

Submission by the Australian Nursing and Midwifery Federation

# Productivity Commission - Indirect employment in aged care

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Australian  
Nursing &  
Midwifery  
Federation



**Annie Butler**  
**Federal Secretary**

**Lori-Anne Sharp**  
**Federal Assistant Secretary**

**Australian Nursing and Midwifery Federation**  
**Level 1, 365 Queen Street, Melbourne VIC 3000**  
**E: [anmffederal@anmf.org.au](mailto:anmffederal@anmf.org.au)**  
**W: [www.anmf.org.au](http://www.anmf.org.au)**



## Introduction

1. The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 310,000 nurses, midwives and care-workers across the country.
2. Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.
3. Our strong and growing membership and integrated role as both a trade union and professional organisation provides us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.
4. Through our work with members, we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.
5. The ANMF thanks the Productivity Commission for the opportunity to provide feedback on the issues paper concerning indirect employment in aged care. The ANMF will respond to the applicable information requests throughout this submission in the order in which they appear in the paper.
6. In the course of the pandemic, there has been genuine need for surge workforce to supplement existing staffing arrangements in aged care. This has occurred when high numbers of staff have been required to self-isolate or there has been a significant outbreak of COVID-19 in a nursing, although in some instances contracted additional staff were not available to meet demand.



7. Whilst Government support to assist providers in accessing qualified staff to fill vacancies that cannot otherwise be filled for short-term COVID-19 related reasons is welcome, the ANMF holds significant concerns around the use of digital platforms and independent contractors in the aged care sector. The ANMF is concerned that the Government has moved to promote this form of insecure work as an alternative to providers engaging ongoing staff directly. It has done this, for example by investing heavily in digital platforms like Mable Pty Ltd (**Mable**).
8. The ANMF supports recommendation 87 of the Royal Commission into Aged Care Quality and Safety (**Royal Commission**), that approved providers have policies and procedures in place that preference direct employment for personal care and nursing and that additionally, where nursing and personal care is contracted to another entity, those entities also have policies and procedures in place that preference direct employment.<sup>1</sup>

**For the purposes of the study, the Commission proposes to focus primarily on the use of independent contractors (including those in labour hire agencies) and platform workers among nursing and personal care workers in residential and home-based aged care. Should labour hire agency workers who are directly employed by the agency also be a major focus of the analysis? If so, why?**

9. The ANMF contends that labour hire agency workers who are directly employed by the agency should also be a major focus of the Productivity Commission's analysis of employment models used in aged care settings.
10. The use of independent contractors in the residential aged care environment is very limited, therefore, limiting analysis to only independent contractors would be of little utility and would do little to examine the different models of employment in the aged care sector.

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<sup>1</sup> *Royal Commission into Aged Care Quality and Safety* (2021a, p. 265).



11. The ANMF considers an examination of the prevalence of permanent part-time and casual employment arrangements as relevant to any review of employment models in the aged care industry. The Department of Health's National Aged Care Workforce Census (**the Workforce Census**), undertaken in 2020, identified that providers reported that more than 90 per cent of care workers were employed part time.<sup>2</sup> Whilst not reported in the 2020 Workforce Census, it is likely that some workers combine more than one part-time job to increase their hours and income.
12. Despite the likelihood of workers holding multiple jobs, evidence suggests that there are still high levels of underemployment in aged care. About 30 per cent of residential aged care workers and 40 per cent of home care workers preferred to work more hours in 2016.<sup>3</sup> It is noted that the impact of COVID-19 on workforce supply has meant that more work is available and some providers report a shortage of available staff. The ANMF considers this should not be regarded as an ongoing trend. The impact of COVID will diminish over time and nurses drawn to work in areas such as COVID related contact tracing, testing and vaccination programs will return to the regular workforce over the coming year.
13. The ANMF submits that the high prevalence of part-time work arrangements is attributable to the perceived cost-savings these arrangements provide employers. Employers have sought to exploit provisions within the *Nurses Award 2020* which allow for the variation of part-time hours of work by agreement, at any time, to avoid paying overtime and/or ongoing full-time employment conditions, creating a 'de-facto' version of insecure work.
14. The ANMF submits that the recommendations of the Royal Commission, requiring approved providers and entities to preference direct employment for personal care and nursing, could go further to preference permanent, full-time employment arrangements where additional hours of work are available and full-time employment is the preference of the employee, particularly in a residential and community care setting. An employment model that preferences the provision of direct, full-time employment, where appropriate, would have a

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<sup>2</sup> Department of Health, *National Aged Care Workforce Census* (2021a, p12).

