



## **Inquiry into the Victorian on-demand workforce**

Submission of the Australian Institute of Employment Rights

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**CONTENTS**

Introduction..... 2

Terms of reference ..... 2

Decent Work and Dignity ..... 3

Recommendations ..... 4

Understanding the on-demand workforce ..... 4

New categories of work ..... 5

Defining employment: addressing the legal status of on-demand workers ..... 5

Occupational Health and Safety and Workers Compensation Insurance..... 7

Extending employment rights: toward decent work for all..... 9

Collective bargaining – New mechanisms for the self-employed..... 9

Appendix A - Australian Charter of Employment Rights..... 11

## Introduction

The Australian Institute of Employment Rights (AIER) is an independent not-for-profit organisation that works in the public interest to promote the recognition and implementation of the rights of workers and employers in a cooperative workplace relations framework.

The work of the AIER is informed by the Australian Charter of Employment Rights<sup>1</sup>. Developed by the AIER in 2007, the Charter identifies the fundamental values upon which we believe good workplace relationships and laws must be based if they are to provide for fair and decent work. The Charter is based on fundamental rights enshrined in international instruments that Australia has willingly adopted and which, as a matter of international law, it is bound to observe; as well as values imbedded in Australia's history of workplace relations such as the 'important guarantee of industrial fairness and reasonableness'.<sup>2</sup>

The Charter, can serve as a blueprint for assessing government policy, legislative reform and workplace relations practices. We encourage the Inquiry to use it as a reference for factors that need to be considered in order to promote security, fairness and dignity within Australian workplace relations.

## Terms of reference

The AIER notes that the Victorian inquiry seeks to examine:

*The extent and nature of the on-demand economy in Victoria, for the purposes of considering its impact on both the Victorian labour market and Victorian economy more broadly, including but not limited to:*

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

The AIER does not seek to address each of the terms of reference for the Inquiry individually in detail. Rather, in this submission the AIER has focused on key issues concerning the regulation of workplace relations relevant to the on-demand economy. Several the issues to be examined may only be addressed in the context of federal legislation, given that Australian labour law is generally governed by the *Fair Work Act 2009* (Cth) (FW Act). However, the Victorian government may still be a powerful advocate on behalf of vulnerable workers engaged in the on-demand or 'gig' economy. In other respects, the issues under consideration fall well within the authority of the Victorian jurisdiction; especially those in relation to accident compensation, and health and safety legislation. The Victorian

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<sup>1</sup> Mordy Bromberg and Mark Irving (eds), *The Australian Charter of Employment Rights* (Hardie Grant, 2007). The ten Charter principles are included at appendix A.

<sup>2</sup> *New South Wales and Others v Commonwealth* [2006] HCA 52 [523-5].

parliament has the power to pass legislation for the benefit of vulnerable on-demand workers and the community at large.

## Decent Work and Dignity

The Australian Charter of Employment Rights states:

*Recognising that labour is not a commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being:*

- *treated with respect;*
- *recognised and valued for the work, managerial or business functions they perform;*
- *provided with opportunities for skill enhancement and career progression;*
- *protected from bullying, harassment and unwarranted surveillance.*

Australian labour law is failing in the provision of decent work and the protection of dignity for Australian workers. Such failings are evidenced by the increase in insecure work, our failing enterprise bargaining system<sup>3</sup>, persistent wage stagnation<sup>4</sup>, wage theft and avoidance of workplace laws<sup>5</sup>, abhorrent levels of workplace sexual harassment<sup>6</sup> and high levels of workplace stress<sup>7</sup>.

On-demand work represents one piece of the larger issue of insecure work. Today, around 40% of Australian workers are engaged in insecure work<sup>8</sup>. Workers most likely to be engaged in insecure and non-standard forms of employment are women, temporary migrant workers and young people.<sup>9</sup> Many workers engaged in insecure work are denied minimum conditions and protections afforded traditional employees; workers engaged in on-demand work are often remunerated at rates below minimum wages for employees,<sup>10</sup> and are being denied workers compensation, superannuation and in some circumstances workplace health and safety protections.<sup>11</sup> Whilst current estimates put the

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<sup>3</sup> See Renee Burns and Keith Harvey, 'Collective Bargaining: Delivering for the public interest?' (Ron McCallum Debate Discussion Paper, Australian Institute of Employment Rights, October 2018); Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act*, (Federation Press; 2018); Alison Pennington, 'On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector' (Research Report, The Australia Institute, Centre for Future Work, December 2018).

