It could not be said that any of the key stakeholders in Australia (or elsewhere) have so far coped particularly well with the challenges with which they are confronted. Indeed, in some instances they have barely recognised that the challenges exist.

Amongst the areas of greatest difficulty in this turbulent environment is the categorisation of work relationships. In particular, all participants in the labour process have persisted in attempting to accommodate to the new reality the traditional dichotomy between 'employees', who sell their labour to 'employers' by means of 'contracts of employment', and 'independent contractors' who sell their services to 'principals' on the basis of 'contracts for services'.

The distinction between the two types of arrangements has obscure historical origins and has never been clear or satisfactory. Under pressure from the kinds of changes noted earlier, it has simply proved incapable of delivering clear, efficient and equitable outcomes for either the purchasers or sellers of labour or services. Nowhere were these failings more starkly apparent than in the context of the 'on-demand' or 'gig' economy.



The nature and extent of on-demand work

One of the most recognisable groups of on-demand workers are young people who use bicycles or motorcycles (usually their own) to deliver food and/or beverages to customers who have placed orders with fast-food outlets or restaurants either by telephone or using an on-line platform.

Orders are notified to riders/drivers using platforms which are accessed by their mobile phones or other electronic devices and they are paid for the delivery via the platform-provider rather than the restaurant. They work as and when they choose, and generally have no guarantee of any minimum amount of work.

A further highly visible category of on-demand workers are car drivers who use their own vehicle to provide 'ride-share' services to members of the public who access the driver using an on-line platform. Again, the driver receives their payment via platform-provider, which deducts a portion of the 'fare' in return for permitting access to the platform.

Although food delivery and ride-share are the most readily-recognised forms of on-demand work, they are by no means the only ones. Others include: performing odd-jobs or household maintenance, translation of documents or provision of translation services, data entry, and provision of personal care services.

Characteristically, on-demand workers enjoy few, if any, of the legal protections and entitlements that are commonly available to those who are engaged under more conventional work arrangements.

A National Survey of Digital Platform Work in Australia (**National Survey**) commissioned by the Inquiry into the Victorian On-Demand Workforce (**Inquiry**) provides some interesting insights into the nature and extent of the on-demand economy in Australia:

- Out of a sample of 14,000 respondents, 7.1% were currently (in 2019) accessing work via online platforms, whilst a further 13.1% had undertaken such work at some point;
- Individuals aged between 18 and 34 years of age, students and males worked for digital platforms in higher proportions than other demographic groups. Females were half as likely as males to work for such platforms, whilst respondents in regional or remote areas were also less likely to work through platforms;
- More than 100 different platforms are being used by survey respondents to undertake digital platform work. The top three were: Airtasker (34.8%), Uber (22.7%) and Freelancer (11.8%). The majority of platform users (64.8%) accessed work using only one digital platform.
- Over a quarter (28.4%) of current platform workers stated that their main platform 'treats' them as employees. However, it is unclear what proportion of these workers believed they actually were employees.
- Nearly half of the respondents (45.5%) stated their main platform did not provide work-related insurance (e.g., work-related injuries or professional indemnity). 39.7% reported that their main platform required them to take out their own insurance.
- Respondents were commonly paid per completed task or job (59.0%), rather than for the time or hours they worked (22%). Of those who indicated their income, the average hourly rate from platform work was $32.16. By way of comparison, the minimum hourly rate under the current National Minimum Wage Order 2020 is $19.84 per hour;
- Engagement varied between a few times per week (27.5% of respondents) and less than once per month (28.3%). When undertaking digital platform work, most (55.3%) respondents worked from home.
- The strongest motivations for undertaking platform work were related to flexibility, autonomy, the ability to make extra money, and the ability to work notwithstanding health issues or disability.
- Current platform workers were least satisfied with 'earning a fair income', 'accessing work opportunities overseas', and 'the fairness of fees and costs associated with working through the platform'.

A common feature of work in the on-demand sector is that: "… many platforms have gone to significant lengths to avoid 'employment' like arrangements applying to their workers", thereby avoiding the need to "apply Australia's extensive labour regulation".[1] This reflects the fact that most such 'regulation' depends for its operation upon the existence of the relationship of employer and employee.

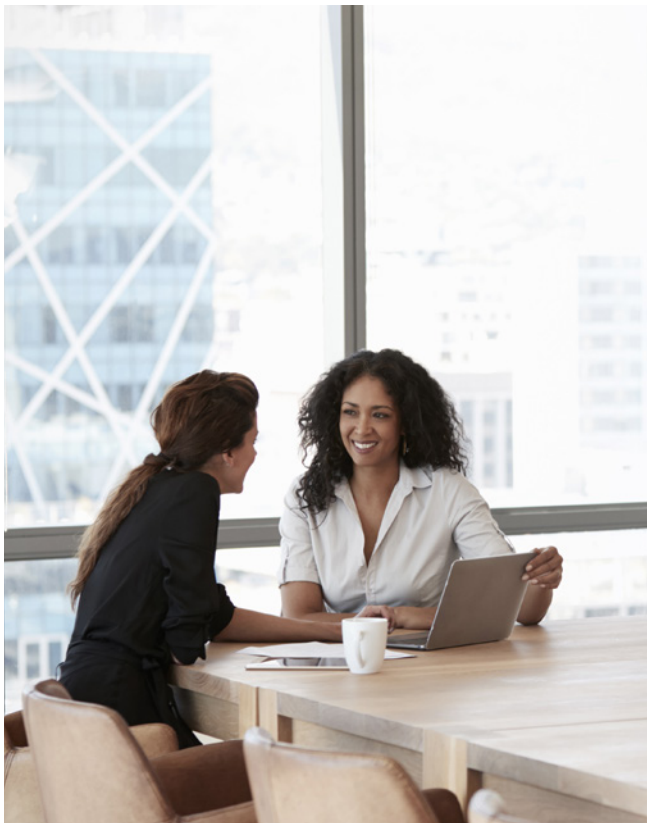
Workers who are characterised as something other than employees are not, for example, able to access the benefits of modern awards or enterprise agreements under the *Fair Work Act 2009* (**FW Act**), or the National Employment Standards (**NES**) set out in Part 2-2 of the same measure.

