Business Council of Australia

SUBMISSION

Submission - Victorian Inquiry Into the On-Demand Workforce

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OVERVIEW

This is the Business Council of Australia's submission to the consultation process of the Victorian Government following the release in June 2020 of the report of its Inquiry Into the Victorian On-Demand Workforce (**the Inquiry**).

Whilst the on-demand workforce covers a wide range of work practices, the Inquiry report notes that *"platform work is the key emergent labour market issue that was the focus of this inquiry."* [1] As such, this submission also adopts a similar focus.

The Business Council believes there is a need to consider appropriate regulation of platform work, for the purpose of ensuring that arrangements for platform workers are fair and transparent, and to develop suitable minimum standards for such workers.

It is important that a balanced approach be taken to any attempt to regulate the on-demand workforce. Platform work is a new form of work that does not easily fit into the conventional employee/contractor paradigm. It has created new work opportunities for workers and new opportunities for consumers, many of which could not be provided if the workers were in an employment relationship. It has generated new forms of economic activity that would otherwise not exist. Any approach to regulation should reflect this reality and be proportionate to any perceived problem it is seeking to address. Governments need to have a more complete and mature understanding of the industry in order to avoid inappropriate regulation.

In most cases relating to platform work, it is not correct to assert that businesses are structured to avoid employment obligations. It is also not correct to assume that on-demand workers are more at risk of exploitation and disadvantage than other workers. On-demand platforms are transparent, which makes them less prone to abuse. For example, their systems guarantee that workers are paid, and that records of their income are generated in real time. This is in contrast to the exploitation of employees that can occur in employment relationships in the 'black economy', or by employers who engage in practices such as underpayments or manipulation of records. This transparency is an advantage of on-demand work.

On-demand workers also value the flexibility and autonomy that platform work provides. They can work (or not work) when they like and can also undertake other work, including for competitor platforms, if they wish.

Enhanced protections and benefits for platform workers are desirable and should be developed as the market matures. They should not be implemented in such a way that on-demand workers are deemed "employees" for the purposes of certain legislation. Any regulation of the on-demand workforce should be undertaken at a Commonwealth level. It is undesirable and unfeasible to attempt to implement separate regulatory regimes at the State level.

The Business Council has identified several issues with the Recommendations of the Inquiry, as outlined below:

- The flaws of a state-based approach to regulation of on-demand work

[1] Inquiry report, page 11

- The appropriate legal test that should apply to on-demand work
- Practical issues with specific recommendations

These matters are addressed in the remainder of this submission.

RESPONSE TO INQUIRY RECOMMENDATIONS

The position of the Business Council in response to each recommendation of the Inquiry is set out in the **Appendix**. This submission addresses key elements of the recommendations, as set out below.

State regulation

It is neither desirable nor workable to have state-based systems of regulation for either employment or the on-demand workforce. Such an approach is not only impractical, it is highly unlikely that Victoria has the constitutional power to implement any workable system of regulation in this field.

Recommendation 2 proposes that "if the Commonwealth does not act" then Victoria should pursue administrative and legislative options that "are constitutionally available". However, such options are extremely limited.

First, the powers necessary for Victoria to implement such options have been referred to the Commonwealth. Victoria's legislation to refer its Industrial Relations powers to the Commonwealth is broad ranging. Its "referred subject matters" specifically include, *inter alia*[2]:

- *terms and conditions of employment*
- *compliance with, and enforcement of, the Commonwealth* Fair Work Act
- *the administration of the Commonwealth* Fair Work Act
- *the application of the Commonwealth* Fair Work Act

Second, whilst the legislation excludes certain matters from the referral,[3] these do not include any matters that could give Victoria the power to regulate the on-demand workforce to any extent to which on-demand workers are considered employees. This includes the power to administratively determine whether they are employees, as this would amount to a determination relating to the administration and application of the Commonwealth *Fair Work Act*.