<sup>4</sup> See Joe Isaac, 'Why are Australian Wages Lagging and What Can be Done About it?' (2018) 51(2) *Australian Economic Review*, 175; Andrew Stewart, Jim Stanford and Tess Hardy (eds) *The Wages Crisis in Australia*, (University of Adelaide Press, 2018).

<sup>5</sup> See, eg, Fair Work Ombudsman, 'A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network' (Report, 2016); Fair Work Ombudsman, 'More Allegations against Melbourne Burger Bar Operator' (Media Release, 19 January 2017).

<sup>6</sup> Australian Human Rights Commission, 'Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces' (Survey Results, 2018).

<sup>7</sup> Lifeline Australia, 'Survey Results, 2016' reported at <<https://www.lifeline.org.au/about-lifeline/media-centre/media-releases/2018-articles/call-to-aussie-bosses-let-your-workers-stress-down>>.

<sup>8</sup> Australian Council of Trade Unions, 'Australia's insecure work crisis: Fixing it for the Future' (Research Report, 2018).

<sup>9</sup> Anthony Forsyth, 'Victorian Inquiry into the Labour Hire Industry and Insecure Work' (Final Report, August 2016), ch 7; Tanya Carney and Jim Stanford, 'The Dimensions of Insecure Work: A Factbook' (Research Report, The Australia Institute, Centre for Future Work, 29 May 2018).

<sup>10</sup> Transport Workers Union, 'Biggest Survey of Ride-Share Drivers Reveals Low Pay, Violence & Sexual Assaults' (Media Release, 24 October 2018); Jim Stanford, 'Subsidising Billionaires: Simulating the Net Incomes of UberX Drivers in Australia' (Research Report, The Australia Institute, Centre for Future Work, March 2018).

<sup>11</sup> Senate Standing Committee on Education and Employment, Parliament of Australia, *Corporate Avoidance of the Fair Work Act* (Report, September 2017), ch 8.

size of the on-demand economy at only 0.5% of the workforce<sup>12</sup> this number is expected to grow. As such, parameters must be set now to ensure that work in the on-demand economy is decent work.

In its *Work for a brighter future* report, the International Labour Organization (ILO) has called for a human centred agenda for the future of work with ‘people and the work they do at the centre of economic and social policy and business practice’<sup>13</sup>. The AIER supports this position and urges the inquiry to adopt a human centred approach to its recommendations, affording the provision of decent work and the protection of dignity for workers the highest of priorities.

## Recommendations

In response to the challenges of the on-demand economy the AIER recommends that:

- I. *a statutory definition of employment be introduced to address what we view as the misrepresentation of on-demand workers engaged via work on-demand systems;*
- II. *the approach of the Model Work Health and Safety Act be adopted in Victoria, with consideration given to potential loop holes created by the condition ‘while the workers are at work in the business or undertaking’;*
- III. *the coverage of the Workplace Injury Rehabilitation and Compensation Act 2013 (VIC) should be extended to include on-demand workers;*
- IV. *the rights provided under the Australian Charter of Employment Rights be extended universally to workers;*
- V. *a framework to better facilitate collective bargaining by self-employed workers be developed on an industry or occupational basis.*

## Understanding the on-demand workforce

The heterogeneous nature of the on-demand economy makes generalisations about the nature of on-demand work, the workers engaged via the on-demand economy and appropriate regulatory approaches very difficult. De Stefano’s distinctions of ‘crowd-work systems’ and ‘work on-demand systems’ are useful in understanding differing modes of delivery within the on-demand economy and identifying where particular regulatory strategies are best directed.<sup>14</sup>

**Crowd-work systems** provide an online market place where end-users advertise tasks and workers bid competitively to undertake those tasks. Jobs available via crowd-work systems range from low skill tasks such as assembling furniture or moving household items, to qualified trade work, retail and hospitality shifts, professional services and care work.

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<sup>12</sup> Productivity Commission, *Digital Disruption: What do governments need to do?* (2016) 149 cited in Industrial Relations Victoria, ‘Inquiry into the Victorian On-Demand Workforce’ (Background Paper, December 2018), 8.

<sup>13</sup> International Labour Organization, ‘Work for a Brighter Future: Global Commission on the Future of Work’ (Report, 2019), 11.