1 *Report of the Inquiry into the Victorian On-Demand Workforce*, Industrial Relations Victoria, 2020, 1.

Context

The Inquiry was established in October 2018 by the then-Minister for Industrial Relations in Victoria and reported in July 2020. The Inquiry was chaired by a former Fair Work Ombudsman, Ms Natalie James. Its terms of reference required it to "inquire into, consider and report" 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". In particular, it was directed to consider:

- the legal or work status of persons working for, or with, businesses using online platforms;
- the application of workplace laws and instruments to those persons, including accident compensation, payroll or similar taxes, superannuation, and health and safety laws;
- whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations; and
- the effectiveness of the enforcement of those laws.



In making recommendations, the Inquiry was required to 'have regard' to a range of matters, including:

- the capacity of existing legal and regulatory frameworks to protect the rights of vulnerable workers;
- the impact on the health and safety of third parties such as consumers and the general public, for example, road safety;
- responsibility for insurance coverage and implications for State revenue;
- the impacts of on-demand services on businesses operating in metropolitan, regional or rural settings;
- regulation in other Australian jurisdictions and in other countries, including how other jurisdictions regulate the on-demand workforce;
- Australia's obligations under international law, including International Labour Organisation Conventions;
- the limitations of Victoria's legislative powers over industrial relations and related matters and the capacity to regulate these matters; and
- the ability of any Victorian regulatory arrangements to operate effectively in the absence of a national approach.

The Inquiry received no fewer than 94 written submissions, and engaged in an extensive program of consultations.[2] Its 214 page report was made public in mid-July 2020 (**Report**).

2 The list of written submissions and consultative meetings are listed at Appendices 3 and 4 of the Report.

The Inquiry's conclusions and recommendations

Overview

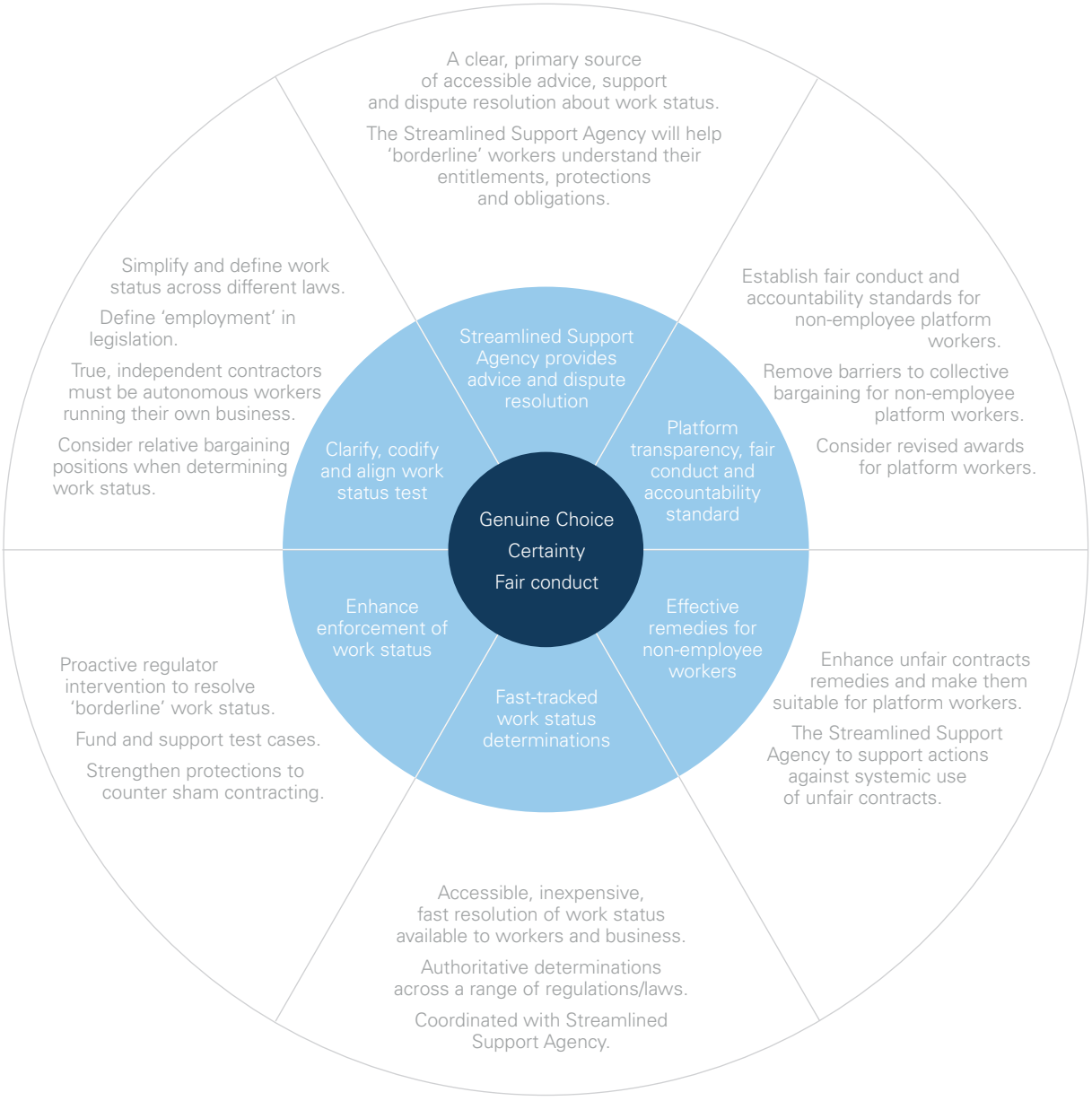
The key premise underpinning the Inquiry's recommendations was that:

