

CONSUMER FIRST

Submission to the Productivity Commission's examination of whether 'direct employment' should be prescribed as the method of worker engagement in the aged care sector

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1. Background to this submission

This is a submission to the [Productivity Commission's examination of whether 'direct employment'](#) should be prescribed as the method of worker engagement in the aged care sector.

The Productivity Commission has been tasked by the Commonwealth Treasurer with this examination in response to a recommendation by the [Royal Commission into Aged Care](#). The Royal Commission recommended as follows:

“that aged care providers be required to preference direct employment”
(Recommendation 87)

This submission responds to the [Productivity Commission's Issues Paper](#) that examines matters in relation the Royal Commission's recommendation for the purposes of facilitating informed discussion and submissions.

The Productivity Commission's Issues Paper states that the study is to look at the use of indirect employment in aged care with a focus on:

- Independent contractors.
- Labour hire agencies.
- Digital platforms.

And the implications for

- Consumers.
- Aged care workers, specifically personal care workers and nurses.
- Aged care providers.

The Issues Papers states that the Royal Commission considered that “...monitoring and checking the quality of care ... is far simpler when employing staff directly” and that direct employment avoids a “fractured, disparate and ill-supported workforce”.

Part One:

Observations from/on the Productivity Commission's Issues Paper

2. No hard evidence – more of a 'feel'?

The Royal Commission's recommended preference for direct employment was not, it seems, based on hard evidence. In commenting on the Royal Commission's opposition to indirect employment the Issues Paper says:

“...there is little evidence on the prevalence and impacts of these employment arrangements [indirect employment] in aged care.” (page4)

Comment: It would seem from the Issues Paper that the recommendation for direct employment was based more on a 'feel' or a 'hunch' by the Commission rather than being fact-based.

3. Is the problem with direct employment itself?

The [Issues Paper \(pages 12-15\)](#) includes statistics on the size and type of the aged care workforce in 2020 as follows:

- 434,000 workers in total.
- 332,000 of the total workforce are in 'caring' roles (nurses, personal care workers and allied health workers). This workforce is the subject of the Productivity Commission's study.
- Almost 250,000 are personal care workers.
- In addition, there are 12,000 volunteers in residential aged care and home-based care.

Further

- 96 per cent of personal care workers (or approximately 240,000) were permanent or casual directly employed.
- Only 3 per cent of the workforce were agency/subcontractor workers.
- Only 1 per cent of nurses and personal care workers were agency/subcontractor workers.

Specifically, this 1 per cent is the focus of the Productivity Commission's study.

In other words, of a total workforce of 434,000, the concern of the Royal Commission relates to 2,400 workers (1 per cent of 240,000)—0.55 per cent of the total workforce.

[Note: This low figure does not surprise us. It is consistent with international data on the number of workers in the gig economy. For example, in the [United States only 1 per cent of all workers are in the gig economy](#). The [2020 Report of the Inquiry into the Victorian On-Demand Workforce](#) found that only 0.19 per cent of the Australian workforce use gig work for their full-time income. The clear observation to be drawn is that there's a lot of public policy 'noise' being created around a tiny percentage of the workforce.]

Comment: There are two stark observations that must arise from these raw statistics.

- *The Royal Commission's recommendation to require a preference for direct employment is illogical.* Without any evidence, the Royal Commission has made, it would seem, some sort of 'judgment call' that indirect employment is a cause of poor care. That is, that 0.55 per cent of the total workforce constitute a 'care' problem. This makes little sense. The numbers of indirectly employed workers are so small comparatively that they could not possibly be the cause of poor care across the system.

Rather, if the method of engagement of the workforce is to be the pointer to reasons for poor care, surely the clearest pointer to systemic care problems across the aged care system must lie in the direction of direct employment, given that 96 per cent of the workforce are employed directly (permanently or casually).

The Royal Commission's only apparent justification for disliking indirect employment relates to an issue of assumed 'control'. We discuss the issues around this further on.

- *Why no comment about volunteers?*
Further, based on the foregoing figures, there are five times more volunteers in the system than the indirect workers being considered in this Productivity Commission Paper. We ask, did the Royal Commission make any comment about volunteer workers? Surely if the Royal Commission has worries about a lack of 'control' with indirect employees, there should be even more concern about the lack of 'control' with volunteers who are not 'employed' in any way at all.