<sup>14</sup> Valerio De Stefano, ‘The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdsourcing and Labour Protection in the “Gig-Economy”’ (Conditions of Work and Employment Series No.71, International Labour Organization, 2016) cited in Andrew Stewart and Jim Stanford, ‘Regulating work in the gig economy: What are the options?’ (2017) 28(3) *The Economic and Labour Relations Review* 420, 422.

**Work on demand systems** connect the available workforce to consumers via digital platforms, services are delivered under the umbrella or branding of that platform. This model, examples of which include Deliveroo and Uber, are characterised by high levels of control exercised by platforms, who to varying degrees, manage the available workforce, allocate work, determine prices and set service standards.

Workers in the on-demand economy are usually engaged on the basis they are independent contractors rather than employees and as such are often remunerated below employee minimum wage; are denied employment rights under the National Employment Standards (NES), Modern Awards and Enterprise Agreements; are not receiving superannuation payments and are often not protected by workers compensation or workplace health and safety schemes. As independent contractors, on-demand workers are not supported by structures for collective bargaining and as such are denied the capacity to exercise their voice at work, are subject to imbalanced power relations and unable to effectively influence their terms and conditions of work.

The potential consequences of an unregulated on-demand economy extend beyond the direct impact on workers. The avoidance of superannuation, occupational health and safety responsibility and workers compensation insurance places financial burden on society more broadly by way of underfunded retirement for populations of insecure workers, public medical expenses, impacts to public insurance schemes and greater risk to health and safety generally. In areas of service provision, particularly those servicing vulnerable populations such as age and disability care the quality of services may be at risk.

## **New categories of work**

The AIER notes that submissions to this Inquiry have called for new workplace laws to create a ‘third way’ to regulate on-demand work. In response the AIER submits that intermediate categories of workers, add complexity to workplace laws. New subordinated categories of worker legitimise the reduction of workers’ rights and encourage the restructuring of work to this end. Addressing inequality and insecure work in Australia demands a principled approach to ensuring decent work through the strengthening of workers’ rights and the extension of those rights to workers more broadly. Further, the AIER submits that, in accordance with international standards and the Australian Charter of Employment Rights, the most appropriate way to deliver flexibility within the on-demand economy is through genuine efforts of collective bargaining.

## **Defining employment: addressing the legal status of on-demand workers**

The legal status of workers in the on-demand economy and the extent to which workers engaged via work on-demand systems are misrepresented as independent contractors is, from a labour law perspective, a central issue of concern with regard to the on-demand economy.

Primarily, minimum employment entitlements and conditions are conferred by the FW Act; the application of which is triggered by the existence of an employment relationship, whereby work is undertaken by an employee engaged under a contract of service. Australian legislation provides no definition of an ‘employee’ instead leaving determination of the matter to common law principles. For an employment relationship to be found, a worker must be ‘undertaking to provide services pursuant to a contract with the person or organisation said to be their employer’,<sup>15</sup> further, that contract must ‘have the characteristics of employment’<sup>16</sup> as determined by the application of a multi-

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<sup>15</sup> Stewart and Stanford, above n 14, 426.

<sup>16</sup> Ibid.

factor test. Findings of employment or otherwise are made on the facts of any particular case and as such may be of little precedential value.

The AIER submits that on-demand work delivered via work on-demand systems is deliberately structured to facilitate the avoidance of minimum employment entitlements. Contractual terms are constructed with false distance, creating the appearance of individual contracting arrangements in situations more correctly characterised as employment.

In the Australian context the legal status of on-demand workers is not conclusively settled. The Fair Work Commission (FWC) has twice held that Uber drivers are not employees. It should be noted that in both cases the drivers were unrepresented, and thus heard without the benefit of full legal argument. In *Kaseris*<sup>17</sup> Deputy President Gostencnik found Mr Kaseris could not be an employee of Uber as the 'work-wages bargain [was] plainly absent'.<sup>18</sup> The Deputy President did however go on to note that the common law understanding of the employment relationship was developed before the 'gig' or 'sharing' economy and that perhaps employment law would evolve to 'catch pace' with such developments.<sup>19</sup> In *Pallage*<sup>20</sup> Commissioner Wilson dismissed the notion that the relationship between the driver and Uber was so tenuous that the possibility of employment would never be entertained.<sup>21</sup> The Commissioner went on to find nothing 'especially entrepreneurial' about the arrangement<sup>22</sup>, but held that in that case the multi-factor test did not on balance point to an employment relationship.<sup>23</sup>

