Australian Institute of Employment Rights

Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce

Submission of the Australian Institute of Employment Rights

Written by James Fleming, Keith Harvey, Mark Perica and Joellen Riley Munton on behalf of the Australian Institute of Employment Rights

Date: 15 February 2022

A 01/2022

Australian Institute of Employment Rights

ABN 29 685 578 949
Level 1 / 214 Graham Street
Port Melbourne VIC 3207

e admin@aierights.com.au
p 03 9647 9102
f 03 9647 9199

Summary of Recommendations

A summary of our key recommendations is as follows:

1. Make the standards mandatory and this can be achieved despite constitutional limitations.
2. Regulate work, health and safety standards directly via amendments to work, health and safety and workers' compensation legislation and regulations.
3. Make the remaining standards mandatory as a condition of obtaining and maintaining a business license to operate in Victoria.
4. With some caveats, make awards the reference for relevant comparator wages under standard 3.2.
5. Describe the standards as 'minimum standards' rather than 'best practice' so as not to overstate the bar they set nor encourage a race to the bottom and labour market dualism between non-employees and employees.
6. Strengthen the bargaining provisions to require platforms to recognise unions and to bargain in good faith.

About the AIER

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 and the subsequent Australian Standard of Employment Rights[1] and overseen by a tripartite Executive Committee drawn from unions, industry and academia committed to these rights and principles.

[1] Bromberg, M. and Irving, M. (eds). 2007. *Australian Charter of Employment Rights*, Melbourne: Hardie Grant Books; Howe, J. 2009. *Australian Standard of Employment Rights: A How-to Guide for the workplace*, Melbourne: Hardie Grant Books. The ten principles of the Charter and Standard are included at appendix A.

Introduction

We thank the Victorian Government for the opportunity to comment on the standards proposed in the consultation paper, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (2021). We note these standards are proposed as part of the Victorian Government's response to the *Report of the Inquiry into the Victorian On-Demand Workforce* (2020) and the Government's stated commitment to implement recommendations 13 and 14 of that report. We note this initiative is aimed at addressing the many problems in the on-demand economy identified in the report, some of which were discussed in our previous submissions.[2] These problems are particularly acute amongst those workers engaged in the on-demand economy ostensibly as independent contractors, and include substandard pay and conditions, lack of bargaining power and access to collective representation, unsafe working conditions and cost shifting from platforms to workers. We note the consultation paper proposes standards for implementation by voluntary industry codes of conduct and leaves for subsequent consideration any other measures to encourage or require compliance, such as economic incentives or government oversight.

While we commend the broad principles articulated in the proposed standards, we are disappointed that the recommendations do not include proposals for more rigorous implementation of the standards. Given the extent of the problems in the gig economy recognised in the report, the voluntary nature of the proposed standards is disappointing. No doubt the Victorian government is concerned about potential constitutional obstacles to regulating enforceable standards for on-demand work, given the scope of the *Fair Work Act 2009* (Cth) and the *Independent Contractors Act 2006* (Cth), and the effect of s109 of the Australian Constitution. Nevertheless, we consider that industry self-regulation via voluntary aspirational standards is unlikely to address the exploitation of vulnerable workers in an industry notorious for regulatory arbitrage. We note that Uber, for example, one of the biggest actors in the on-demand economy in Victoria, established itself in the state in defiance of taxi licensing laws[3], and has been criticised

[2] See: the AIER's submission to the inquiry here and subsequent submission which has not yet been made public by the inquiry.

[3] The law firm Maurice Blackburn has launched one of the biggest class actions in Australia's history against Uber on behalf of taxi drivers, alleging that Uber initially operated illegally, causing taxi drivers to lose business: see Emma Ryan, 'Maurice Blackburn braces for "epic" uber class action', *Lawyers Weekly*, 5 May 2019.

for unilateral termination of workers and opaque internal processes.[4] The Consultation Paper appears to rely on the assumption that platforms will comply with standards to enhance their market reputations. Unfortunately, considerable media attention to poor practices in the industry has not been sufficient to deter its growth or modify the behaviour of its main actors. More robust measures for encouraging compliance with these standards will be needed if they are to be meaningful.

Mindful of the constitutional issues, we suggest several ways in which the standards may be given more force via direct regulation in areas clearly within the State Government's legislative competence, free of Commonwealth interference. These are: health and safety regulation, workers' compensation laws, and business licensing regulation. These are outlined below. We also suggest several ways in which the bar set by the standards should be raised to adequately address the disparity in pay and conditions between non-employee workers in the gig economy and the pay and conditions enjoyed by national system employees in Australia. We refer to the Australian Charter of Employment Rights and Australian Standard of Employment Rights as useful benchmarks for best practice in this regard. These topics are discussed in turn below.