These initial observations force us call into question the soundness of the Royal Commission's recommendation #87. Indeed, we believe that it is the obverse of recommendation 87 that is likely to be true—namely, that it would be more logical to look for care problems across the system that emanate from direct employment, rather than indirect employment.

But we see the issue quite differently from the Royal Commission. We say that a focus on the type of employment or engagement arrangements as a source of care problems is facile. It possibly reflects, in part at least, a superficial analysis of the issues. At worst such a focus carries with it a high risk of being distracted from the real issues that lead to a worsening of care problems, rather than addressing them.

4. Low pay rates for care workers!

The Issues Paper reports that the Royal Commission identified low wages as a major factor in failing to attract and retain quality care staff, and quotes the Royal Commission saying:

“...poor working conditions such as low pay and inconsistent working hours, [are] forcing workers to hold multiple jobs.”

The Issues Paper says:

“The wages for platform workers in caring roles was at the lower end of the distribution across all occupations (ranging between \$20 and \$45 across 12 different work classifications), as is the case for the career workforce as a whole.”

That is, low wages are allegedly affecting the quality of care.

This observation makes common sense. Regardless of how a work sector is regulated, the market price paid for labour in any sector will always be a heavy determinant of both labour quality and retention rates. This same equation applies whether workers are engaged directly or indirectly. That is, whatever regulators try to enforce on a sector, people (workers) make rational choices about the pay on offer.

The evidence from the Royal Commission and the Issues Paper is that the aged care sector suffers from low pay rates for *all* workers.

4a. Comment

This being the case, it should be expected that considerations about the quality of care would, as a core function, involve an analysis of cost structures and how those structures affect the worker pay rates on offer. That is, making assumptions (we say, simplistic assumptions) about direct versus indirect employment deflects attention from considering the more substantial issue—namely, the pay rates on offer.

We are therefore surprised, even shocked, to see the following statement in the Royal Commission’s Report:

“We have heard that there has never been an assessment of how much money is required to deliver high quality care.”

[\(ACRC, Final Report, Vol 1, page 9\)](#)

This is an extraordinary admission (surely) of systemic failure across the aged care system. Any business that hopes to survive operates with sound analysis and monitoring of costs.

McDonalds, for example, would know the exact cost of delivering a hamburger into the hands of a consumer. It’s just basic business 101. That the aged care system does not know the cost of delivering high quality care points to a situation in which the system is running blind.

In a system operating on a blind financial analysis it’s no wonder that the workers delivering the front-line care are poorly paid. The financial blindness means that there is no capacity to investigate how wages can or could be increased within even current budget constraints. It most likely also points to a system operating on untested assumptions, ‘gut’ feelings and a sinkhole of guess work.

But what the Royal Commission does make clear is that for all the money being spent, the actual care delivered to the consumer (aged person) is inadequate.

As one example the Royal Commission reports that:

“People receiving the highest level of care at home, on average, get only eight hours and 45 minutes of service a week.”

[\(ACRC, Final Report, Vol 1, page 8\)](#)

If the care is inadequate, the question must be 'why'? But that question can never be answered if the system is running blind on cost analysis.

4b. 'Back of an envelope' cost calculations

For example, take a theoretical 'back of an envelope' hourly costs assessment (rounded figures used).

Our understanding is that, under the Commonwealth aged care funding scheme, the highest level of home care (level 4) has a budget allocation of around \$52,000 per person per year. That's the total amount the Commonwealth funds for an aged person who needs the highest level of care that can be provided in the person's own home. The Royal Commission identified that this provides 8 hours 45 minutes of care a week, which equates to 455 hours a year. (ACRC, Final Report, Vol 1, page 8)

Dividing \$52,000 by 455 hours means that the budget allocation is around \$114 per hour.

The Commonwealth contracts out the aged care management to 'Approved Home Care Providers'. These providers receive the \$52,000. The providers:

- Design the care package the aged person receives.
- Engage/employ the worker/s who do the actual care in the home.
- Manage the payments.
- Monitor the delivery of the care.