These decisions may be contrasted with the UK Court of Appeal decision<sup>24</sup> which held that Uber drivers were 'workers' under the relevant legislation. The majority in this case rejected Uber's characterisation that it acted only as an intermediary, facilitating contractual arrangements between drivers and passengers. Further it was accepted that the written terms of contract, purporting to establish an independent contracting arrangement 'bore no practical relation to the reality of the relationship'.<sup>25</sup>

More recently in the case of a Foodora delivery rider, the FWC held the rider 'was, despite the attempt to create the existence of an independent contractor arrangement, engaged in work as a delivery rider/driver for Foodora as an employee'.<sup>26</sup> Commissioner Cambridge found that in examining all the elements of the relationship the rider 'was not carrying on a trade or business of his own, or on his own behalf, instead [he] was working in [Foodora's] business as part of that business'. Commissioner Cambridge acknowledged the importance of correctly categorising work relationships, stating:

*Contracting and contracting out of work, are legitimate practices which are essential components of business and commercial activity in a modern industrialised economy. However, if the machinery that facilitates contracting out also provides considerable potential for the lowering, avoidance, and/or obfuscation of legal rights, responsibilities, or statutory and regulatory standards, as a matter of public interest, these arrangements should be subject to stringent scrutiny. Further, if as part of any analysis involving the correct characterisation that should be given to a particular relationship, an apparent violation of the*

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<sup>17</sup> *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 (*Kaseris*).

<sup>18</sup> *Ibid* [51].

<sup>19</sup> *Ibid* [66].

<sup>20</sup> *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (*Pallage*).

<sup>21</sup> *Ibid* [16].

<sup>22</sup> *Ibid* [28].

<sup>23</sup> *Ibid* [53].

<sup>24</sup> *Uber BV & Ors v Aslam & Ors* [2018] EWCA Civ 2748 (19 December 2018).

<sup>25</sup> *Ibid* [50].

<sup>26</sup> *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 (16 November 2018) [102] (*Klooger*).

*law, or statutory or regulatory standards is identified, as a matter of public interest, any characterisation of the relationship which would avoid or minimise the likelihood of such violation should be preferred.*<sup>27</sup>

**The AIER recommends that a statutory definition of employment be introduced to address what we view as the misrepresentation of on-demand workers engaged via work on-demand systems.** As this change may only be effected by the Federal Government the AIER encourages the Victorian Government to advocate for the introduction of the proposed statutory definition through available consultative processes.

To this end the AIER proposes that the *Superannuation Guarantee (Administration) Act 1992* (Cth) definition might be imported into the Fair Work Act to provide:

*If a person works under a contract that is wholly or principally for the labour of the person, that person is an employee of the other party to the contract.*<sup>28</sup>

Alternatively, the AIER supports the position advanced by Andrew Stewart and Cameron Roles in their submission to the ABCC Inquiry into Sham Arrangement in the Building and Construction Industry.<sup>29</sup> Whereby persons contracting to work for another are presumed to do so as an employee unless it can be shown they are genuinely performing that work as a function of their own business. The AIER proposes that an appropriate test for this was set out by Justice Bromberg in in *On Call*<sup>30</sup>:

*Viewed as a “practical matter”:*

- (i) is the person performing the work of an entrepreneur who owns and operates a business; and*
- (ii) in performing the work, is that person working in and for that person’s business as a representative of that business and not of the business receiving the work?*

Confirming the employment status of on-demand workers ensures such workers receive the full protection of labour regulation. The AIER submits that in this circumstance flexibility is best achieved through collective bargaining. Hayter, Fashoyin and Kochan state:

*the institution of collective bargaining is changing and adapting to the multiple developments in the economy and in organizational practices. Rather than create rigidities and obstacles to flexible adjustment as is commonly argued, industrial relations systems have been robust and flexible and are evolving to meet rising demands for microeconomic adaptability*<sup>31</sup>

## **Occupational Health and Safety and Workers Compensation Insurance**

The provision of occupational health and safety protection and workers’ compensation insurance for on-demand workers is of significant public interest affecting workers engaged via both the ‘work on-

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<sup>27</sup> Ibid [106].

<sup>28</sup> *Superannuation Guarantee (Administration) Act 1992* (Cth) s 12(3).

<sup>29</sup> Andrew Stewart and Cameron Roles, Submission to the Australian Building and Construction Commission, *Inquiry into Sham Arrangements and the Use of Labour Hire in the Building and Construction Industry*, 2011.