Even in the absence of a referral of the relevant powers, the Victorian Parliament would be unlikely to have sufficient powers to legislate for a workable system of regulation. The Commonwealth *Fair Work Act* is intended to "cover the field" and prevail over inconsistent state legislation. This will be sufficient to invalidate the Victorian legislation. The *Fair Work Act* specifically overrides state laws:

- *regulating workplace relations* [4]

[2] "referred subject matters" as defined in the *Fair Work (Commonwealth Powers) Act 2009 (Vic)*

[3] "excluded subject matters" as defined in the *Fair Work (Commonwealth Powers) Act 2009 (Vic)*

[4] section 26(2)(b)(i) of the *Fair Work Act 2009* (Cwth)

- *providing for the establishment or enforcement of terms and conditions of employment* [5]
- *providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment* [6]

The recommendations of the Report demonstrate that any substantive reform in this area must always be a Commonwealth responsibility. It is notable that 15 of its 20 recommendations would require implementation at a Commonwealth level. As recommendation 1 itself acknowledges, the Commonwealth should lead any reform process in this area.

Work status test

The Inquiry has proposed that a new statutory definition of "employee" and "contractor" be introduced as a basis for regulation of the on-demand workforces and that on-demand workers would be categorised in either cohort depending on their "work status".[7] The Inquiry has proposed[8] that the Commonwealth *Fair Work Act* be amended to:

- *codify work status on the face of relevant legislation (rather than relying on indistinct common law tests)*; and
- *clarify the work status test including by 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.*

This would be a significant and far-reaching amendment. If implemented, it would be the first time that Commonwealth industrial relations legislation has attempted to codify a definition of "employee". It would also expand the definition to cover types of work not currently considered to be employment.

The Inquiry acknowledges that the existing common law test to distinguish between "employees" and "contractors" depends on a wide range of factors that have created complexity and uncertainty when they are applied to certain forms of work. One recent decision of a full court of the Federal Court stated that the test has led to "*ambiguity, inconsistency and contradiction*".[9]

The report of the Inquiry also noted that *"'Work status' can be indistinct – modern labour market work arrangements may have both non-employment and employment characteristics"* and that *"Indistinct or 'borderline' work status is common in platform work"*.[10] It is correct that the distinction between employment and contractor relationships is not always clear. However, it does not necessarily follow that any attempt to re-define the distinction in legislation would lead to greater clarity or less uncertainty.

There is a significant risk in attempting to fit the on-demand workforce into the conventional paradigm of employee-contractor. If the definition of "employee" was broadened to capture

[5] section 26(2)(b)(ii) of the *Fair Work Act 2009* (Cwth)

[6] section 26(2)(b)(vi) of the *Fair Work Act 2009* (Cwth)

[7] Recommendation 6(b)

[8] Recommendation 6

[9] *CFMMEU v Personnel Contracting Pty Ltd* [2020] FCAFC 122, [61] per Lee J

[10] Page 104

arrangements that are currently of the nature of “independent contractor” there would be several problems with this approach:

- Certain businesses that have in good faith established their operations on the basis of the current legal test would be disadvantaged in the event that a new legal test deemed their workers to be “employees”
- The Inquiry proposal for a reverse onus on a party claiming that a person is not an employee[11] would be an unbalanced and disproportionate burden on business
- The “relative bargaining positions of each party” would be a key element of the statutory test.[12] This would be potentially uncertain and could lead to subjective and arbitrary judgements if this element is given priority over other factors

As such, this recommendation of the Inquiry is not supported and should not be pursued via amendments to the *Fair Work Act*, as proposed in recommendation 6.

Recommendations 9 and 10 further propose that new types of determinations of work status could be made by a new administrative agency. This approach is also not supported.

In practice, it would not be possible for such rulings to be conclusive, even under a purportedly simpler statutory test. Any such decisions would be subject to judicial review, which could render the process as “uncertain” as existing arrangements. Recommendation 12 proposes that governments could require businesses to be subject to work status determinations (even when the business and its workers are satisfied with their current status). There will inevitably be disputes around the boundaries of whatever new legal test was introduced to delineate “employment” and “contractor” arrangements. In the event of an unfavourable finding, a business (or a union) would invariably seek to exercise whatever appeal options were available to it, most likely judicial review.