Providers charge (we understand) between 25 to 35 per cent of the \$52,000 (or \$114 per hour) for their services. The Issues Paper states that:

"The Aged Care Financing Authority reported that administrative costs comprised 32 per cent of home care providers' expenses."

Using the 32 per cent figure, this would be \$36.00. This is deducted from the \$114—leaving \$78 per hour available presumably to be spent directly on the care in the home.

Generally, the support worker who comes to the person's home to look after them is paid \$23 an hour (full-time) under the relevant award. Add 25 per cent for a casual rate and the worker is paid \$28.75 an hour. Add superannuation (say 10 per cent) and the total income for the worker is \$31.62.

There are also other costs the 'employer' (provider) must pay:

| | |
|-----------------------------------|--------------------|
| Worker receives | \$31.62 |
| Workers' compensation 4 per cent | \$ 1.26 |
| Payroll administration 5 per cent | <u>\$ 1.58</u> |
| Real cost per hour | \$34.46 (say \$35) |

[Notes: We understand that

- payroll tax does not normally apply because the aged care providers are frequently not-for-profit organisations and exempt from payroll tax.
- GST does not apply.
- Medicare covers all/most of 'consumables' used to care for the person in the home (for example, dressings, etc.)

Summary

| | |
|---|-----------------|
| Commonwealth funding | \$114.00 |
| Aged Care Provider Administration Fee (32 per cent) | \$ 36.00 |
| In home worker cost (approx.) | <u>\$ 35.00</u> |
| Balance | \$ 43.00 |

This is of course a ‘back of an envelope’ calculation taking the highest level of support and a lower pay rate. There would be other scenarios. On the surface, however, and to the outsider, there still seems to be \$43 per hour unaccounted for. That is, the provider receives \$114 per hour and, after known expenses, is left with \$43 per hour. What happens to that \$43 per hour?

The Royal Commission identified low pay rates as a primary (we argue *the* primary) reason for staffing shortages and difficulty with attracting and retaining high quality staff. We say this (market) reality applies whether the workers engaged are employees or independent contractors.

We note that, currently, unions are applying for a 25 per cent increase in wages for aged care workers. Based on the scenario we have calculated above, with \$43 per hour unaccounted for, there would seem to be plenty of room to increase aged care workers’ remuneration within the existing Commonwealth budget arrangements.

Our scenario is just one possible scenario. The \$43 an hour left in the hands of the providers might well be justified.

However, when we put together some core stated facts that

- The amount of care available is inadequate, (but)
- there has never been an assessment of how much money is required to deliver high quality care (according to the Royal Commission), and
- back-of-envelope cost assessments (above) could suggest that there is substantial capacity to increase care worker remuneration,

we are forced to question how the Royal Commission can come to any persuasive position on the issue of direct versus indirect employment. There is a massive hole in the information and analysis. That analysis is sorely needed.

4c. Recommendation

The Productivity Commission is a body with the knowledge, skills, and capacity to undertake such an analysis. We recommend that the Productivity Commission undertake that analysis as a key part of its consideration of direct versus indirect employment in the aged care sector.

5. How are workers ‘protected’?

The Productivity Commission wants to understand the impact of indirect employment on aged care workers. In this context the Issues Paper raises the topic of worker ‘protections’

reflecting the general assumption taken within the academic, legal and political debate that 'employed' workers are 'protected' whereas self-employed independent contractors are not. The Issues Paper says:

“...independent contractors (including those engaged through platforms) do not have the same protections that are available to employees.”

This has been a debate that has been raging ever since Engels decided to 'protect' Marx by funding Marx to write his great Manifesto (and more).

Presumably the Royal Commission's call for enforced direct employment is in part based on a view that indirectly employed workers (independent contractors, etc.) are not 'protected.' The idea of 'protection', however, needs to be considered more deeply than the prevailing academic assumptions allow.

In the Australian context the idea of worker 'protections' holds that workers' remuneration and conditions need to be regulated through a state-controlled, highly detailed, wages process conducted (currently) under the *Fair Work Act 2009*.