<sup>3</sup> Department of Health, *The Aged Care Workforce*, Mavromaras, K., Knight, G., Isherwood, L., Crettenden, A., Flavel, J., Karmel, T., Moskos, M., Smith, L., Walton, H. and Wei, Z., (2016, pp. 27, 86).



number of significant impacts on issues of concern in aged care, including continuity of care, attraction and retention of staff and better rostering and resourcing capabilities.

15. In addition, contracted part-time hours that reflect actual work done, would increase the level of secure ongoing work. Low-hour contracts remain a concern, even where current demand means that aged care workers are doing more work, it is still the case that contracts of engagement do not reflect the actual regular weekly hours of work performed. This creates both the de facto casualization of the additional hours worked and leaves workers with a lack of security with regard to obtaining loans, leases and retirement income.

**If you currently work as an agency employee, independent contractor, or platform worker, are you satisfied with your employment arrangements? Would you prefer a different employment arrangement?**

16. The ANMF did a brief survey via social media to ascertain the thoughts of agency employees, independent contractors and platform workers. There were a variety of responses to the question:

*“If you currently work as an agency employee, independent contractor, or platform worker, are you satisfied with your employment arrangements? Would you prefer a different employment arrangement?”*

17. Some workers indicated that they were satisfied with the arrangement of working as an agency nurse. The typical reason for this was that they had the choice of where and when to work, highlighting the relevance of poor rostering practices and/or the availability of flexible working arrangements with aged care providers. Responses included the following:

(a) *“I’m happy with an agency. You can work if you want the hours.”*

(b) *“I am satisfied with the hours. I like working in varied RACF (residential aged care facilities). I no longer want to work directly for one facility. I like to have the choice around my working roster.”*



(c) *“Very happy to be able to pick shifts. Not able to do that in aged care or hospitals”*

18. However, other workers were not happy with their current arrangements. Some of the answers to the question mentioned at paragraph 9 which mentioned being dissatisfied included:

(a) *“I would prefer guaranteed hrs and work for a facility”*

(b) *“I'd prefer to have a permanent job with permanent hours”*

(c) *“No. Guarantee hours and permanent times please. Last minute cancellations or last minute/on call requirements are a definite let down.”*

19. Overall, workers who completed the survey were evenly split on whether they were “satisfied” with current arrangements. This demonstrates that many workers in the sector would prefer permanent employment but cannot obtain it. One respondent said that rates of pay were the main reason for never wanting to work directly for an aged care employer stating:

*“Would never work in aged care outside of agency work. The work is too stressful and taxing to work for anything less than agency pay rates.”*

20. While some workers prefer the flexibility of agency work, it must be noted that this also reflects the lack of employee friendly flexibility offered in ongoing work. In addition, if wages and staffing levels and skills mix improve in residential aged care, more workers would be attracted to taking ongoing employment with a single provider.

21. A recent survey conducted by the ANMF of its members found that of those surveyed, 71% would consider working in aged care if at least one registered nurse was onsite at all times and 79% would consider working in aged care if there were guaranteed staffing levels and mix for every shift.



**What are the implications for aged care recipients of using agency workers, independent contractors, or platform workers to provide government-subsidised care? Who is responsible for the quality of care provided in these circumstances? Does the situation differ if the worker is engaged as an independent contractor rather than as an employee of an agency or a platform?**

22. The implications for aged care recipients of using agency workers, independent contractors, or platform workers are many and varied.
23. A significant implication is that aged care recipients are less likely to receive continuity of care.
24. Staff who are familiar with the needs of residents, especially during periods of limited access to nursing homes by families and friends, are essential to providing quality and safe care. The Royal Commission heard on multiple occasions; residents and families value staff who are familiar with their loved ones' needs and preferences for care and the evidence for the effectiveness and appropriateness of continuity of care is irrefutable.
25. Commissioner Briggs outlined the importance of continuity of care in her final report for the Royal Commission;  
*Older people get the best care from regular workers they know, who respect them and offer continuity of care as well as insights into their changing care needs and health requirements. That is why I have recommended that aged care providers preference the direct employment of workers, rather than use casuals who may be unable to provide continuity of care and form ongoing relationships with older people.*<sup>4</sup>
26. The inherent nature of the employment arrangement for an employee versus an independent contractor, also has significant implications for the ability to provide effective oversight and direction in the delivery of quality care. Employees are contractually obliged to follow lawful and reasonable directions issued by their employer in the course of their work.

