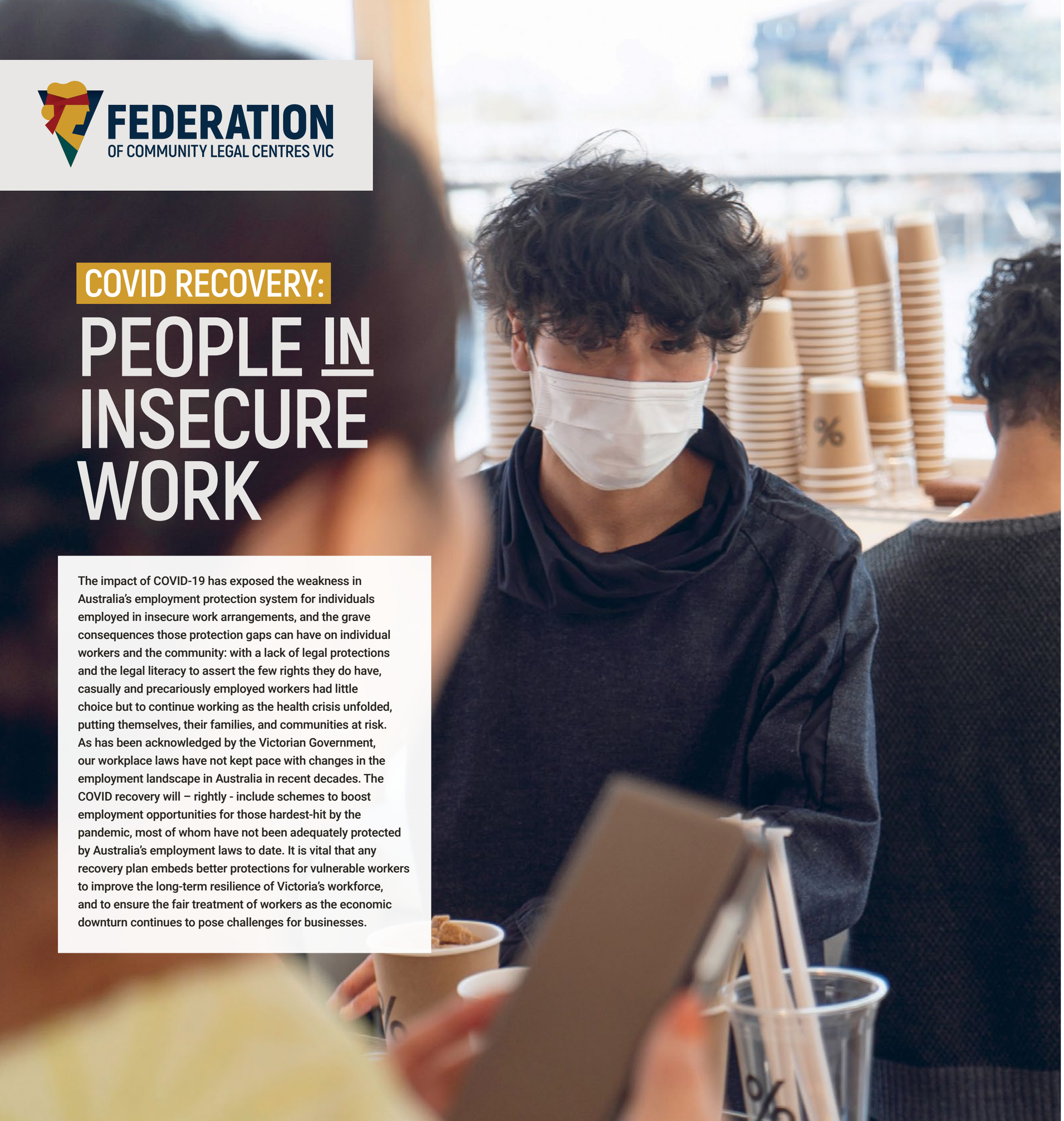
FEDERATION
OF COMMUNITY LEGAL CENTRES VIC