<sup>30</sup> *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366 [208] (*On Call*).

<sup>31</sup> Susan Hayter, Tayo Fashoyin and Thomas A. Kochan, ‘Review essay: Collective bargaining for the 21<sup>st</sup> century’ (2011) 53(2) *Journal of Industrial Relations* 225, 240 cited in Hannah Johnston and Chris Land-Kazlauskas, ‘Organizing on-demand: Representation, voice, and collective bargaining in the gig economy’ (Conditions of Work and Employment Series No.94, International Labour Organization, 2018).



demand' and 'crowd-work' models. This is an issue that falls squarely within the power of the Victorian Government. Evidence regarding the avoidance of health and safety obligations and the non-payment of workers' compensation insurance was heard by the Senate Standing Committee on Education and Employment, investigating corporate avoidance of the Fair Work Act. In its final report, the Committee recommended reviews be undertaken of:

*'health and safety and workers' compensation legislation to ensure that companies operating in the gig economy are responsible for the safety of workers engaged in the gig economy.'*<sup>32</sup>

By imposing duties on 'employers', the *Occupational Health and Safety Act 2004* (VIC) exposes on-demand workers to risk where no employment relationship has been identified. The framing of the primary duty of care in the *Model Work Health and Safety Act* (Model Act) is an attempt to address such areas of exposure, ensuring more comprehensive coverage. The Model Act states:<sup>33</sup>

*(1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:*

*(a) workers engaged, or caused to be engaged by the person; and*

*(b) workers whose activities in carrying out work are influenced or directed by the person,*

*while the workers are at work in the business or undertaking.*

On-demand workers engaged via 'crowd-work' systems would still sit outside of relevant protections where it is said they are not 'at work in the business or undertaking'. Similarly, should the self-characterisation of Uber be accepted, ie that it is a digital intermediary and not in the business of transport or delivery services those workers might too remain outside the reach of the Act.

**The AIER recommends that the approach of the Model Work Health and Safety Act be adopted in Victoria, with consideration given to potential loop holes created by the condition 'while the workers are at work in the business or undertaking'.**

Following a review of the QLD workers' compensation scheme, Professor David Peetz recommended that the QLD scheme should be extended to ensure on-demand workers are not disadvantaged, Professor Peetz recommended:<sup>34</sup>

**Recommendation 10.1:** *The coverage of the Act should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and specify that it applied where at least two parties were in Queensland at the time the work was undertaken.*

**Recommendation 10.2:** *Intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income received by the intermediaries or agencies.*

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<sup>32</sup> Senate Standing Committee on Education and Employment, Parliament of Australia, *Corporate Avoidance of the Fair Work Act* (Report, September 2017) [8.80].

<sup>33</sup> *Model Work Health and Safety Act 2016* s 19.

<sup>34</sup> David Peetz, 'The operation of the Queensland Workers' Compensation Scheme' (Final Report of the second five-yearly review of the scheme, 2 May 2018) [76].

The AIER encourages this Inquiry to consider the recommendations of Professor Peetz in conjunction with evidence related to the Victorian system.

**The AIER recommends that the coverage of the Workplace Injury Rehabilitation and Compensation Act 2013 (VIC) should be extended to include on-demand workers.**

## **Extending employment rights: toward decent work for all**

Workers sourcing jobs via crowd-work systems are unlikely to ever be considered employees for the purposes of Australian labour law. The platforms through which they are engaged do little more than host an online market place for labour, exercising no control of what jobs, if any, workers bid for or the manner and timing of the work. However, left unregulated the implications of this model are varied and far reaching. Ultimately this market-place system represents the commodification of labour, encouraging workers in a ‘race to the bottom’, resulting in a degradation of work standards, and increasing insecurity and inequality within society.

The Australian Charter of Employment Rights<sup>35</sup> (The Charter) sets out a rights-based approach to regulating workplace relations. The rights enshrined in the Charter are to be intended to be universally applied to all workers rather than limited to those engaged as employees at law.

**The AIER recommends that the rights provided under the Australian Charter of Employment Rights be extended universally to workers.**

A rights-based approach to labour law has been supported academically<sup>36</sup> and is discussed as an option by Stewart and Stanford,<sup>37</sup> who caution that conditions that carry a financial burden would require substantial reconfiguration if applied more broadly. Stewart warns that the extension of such conditions to all workers would likely result in a degradation of the minimum terms and conditions that currently apply to employees.<sup>38</sup> The AIER submits that the rights contained within the Charter do not carry a financial burden and are capable of being broadly applied to workers.