The existing regime, in which the Fair Work Commission or courts can provide rulings where required, is a more appropriate approach. For example, Uber was subject to rulings by the Commission that its drivers[13] and Uber Eats delivery workers[14] were not employees. The Uber Eats decision was then upheld on appeal by a full bench of the Commission.[15] It is now subject to judicial review by a full bench of the Federal Court. In contrast, the Commission in 2018 ruled that a Foodora delivery worker was an employee.[16] Foodora subsequently exited the Australian market.

These differing outcomes should not be seen as a negative situation that has led to “systemic uncertainty”[17] that now requires a legislative solution. Where new forms of work or new business models evolve there will invariably be disputes and legal proceedings to determine how they should be categorised. Governments and regulators are also able to

[11] Recommendation (6)(c)(ii)

[12] Recommendation (6)(c)(iii)

[13] *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610 (21 December 2017); *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (11 May 2018)

[14] *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* [2019] FWC 5008 (23 August 2019)

[15] *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* [2020] FWCFB 1698 (21 April 2020)

[16] *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 (16 November 2018)

[17] this phrase is used in Recommendation 4

initiate or intervene in such cases in the public interest, which is consistent with recommendation 20.

The existing legal distinction between employee and contractor has been criticised for not being sufficiently certain but it should not be assumed that any new definition will create greater certainty or be less likely to lead to disputes. It should also be noted that the Fair Work Ombudsman (FWO) currently provides advice and guidance on employee/contractor issues and workers who have concerns about their status can seek this assistance from the FWO. As such, there is no need to set up a separate body to provide advisory and adjudicative services. If the process of determining work status is to be improved it is preferable to utilise existing institutions, rather than set up new parallel systems.

Both the courts and the Fair Work Commission have the benefit of being open judicial or quasi-judicial proceedings with appropriate appeal rights. There is nothing to suggest that a new administrative body[18] would be better able to undertake this task. It is not realistic to aim for a "clear primary source of advice" on work status, as proposed in recommendations 8 and 9. It is also debatable whether any new definition or source of advice would be any clearer than the status quo.

Whilst it is not necessary to change existing legal tests, it is appropriate to consider whether legal remedies for sham contracting can be enhanced, consistent with recommendation 19(a). This is consistent with the principle that on-demand work should not be able to be used to mis-characterise workers as a means of avoiding the obligations that pertain to employment relationships.

Fair conduct standards

Recommendation 13 proposes that "*governments lead a process to establish Fair Conduct and Accountability Standards*". Such a process is desirable, provided those standards are fit-for-purpose and do not have the effect of inhibiting legitimate platform work.

Such standards should be led at a national level, with input from states where necessary. These standards should reflect the need for on-demand workers to be subject to minimum standards in their work. They should not be used to discourage platform work or impose employment-type obligations on business where they are not appropriate.

As an example, Uber has introduced insurance to protect its drivers if they are in an accident or injured whilst performing work. However, existing laws mean that platforms such as Uber are constrained in providing additional support to their workers. This is because offering payments, training or equipment could compromise their "contractor" status by deeming them to be "employees".

This risk prevents platforms from providing greater support for their workers. It demonstrates that existing legal frameworks that cover (or potentially cover) independent work are out-of-date in certain respects and do not reflect the ways in which people choose to work for such platforms.

The Business Council supports Recommendation 6(c)(i), which proposes that the *Fair Work Act* be amended to provide that the:

[18] such as the "Streamlined Support Agency" proposed in Recommendation 9 or the "fit-for-purpose" determinative body proposed in Recommendation 10

> *“provision of safety protections and entitlements such as superannuation, training, occupational health and safety and worker consultation is not disincentivised because of the potential impact on work status”*

This Recommendation is appropriate. It would reflect developments in the on-demand workforce and the need to provide enhanced benefits for their workers without altering their status for the purpose of the existing legal definition of “employee”.