> The growth of digital platforms in Australia, using models that operate outside of labour market regulation, has put the spotlight on the need to balance agility and flexibility, with protections. It has intensified the imperative to ensure our labour market regulation meets the needs of our modern ways of working. There has been little deliberate, transparent consideration of these issues by Australian governments prior to this Inquiry, and limited research in the Australian context.

The Inquiry went on to identify six reasons why action is required to revise the current system:

1. The inherent uncertainty of the work status test.
2. The fragmented and limited nature of advice and support about work status.
3. Inaccessible resolution pathways to determine work status.
4. The emergence and conduct of platforms.
5. High incidences of low-leveraged workers accessing work via platforms and working under 'borderline' work status.
6. Inadequate protections for non-employee 'small business' platform workers

These considerations led the Inquiry to make 20 recommendations for legislative and administrative change in order to address the shortcomings it had identified. These are helpfully summarised in graphic form[3] in the Report:



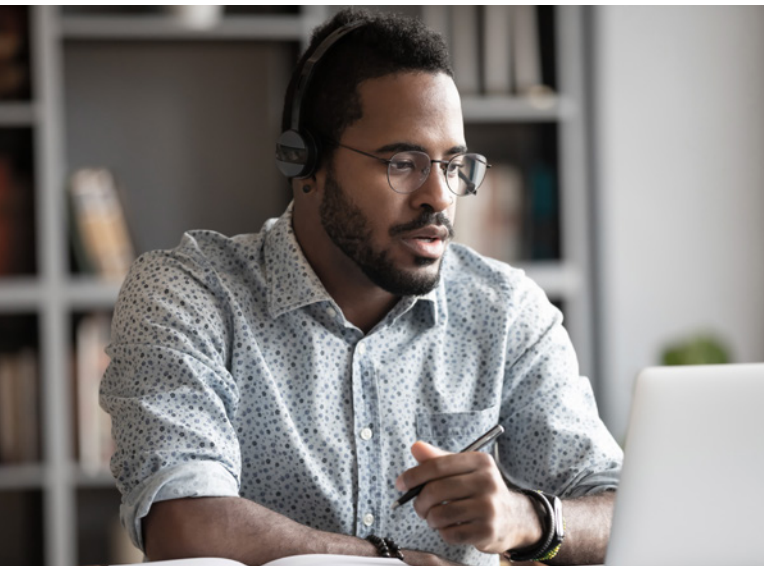
3 Report, page 184.

The Inquiry was of the clear view that the Commonwealth Government, in collaboration with State governments and other key stakeholders, should "lead the delivery of the recommendations in this report regarding the national workplace system".[4]

It did recognise, however, that the Commonwealth might not be prepared to assume this role, in which case Victoria "in consultation and collaboration with other states… should pursue administrative and legislative options to improve choice, fairness and certainty for platform workers". Such measures would need to be constitutionally available, align with the State Government's broader priorities, be "appropriate in the current regulatory landscape", and "meet the needs of the current and future workforce".[5]

For present purposes, there are six sets of recommendations that merit particular attention:

- clarification of the status of on-demand workers;
- provision of advice and support to workers and the availability of a mechanism for accessible, fast resolution of work status;
- enhanced transparency and fairness in relation to work arrangements;
- access to collective bargaining for non-employee platform workers;
- award coverage for employee platform workers; and
- enhancement and streamlining of "existing unfair contracts remedies" and sham contracting provisions.



Legal status of on-demand workers

As noted earlier, both courts and legislators have struggled for many years to adapt the traditional binary divide between employer/employee and principal/contractor to the realities of a changing world of work.

As Justice Lee recently observed in the Full Court of the Federal Court: "… it is fair to say that the evolution of this dichotomy has produced ambiguity, inconsistency and contradiction".[6]

The courts have at various times adopted a range of 'tests' to try to draw the distinction between employees and contractors. At the present time, courts generally (but not invariably) characterise work relationships by reference to a multi-factor approach which involves looking at a range of different aspects of a given work relationship, and then deciding whether 'on balance' those factors favour employee or contractor status. In Personnel Contracting, Justice Lee was sharply critical of this approach:

> "Since there is no universally accepted understanding of how many indicia, or what combination of indicia must point towards a contract of service, the balancing exercise is necessarily impressionistic. Indeed, such an approach inevitably involves what has been described as a 'smell test', or a 'level of intuition'… Plainly, such an impressionistic and amorphous exercise is susceptible to manipulation and its application is inevitably productive of inconsistency, in that courts can apply the same legal test to similar facts, but reach a different conclusion. This open-endedness has given rise to a number of what might be described as 'tensions' regarding the 'correct' application of the multi-factorial inquiry."[7]