## **Collective bargaining – New mechanisms for the self-employed**

Under Australian law, independent contractors are free to form and join associations however they are not supported by any formal mechanism to bargain collectively. Collective bargaining by independent contractors may occur through an Australian Competition and Consumer Commission (ACCC) exemption from the anti-competitive conduct provisions of the *Competition and Consumer Act 2010* (CC Act) subject to a public benefit test.<sup>39</sup> In circumstances where applications are approved, and collective bargaining is permitted the process of bargaining and negotiated agreements remain voluntary.<sup>40</sup> Johnstone et al state that ‘[w]hile there is as yet no reliable evidence

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<sup>35</sup> Bromberg Mark Irving, above n 1.

<sup>36</sup> Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012).

<sup>37</sup> Stewart and Stanford, above n 14, 430.

<sup>38</sup> Andrew Stewart, ‘Labour Law and the Future World of Work’ Keynote Address, Australian Labour Law Association National Conference, 9 November 2018).

<sup>39</sup> Johnstone et al, above n 36, 140-147.

<sup>40</sup> For discussion of the difficulties faced by independent contractors bargaining under the *Competition and Consumer Act 2010* (Cth) see Shae McCrystal, ‘Organising Independent Contractors: The Impact of Competition Law’ in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 139.

to indicate if ACCC exemptions from the anti-competitive conduct provision of the CC Act produce meaningful collective bargaining outcomes, it seems unlikely'.<sup>41</sup>

The heterogeneous nature of the on-demand economy and the workers operating within that economy is such that even the cohort of workers that operate via market platforms as genuinely self-employed contractors cannot be understood through generalisation. While commercial and contractual assumptions of bargaining power might be appropriate for some more entrepreneurial players, other low skill, low income self-employed workers in the sphere of contracting should be afforded support negotiating and determining their terms and conditions of engagement.<sup>42</sup> The fundamental rights of freedom of association and collective bargaining as set out in ILO Conventions Nos 87<sup>43</sup> and 98,<sup>44</sup> apply to 'workers' broadly interpreted, and include self-employed workers.<sup>45</sup> These Conventions have been willingly adopted by Australia, and hold especial authority owing to their high levels of ratification by ILO member states<sup>46</sup> and the special ILO supervisory mechanisms they are afforded.<sup>47</sup>

**The AIER recommends that a framework to better facilitate collective bargaining by self-employed workers be developed on an industry or occupational basis.**

The agreement between Unions NSW and the Airtasker platform provide an example, albeit voluntary, of bargaining in this sphere, setting out conditions including recommended rates, insurance and safety requirements.<sup>48</sup> As the on-demand economy grows regulation is essential for protecting the dignity, conditions and rights of not only on-demand workers, but employees performing similar tasks who could face downward pressure on wages and also consumers; particularly in areas such as disability care where the end consumers are among the most vulnerable. Collective agreement making, although not straightforward in this context<sup>49</sup>, recognises 'that the need for countervailing power in work relationships is not confined to employment',<sup>50</sup> and offers a means of flexible 'self-regulation which allows for much greater democratic influence from workers, employers and their organizations'<sup>51</sup>.

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<sup>41</sup> Johnstone et al, above n 36, 147; For discussion and comparative analysis of collective bargaining regimes for self-employed workers see Shae McCrystal, 'Collective Bargaining beyond the Boundaries of Employment: A Comparative Analysis' (2014) 37 *Melbourne University Law Review* 662.

<sup>42</sup> Shae McCrystal, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20 *Australian Journal of Labour Law* 1, citing Harry Arthurs, 'The Dependant Contractor: A Study of the Legal Problems on Countervailing Power' (1965) 16 *University of Toronto Law Journal* 89.

<sup>43</sup> *Freedom of Association and Protection of the Right to Organise Convention* (ILO No 87), opened for signature 9 July 1948, 68 UNTS 17 entered into force 4 July 1950).

<sup>44</sup> *Right to Organise and Collective Bargaining Convention* (ILO No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951).