COVID RECOVERY:
PEOPLE IN INSECURE WORK



The impact of COVID-19 has exposed the weakness in Australia's employment protection system for individuals employed in insecure work arrangements, and the grave consequences those protection gaps can have on individual workers and the community: with a lack of legal protections and the legal literacy to assert the few rights they do have, casually and precariously employed workers had little choice but to continue working as the health crisis unfolded, putting themselves, their families, and communities at risk. As has been acknowledged by the Victorian Government, our workplace laws have not kept pace with changes in the employment landscape in Australia in recent decades. The COVID recovery will – rightly - include schemes to boost employment opportunities for those hardest-hit by the pandemic, most of whom have not been adequately protected by Australia's employment laws to date. It is vital that any recovery plan embeds better protections for vulnerable workers to improve the long-term resilience of Victoria's workforce, and to ensure the fair treatment of workers as the economic downturn continues to pose challenges for businesses.

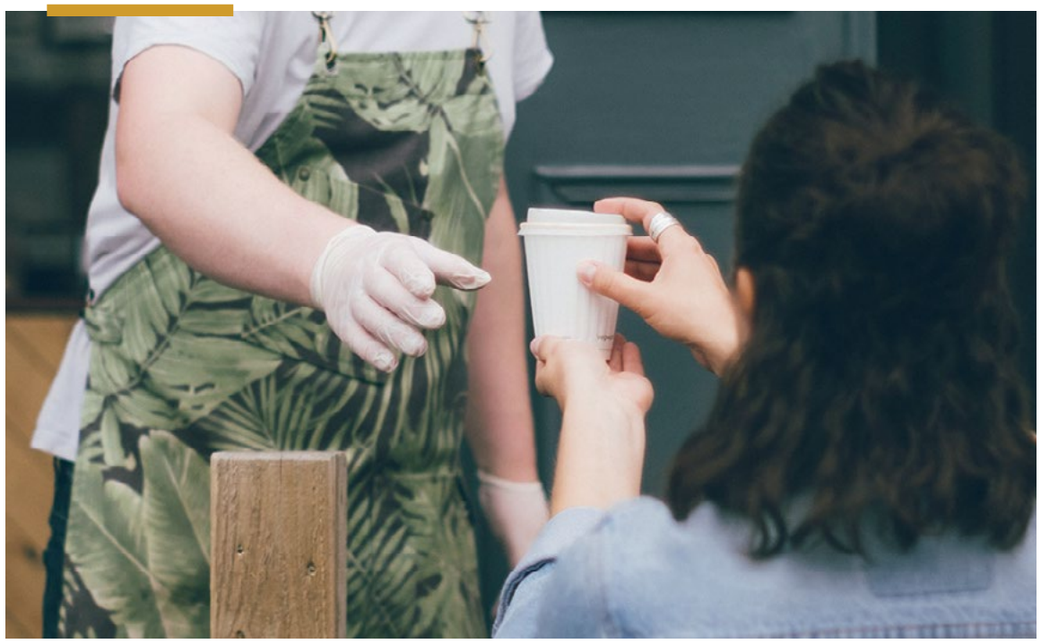
Australia's workplace protections assume a traditional, full-time, permanent employer-employee relationship, and fail to protect the increasing number of workers employed in alternative arrangements. Migrant workers, women, young people and people from disadvantaged backgrounds are all more likely to be employed in insecure work arrangements: in other words, their employment arrangement attracts very minimal protection from Australia's workplace laws. At the same time, pre-existing financial disadvantage, caring responsibilities, a lack of legal understanding and other factors can further weaken these vulnerable workers' bargaining power and ability to assert the legal rights they do possess.

The impacts of COVID-19 on businesses and the economy had a disproportionate impact on Victoria's more vulnerable cohorts. The COVID recovery is already focussing on supporting businesses to reopen and rebuild. Supports include programs to support industries like agriculture that have been impacted by the reduction in casual backpacker and migrant workers through sourcing labour.

In order to ensure the COVID recovery is fair, and help to build a more resilient Victorian economy and community, the Government must also focus on extending and enhancing protections for insecurely employed workers, or we risk more vulnerable community members than ever falling through the cracks in our legal system. In addition, attention must be given to the discrimination that vulnerable groups can experience in work places.