Health and safety

Proposed standard 6 concerns health and safety and urges platforms to maintain safe workplaces, promote health and safety objectives, consult workers on safety and have work-related injury insurance, and to cover workers not covered by state schemes. There is no constitutional hinderance nor sound policy reason why this should be presented as a voluntary aspirational standard rather than a mandatory requirement. The State Government already regulates work health and safety obligations through the *Occupational Health and Safety Act 2004* (Vic) and the *Occupational Health and Safety Regulations 2017* (Vic). There is no reason that on-demand workers should be considered to be excluded from the obligations owed to all workers under this legislation.

[4] E.g., see: Ben Chapman, 'Uber and Deliveroo drivers protest over hundreds of 'unfair' dismissals', *Yahoo! Finance*, 27 July 2021.

Likewise, the provision of compensation for workplace injuries and access to rehabilitation and other rights (such as protection from dismissal following a workplace injury) are regulated in Victoria by the *Workers Compensation Act 1958* (Vic) and the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic). This legislation could be amended to include on-demand workers as presumed or deemed employees covered by these Acts, just as this legislation has long included certain categories of non-employed workers when good policy dictates their inclusion.

A report recently published by the Transport Education Audit Compliance Health Organisation ('TEACHO')[5] describes in detail how this may be achieved using the example of delivery drivers in the gig economy. We extract the following relevant passages, but the TEACHO report is worth reading in full:

> "...legislatures have been willing to define or deem certain workers to be covered by workers' compensation insurance, and to deem the entity engaging them as the person obliged to take out cover, whenever the worker is performing the service personally, as an unincorporated individual with no trade or business identity of their own. The obstacles to inclusion of on demand road transport workers in these extended definitions largely relate to two matters: the nature of the contract with the platform, and the fact that the drivers/riders provide their own vehicles, phones and data packs....
>
> It is also apparent, however, that it would be a straightforward matter for state legislatures to enact further deeming provisions – or to clarify the general contractor provisions already in the Acts – to provide that on demand road transport workers are covered by workers compensation, and the platforms engaging them should be deemed to be their 'employer' for the purpose of workers' compensation premiums. Stories about workers killed or injured in the course of their work are depressingly frequent. See for example the report of two deaths of food delivery drivers, Dede Fredy and Xiaojun Chen, in late September 2020 (Nick Bonyhady and Tom Rabe 'Rider deaths reveal risky safety practices' *Sydney Morning Herald*, 3-4 October 2020, 24). Given the low rates of pay that these workers receive, and their highly dangerous working conditions, it would be appropriate, and economically efficient, if the platforms taking substantial commissions from their work were required to hold workers' compensation policies to cover them in cases of accident. One policy taken out on behalf of a whole class of workers is more efficient than requiring each of them to take out personal injury insurance individually."

[5] Michael Rawling and Joellen Munton, *Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry* (Report, Faculty of Law, University of Technology Sydney, January 2021) 6 ('TEACHO Report').

The TEACHO report goes on to relate how this is consistent with past practice in relation to various groups of non-employee workers in need of protection:

> "This is not a radical proposal. It is entirely consistent with decisions made in the past about ensuring that certain categories of workers who are not employees should nevertheless be covered by the general workers' compensation system managed by the State. The categories of deemed workers for the purpose of workers' compensation statutes tend to share a common characteristic: they are workers who are paid only for their labour, and have no organizational structure of their own to carry workers' compensation insurance. For example, among the extensive list of deemed workers in the *Workers Compensation Act 1958* (Vic) s 3(3) are tributers, who undertake mining work for mine owners on the basis that they are paid with a fraction of the minerals they extract. Tributers are also deemed to be workers under the *Workers Compensation and Injury Management Act 1981* (WA) s 7."[6]

Not only are these measures not radical, but they are also not new either. For more than 100 years, the Victorian parliament, through regular amendments to Workers Compensation legislation first enacted in 1914 has sought to bring within the scope of the legislation categories of workers not necessarily in a strict 'master/servant' or 'employer/employee' relationship.

One example of such a category of worker is that of 'tributers' working in the mining industry. Tributers were not owners or lessees of mines or employees and did not work for wages. They were granted the right to work a portion of a mine lease and were paid a proportion of the revenue from the mine as payment.[7] In 1922, the Victorian Parliament determined that it was important that this category of worker was covered by Workers Compensation legislation and amended the Act to make this clear.[8]

There are many such examples of workers who are not employees who are covered by current Workers Compensation legislation in Victoria, including share farmers and tree fellers/cutters working in accordance with contracts and non-employee taxi drivers (bailees): see *Workers Compensation Act 1958* (Vic), s 3(1).