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<sup>4</sup> Royal Commission into Aged Care Quality and Safety (2021, Vol 1 p42.)





This same contractual obligation does not exist for independent contractors. The Royal Commission highlighted the importance of this distinction in the context of oversight and direction regarding models of care stating:

*“Employees as opposed to independent contractors, are, by definition, required contractually to comply with any lawful and reasonable directions they are given about the performance of their work. If a provider directs an employed care worker to provide care through a relationship-based model of care, for example, the employee is required to do so. Where the care worker is engaged by an older person directly via a platform, this is necessarily more difficult, if not impossible, for the provider to control.”<sup>5</sup>*

27. The existing regulatory frameworks for approved aged care providers and their employees require compliance with Aged Care Quality Standards (**ACQS**) but there can be a lack of certainty about who bears responsibility for the quality of the service delivered by independent contractors and platform workers when they are engaged directly by the care recipient, rather than the approved provider.

28. Where an aged care recipient engages an independent contractor or platform worker they could in fact be engaging a worker in an employment relationship. There can be a lack of transparency about who ultimately bears responsibility for the quality of the service delivered by independent contractors and platform workers when they are engaged directly by the care recipient through digital platforms, rather than an approved provider. The Royal Commission specifically addressed this point in its findings:

*“Unless an older person willingly takes on the role of an employer and is fully informed about the implications, we consider it is undesirable for an older person to risk being deemed an employer because of their use of online platforms to select their own workers.”<sup>6</sup>*

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<sup>5</sup> Royal Commission into Aged Care Quality and Safety (2021, Vol 3A p.431)

<sup>6</sup> Royal Commission into Aged Care Quality and Safety (2021, Vol 3A p.432)



29. Consumer directed care is dependent on the capacity of the care recipient and or their family/informal carers, to determine how care needs are met. As the care recipient becomes more frail, and experiences greater levels of cognitive or health deterioration, determining care needs becomes more difficult for the individual. The capacity to oversee quality and the standard of care can also become an unrealistic imposition on the care recipient. Placing a care recipient in a position of an employer, has the potential to place them in a highly vulnerable position and at risk of receiving poor quality and inappropriate care. It is of course the case that many care recipients are well-placed to manage their own care provision.
30. The Royal Commission heard extensive evidence about the risks of insecure work in aged care and the implications for quality of care and difficulties in recruiting and retaining suitably qualified and experienced staff. The ANMF is extremely concerned that the promotion of short-term labour hire staffing in aged care exacerbates those risks and problems. For example, staff engaged through digital platform Mable, are treated as independent contractors and can be engaged by providers on a short-term basis. It is up to workers who register with Mable to provide details of their qualifications and appropriate checks, such as proof of registration. There is the potential for platform providers of labour to have insufficient oversight of the qualifications and suitability of workers offering services via the platform.
31. Furthermore, companies like Mable Pty assert that once an agreement is signed between client and worker the client effectively becomes the employer. This suggests it would be the responsibility of the client to periodically check the registration status of nurses employed against the AHPRA register of licensed practitioners. It would not be unreasonable to suggest that a member of the general public seeking aged and disability services in their own homes would not necessarily be aware of the need to undertake an annual check on registered nurses and enrolled nurses providing care, meaning they are vulnerable to receiving services from an unlicensed practitioner.



32. In instances of suspected malpractice or serious complaints there are requirements placed upon employers to report these instances to AHPRA. Mable Pty does not explicitly provide such direction to prospective clients in its terms. Mable Pty allows clients to self-select a worker but retain no responsibility for the quality of the worker.