Furthermore:

> "It may be thought that the prevalence of trilateral relationships, the evolution of digital platforms and the increasing diversity in worker relationships has evolved in a way that the traditional dichotomy may not necessarily comprehend or easily accommodate."[8]

Legislators have fared no better than the courts in this context. In some instances they adopt definitions which more or less reflect the common law categories, and then 'deem' a range of other persons to be 'employees' or 'workers' for purposes of the legislation - even though they might otherwise be regarded as independent contractors or even something else entirely.[9]

4 Recommendation 1.
5 Recommendation 2.
6 *CFMMEU v Personnel Contracting Pty Ltd* [2020] FCAFC 122 (**Personnel Contracting**), [61].
7 [2020] FCAFC 122, [74], [77].
8 [2020] FCAFC 122, [72].
9 For example, section 3 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) essentially defines a 'worker' as an employee, but then in Part 1 of Schedule 1 'deems' 19 further categories of persons to be 'workers'.

In other instances, they simply treat employees and independent contractors in the same manner.[10] On yet other occasions, they simply leave the matter to the common law. The FW Act, for example, refers to the concept of employee in its 'ordinary meaning', without providing any guidance as to what that meaning is.

The result of all this is that the same individual can be an 'employee' for purposes of one piece of legislation, and an independent contractor for another,[11] whilst also being either an employee or a contractor at common law.

The Inquiry suggests that this kind of confusion should be resolved by amending the FW Act to 'codify' work status 'on the face of the legislation'.[12] This should consist of "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."[13]

Furthermore, the Inquiry also recommended that a party that is asserting that a worker is not an employee should bear the onus of proving that that is the case, and that "the relative bargaining positions of each party are expressly considered when determining work status".

These proposals are complemented by those in Recommendation 7, which urges that governments review the approach to work status across work laws (such as the *Independent Contractors Act 1996* (Cth) (**IC Act**) and those dealing with superannuation, workplace health and safety, and tax) "with the purpose of more closely aligning them" considering:

a. the need for clarity, consistency and simplicity
b. the policy imperatives of each regulatory framework
c. appropriate coverage for low-leveraged workers
d. the need to appropriately protect platform workers.

It should be noted that the 'entrepreneurial worker' approach is not new. The question of whether a worker who is alleged to be an independent contractor can be said to be in business on her or his own account has long been a factor to be taken into account in applying the multi-factoral approach to categorisation. On several occasions in recent years the Federal Court has regarded it as the determinative factor,[14] as have courts in other common law jurisdictions.[15]

What is novel about the Inquiry's recommendation is that the test should be enshrined in legislation, and (implicitly) that it should operate to the exclusion of the other so-called tests.

There is much to be said for the entrepreneurial worker approach. In a real sense, the essence of a principal/contractor relationship is that it is a relationship between someone who is a purchaser of services and another person who is in the business of selling services. Arguably, that essentially simple concept has been obscured over the years by over-elaborate attempts to accommodate relationships that can equally credibly be characterised as one of employer/employee or of principal/contractor, and by the overlay of legislative provisions which depend for their application upon a distinction – that between employer/employee and principal/contractor - that is simply not fit–for-purpose.

On that basis, the Inquiry's recommendations on this issue have much to commend them. They do have the capacity to provide a welcome measure of clarity in a difficult and confusing area – in particular by helping ensure that legal categorisations of work relationships more closely accord with the realities of the marketplace. There is also much to be said for the proposition that there should be greater uniformity between the different purposes for which work relationships need to be categorised.

It is, however, important to keep the issue in perspective. It would be naïve to suppose that giving legislative effect to the entrepreneurial worker test would in itself resolve all difficulties that may arise in the general context of categorisation of work relationships, or even in the narrower context of on-demand working. There must inevitably be situations where it is not entirely clear whether a particular individual can properly be said to be carrying on business on their own account – for example where they provide services wholly or mainly to just one principal.

Nevertheless, even recognising its limitations, the entrepreneurial worker test does seem to provide a more rational and consistent basis for characterisation of work relationships than the indeterminate and open-ended tests that have generally been applied in Australia up to now.

10 For example, the definition of 'employee' in the *Equal Opportunity Act 2010* (Vic) provides that that term includes 'a person engaged under a contract for services.

11 For example, in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 the High Court of Australia determined that a bicycle courier was an employee for purposes of establishing that his employer was vicariously liable for his negligence in circumstances where a member of the public had suffered serious injuries in consequence of that negligence. In contrast, just a few years earlier, in *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 81 IR 150 the New South Wales Court of Appeal had determined that couriers working under the same arrangements were not employees for purposes of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

12 Recommendation 6(a).

13 Recommendation 6(b).

14 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366; *Fair Work Ombudsman v Quest South Perth Holdings Ltd* [2015] FCAFC 37.

15 In the United Kingdom, see *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173. In the United States, see *United States v Silk* 331 US 704 (1946).

Advice, support and dispute resolution

The Inquiry determined that "pathways for seeking support and advice around work status are confusing and not always accessible to low-leveraged workers." This is a particular source of difficulty where the workers concerned are from non-English-speaking backgrounds who may be seeking on-demand work only whilst they are in Australia on temporary work visas.

These concerns led the Inquiry to the conclusion that "governments can, and should, do better to streamline support and advice about work status and ensure this support is low cost and accessible to platform workers, using dispute resolution and other informal options."