---

[6] Ibid., pp30-31.
[7] https://researchdata.edu.au/mining-warden039s-register-mining-division/154507 (accessed 14th February 2022.
[8] http://classic.austlii.edu.au/au/legis/vic/hist_act/wca1922255/ No. 3217. An Act to amend the Workers Compensation Act 1915. See also Victorian LEGISLATIVE ASS·EMBLY. Thursday) November 16~ 1922 at 2801

Moreover, the Victorian Parliament has sought to ensure that earlier forms of on-demand workers were covered by Workers Compensation legislation. The current Act includes a provision (which appears to date from the era of day labour in the stevedoring industry) which covers workers travelling to and from 'pick-ups' to seek such employment – whether or not any work was obtained on the day:

> "(7) Notwithstanding anything in this Act or any law, where any person is ordinarily engaged in any employment in connexion with which persons customarily attend certain pre-arranged places in this Act called places of pick-up) at which employers select and engage persons for employment, any such person shall be deemed, while in attendance at any such place of pick-up for the purpose of being so selected or while travelling thereto from his place of residence, or (where he fails to be so selected) while travelling from such place of pick-up to his place of residence, to be working under a contract of service with an employer, and the employer who last employed him in his customary employment shall be deemed to be that employer."[9]

It is clear in our submission that it has been a priority for the Victorian Parliament to ensure that work of various forms has been included in Workers Compensation legislation to ensure that non-employee workers are protected from the consequences of injury or accident in the course of their work.

Business licensing

Another way in which the State government may act to provide for mandatory standards is via business licensing requirements. There are sound policy reasons for requiring gig platforms to meet broad community standards in order to operate within the State. Demonstrating a business model that complies with the proposed standards should be a precondition of business licenses to commence operating in the State of Victoria. Demonstrating ongoing compliance with such standards should be a requirement for license renewal. State labour hire licensing schemes were introduced for similar policy reasons to address exploitative practices in the labour hire industry.

[9] *Workers Compensation Act 1958* (Vic), s 3(7).

Victoria's own labour hire licensing scheme came into force on 29 April 2019 under the *Labour Hire Licensing Act 2018 (Vic)*. The scheme requires labour hire providers to be licensed to operate in Victoria and users of labour hire to engage only licensed providers. To obtain a license, labour hire providers are required to pass a 'fit and proper person test', demonstrate compliance with workplace laws, labour hire laws, minimum accommodation standards, as well as report annually on their activities. We urge the Victorian government to adopt a similar legislated scheme for on-demand work.[10]

Best practice

The consultation paper makes reference to a number of international standards and charters of rights for gig workers. We wish to refer you also to the Australian Charter of Employment Rights ('the Charter') and to explain its relevance to the proposed standards. Developed by the AIER in 2007, the Charter aims to identify the fundamental values upon which workplace relationships and laws should be based if they are to provide for fair and decent work. The Charter is the result of a collaboration of eminent scholars and legal practitioners and broad community consultation.

The Charter rights are derived from fundamental principles enshrined in international instruments that Australia has willingly adopted. Australia is bound to implement and observe these principles as a matter of international law. Charter rights also reflect the values embedded in Australia's history of workplace relations such as the "important guarantee of industrial fairness and reasonableness"[11], and well-established common law principles. Hence, the Charter was created to provide a clear distillation of the fundamental standards that should guide the development of just, fair and reasonable labour laws and Australian workplace practices. It is intended as a blueprint for assessing government policy, legislative reform and workplace relations conduct. We

[10] We note that the Victorian government already has in place legislation to regulate certain kinds of work in the heavy vehicle transport industry, the *Owner Drivers (Contracts and Disputes) Act 2007* (Vic). This legislation is specifically afforded continued operation, by provisions in the Independent Contractors Act 2006 (Cth). An expansion of coverage of this legislation might be used to extend the standards to on demand workers in the transport industry. Other measures, however, will be necessary to ensure adoption of the standards in the broad range of industries in which on demand platforms now operate.

[11] *New South Wales and Others v Commonwealth* [2006] HCA 52 [523-5].

encourage the Victorian Government to use it as a reference in developing best practice standards in the on-demand economy and to promote fairness and dignity at work for all Victorian workers.