*“Mable Pty is only an intermediary that facilitates the provision of selected information about Members as represented by Members. “We do not offer advice regarding the quality or suitability of any particular Member for specific treatments or health conditions, and no information on this Site should be construed as health or medical advice.”<sup>7</sup>*

33. Clients receiving aged care services in their own home through Mable Pty wishing to raise concerns are directed to the ACQSC by their website. However, being responsible only for regulating approved providers receiving commonwealth funding, the ACQSC cannot investigate Mable Pty. The ACQSC can only investigate the approved aged care provider whose only job it is to pay the invoices for the workers sourced through Mable Pty. This approved aged care provider can correctly claim that, in relation to the client’s concern, it is not in breach of aged care regulation because the contractual relationship is between the client and the Mable Pty-sourced care worker. As a result, the ACQSC is powerless to address any issues arising, because it cannot investigate the care worker or the client and vulnerable aged care recipients are left without recourse.

34. Mable Pty presides over an arrangement that legally bypasses legislated consumer protections. People requiring nursing services in the aged and disability home care sector may be extremely vulnerable, and at risk of potential abuse. To seek care services and understand the process for recourse effectively through a platform company such as Mable Pty, a client would need to have, or have access to assistance with high levels of literacy, including health literacy. The lack of a provider with direct responsibility for services provided, carries a significant risk of exposing vulnerable older people to abuse and poor and unaccountable care outcomes.

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<sup>7</sup> [Terms Of Use – Find Local Support Workers | Mable](#)



35. Responsibility for work health and safety (**WHS**) in the context of aged care, will differ according to the status of the worker.

**Who is currently accountable for lapses in work health and safety or quality of care when care is delivered by agency workers, independent contractors or platform workers?**

**Is there any evidence that the existing regulatory framework is deficient in scope, implementation or enforcement?**

36. In Victoria, under the *Occupational Health and Safety Act 2004 (OHS Act)*, a host employer is taken to be the employer of a labour hire worker in accordance with s5A of the OHS Act. This means the host owes the labour hire worker the same WHS duties as any other employee.

37. For independent contractors, the same arrangement as above would apply concerning their status. However, the individual contractor or a self-employed person can be both a worker who is owed WHS duties, and is PCBU who owes WHS duties to themselves and to other workers.<sup>8</sup>

38. Effective regulation of agency workers, including independent contractors engaged through agencies, occurs in Victoria with respect to nurses and personal carers engaged by a labour hire company. This is because such companies are regulated by the Victorian Labour Hire Authority, in accordance with the *Labour Hire Licensing Act 2018 (Vic)*. Such labour hire providers have to pass an assessment for each “relevant person” to ensure they are a “fit and proper person”.

39. Under the model Work Health and Safety Act 2011 (**WHS Act**), an agency worker who is an employee, is considered a “worker” for the purposes of the WHS Act, with similar Acts of Parliament operating in most Australian jurisdictions. The agency engaging the nurse or carer is a person conducting a business or undertaking (**PCBU**). In addition, the workplace where the nurse or carer works is a PCBU that would have obligations to that nurse or care per the WHS Act.

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<sup>8</sup> <https://www.safeworkaustralia.gov.au/media-centre/news/new-fact-sheet-whs-duties-contractual-chain>



40. For platform workers in aged care settings, there are divergent views regarding the application of model WHS laws. Safe Work NSW for example, have published materials indicating that digital platforms would be considered a PCBU. For example, in the context of food delivery drivers SafeWork NSW considers platforms to be PCBUs in the context of food delivery drivers:

*The platform is a PCBU. It oversees the technology in the app used to order and deliver the food. It markets the service to outlets and to riders who can register with the platform to deliver orders made via their app. The delivery services provided by these riders, forms part of the business or undertaking of the platform. The platform owes the section 19(1) duty to all riders that it engages, causes to be engaged, influences or directs.*

*The platform owes the section 19(2) duty to all other persons whose health and safety might be affected by the food delivery system that the platform has established (such as customers receiving the food delivery, road users, pedestrians, and members of the public).<sup>9</sup>*

41. However, in addition to considering a platform as a PCBU, with duties of care to delivery drivers and customers, the same materials consider the delivery drivers as PCBU's themselves, meaning they have a duty to ensure their own health and safety and that of those they come into contact with in the course of their work:

*In the majority of cases, the rider will be self-employed. In these cases, the rider will also be a PCBU and will have a duty to ensure, as far as is reasonably practicable, their own health and safety while at work (section 19(5)), and that the health and safety of other people is not put at risk from their activities at work (section 19(2)).<sup>10</sup>*

42. These materials demonstrate the lack of clarity that exists about the nature of WHS obligations in the context of digital platform employees and their work in most jurisdictions.