ADDRESSING INSECURE WORK TO KEEP PEOPLE SAFE FROM EXPLOITATION

The 'gig economy' that has arisen in Victoria and around the world in recent years has taken many goods and services to new heights of convenience for both the consumer and for businesses. And in Victoria, just as in other places, this convenience has been supported by the proliferation of a deeply financially and legally insecure 'on-demand workforce'. The *Inquiry into the Victorian On-Demand Workforce* was commissioned by the Victorian Government in 2018 to investigate this problem, and the report was released in September 2020. Chairperson Natalie James made a suite of recommendations designed to clarify and secure the work status of 'on-demand' workers, which the Federation strongly supports – noting that the community legal sector, which frequently provides assistance to on-demand workers, has a key role to play in the response and will enhance the work/reach of government, industry and unions. The CLC sector anticipates an uptick in attempts to exploit vulnerable workers as businesses continue to cope with a challenging economic landscape through the COVID-19 recovery period, making the need to address insecure work more urgent than ever.



SHAM CONTRACTING

Sham contracting refers to the practice of hiring workers as 'independent contractors' when they are in practice an employee. This allows employers – often, in the gig economy context, digital platforms – to obtain labour without being obliged to extend any of the legal benefits that employees are owed, such as leave entitlements, minimum wage, and protections from unfair dismissal. This practice is unlawful under Australia's employment legislation, the *Fair Work Act* (Cth), but is nonetheless rife, especially amongst groups of workers who are vulnerable to exploitation – for example, people who are newly arrived in Australia, refugees, young people, and financially disadvantaged people. The CLC sector has found that sham contracting is a core business practice throughout the cleaning, food and goods delivery, home and commercial maintenance (e.g. painters), and building and construction industries. With greater demand for delivery and cleaning services to be expected throughout the COVID recovery, government investment in infrastructure and renovation programs, and more people in need of work, it is likely that the number of people in these and other contract-heavy sectors – and thus at risk of sham contracting exploitation – will grow.

The *On-Demand Workforce* Inquiry Report identified the lack of clarity in Australia's workplace laws around whether someone is an 'employee' (as opposed to a contractor) as the 'root cause' of many of the issues relating to insecure work in the gig economy context.[1] The most straightforward and low-cost way to address this issue is the introduction of a clear definition into the *Fair Work Act*. The Federation recommends the insertion of a provision which assumes that a worker is an employee unless the person for whom they are performing work can prove that the worker is genuinely carrying on their own business (and therefore an independent contractor).[2] In recognition of the power imbalance between workers and employers – especially in the gig economy context – this provision shifts the onus of establishing a genuine contracting relationship onto the employer.

Changes to the law will only be effective if accompanied by practical measures to implement better oversight of relevant regulatory processes to prevent sham contracting in the first place, and enforce legal protections. In some instances, gig economy arrangements are conditional upon applicants having an ABN, even though the ultimate arrangement will for all intents and purposes equate to employment. Better oversight and more support during the ABN application and grant process could assist to combat this problem. Other efforts to prevent an increase in sham contracting in the COVID recovery period should include greater auditing and on-the-spot inspections of platform-based businesses and other key industries (including construction, cleaning services and courier/distribution workers), and working with the community legal sector to identify serial offenders for investigation by the Fair Work Ombudsman or other appropriate authorities.

Recommendation: Amend the *Fair Work Act* to create an assumption of 'employee' status to combat sham contracting, and improve regulatory oversight in relation to contracting processes and sham contract-heavy industries.

CASUAL WORKERS

COVID has also exposed the vulnerability of workers hired on casual contracts. Under the *Fair Work Act*, people employed as casuals have far fewer protections than full-time and permanent employees. This means it is much easier for employers to fire and replace staff who, for example, are unable to work because their child is ill and is sent home from childcare, or because their home suburb becomes a COVID 'hotspot' and stay-at-home orders are reintroduced.

Casual employees are workers employed or paid on a casual basis – similarly to 'employee', there is no additional definition of 'casual' under the *Fair Work Act*. Casual workers are generally not entitled to paid leave or able to access unfair dismissal or redundancy payments. Casuals are legally entitled to a higher hourly rate of pay than other employees, and to shifts of minimum duration (generally 2-4 hours).