In summary, the Charter expresses 10 fundamental rights, all of which are appropriate to workers in precarious work. We list them here, some with some clarification, however, most speak for themselves:

1. *Good faith performance* – this broad principle holds that all parties to working relationships have an obligation to cooperate in good faith to ensure a 'fair go all round'. Good faith requires that parties to work engagements ought not to seek to disguise the true nature of those engagements for the purpose of regulatory avoidance.
2. *Work with Dignity* – this fundamental principle respects the humanity of the worker and holds that they are entitled to respectful treatment.
3. *Freedom from Discrimination and Harassment*.
4. *A Safe and Healthy Workplace*.
5. *Workplace Democracy* – which requires that workers should be entitled to be consulted on matters affecting their work.
6. *Union membership and representation* – this requires that workers should enjoy not only the freedom to join associations, but also the right to bargain collectively to secure decent wages and conditions of work.
7. *Protection from Unfair Dismissal*. The right to contest capricious termination of a work contract is fundamentally important in ensuring respect for all other workplace rights. A worker who can lose their job without recourse to review is vulnerable to abuse on all grounds. Those who cannot contest a capricious dismissal cannot safely raise other concerns about their treatment at work.
8. *Fair minimum standards* – including fair wages and also fair conditions of work, such as entitlements to take leave from work when ill without risking one's employment.
9. *Fairness and balance in industrial bargaining*.
10. *Effective dispute resolution*. This right is also fundamental to ensuring respect for all other rights. Accessible and affordable avenues of dispute resolution that can deal with problems in a timely manner are essential when the interests at stake are a worker's livelihood.

A copy of the Charter is attached as an appendix to this Submission. Each right is discussed in more detail in Bromberg, M. & Irving, M. *Australian Charter of Employment Rights* (2007).

Extending Charter rights to non-employed workers

In Chapter 11 of the aforementioned book, entitled 'The Scope of the Charter', Bromberg and Irving, establish the case for applying the fundamental rights articulated in the *Charter* beyond the boundaries of the employment contract, as defined by common law tests. In critiquing the common law 'multi-factor test', they note that the ambiguities in this test leave scope for employers to 'avoid laws meant to protect employees'.[12] Employers achieve this by deliberately choosing contractual terms to avoid employment (such as including apparent entitlements for the worker to delegate work to others, even though delegation would be impractical in the circumstances), or often by interposing an intermediary (such as a labour hire agency, or a small company formed by the worker at the insistence of the employer) to avoid any direct contractual relationship with the worker. The ease with which employers have been able to escape the application of protective labour laws by these means is manifested in the rising numbers of workers engaged on contracts other than continuing full-time employment.

Bromberg and Irving explain, and we continue to maintain, that an extension of *Charter* rights to dependent workers, whether or not they are directly engaged as permanent employees, is justified on the basis of the purpose of industrial laws, as expressed in International Labour Organisation instruments. One "purpose of industrial laws, and one of the purposes of the *Charter*, is to redress the inequality of bargaining power between those who perform work and those for whom work is performed."[13] The ILO's 2006 Recommendation Concerning the Employment Relationship supports "action to combat disguised employment relationships that hide the true legal status of the relationship".[14]

---

[12] Bromberg, M. and Irving, M. (eds). 2007., above n1 at p 119.
[13] Above n1 at p 121.
[14] Ibid.

For this reason, we continue to press for the recognition of these basic Charter rights for categories of worker who fall outside of the common law definition of employment but nevertheless undertake subservient work for another who engages their labour on terms largely dictated by the hirer. This includes workers who have been found to be genuine 'independent contractors' according to the common law test, because many of these workers also manifest a serious inequality of bargaining power in the context of providing services under an essentially labour-only contract. As Bromberg and Irving state, a truly entrepreneurial worker is one who provides "a commercial service (and not merely labour) to a range of customers", and has "capacity to sell the business including its goodwill and the capacity to delegate the performance of the work to others".[15] Contractors who are not running businesses of their own, in which they enjoy the prerogative to negotiate the price of their services and develop their own business goodwill, are as much in need of the protections articulated in the Charter as employees. This is especially so in the case of that new classification of worker – the on-demand 'gig worker' – whose existence was not so prominent in 2007 when the *Charter* was first published as it is now.