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<sup>9</sup> [https://www.safework.nsw.gov.au/\\_data/assets/pdf\\_file/0020/1004645/a-guide-to-managing-whs-in-the-food-delivery-industry.pdf](https://www.safework.nsw.gov.au/_data/assets/pdf_file/0020/1004645/a-guide-to-managing-whs-in-the-food-delivery-industry.pdf)

<sup>10</sup> Ibid.



43. Work health and safety concerns in relation to infection prevention and control have come to the fore throughout the COVID-19 pandemic. Platforms such as Mable have no obligation to ensure workers are equipped with personal protective equipment (PPE). Nor is there any responsibility to ensure client's place of residence or any other area where care is delivered is safe, and subject to infection prevention and control measures. Mable Pty terms explicitly state the responsibility for work health and safety fall to the client and worker.

*"By using the Mable Pty Site as a Customer, you agree that you will observe and comply with all regulations relating to the engagement of Support Workers, including any applicable workplace laws. For more information see <https://www.fairwork.gov.au/about-us/legislation> and <http://www.safeworkaustralia.gov.au/sites/SWA>.*

*By using the Mable Pty Site as a Support Worker, you agree that you will comply with all applicable workplace laws and any applicable occupational health and safety policies or directions given by a Customer in relation to the provision of Care Services pursuant to a Support Worker Contract.*

*Mable Pty does not involve itself in regulating or managing these issues and by using the Site you warrant that you have made yourself aware of the requirements under applicable workplace and occupational health and safety laws which may apply to the engagement between a Customer and Support Worker. The Customer warrants to the Support Worker that they have inspected their premises and that it is a safe work environment for the Support Worker to provide the Care Services requested by the Customer."<sup>11</sup>*

44. Mable Pty workers and their ability to safely deliver residential aged care have come under significant scrutiny during the pandemic. It has been widely reported that the CEO of Newmarch House, the residential aged care facility worst affected by COVID-19 in NSW, found Mable Pty workers lacking in their ability to meet the demands of complex high care residents.<sup>12</sup> This failure to meet care standards can be attributed to the fact that Mable Pty

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<sup>11</sup> [Terms Of Use – Find Local Support Workers | Mable](#)

<sup>12</sup> [Newmarch House: confusion over who was in charge during Covid-19 outbreak worsened outcome | Aged care | The Guardian](#)



is unable to afford workers and care recipients the same level of protections as approved aged care providers, who directly employ nurses and are regulated by the Aged Care Quality and Safety Commission (ACQSC). Such protections include access to training, PPE and professional development. The very nature of digital platform work in nursing/personal care results in situations where workers are more likely to be visiting more than one client and have more than one form of employment. Given concerns raised during COVID-19 regarding spread of infection by workers employed across multiple-sites this is a potential risk. However, unlike approved aged care providers Mable Pty states they are not responsible for delivery of care, and by default, scheduling of work or tracking the movements of workers.

45. In June 2021, the Victorian Department of Premier and Cabinet engaged a research team from Queensland University of Technology to conduct a review of Australian and international evidence of the gendered dimensions of digital platform work. The report explored the impacts on health, safety and wellbeing of workers on digital platforms and found that the lack of and/or uncertainty of regulation characterising platform work exposes workers to risks not typically experienced by employees or agency contractors. Workers undertaking platform-mediated care work often lacked sufficient information about either the client or the task, prior to commencing a job, exposing the worker to increased risk of exposure to potentially hazardous situations and environments.<sup>13</sup>
46. Carers engaged through digital platforms were interviewed as part of the review and were asked about how they protected their own safety when going to a job or when meeting a potential client for the first time. The carers interviewed described how they would choose to meet clients first in a public place (such as a café) and when they began work they would advise a family member of the location of the job. In most cases, carers would rely on their own intuition or “gut feeling” to judge whether a situation was safe. As one carer put it:

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<sup>13</sup> *Gendered Dimensions of Platform Work; Review of Literature and Findings*, 2021, Queensland University of Technology, p27.