Some casuals genuinely do work irregular numbers and patterns of hours, but many work regular, full-time-equivalent hours. Despite working in equivalent arrangements to full-time employees, casuals in this position are nonetheless not entitled to the same protections. Although they rely on the regular income from their work, their employer retains the right to unilaterally and with no notice terminate their employment or severely decrease their hours. Although casual workers technically have the right to refuse shifts, and are legally protected from 'adverse action' if they refuse a shift, it has been widely observed that shift refusal results in poor treatment at work/less shifts being offered, and so in reality, casual workers enjoy few genuine benefits of flexibility.

This phenomenon was immediately apparent when government orders responding to COVID unexpectedly halted or otherwise impacted on businesses across Victoria – especially the hospitality, childcare and cleaning industries which have a highly casualised workforce. Casual workers were among the most immediately and significantly affected; having no legal right to ongoing work, many were fired, with no entitlement to leave being paid out to cushion the financial impacts. Crucially, many casually employed workers are already among the more socio-economically disadvantaged members of our community.

The increasing casualisation of workers across many industries has led to a new focus on how to better protect casuals, especially those who have worked regular and systematic hours for a sustained period. Rules have been introduced to enable workers to request to convert ongoing work arrangements involving regularised hours to formal full-time or part-time employment. Legislation was developed by the Commonwealth Government to extend this right to workers not covered by an award, but ultimately not passed.[3] The precarious position of long-term casual workers was recognised in the immediate response to COVID-19: casual employees have been entitled to access JobKeeper payments if they had been employed on a regular and systemic basis for longer than 12 months by their employer. However, there has also been criticism of the exclusions in the JobKeeper provisions, in particular the disproportionate impact the 12 month limit had on young people who are more likely to have entered the labour market recently, and other casual workers who have been employed 'regularly' over the required period but for a range of different employers.

Momentum to better protect casual workers should not be lost – indeed, extending legal protections and entitlements to casual workers is more important during the COVID recovery period than ever before. Although the health crisis is easing in Victoria, and businesses are starting to reopen, the significant economic recession faced by Victoria and the country in general mean that people in precarious work will continue to bear the brunt of restructuring and business changes across the economy.

The Federation recommends that changes should be made to the *Fair Work Act* to automatically convert casual employees who have worked a regular pattern of hours on an ongoing basis for the same employer for 12 months to permanent full-time or part-time employees (depending on number of hours usually worked). The onus should not be on employees to request the conversion, but should be automatic after 12 months of regular employment. There is a significant disparity in bargaining power between employers and casual employees, who are dependent on income from working full-time hours and often in comparatively low skill/qualification industries. This change would afford better protection to long-term casual workers, in line with both the contribution they make to their employers and the reliance they have on their income, and in recognition of the power disparity inherent to their working arrangements.

Recommendation: Amend the *Fair Work Act* to automatically convert casual employees to part- or full-time employees after 12 months' continuous employment.

BETTER PROTECTION FOR VULNERABLE WORKERS FROM DISCRIMINATION AT WORK

Many workers who seek advice from CLCs in relation to employment law issues, particularly gig economy-related matters, are disadvantaged in their capacity to enforce their legal rights. Some have travelled to Australia from other countries and have limited knowledge about Australian employment law, others speak limited English, many are socio-economically disadvantaged, and some are critically dependent on income from platform work, being temporary visa holders or otherwise excluded from Australia's social security safety net. These barriers to legal literacy and capacity are difficult to overcome, which is why a protection mechanism for vulnerable cohorts are so vital.

These types of vulnerabilities can lead to discrimination in the workplace, especially when there aren't systemic safeguards in place. In order to ensure that post-COVID protections are as effective as possible, the Federation recommends that the Victorian Government enhance the power and resources of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) to allow for the investigation and enforcement of breaches of anti-discrimination and sexual harassment laws.

Recommendation: The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) (EOA) to reinstate and strengthen the Victorian Equal Opportunity and Human Rights Commission's functions and powers to proactively investigate and enforce breaches of the EOA.

REFERENCES

1 Natalie James, Report of the Inquiry into the Victorian On-Demand Workforce (September 2020), [7.1.1].

2 WEstjustice, JobWatch and Springvale Monash Legal Service, Submission to Select Committee on Temporary Migration, 69.

3 Natalie James, Report of the Inquiry into the Victorian On-Demand Workforce (September 2020), [120].