The Inquiry canvased a number of ways in which these issues could best be addressed. Its preferred option was for the establishment of a properly resourced stand-alone 'Streamlined Support Agency' (**SSA**),[16] although it did recognise that an alternative approach would be to incorporate the proposed functions into those of an existing body such as the Fair Work Ombudsman or (at State level) the Wage Inspectorate Victoria or the Victorian Small Business Commissioner.

The proposed agency should be "accessible to and prioritise platform workers"; help workers understand the "entitlements, protections and obligations of their work status"; and "help resolve work status through advice and dispute resolution".[17]

The issue of 'dispute resolution' is addressed in Recommendations 10, 11 and 12. Essentially these propose that there be a 'fit-for-purpose' body to provide "a mechanism for accessible, fast resolution of work status".[18] This should be available both to workers and to businesses, and would have the capacity both to deal with individual issues and to make work status determinations of more general application (e.g. all persons engaged by a given business with a significant on-demand workforce).

Transparency and fairness

A constant theme in the Report is the need for transparency and fairness in the terms on which workers are engaged by on-demand platforms – especially where the workers concerned are non-employees.

The Inquiry's concerns in this area are reflected in Recommendation 13, which states that:

> "[P]latforms should be transparent with workers, customers and regulators about their worker contracts. Arrangements should be fair and consider the nature of the work and the workers."

This somewhat anodyne proposal is complemented by Recommendation 14, which is to the effect that governments at all levels should lead a process "to establish Fair Conduct and Accountability Standards or principles" which should "underpin arrangements established by platforms with non-employed on-demand workforces".

According to the Report, these Standards could establish principles for:

a. genuine consultation about work status and arrangements.
b. consideration of parties' relative leverage.
c. fair conditions and pay.
d. fair and transparent independent dispute resolution.
e. worker representation, including ability to seek better work arrangements.
f. safety.

This should be done through a process of consultation with relevant stakeholders but it is not envisaged that failure to adhere to the Standards or to observe the principles would have any legal consequences. A proposal with perhaps more teeth is to be found in Recommendation 15.

16 Report, para [1369].
17 Recommendations 8 and 9.
18 This could be an existing body such as the Federal Circuit Court, VCAT or the Magistrates' Court of Victoria, or a 'purpose-built body'.

Collective bargaining for non-employees

Recommendation 15 states that:

> "The Inquiry recommends Commonwealth competition laws remove barriers to collective bargaining for non-employee platform workers and ensure workers may access appropriate representation in dealing with platforms about their work arrangements."

This Recommendation reflects the Inquiry's perception that many platform workers

> "… are not well positioned to engage with platforms to resolve disputes or seek improved arrangements. The precarious nature of their arrangements inhibits their capacity, and there is nothing to compel platforms to engage on such matters. The concerns about unilateral decision making, particularly around access to the platform, are also powerful disincentives to workers advocating on their own behalf."

In principle, on-demand workers who are legally categorised as employees could negotiate with their employers for improved terms and conditions of employment, and could lawfully take industrial action in support of their claims.

As the Inquiry recognises, however, the precarious nature of on-demand work, and the transient nature of the workforce, makes it unlikely that this would happen in practice on any significant scale – but at least the possibility of collective negotiation is there, and may have practical effect in some instances, especially where the employer/platform is cooperative.[19]

Even the theoretical possibility of collective bargaining is not available to on-demand workers who are not employees. That is because "self-employed workers are 'small businesses' and as such…are inhibited in their capacity to take collective action if it is anti-competitive under Commonwealth competition laws."

It is true that under the *Competition and Consumer Act 2010* (Cth) (**CC Act**) the Australian Competition and Consumer Commission (**ACCC**) can authorise collective action by businesses that would otherwise infringe anti-competition law,[20] but in doing so the ACCC must consider whether the collective action would result in a public benefit which outweighs any detrimental anti-competitive effects.[21]

This provision is not specifically designed for workplace collective bargaining, however, and it has been pointed out that the ACCC is unlikely to authorise action that resembles traditional labour market collective bargaining.[22] Indeed, there is a kind of 'double whammy' effect in play here which derives from the fact that if on-demand working conditions were improved through collective bargaining costs of platform services would increase which is not likely to be considered a 'public benefit' under the CC Act anti-competitive framework.[23]

The ACCC is currently considering submissions on a proposed amendment to the CC Act whereby 'collective bargaining exemption notices' would allow businesses or independent contractors with a turnover of less than $10 million per annum to form collective bargaining groups in order to negotiate arrangements with customers and suppliers.

The Inquiry notes, however, that this proposed change would not remove all barriers to collective bargaining by non-employee platform workers being able meaningfully to engage in collective bargaining. For example, the proposed class exemption would not extend to conduct amounting to a collective boycott by platform workers. That means, in effect, on-demand workers could not take or threaten industrial action during bargaining. It is true that, theoretically at least, the ACCC could still separately authorise such a boycott – but it has been pointed out by two leading academic observers that this would rarely if ever happen in practice.[24]

Whilst it acknowledges these difficulties, the Inquiry offers no insights into how they might be addressed in practice. Indeed it provides no detail whatsoever as to how Recommendation 15 might be implemented. It is, therefore, hard to avoid the suspicion that this apparently quite radical recommendation is unlikely to have any significant practical impact.

19 For a practical example involving Airtasker workers in New South Wales, see Report, para [1230]. A further example is furnished by the agreement between the Transport Workers Union and the Australian operation of a large American food delivery platform (DoorDash) which provides for payment of two weeks' earnings to drivers/riders who are required to self-isolate because of Covid-19 precautions, and for a range of other Covid-related benefits – 'Food delivery platform offers self-isolation pay', *Workplace Express*, 28 July 2020. Both the DoorDash and the Airtasker agreements were concluded outside the formal framework of industrial regulation. Technically, they are almost certainly not legally enforceable, but both instances do bear out the suggestion that a form of collective bargaining is possible in the on-demand sector in appropriate circumstances.