<sup>45</sup> Camilo Rubiano, 'Precarious Work and Access to Collective Bargaining: What are the Legal Obstacles?' (2013) 5(1) *International Journal of Labour Research* 133, 137-8; Breen Creighton and Shae McCrystal, 'Who is a "Worker" in international law' [2016] 3 *Comparative Labor Law and Policy Journal* 691.

<sup>46</sup> Breen Creighton, 'Freedom of Association' in Roger Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (Wolters Kluwer, 11<sup>th</sup> ed, 2014) 315 [2].

<sup>47</sup> Lee Swepston, 'International Labour Law' in Roger Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (Wolters Kluwer, 11<sup>th</sup> ed, 2014) 155, 177-81.

<sup>48</sup> Kate Minter, 'Negotiating Labour Standards in the Gig Economy: Airtasker and Unions NSW' (2017) 28(3) *Economic and Labour Relations Review* 438.

<sup>49</sup> For discussion of legal challenges see McCrystal, above n 42; For discussion of comparator systems and difficulties of coverage, representation and identifying counterparts for bargaining see McCrystal, above n 41.

<sup>50</sup> McCrystal, above n 42.

<sup>51</sup> Johnston and Land-Kazlauskas, above n 31.

## **Appendix A - Australian Charter of Employment Rights**

### ***Recognising that***

improved workplace relations requires a collaborative culture in which workers commit to the legitimate expectations of the enterprise in which they work and employers provide for the legitimate expectations of their workers

### ***And drawing upon***

Australian industrial practice, the common law and international treaty obligations binding on Australia, this Charter has been framed as a statement of the reciprocal rights of workers and employers in Australian workplaces.

### ***1 Good Faith Performance***

Every worker and every employer has the right to have their agreed terms of employment performed by them in good faith. They have an obligation to co-operate with each other and ensure a “fair go all round”.

### ***2 Work with Dignity***

Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work and to experience the dignity of work. This includes being:

- treated with respect
- recognised and valued for the work, managerial or business functions they perform
- provided with opportunities for skill enhancement and career progression
- protected from bullying, harassment and unwarranted surveillance.

### ***3 Freedom from Discrimination and Harassment***

Workers and employers have the right to enjoy a workplace that is free of discrimination or harassment based on:

- race, colour, descent, national, social or ethnic origin
- sex, gender identity or sexual orientation
- age
- physical or mental disability
- marital status
- family or carer responsibilities
- pregnancy, potential pregnancy or breastfeeding
- religion or religious belief
- political opinion
- irrelevant criminal record
- union membership or participation in union activities or other collective industrial activity
- membership of an employer organisation or participation in the activities of such a body
- personal association with someone possessing one or more of these attributes.

### ***4 A Safe and Healthy Workplace***

Every worker has the right to a safe and healthy working environment.

Every employer has the right to expect that workers will co-operate with, and assist, their employer to provide a safe working environment.

### ***5 Workplace Democracy***

Employers have the right to responsibly manage their business.

Workers have the right to express their views to their employer and have those views duly considered in good faith.

Workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace.

### ***6 Union Membership and Representation***

Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.

Workers have the right to require their union to perform and observe its rules, and to have the activities of their union conducted free from employer and governmental interference.

Every worker has the right to be represented by their union in the workplace.

### ***7 Protection from Unfair Dismissal***

Every worker has the right to security of employment and to be protected against unfair, capricious or arbitrary dismissal without a valid reason related to the worker's performance or conduct or the operational requirements of the enterprise affecting that worker. This right is subject to exceptions consistent with International Labour Organization standards.

### ***8 Fair Minimum Standards***

Every worker is entitled to the protection of minimum standards, mandated by law and principally established and maintained by an impartial tribunal independent of government, which provide for a minimum wage and just conditions of work, including safe and family-friendly working hours.

### ***9 Fairness and Balance in Industrial Bargaining***

Workers have the right to bargain collectively through the representative of their choosing.

Workers, workers' representatives and employers have the obligation to conduct any such bargaining in good faith.

Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond.

Conciliation services are provided where necessary and access to arbitration is available where there is no reasonable prospect of agreement being reached and the public interest so requires.

Employers and workers may make individual agreements that do not reduce minimum standards and that do not undermine either the capacity of workers and employers to bargain collectively or the collective agreements made by them.

### ***10 Effective Dispute Resolution***

Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith, and, where appropriate, to access an independent tribunal to resolve a grievance or enforce a remedy.

The right to an effective remedy for workers includes the power for workers' representatives to visit and inspect workplaces, obtain relevant information and provide representation.