APPENDIX: BCA RESPONSE TO ALL INQUIRY RECOMMENDATIONS

	Recommendation	Position
1.	the Commonwealth Government, in collaboration with state governments and other key stakeholders, lead the delivery of the recommendations in this report regarding the national workplace system. (Requires Commonwealth action)	Conditional support • The Commonwealth should lead any reform process, which should be limited only to appropriate recommendations
2.	if the Commonwealth does not act, Victoria, in consultation and collaboration with other states, should pursue administrative and legislative options to improve choice, fairness and certainty for platform workers that: • are constitutionally available • align with its broader priorities • are appropriate in the current regulatory landscape, and • meet the needs of the current and future workplace.	Oppose • Differing regulation between states is undesirable. Any effective regulation can only be implemented at the Commonwealth level
3.	governments should, in implementing change, consult and collaborate with stakeholders; including platforms, employees, industry groups and unions.	Support
4.	governments cost the changes and consider those costs alongside the transferred costs of the current systemic uncertainty around work status – the impacts on workers, businesses, the economy and community more broadly.	Oppose • It is difficult to quantify 'costs' associated with platform work and attributing an adverse cost is a value judgement. In many cases, on-demand work is not substitutable for work performed by employees, so any cost comparison is invalid
5.	appropriate government funded surveys and evidence-based research to ensure policy makers are aware of critical developments in platform work.	Support • There is a gap in data on the digital platform workforce • Any new survey data should be well-designed, comparable with existing data (particularly the ABS Labour Force), produced on a regular basis (eg. annually) and should not provide too much of an impost on survey participants
6.	the *Fair Work Act* be amended to: (a) codify work status on the face of relevant legislation (rather than relying on indistinct common law tests) (b) clarify the work status test including by 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. (c) provide that the:	Oppose 6(a) and 6(b) • The existing common law test is complex but the case has not been made that the proposed alternative would be more effective • The definition of "employee" should not be expanded to cover arrangements that are not akin to employment in important respects (eg. Uber drivers) Support 6(c)(i)

	(i) provision of safety protections and entitlements such as superannuation, training, occupational health and safety and worker consultation is not disincentivised because of the potential impact on work status (ii) party asserting a worker is not an employee, bears the onus of proving work status, and (iii) the relative bargaining positions of each party are expressly considered when determining work status. (Requires Commonwealth action)	• Provision of enhanced support for platform workers should not result in a change to their legal status when the nature of their work is otherwise clearly not employment Oppose 6(c)(ii) and (iii) • A reverse onus would create uncertainty and encourage disputation and litigation. It increases the likelihood that workers who are satisfied to not be employees will have their status changed as a result of such litigation • "Relative bargaining position" is an uncertain term that would create significant difficulty if it was given primacy in legislation as part of the test for a worker's legal status
7.	governments review the approach to 'work status' across work laws (e.g. *Independent Contractors Act*, superannuation, workplace health and safety, tax) with the purpose of more closely aligning them, specifically, 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. (Requires Commonwealth action)	Oppose • Work status under such legislation may differ in response to the purpose of each Act • Individual Acts can be amended where appropriate in response to developments in working arrangements, but this should not equate to closer alignment in terms of deeming independent workers to be "employees"
8.	there be a clear primary source of advice and support to workers to help them understand and use dispute resolution or other informal options to resolve their work status. (Requires Commonwealth action)	Oppose • The FWO already provides such services, which can be enhanced if necessary • It is not necessary to develop an additional parallel system
9.	a Streamlined Support Agency (whether stand alone or incorporated into the functions of an existing suitable body) should: (a) have dedicated and sufficient resources (b) be accessible to and prioritise platform workers, particularly low-leveraged workers (c) help resolve work status through advice and dispute resolution (d) help workers understand the entitlements, protections and obligations of their work status (e) where work status is borderline, escalate the question to Fast-tracked Resolution (see Recommendation 10) prioritising a determination. (Requires Commonwealth action)	Oppose • for the same reasons as Recommendation 8
10.	a fit-for-purpose body provides a mechanism for accessible, fast resolution of work status that: (a) produces authoritative and binding determinations for all parties	Oppose • for the same reasons as Recommendations 8 and 9