The Issues Paper says:

- “Independent contractors are not subject to industrial awards and must negotiate remuneration with their host organisation. They are not entitled to paid leave, superannuation or workers compensation, and these costs — as well as other risks associated with self-employment such as insecure work and income — need to be factored into their fees.”

This statement needs to be looked at more closely.

Minimum pay rates: Independent contractors are not subject to industrial awards. But the unfair contract provisions of the [Independent Contractors Act 2006](#) contain a broad provision that protects independent contractors from being paid less than employees. The Act says (see 15):

- (1) In reviewing a services contract in relation to which an application has been made under subsection 12(1), the Court may have regard to:
- (c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work;
- (Item 15 in the Act)

Further, when the regulation of employee wages is looked at through a different prism of 'protection', the regulations take on a different perspective as follows:

Permanent full-time employees have

- *Holiday 'entitlements.'* But in reality these 'entitlements' consist of wages withheld from the employee so that the 'employer' can control when the employee takes holidays. The 'entitlement' is in fact a process which facilitates management control of the worker. It's a process of tying the worker to the firm for the purposes of management convenience.

- *Sick leave 'entitlements'*. Again, in reality such 'entitlements' are wages withheld from the employee and only paid to the employee if the employee is sick. If the employee is not sick, those withheld wages can be lost to the employee.

When full-time employee 'entitlements' are added up, the withheld wages are commonly around 19 per cent of the full-time rate. This is why casual employment is so popular with so many people. Casuals normally have 25 per cent added to the full-time rate. That is, casual remuneration normally exceeds full-time remuneration.

People are not financially dumb. They know that, as a casual, they earn more than a full-time employee. But the difference between being a full-time and a casual employee is more than just the total remuneration received.

The core philosophical, managerial and industrial 'justification' underpinning this, but seldom uttered, is that employees are not capable or should not be allowed to manage their own money. It's a control mechanism but justified on the 'grounds' that 'we do it for your own good'.

Funny! Our society allows these same people to go into debt, buy houses, cars and decide how they spend their money. However, our industrial relations system denies people self-control about how and when they receive their full income. And it's called 'protection'.

Viewed from this other prism, employment is a paternalistic control mechanism of full-time employees. Casual employment is a move away from this. Self-employment (independent contracting) is a further extension of casual employment to its psychological, emotional, behavioural and managerial logical end.

Self-employment (independent contracting) is and always has been about individual workers having control of their work situation, including how they receive their income.

This then, we say, is the real issue around the Royal Commission's recommendation for preferencing direct employment. It's about who has control. We expand on this further (below).

Part Two: Workers, Consumers and Markets

6. The ‘little bit pregnant’/‘little bit employee’ independent contractor

The Issues Paper raises the concept of a ‘third’ way of classifying workers.

“In the United Kingdom, Uber drivers are now classified as ‘workers’, a distinct category separate to employees and independent contractors, which provides some protections and minimum rates of pay like those provided to employees”.

And in this context the Issues Paper refers to a [Professor Stewart](#) (in a Senate Select Committee on Job Security, 2021) proposing:

- clarifying or expanding definitions of ‘employment’ to capture the relationship between a digital intermediary and its workers;
- creating a new category of ‘independent worker’ to define new rights and protections tied explicitly to the circumstances of gig workers.

The idea of creating a third category of worker has been around since the 1960s. It was initiated by a Professor Arthurs of Canada in his 1965 thesis [The Dependent Contractor: A Study of the Legal Problems of Countervailing Power](#). Arthurs’ thesis was based on a study of self-employed fisherman working off the east coast of Canada who had only one cannery where they could effectively sell their catch. Arthurs argued that although the fisherman were operating as small business people, they were nonetheless ‘dependent’.

Arthurs’ idea of ‘dependent contractors’ has found currency, favour and promotion amongst many labour law academics and has been translated into some legislative forms globally (for example, in Quebec, Canada.) This happened in the United Kingdom from around the mid-1980s with the introduction of the [Wages Act 1986](#). More significantly for this discussion was the UK [Employment Rights Act 1996](#).

The term ‘worker’ is defined by section 230(3) of the UK [Employment Rights Act 1996](#). It creates a statutory definition of ‘workers’ that sits outside the common law. It defines this ‘other worker’ as an individual working under,

“...any other contract, ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.”