*“You just have to be really careful sometimes and just go with your gut feelings, especially when you’re a woman. You just have to be very careful with what you choose to do, and where you choose to spend your time.”*

47. Carers also described situations where they felt that their physical safety was at risk and the situations occurred after they were employed by a family. Those carers described the handling of those situations and matters of physical safety as; *“between me and the client basically”*.<sup>14</sup>

48. These safety and wellbeing issues cannot be underestimated, especially given that research indicates that women are considerably more likely than men to be undertaking platform mediated care work in clients’ homes creating a gendered health and safety issue.<sup>15</sup>

**What are the pros and cons of agency workers, independent contractors and platform workers in aged care for aged care workers (in terms of employment conditions and worker preferences)?**

49. The use of independent contractors and platform workers has significant implications for the employment conditions of workers.

50. Workers engaged as independent contractors through agency or platform work, are not eligible for a number of entitlements they would otherwise be entitled to if they were employed full time, part time or on a casual basis. Some of these rights can include, but are not limited to, paid annual/personal/carers/long service leave, rest periods and on-call allowances. Additionally, being effectively self-employed, workers also lose the ability to collectively bargain for improved terms and conditions of employment. This means they are more at risk of exploitation, insecure work, and financial hardship. These factors can result in

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

<sup>15</sup> *Ibid* at p28.





workers working multiple jobs leading to tiredness and errors in judgement. This not only leaves nurses professionally compromised but is wholly undesirable in the care industry given the vulnerability of people likely to use care platforms. In addition, this form of engagement creates greater risk of underpayment, wage theft and often fails to provide payment for work performed outside the direct care time – for instance, driving between engagements and completing administration.

51. The *Nurses Award (2020)* provides that nurses who do home care work are not paid for the travel time to their first client or from their last client to home. However, they are paid for all travel time between clients as per their hourly rate including any applicable penalties. If they are using their own car, they are also paid a flat rate per kilometre.
52. Personal Care Workers (PCW's) covered by the Social, Community, Home Care and Disability Services Award (SCHADS Award) do not receive any payment for travel time. However from 1 July 2022, the SCHADS Award will contain new rules about minimum payment periods for part-time employees. These will stipulate that for each shift or period of work in a broken shift, part-time employees must be paid 3 hours for social and community services employees (except when undertaking disability services work) and 2 hours for all other employees. These changes will also apply to casual employees, which means that home care employees will be subject to a minimum payment period of 2 hours (currently the requirement is 1 hour).
53. Self-employed workers on the other hand, shoulder additional costs such as transport, travel time, insurances, superannuation, and protective clothing. There are not requirements around minimum engagement, creating uncertainty around their pattern of hours and unpaid travel time between clients.
54. As outlined in this submission, self-employed workers are rarely supported with organisational infrastructure and resources to minimise their health and safety risks, and as independent contractors, are frequently responsible for sourcing and purchasing their own personal protective equipment (PPE).
55. The gendered implications of the use digital platforms, agency work and independent



contractors cannot be understated.

56. About 86 per cent of care workers (allied health, nurses and personal care workers) in residential care in 2020 were female with a similar proportion in home-based care.<sup>16</sup>
57. The typical response given by aged care nurses, regarding the most attractive parts of agency and digital platform work (see paragraph 17 of this submission) is the perceived flexibility of hours and times that can be worked. This is said to counter the lack of flexibility in many traditional workplaces, allowing for greater control over paid working hours, enabling prioritisation of caring responsibilities compared to other work. However, at the same time as facilitating access to work for women with significant caring responsibilities, this type of 'flexibility' also blurs the lines between markets, work, and domestic spheres reinforcing the social role of women as primary caregivers.<sup>17</sup>
58. Workers needing to juggle carer responsibilities and paid work can be also be actively disadvantaged in that platform work structures and algorithms reward the most responsive/quickest workers and those who can accommodate higher volumes of work. Indeed, it is argued that the need to be constantly available and responsive discriminates against those seeking to simultaneously undertake online work and fulfil caring obligations.<sup>18</sup>
59. The ANMF asserts that flexibility required in the context of carer responsibilities should not require a trade-off of employment conditions. The existence of flexible working arrangements under the NES<sup>19</sup> and enshrined in some enterprise agreements, provides a mechanism whereby flexibility can be achieved in a direct employment relationship, preventing the loss of important worker entitlements.
60. Indirect employment relationships also have implications for professional requirements of nurses. Ongoing professional requirements to practice dictate that registered nurses and enrolled nurses must undertake 20 hours of continuous professional development relevant