20 CC Act section 88.

21 CC Act section 90.

22 S McCrystal, 'Collective Bargaining Beyond the Boundaries of Employment: A Comparative Analysis' (2014) 37 *Melbourne University Law Review* 664, 684.

23 Report p 173, CC Act sections 88, 93AB.

24 T Hardy & S McCrystal, *Submission on Potential ACCC Class Exemption for Collective Bargaining*, 7 – cited Report, note 1433.

Award coverage

As indicated in the previous section, collective bargaining is unlikely to be a practical proposition for on-demand employees in other than exceptional circumstances. The same is not necessarily true for coverage by modern awards.

Modern awards set out minimum employment standards for employees in the industries or occupations to which they apply, and as such they complement the minimum standards set out in the NES.

It is clear that modern awards such as the Fast Food Industry Award and the Hospitality Industry (General) Award already apply to many on-demand workers – so long as they are 'employees'. It is likely that they would apply to significantly more such workers if the definition of 'employee' were to be amended in the manner recommended by the Inquiry.

Although some modern awards apply to many on-demand workers, they do not make specific provision for them – for example they will apply to workers who can be said to be engaged as 'casuals' for purposes of the award but they do not make specific provision to adapt to the requirements of engagement through on-demand platforms. They could, however, do so if stakeholders were so-minded, and they were able to persuade the Fair Work Commission (**FWC**) to include appropriate provisions in the relevant awards.

This finds expression in the Inquiry's Recommendation 16, which contemplates that the FWC should engage with stakeholders about "the application of modern awards to platform workers" with a view to putting in place "fit-for-purpose, fair arrangements that are compatible with work enabled by technology".

Enforcement and fairness

Underpinning much of the Inquiry's analysis and recommendations is a concern that many on-demand workers are subjected to unfair treatment by those who engage them – whether as employees or independent contractors. The Inquiry does recognise that there already exist means by which such unfair treatment can be challenged but was concerned that those provisions are "unduly limited and confusing to understand and access".

In order to address these concerns, the Inquiry recommended (Recommendation 17) that governments at all levels "clarify, enhance and streamline" existing unfair contract remedies so that they:

a. are accessible to low-leveraged workers
b. enable system-wide scrutiny of platforms' arrangements
c. introduce penalties and compensation to effectively deter unfair contracts
d. allow materially similar contracts to be considered together and orders made with respect to current and future arrangements.

This is complemented by Recommendation 18, which proposes that the SSA (or its equivalent) 'be responsible for and sufficiently resourced to provide effective support to self-employed platform workers and to prioritise actions against systemic deployment of unfair contracts involving these workers.'

Meanwhile, the Inquiry also recommends (Recommendation 19) that certain of the current substantive protections against unfair treatment – especially those relating to so-called 'sham contracting' – should be strengthened, and that relevant regulators should adopt a more pro-active approach to the resolution of cases of 'borderline' work status (Recommendation 20).

The Inquiry in perspective

State/Commonwealth issues

Although the Inquiry was established and funded by the Government of Victoria, the Report exhibits clear awareness that the Inquiry's recommendations would be "most effectively led by the Commonwealth as part of national system reforms". However, even if the Commonwealth declines to take the recommended actions, "Victoria also has levers available to it".

It is true that Victoria could take both legislative and administrative action in relation to a number of the Inquiry's recommendations. Indeed, in some areas only the State has the capacity to legislate. For example in relation to harmonising definitions of 'employees' or 'workers' for purposes of OHS, workers' compensation, transport accident and payroll tax legislation.

The fact remains, however, that most of the Inquiry's key recommendations fall wholly or mainly within the legislative competence of the Commonwealth. This would encompass all recommendations that require amendment of the FW Act – including the adoption of the 'entrepreneurial worker' test in accordance with Recommendation 6. It would also include the recommended amendments to the CC Act in order to recognise the capacity of non-employees to engage in collective bargaining.

The Morrison Government has indicated an awareness of the issues which prompted the establishment of the Inquiry.[25] It has, however, given no public indication of its attitude to the recommendations set out in the Report. On the information available, it also appears that the on-demand issue is not on the agenda of any of the five Working Groups which are currently examining possible reforms to the federal workplace relations legislation.

Other approaches to regulation of on-demand working

Australia has not been alone in trying to adapt traditional legal constructs to the realities of the on-demand economy: nor is it alone in having failed effectively to do so.

Notably, the European Union in 2019 adopted a 'Directive on Transparent and Predictable Working Conditions in the European Union'.[26] This was welcomed by some observers as providing a means of protecting and promoting the rights of workers in the on-demand or gig economy. This is a misleading assessment.