(b) is available to all workers and businesses (c) is as informal as possible (d) is appropriately funded so as to provide access (e) has decision makers with appropriate expertise (f) allows for resolution from the outset of the work arrangement (g) allows groups of workers under similar arrangements to seek resolution (h) is inexpensive and helps fund applications and costs of low-leveraged workers (i) operates in a coordinated way with the Streamlined Support Agency, enabling seamless referrals and support. (Requires Commonwealth action)	• Courts and the Fair Work Commission are the appropriate bodies to make such determinations
11. governments encourage platform businesses with significant non-employee, on-demand workforces to seek a work status determination. (Requires Commonwealth action)	Oppose • for the same reasons as Recommendations 8, 9 and 10
12. if platforms do not voluntarily seek a proactive determination, governments consider requiring platforms to initiate a determination process, or governments could facilitate this. (a) Proactive work status determinations should be targeted at enterprises of an appropriate size, maturity and number of workers and consider the costs for businesses, particularly small and emerging businesses. (b) Platforms should be given appropriate timeframes to apply and react to potential consequences and effect any changes. (Requires Commonwealth action)	Oppose • for the same reasons as Recommendations 8, 9, 10 and 11
13. platforms 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.	Support • Remuneration arrangements for many platforms are already more transparent than remuneration arrangements that apply to certain employees
14. governments lead a process to establish Fair Conduct and Accountability Standards or principles, to underpin arrangements established by platforms with non-employed on-demand workforces. (Requires Commonwealth action)	Conditional support • Industry is also leading the development of appropriate standards • Such standards should not be used to discourage platform work or impose employment-type obligations on business where they are not appropriate
15. 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. (Requires Commonwealth action)	Conditional support • It is necessary to consider further details of which ‘barriers’ would be removed and how such a regime would work in practice

16. the Fair Work Commission work with relevant stakeholders, including platforms and representatives of workers and industry, about the application of modern awards to platform workers, with a view to ensuring fit-for-purpose, fair arrangements that are compatible with work enabled by technology. (Requires Commonwealth action)	Oppose • Awards are designed for employment relationships and should not be expanded to other forms of work
17. governments clarify, enhance and streamline existing unfair contracts 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. (Requires Commonwealth action)	Conditional support • It is necessary to consider which existing remedies are not fit-for-purpose or should be extended to platform workers
18. the Streamlined Support Agency 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. (Requires Commonwealth action)	Oppose • for the same reason as Recommendations 8, 9 and 10
19. strengthen provisions to counter sham contracting to: (a) reflect the recommendations of previous reviews including the Black Economy Taskforce and the Productivity Commission, to capture conduct where it would be reasonable to expect the employer knew, or should have known, the true character of the arrangement was 'employment', and apply appropriate penalties to this conduct (b) require a court to consider each party's relative bargaining position and how much genuine choice a worker has over their presumed work status. (Requires Commonwealth action)	Support 19(a) Oppose 19(b) • 19(b) would require a legislative modification of the existing common law work status test
20. regulators proactively intervene to resolve cases of 'borderline' work status, especially where it is occurring at a systemic level and impacts on low-leveraged workers, including by initiating test cases. (Requires Commonwealth action)	Support • Such test cases are appropriate in 'borderline' cases in order to provide greater legal certainty, or where allegedly sham arrangements are being used • The Fair Work Ombudsman has existing powers and resources to undertake such cases

Note: 15 of the 20 recommendations would require action by the Commonwealth in order to be implemented.

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