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<sup>16</sup> *Department of Health, National Aged Care Workforce Census* (2021a, p15).

<sup>17</sup> 'Sharing Sexism', K.T Bartlett, *Fordham Urban Law Journal*, 43(4) (2016) , pp .1163–1173 .

<sup>18</sup> 'Gender inequalities in the new world of work' Piasna, A. & Drahokoupil, J . *Transfer* 23(3) (2017), p328.

<sup>19</sup> *Fair Work Act* (2009) Cth s.65.



to their practice annually. The costs associated with this are covered in most healthcare settings through the provision of on-site education even for casual workers. Whilst digital platforms benefit from being able to connect clients to nursing services, they do not bear any costs associated with undertaking professional development activities necessary for registered nurses and enrolled nurses to maintain their professional status. This represents another financial burden, typically monitored and shouldered by an employer in a direct employment relationship.

61. Another benefit of direct employment is access to training, professional development, mentoring and supervision for both nurses and care workers.
62. Professional standards for practice, require that enrolled nurses must provide care with supervision of a registered nurse. In circumstances where digital platforms offer home care, often by a single worker, it is unclear how an enrolled nurse could operate safely within this framework. These potentially problematic professional dilemmas fall to the workers themselves to resolve. Digital platforms like Mable Pty for example, do not facilitate solutions to enable enrolled nurses to practice safely, and within their scope of practice. It could be argued that a company benefitting through its relationship, either formally or informally with registered nurses and enrolled nurses, should be accountable in some way for ensuring it does not professionally compromise them.

**How could providers give effect to such a requirement to preference direct employment models in practice?**

63. Providers could give effect to a requirement to preference direct models of employment in aged care settings by including this requirement included as part of the Aged Care Quality Standards. As recommended by Commissioner Briggs in the Royal Commission, quality reviews conducted by the Quality Regulator could assess compliance with policies and procedures preferencing direct employment and record the extent of use of independent contractors.



If the use of agency workers, independent contractors and platform workers in aged care was restricted, could they be readily and effectively replaced by workers engaged as employees of aged care providers?

Are there any preconditions in personal care and nursing workforce supply that would be required prior to any potential policies and procedures to preference the use of direct employment?

64. If the use of agency workers, independent contractors and platform workers in aged care was restricted, aged care workers currently working as agency workers, independent contractors and platform workers could be engaged as employees of aged care, resulting in no real net change to the number of available care workers.

65. The biggest precondition in terms of creating a sustainable workforce supply in nursing and personal care would be addressing issues of work value and staffing levels in the sector. Wages for these workers need to increase to be close to those of their colleagues in public and private hospitals. As the Royal Commission found:

*Gratitude must mean something in real terms. It must mean that the work of caring for older people is valued.*

*This will require strategic leadership by the Australian Government on aged care workforce planning. It will require collaboration between employee representatives, sector and the Australian Government to improve pay.<sup>20</sup>*

66. To that end, the ANMF, Health Services Union and United Workers Union are currently conducting the 'Work value case - Aged care industry'<sup>21</sup> (**Work Value case**) in the Fair Work Commission (**FWC**).