This UK-specific non-common law statute definition has remained somewhat ‘asleep’ until an ‘Uber’ decision of the London Employment Tribunal (2016) declared Uber drivers to be subject to the [Employment Rights Act](#). This was [confirmed by the UK’s highest court in February 2021](#).

The Uber decision in the UK has created a good deal of animated commentary suggesting that the definition of independent contracting has changed. In fact the Uber decision is specific to the

UK statute. It is not common law. It effectively declares that someone who is an independent contractor can also be a ‘little bit’ an employee.

We surmise that a one-line comment in the recent Australian High Court ruling ([Personnel v CFMEU Feb 2022](#)) is a reference to the UK Uber decision. The High Court said:

“In the United Kingdom, the common law distinction seems of late largely to have been abandoned.” (at paragraph 97)

And this limited statutory abandonment of common law in the UK is out of sync with international labour principles.

In 2003 the International Labour Organisation resolved the definition of ‘worker’ as follows.

The **term employee** is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship.

The **term worker** is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee.

Self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.

[Report of the Committee on the Employment Relationship](#) (page 52)

Then again, in [2006, the ILO Recommended](#) that:

“National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships...” (Page 77, Item 8)

Australia is a signatory to this ILO labour definitional settlement. It therefore has obligations arising from it with which it must comply.

In other words, like being a ‘little bit pregnant’, the ‘dependent contractor’ (or ‘little bit employee’ independent contractor) concept is *not* part of Australian law. The Australian definition of employee/independent contractor is entirely common law. This is made clear in the [Personnel High Court ruling](#) . Further, the ILO definition to which Australia has committed—that self-employment (independent contracting) is based on commercial and civil contracts—is also in accord with common law.

The Productivity Commission’s Issues Paper has raised the issue of ‘dependent’ contracting within the context of considering the Royal Commission’s recommendation to discriminate against ‘indirect’ employment—that is, against independent contracting and so on.

We say that the Productivity Commission should ignore ideas of ‘dependent’ contracting and the hyperbole created around the UK Uber decision. In Australia, a worker is either an employee or an independent contractor. There is no ‘bit’ in-between. This is cemented in Australia:

- Under common law and confirmed in 2022 by the High Court.
- Under statute with the *Independent Contractors Act*.
- Through ILO labour conventions to which Australia is a signatory.

This clarity is important in the consideration of the Royal Commission's recommendation to prescribe direct employment. Such clarity enables a more focused and more detailed discussion of the Royal Commission's recommendation.

It's about control: The Issues Paper only really identified one clear motivation by the Royal Commission for preferencing direct employment. It was this statement by the Royal Commission:

“...monitoring and checking the quality of care ... is far simpler when employing staff directly.’

It appears from the Issues Paper that the Royal Commission did not expand on this. And the Issues Paper itself seems also not to expand on this motivation. But to us, this is the core issue.

The Royal Commission's preference for direct employment is really about who controls the aged care system and how that control is exercised.

The choice between direct and indirect employment from a control perspective is as follows:

- Direct employment provides a known, institutionally well-entrenched, bureaucratically comfortable and predictable process for controlling the delivery of aged care services.
- Independent contracting, labour hire and gig platforms provide systems that are unfamiliar, seemingly confusing, not institutionally entrenched within bureaucracies and even 'scary' to the familiar ideas and practices of control.

6a. Direct employment

Direct employment offers 'control'—at least in theory—because:

- Under common law the employment contract involves the 'employer' having the 'right to control' the employee.
- The employer has vicariously liability for the actions of the employee.

These control/liability features embedded in the employment contract help create and sustain the pyramid shape of organisations. That is, at the top of the pyramid is the 'employer' who determines the activities and objectives of the organisation. The achievement of those objectives is undertaken by cascading levels of employees, where each level of employee has control of the employees on the next level down.

This employment organisational model has tremendous academic 'grunt' supporting it. In fact the 1937 thesis by Nobel prize-winner Ronald Coase [The Nature of the Firm](#) argued that this employment model had to prevail because it was the process by which transaction costs could be contained. Under this model what we can observe is that market economies consist of pyramid organisations in competition with each other to provide goods/services to consumers.