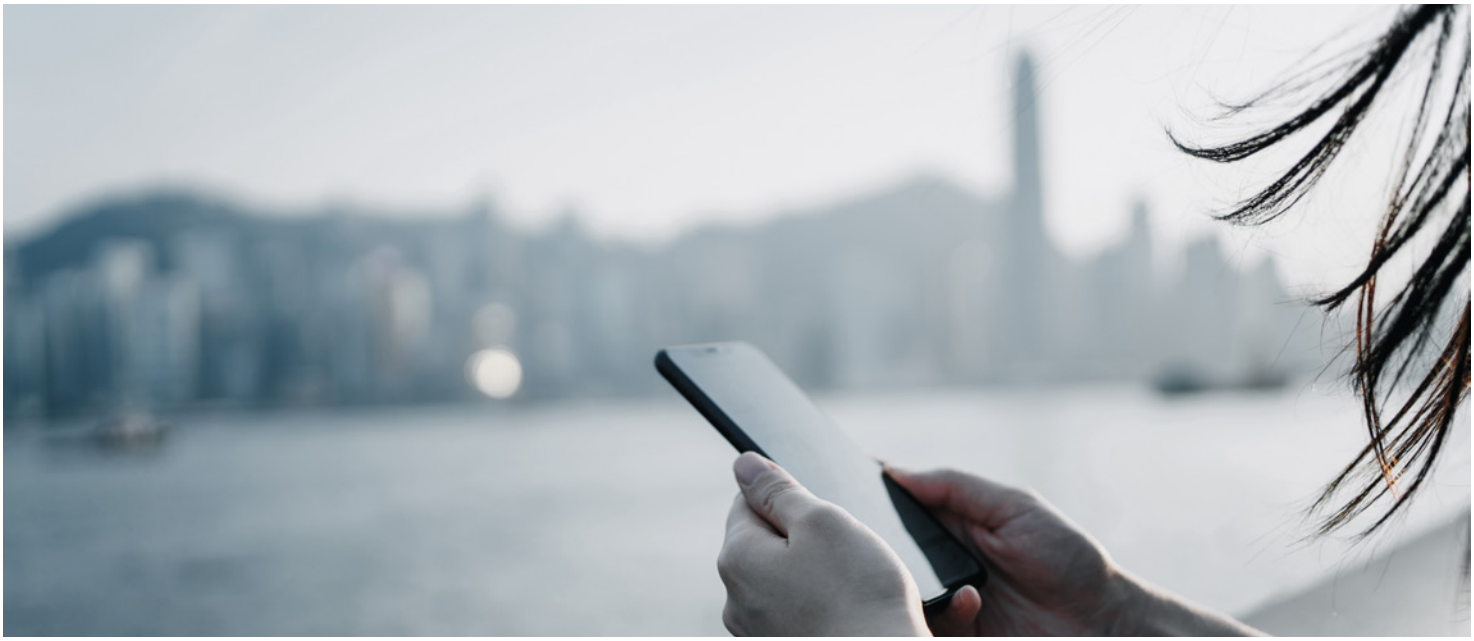
What Directive 2019/1152 actually does is require employers to provide certain basic information about their employment to all employees/workers within specified periods after the commencement of employment. It is targeted only at workers who are categorised as such under national law and practice. To the extent that workers in the on-demand economy are so-characterised, then it is of assistance to them in that it provides them with the right to receive basic information about their employment arrangements, including as to when they can be required to work, the minimum number of hours for which they must be paid, and the amount of notice with which they must be provided before commencing work.

It also provides that where national law allows for "the use of on-demand or similar employment contracts" Member States must take one or more of three measures to "prevent abusive practices":

- limitations to the use and duration of on-demand or similar employment contracts;
- a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period; and
- other equivalent measures than ensure effective prevention of abusive practices.

25 For example, in January 2020 the federal Industrial Relations Minister was reported to have said that the gig economy provided opportunities for 'freedom and innovation', but that it also presented challenges including sham contracting 'which the Government is committed to addressing' – 'Safety fears over Amazon delivery plan', *Sydney Morning Herald*, 23 January 2020. The Minister was quoted to the same effect in the context of a news report on the publication of the Report, which at that point he had 'yet to read' – 'Gig economy failing workers, avoids regulations: report', Canberra Times, 16 July 2020.

26 Directive (EU) 2019/1152.



The Directive does not, however, purport in any way to regulate or to discourage on-demand work by persons who are not employees/workers under national law.

Directive 2019/1152 is clearly a very limited measure, but it does at least constitute some recognition that there needs to be some regulation of on-demand working, and in particular that there needs to be some attempt to address some of the perceived abuses that may be attendant upon it. As such the Directive may, over time, help pave the way for more far reaching regulation of on-demand work within the EU, especially if the European Court of Justice adopts a pro-active approach to the requirements of the Directive.

At a national level a number of countries have tried, with only limited success, to regulate on-demand work. The Inquiry, for example, notes the introduction in the French legislature in 2018 of the Taché Charter in an attempt to enable platforms to establish 'social charters' defining the rights and obligations of both platforms and workers, including assurances of a 'decent wage' and of "guarantees in case of termination of contractual relations".

The Taché proposal did not become law, but it again evidences an awareness that on-demand working does raise significant legal, social and regulatory issues that need to be addressed.

Perspectives

It is important to keep the issues associated with on-demand working in perspective:

> "In general, non-standard working arrangements should not be seen as problematic per se as they grant access to the labour market for some workforce that enjoy and value flexibility. Yet workers must be subject to a certain level of employment and social protection. In other words, flexibility is not inherently at odds with labour and social law in so far as there is a social level playing field for both employers and workers."[27]

This serves as a timely reminder that not all on-demand work arrangements are 'bad'. But as the author of the analysis of EU Directive 2019/1152 observes, workers who are engaged through on-demand platforms and other forms of non-standard working arrangements must be provided with an appropriate measure of legal and social protection.

Not only is this necessary in order to protect the workers concerned against exploitation, but also to protect those stakeholders who try to do the right thing against unfair competition from others who seek to gain a competitive advantage by exploitation of what is in many instances a vulnerable workforce.