<sup>20</sup> [https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a\\_0.pdf](https://agedcare.royalcommission.gov.au/sites/default/files/2021-03/final-report-volume-3a_0.pdf) p.437

<sup>21</sup> <https://www.fwc.gov.au/hearings-decisions/major-cases/work-value-case-aged-care-industry>



67. Despite the clear findings of the Royal Commission, the Australian Government has done nothing of substance to address the issues surrounding undervaluation of aged care work. The government has failed to actively participate in proceedings relating to the Work Value case, despite being given the opportunity to do so. It has also failed to commit to funding any increase ordered by the FWC as a product of the Work Value case.<sup>22</sup>
68. As outlined in ANMF surveys, referred to in this submission, nurses and carers state they will be more willing to work in aged care if staffing ratios and skills mix improve. Monitoring staffing ratios and skills mix is best achieved and monitored in the context of direct employment relationships. The guarantee that an approved aged care provider can access a suitably sized, permanent workforce with an appropriate skills mix to deliver an appropriate number of care minutes benefits both workers and the quality and safety of the care provided.

**Would it be appropriate to regulate indirect employment in aged care using industry-specific regulation visà-vis economy-wide regulation?**

69. As outlined in this submission, at present operators such as Mable operate outside the normal protections offered by aged and disability care legislation and are outside the reach of the ACQSC. There is also significant conjecture over the WHS requirements owed by agencies and digital platforms to aged care recipients and aged care workers.
70. The ANMF asserts that any agency or digital platform offering aged care services should be covered by the same standards pertaining to qualifications, WHS, training and regulation that apply to direct employment relationships and other aged care providers. Indirect employment models should not be seen as a means through which to escape the purview of regulatory systems and standards. Safe, quality care will only be achieved with industry-

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<sup>22</sup> Aged care bodies and unions demand Coalition match Labor's pledge to fund potential wage rises *The Guardian*, 4 April 2022 <<https://www.theguardian.com/australia-news/2022/apr/04/aged-care-bodies-and-unions-demand-coalition-match-labors-pledge-to-fund-potential-wage-rises>>



specific regulation that extends to all forms of employment.



## Summary

71. The ANMF acknowledges that in the course of the pandemic, there has been genuine need for surge workforce to supplement existing staffing arrangements in aged care. Whilst Government support to assist providers in accessing qualified staff to fill vacancies that cannot otherwise be filled for short-term COVID-19 related reasons is welcome, the ANMF holds significant concerns around the use of digital platforms and independent contractors as a means to achieve this goal. The ANMF is concerned that the Government has moved to promote this form of insecure work as an alternative to providers engaging ongoing staff directly.
72. The use of agency workers, digital platforms and independent contractors have significant implications for the quality of care delivered to aged care recipients. The existing regulatory frameworks for approved aged care providers and their employees require compliance with Aged Care Quality Standards (**ACQS**) but there can be a lack of certainty about who bears responsibility for the quality of the service delivered by independent contractors and platform workers when they are engaged directly by the care recipient, rather than the approved provider. It may also be appropriate to strengthen consumer protection legislation to provide greater protection for consumers who access care services via platforms or independent contractors.
73. The same can be said in the context of work health and safety obligations with a lack of clarity and delineation around the duties of a worker engaged through a digital platform, leaving aged care recipients vulnerable and aged care workers charged with sole responsibility for their own health and safety and that of their client, with no support or health and safety infrastructure from the platform itself.
74. Whilst some aged care nurses indicate they are attracted to the flexibility of agency and digital platform work, so as to facilitate their own caring responsibilities among other factors, this can have negative ramifications for the worker in an employment context. The existence of flexible working arrangements under the NES<sup>23</sup> and enshrined in some enterprise

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<sup>23</sup> *Fair Work Act* (2009) Cth s.65.



agreements, provides a mechanism whereby flexibility and can be achieved in a direct employment relationship, preventing the loss of important worker entitlements such as leave, superannuation and work health and safety infrastructure.

75. Giving effect to a requirement to preference direct models of employment in aged care settings could be easily achieved by including this requirement as part of the Aged Care Quality Standards, with an assessment of compliance with relevant policies and procedures forming part of quality reviews conducted by the Quality Regulator.
76. For the reasons outlined in this submission the ANMF supports recommendation 87 of the Royal Commission into Aged Care Quality and Safety (**Royal Commission**), that approved providers have policies and procedures in place that preference direct employment for personal care and nursing and that additionally, where nursing and personal care is contracted to another entity, those entities also have policies and procedures in place that preference direct employment.<sup>24</sup>

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<sup>24</sup> *Royal Commission into Aged Care Quality and Safety* (2021a, p. 265).