This is what we think lies behind the Royal Commission view that

“...monitoring and checking the quality of care ... is far simpler when employing staff directly.”

That is, quality care can be delivered because the employment contract (of employee control and vicarious liability) can more easily deliver care and that the care outcome can more easily be monitored than other forms of engagement. This is an understandable approach by the Royal Commission. It is an approach that is known, comfortable and entrenched within the structures, processes and traditions of the bureaucracies that are charged by Parliament to deliver aged care services.

What throws the Royal Commission’s methodological presumption into disarray is that independent contracting, labour hire and gig platforms challenge the prevailing orthodoxy of the pyramidal employment organisational form through which aged care is delivered.

6b. Independent contracting

As discussed previously, independent contracting (self-employment) in Australia does not involve the ‘right to control’ or vicarious liability. These two critical elements of employment ‘control’ are absent at law and in practice. That is the nature of independent contracting at common law and under ILO international principles.

Independent contracting instead operates under and through the commercial contract. (Referred to in Roman law jurisdictions as the ‘civil’ contract.) And in Australia, unlike the UK, there is no statutory ‘third way’ where, in effect, the commercial contract (independent contracting) has employment contract features imposed on it.

What the Royal Commission is presuming is that quality aged care delivery can only be, or should only be, delivered through the control mechanisms of the employment contract. But this is a fundamental conceptual error.

A market economy is one which operates through and with the commercial contract. There are commonly well known and institutionally entrenched processes through which control is exercised through the commercial contract. This is achieved first by parties to the contract agreeing between themselves as to the terms of the contract—which is in effect the ‘control’ the parties agree to have between them.

This first layer of commercial contract control is then layered by government regulation that in principle offers ‘protection’ for the parties. The most obvious is the operation of competition law. This seeks to ensure that consumers (and small business people) are not unfairly disadvantaged (exploited) by commercial contracts that give one party unreasonable power or control over the other party. Think, for example, of statutory requirements that stipulate contract terms for the real estate and car sales sectors. The statutes identify terms that can and cannot be included in sales contracts. Another example is the overarching unfair contract laws applying to standard form (commercial) contracts.

The point here is that independent contracting is not something strange, unknown or threatening to aged care delivery. Independent contracting is common because it involves the commercial contract.

The Commonwealth government uses commercial contracts with independent contractors on a daily and substantial scale. Think of Medicare and the arrangements with General Practitioners. GPs are independent contractors. The Commonwealth has standard form contracts that apply to each individual GP for the delivery of quality services. The GP delivers the services directly to the consumer (patient) where both the GP and the consumer agree between them what the care services are. Monitoring of quality is primarily undertaken by consumers in their exercise of choice.

Yes, fraud occurs. Some doctors (a small minority) 'over' service, falsify documents and claim what they should not claim. Some may be incompetent in the delivery of services. But even if a small few cannot be trusted, this does not mean that the health system dumps all GPs as independent contractors and 'preferences' direct employment instead.

Independent contracting is the contractual bedrock of the medical services GP system. The concepts, principles and general contractual practices of this are surely transferrable to the aged care sector. To think that they cannot be transferrable is illogical. To deny the use of independent contractors in the aged care sector is to deny the reality of how a market economy operates and is regulated.

6c. Gig platforms

Gig platforms provide services whereby they connect independent contractors directly to consumers.

The apparent controversy that gig platforms have created comes only from one sector. Gig platforms challenge the orthodoxy of the Coasean theory of the firm. In turn, gig platforms pose a threat to the theorists and regulators who manage the employment firm. But this challenge and threat, however, in fact only occurs because consumers seem to love gig platforms.

Coase argued, and it's been assumed to be true well until the end of the 20th Century, that only the employment-structured firm could manage and contain transaction costs. That is, that the control mechanisms embedded in the employment contract enabled efficiencies in the delivery of goods and services that could not be achieved through other contract models.