We also note that Bromberg and Irving recommend that the Charter apply to 'true employers' in any arrangement where an intermediary has been interposed between the true employer and the worker for the purposes of avoiding labour costs or undermining the capacity of employees to engage in collective bargaining.[16] They proposed that a host employer should be treated as the true employer where the worker is 'subject to the control of the host employer in relation to how the work is performed', and usually provides work only to the host employer's business, doing work that is the same as the host employer's directly engaged staff.[17] The Australian Standard of Employment Rights builds on the Charter to develop best practice standards. We attach both for reference and refer you also to the accompanying book, Joanna Howe, *Australian Standard of Employment Rights: A How-to Guide for the Workplace* (Hardie Grant: 2009). This work contains practical tools to be used in translating the principles and ideals in the Charter into workplace policies and conditions, regardless of an organisation's size, industry or background, which you will likely find highly useful for present purposes. We would welcome the opportunity to discuss

[15] Ibid p 123.
[16] Ibid p 125
[17] Ibid at pp 125-126.

this further and our work on accreditation and implementation of workplace standards at the appropriate stage.

Best practice v minimum standards

The consultation paper asks whether each of the proposed standards represent 'best practice'. We suggest the term 'best practice' is used in a somewhat vague and misleading fashion. Does it mean the highest standard observed empirically in other industries or jurisdictions? Alternatively, does it mean the highest observed standard amongst existing gig economy players (a low bar) or an aspirational standard that has not yet been achieved? At best, the proposed standards barely approach the 'minimum' legal standards that apply to all employees. For example, standard 3.2 concerning fair conditions and pay, encourages platforms to publish average earnings and comparisons with 'the minimum wage'. This appears to be a reference to the Federal Minimum Wage. We suggest the minimum benchmark should be award wages appropriate to the relevant industry. Award wages are already the lowest standard applying to only a minority of employee in Australia. The majority of national system employees in Australia enjoy above-award wages, for example, set by collective agreements or individual contractual arrangements.

According to the ABS, in May 2021 (the latest figures), only 24.75% of Australian employees were paid in accordance with an award. Over 37% were covered by a collective agreement and a further 38% were paid by an 'individual arrangement' (as defined – these are usually non-award-covered employees or employees who are paid rates of pay in excess of an award that might apply to them). Agreement covered employees earned on average $1425.60 per week compared to award-covered employees who earned an average of $848.30 per week, a margin of 68%.[18]

Describing a platform that merely meets the Federal statutory minimum wage as meeting 'best practice' would be highly problematic and misleading. It would legitimise a race to the bottom and encourage labour market dualism that locks in subordinate pay and conditions for non-employee on-demand workers compared to employees. Under the proposals, a gig economy platform could

[18] ABS 63060DO005_202105 *Employee Earnings and Hours*, Australia, May 2021, Table 4.

offer rates lower than award wages and yet legitimately claim to be complying with 'best practice' as defined by the standards. Further, as the discussion in the consultation paper implies, there is a difficulty in comparing wages with piece rate work. This is because a direct comparison may not account for the lost working time in between jobs that apply to on-demand workers. Instead, the State Government ought to take inspiration from the regulation of road transport in New York in 2019, where the regulator was able to convert time-based wages designed for employees and convert them to an equivalent piece rate for bailees and contractors (i.e., a flag fall and distance-based rate that applied to taxi and ride share drivers). A similar on-demand economy tribunal is needed that can translate industry standards drawn from awards and collective agreement standards and translate them into equivalent piece rates and conditions for various non-employees in on-demand jobs.[19] This general approach of 'directed devolution', translating general standards across modes of engagement and different levels and jurisdictions is developed further in our forthcoming publication, Fleming, J. (ed.), *A New Workplace Relations Architecture* (Hardie Grant: 2022). Compliance with standards developed by a Victorian on-demand economy tribunal ought to be a business licensing requirement as explained above.

Another area in which the standards ought to be higher is in bargaining. Given the legal and practical barriers to non-employee on-demand workers organising and taking industrial action, the standards ought to require that platforms recognise unions as bargaining agents and bargain in good faith. Failure to do so ought to jeopardise a platform's business license. In any event, we suggest the standards ought to be called 'minimum standards' rather than 'best practice'.

Conclusion

In conclusion, whilst the constitutional framework inhibits the ability of the Victorian Government from regulating wages and conditions for workers in the gig economy directly, both work health and safety and rights to compensation for workplace injury are areas of State regulation. In those areas the definition of worker could be expanded to cover non-employee on-demand workers. A raft of relevant historical precedents justify this approach. Business licensing is also within state

[19] Discussed in David Peetz (2021) 'Institutional experimentation, directed devolution and the search for policy innovation', *Relations Industrielles/Industrial Relations* 76 (1):69-89. See also note 10 above.

jurisdiction and could be used to give the standards force. As argued above, the standards are unlikely to be effective in influencing industry practice if they remain entirely voluntary. We have also suggested that the bar set by the standards is too low in several areas including bargaining and wages. Finally, we recommend that the standards should be described as 'minimum standards' rather than 'best practice'.