When responding to these imperatives, it is important not to over-react. In particular, it is important not to adopt solutions that are legislatively over-elaborate or put in place administrative arrangements which compromise the flexibility that is the principal attraction of on-demand work in the first place.

The recommendations set out in the Report appear to exhibit an awareness of these potential pitfalls, and to have the capacity to make a modest contribution to addressing the issues that need to be addressed.

27 Bartlomiej Bednarowicz, 'Delivering on the European pillar of social rights: the new directive on transparent and predictable working conditions in the European Union' (2019) 48(4) *Industrial Law Journal* 604, 622-23.

Contacts

John Tuck
Partner

+61 3 9672 3257
+61 434 181 323
john.tuck@corrs.com.au

Heidi Roberts
Partner

+61 3 9672 3562
+61 487 326 643
heidi.roberts@corrs.com.au

Paul Burns
Partner

+61 3 9672 3323
+61 417 325 009
paul.burns@corrs.com.au

Stephen Price
Partner

+61 2 9210 6236
+61 418 115 145
stephen.price@corrs.com.au

Nick Le Mare
Partner

+61 7 3228 9786
+61 428 556 350
nick.lemare@corrs.com.au

Nicholas Ellery
Partner

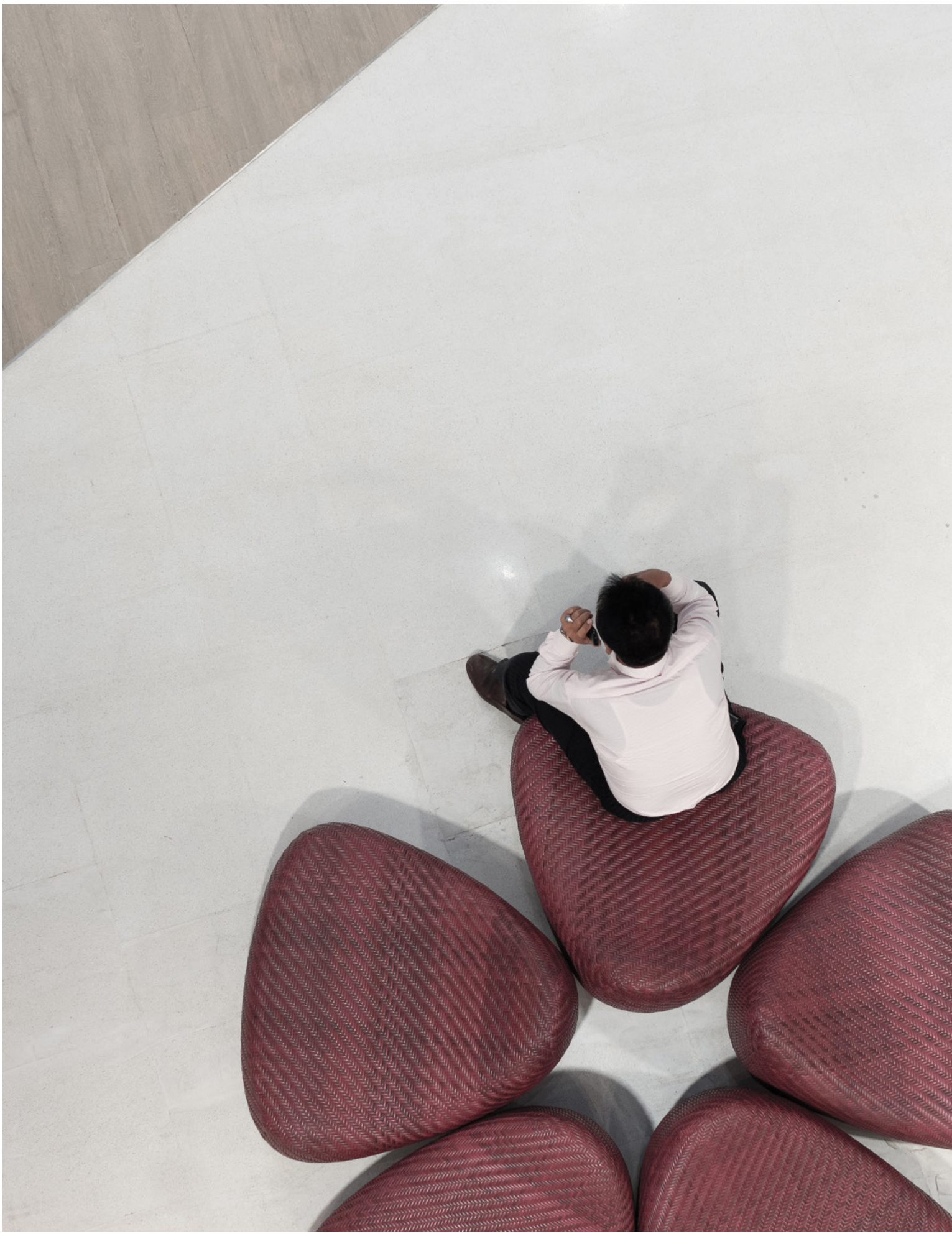
+61 8 9460 1615
+61 417 505 613
nicholas.ellery@corrs.com.au

Jack de Flamingh
Partner

+61 2 9210 6192
+61 403 222 954
jack.de.flamingh@corrs.com.au

Sarah Clarke
Partner

+61 3 9672 3388
+61 408 323 426
sarah.clarke@corrs.com.au



CORRS
CHAMBERS
WESTGARTH

Sydney
Melbourne
Brisbane
Perth
Port Moresby

corrs.com.au