What has occurred in the 21st century is that technology has superseded Coase's argument. It's not that Coase was wrong. Coase observed a pre-World War II economy where commercial contracts were all paper-based and slow to put into place. Information technology, in all its forms, now enables commercial contract transactions to happen almost instantaneously.

Gig platforms:

- Enable service/goods providers (independent contractors) to advertise and offer their services/goods online.
- Enable consumers to search across (often) a vast array of offerings to choose the service/goods they want.
- Facilitate payments processes so that the financial risk to both the independent contractor (of non-payment by the consumer) and to the consumer (of non-delivery of the contracted service/good) is well managed. The financial risk is further managed (generally) through credit card payment transactions.
- Add a layer of quality control where both consumers and providers review each other in a public forum. This is a powerful form of market-based quality monitoring that bureaucratic processes of quality monitoring are probably never able to match.

By rejecting the use of gig platforms in aged care the Royal Commission is really turning its back on two things:

- The potential to maximise the aged care spend where it is needed most—that is, directly to the consumer, the aged person—thanks to the collapse of transaction costs that gig platforms offer.
- A consumer-focused care model. Gig platforms are so popular and near dominant (think of travel) because consumer satisfaction is at the core of what gig platforms deliver. If gig platforms fail on the consumer score, they die. This should be a principle and practice applicable to aged care. The consumer should be dominant because the consumer decides and has control.

And the reasoning provided by the Royal Commission for the rejection of gig platforms is scant. As we have seen, there is little or no analysis to back up the preference stated. It is a recommendation based on assumptions.

6d. Consumer-based aged care?

All health professionals want the best care for the consumers of their services (their patients). But the health sector has and is always afflicted by a dilemma.

- Patients cannot ‘know’ why they are sick. Patients only experience the symptoms.
- Health professionals, on the other hand, have ‘science’ and ‘knowledge’ about why a patient might be sick and can avail themselves of possible treatments. In truth, health professionals also know that their knowledge has limits. And health professionals do the best with the knowledge they have.

The dilemma is over who ‘controls’ the health care to the patient—the health care professional or the consumer/patient? This involves ethical and moral considerations to which the health profession has long turned its mind. The resolution is never perfect and involves delicate balances, the parameters of which change over time.

This health control dilemma slams directly into the Royal Commission’s recommendation for the aged care sector to turn it back on indirect employment. The recommendation is effectively a recommendation for the aged care bureaucracy to have control over the delivery of care to the consumers—the aged individuals needing care. This may not be the intent or motivation of the recommendation, but it is the inevitable outcome.

Bureaucracies, particularly public sector bureaucracies, are the consummate form of pyramidal employment organisations. The Coasean theory (as previously discussed) is that employment bureaucracies are the best system for managing transaction costs. This theory is now under serious challenge (also as previously discussed). But there's another aspect of the employment organisation that is relevant to the Royal Commission's recommendation. Employment organisations/bureaucracies have embedded in their structures the avoidance of transparency and accountability.

Avoiding transparency and accountability is a direct outcome of the employment contract underpinning the Coasean concept of the firm, translated into labour law and social and political expectations:

- The 'firm' is the 'employer' of the employees.
- The firm exists to interface with the market.
- The firm takes on the risks of operating in the market.
- The employment contract with cascading control and vicarious liability 'protects' the employee from the risks of the market.
- If an employee does something wrong causing the firm to suffer loss, the firm takes the loss not the employee.
- The firm manages the employee behaviour internally. Transparency and accountability for the employee is *within* the firm, not external to the firm.

In far too many instances the outcome is that when an employment organisation fails the consumer, or worse still, harms the consumer, the organisation 'closes in'. Its primary motivation becomes the protection of the organisation itself. In truth, such organisational protection is undertaken by employees within the organisation who are protecting themselves from accountability. Avoiding transparency is key to the process of avoiding accountability.

This is not to suggest intentional misbehaviour by employees (although this can and does occur). Generally, it is just humans being humans as observed throughout human history. However, in its modern form it hinges around the employment contract.

The Royal Commission's recommendation for direct employment thus amounts to advocacy for the enforcement of the aged care *employment bureaucracy* to be the dominant controller of aged care. The problem with this, however, is that when this comes up

- against the health care dilemma (discussed above) of health professionals having imperfect knowledge,

and is combined with

- the avoidance of accountability and transparency embedded in the employment bureaucracy,

the Royal Commission's recommendation shouts trouble for aged care consumers.

The 'trouble' is that, by the nature of the health system, aged care consumers are disempowered within the system and can become subject to abuse by the system. Further, that the system will do its darndest to prevent disclosure and transparency.

We do not for a moment think that this is the motivation of the Royal Commission’s recommendation. The Royal Commission, we surmise, is acting on what is historically comfortable in the way the aged care system is organised. But we do say that what we describe above is the inevitable outcome.

It does not need to be the case.

A sharp and clear comparison can be drawn with the model provided by the National Disability Insurance Scheme.

7. National Disability Insurance Scheme

The NDIS does not have historical organisational baggage. It is not seeking to provide services to disabled people through an employment-organised bureaucracy. Instead, it seeks to fund the disabled person directly and to allow the disabled person to decide what services they will buy with the money.

That is, by design, the NDIS puts the consumer, the disabled person, at the core of the system. The entire concept of the NDIS is that the consumer (the disabled person) has maximum control and choice over the services that they receive. The consumer, as is the case in the broader economy, is empowered

This is how it should be.

From anecdotal information we believe that NDIS consumers are significant users of independent contractors and gig platforms. In this submission we don’t seek to go into statistical verification of our information but recommend that the Productivity Commission do a close comparison of care worker engagement systems used by NDIS consumers with those in aged care.

The Issues Paper indicates that the Productivity Commission has already done some comparative work as we suggest. The Issues Paper says:

“Although many care platforms are NDIS-registered providers, to the Commission’s knowledge, only one (Five Good Friends) is currently an approved aged care provider.”

This is not to say that the NDIS has stepped into some sort of market-based organizational nirvana by seeking to empower the consumer (disabled people). Markets are never perfect, and it takes time, experimentation and experience to sort out how the contractual arrangements should be designed, managed and flow.

The NDIS is clearly going through a major learning process. Abuses of disabled people have occurred under the NDIS. However, what is impressive is that disabled consumers themselves are significant advocates in the analysis of problems and likely solutions. We observe an NDIS system that is subject to significant transparency and disclosure—in large part driven by the consumers themselves. This is how it should be.

As one example we find this article, [Choice and control, advocacy and relationships – keys to addressing abuse and neglect](#), by Dr George Taleporos, an NDIS consumer himself, to be impressive in its analysis.

8. Consumer power in the aged care sector

In the 'in home' aged care sector, which is the focus of this submission, the Commonwealth has contracted out the management of the delivery of care to Approved Home Care Providers. The providers are paid a lump sum to deliver the services under Commonwealth legislative and contractual arrangements.

The Commonwealth has not created its own bureaucracy to manage the services delivery. The Commonwealth has a bureaucracy to oversee the funding and (presumably) audit and monitor use of funds and service delivery.

The providers in effect operate their own private-sector (most commonly not-for-profit) bureaucracy. According to the Royal Commission, 96 per cent of the people who work in these bureaucracies and the workers who are employed by them to deliver services in the home are direct employees (permanent and casual). We do not question that the intent is to provide quality care. But the Royal Commission says the system is failing.

However, the Royal Commission says the Commonwealth should require preferencing of direct employment as part of the 'fix'. This is simply illogical. This submission has sought to demonstrate why.

Requiring or enforcing direct employment sounds far too much like applying Einstein's definition of insanity. *"Insanity is doing the same thing over and over and expecting different results."*

We say that the aged care sector should be encouraged to use and experiment with different forms of worker engagement:

- Direct employment, permanent, part time and casual.
- Indirect employment through labour hire (not discussed on this submission).
- Direct independent contracting (self-employment).
- Independent contracting (self-employment) through gig platforms.

And the choice of which engagement model used should rest firstly and primarily with the consumer, the aged person requiring the care in their home. This is the conceptual driver in the NDIS. It should be applied to aged care as well.

Our submission can be summarised quite simply.

- Put the aged care consumer first by empowering the consumer allowing them to decide what services they receive and by what method.
- That is let the (aged care consumer) market prevail.