Australian Institute of Employment Rights

Inquiry into the Victorian On-Demand Workforce

Submission of the Australian Institute of Employment Rights Inc on the Recommendations in the Report of the Inquiry

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Introduction

The Australian Institute of Employment Rights Inc. welcomes the opportunity to comment on the Recommendations arising from the Report of the Inquiry into the Victorian On-Demand Workforce.

The AIER made a submission to the Inquiry [Submission No 12].

The Report of the inquiry is a detailed investigation of the issues arising from the growing prevalence of 'on demand' or 'platform' work in Victoria and, by extension, throughout Australia and other jurisdictions. This form of work has grown enormously because of the rise of technology platforms mentioned in the Report.

Since the Inquiry commenced, the issues associated with 'on demand' or gig economy work have become even more pronounced because of the global pandemic. In particular, the engagement of workers through online 'Apps' and other means is likely to be found to be a contributing factor to the second wave of COVID-19 infections in Victoria. Similarly, the engagement of aged care workers across multiple sites and via agencies and through short term, casual or other forms of precarious employment has resulted in major health care challenges.

While these issues are beyond the scope of this Report, they highlight the significance of the issues with which this Report seeks to grapple.

AIER submission

The AIER did not seek to make submissions on all aspects of the Inquiry's Terms of Reference. The AIER made five recommendations to the Inquiry. They were:

> *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 loopholes 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.

Response to the Recommendations in the Report of the Inquiry

In the opinion of the AIER, the Recommendations contained in the Report of the Inquiry address these five Recommendations. In addition, the Report's recommendations taken as a whole provide a comprehensive approach to the issues presented by 'platform' work.

AIER notes that the Inquiry's key finding and recommendations revolve around the need to clarify the work status of workers engaged by various 'platforms' in the On Demand economy. AIER strongly supports this conclusion. The Inquiry Report concludes that:

1352 Genuinely self-employed, autonomous businesspeople should operate under commercial arrangements. Workers who operate as part of another's business or enterprise should be covered by protections and entitlements provided by labour regulation. This is consistent with recent court decisions such as On Call and Quest, which have considered the question of 'entrepreneurship' in applying the work status test.
1353 The Inquiry recommends that this approach be adopted and clearly set out in the legislation.

Recommendation 6 deals with this issue. The AIER strongly supports all the elements of Recommendation 6 which, if implemented, should provide a basis for resolving key issues related to 'on demand' work.

AIER submitted 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;

However, Recommendation 6 does not specifically recommend the form of statutory definition to address this issue.

AIER submitted that either of the following definitions might be effectively used to implement the principle set out in the Inquiry's Report:

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.

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.29 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:

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?

AIER also submitted that definitions used in Victorian Health and Safety and Workplace Injury Rehabilitation and Compensation legislation be adopted and where necessary extended to 'on demand' economy workers.

AIER notes that the Inquiry's Recommendation 7 calls for the work status definition to be aligned across all Statutes. On the basis that the definition adopted has the effect of ensuring that 'workers who operate as part of another's business or enterprise' are classified as employees and thus entitled to the benefits and protections of labour legislation, AIER supports Recommendation 7.

The effect of the Inquiry's Recommendations 6 and 7, together with other Recommendations will ensure that all workers who are employees are entitled to the core labour rights contained in the AIER's Australian Charter of Employment Rights referenced in our submission.

AIER's submission and the Inquiry's Report both hold that the Commonwealth Government should be the lead jurisdiction to deal with the key issue of introducing a statutory definition of employment which would ensure that on demand workers are properly defined as employees where they are engaged as part of another's business or enterprise.

The Commonwealth has, by its reliance on the Corporations Head of Power in the Constitution and by referral of State powers by all States other than West Australia [and through other heads of power], adequate legislative power to introduce an appropriate definition of employment. Section 51 (xx) of the Constitution provides power to legislate with respect to:

(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

The Fair Work Act covers 'national system employers' [and their employees] generally [there are some exceptions], these employers being defined as:

***14 Meaning of* national system employer**

> *(1) A* **national system employer** *is:*
>
> *(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or*
>
> …

Thus, there would appear to be no impediment to the Australian Parliament legislating a statutory definition of employee for the purposes of the Fair Work Act. On demand businesses are clearly constitutional corporations for the purposes of the Act and the Commonwealth should use its constitutional powers to ensure fair treatment for all workers engaged in these businesses.

As the Inquiry's Report notes, Australian industrial law relies on a series of common law tests to determine whether a worker is or is not an employee. Section 25 of the fair Work Act 2009 simply says:

> ***25 Meanings of employee and employer***
>
> *In this Part,* ***employee*** *and* ***employer*** *have their ordinary meanings.*

The Inquiry's Report notes a considerable number of difficulties in relying on a common law approach to this issue, including the uncertainty [for both workers and businesses], delays and costs associated with resolving these issues. Of great significance is the power imbalance between individual workers and often global corporations when these issues are sought to be resolved.

AIER strongly supports the Report's Recommendations 8-12 which seek to provide streamlined support for on demand employees and a fast track determination of the work status of workers to provide speedy and fair resolution of these issues so that workers and businesses know where they stand.

The AIER's submission did not specifically address issues relating to workers who are not employees. However, the AIER notes that with respect of those 'platform' workers who are genuinely not employees, the Inquiry makes several Recommendations. These include:

- *establishing Fair Conduct and Accountability Standards and principles to underpin working arrangements for non-employed on demand workers [Recommendation 14]*
- *Removing barriers to collective bargaining rights for non-employee platform workers [Recommendation 15]*
- *Clarifying, enhancing and streamlining existing unfair contracts remedies [Recommendation 17]*
- *strengthening provisions to counter sham contracting [Recommendation 19]*

AIER supports these Recommendations.

It is noted that Recommendation 15 implements AIER's fifth Recommendation in our submission. Providing collective bargaining rights to independent contractors in their dealings with larger, economically powerful corporations is an important protection to ensure fair dealing.

The Inquiry's Report notes the AIER's submission on this question:

> *1286 The AIER suggested that the framework to facilitate collective bargaining by self-employed workers ought to be improved. While non-employee workers may form and join associations, they are not, however, supported by any formal mechanism to bargain collectively.*

AIER also strongly supports the proposed Fair Conduct and Accountability Standards and principles to underpin working arrangements for non-employed on demand workers as well as the improvements to the Unfair Contracts remedies.

AIER submits that, again, the powers of the Commonwealth to legislate regarding constitutional corporations, including foreign corporations, provides adequate power to ensure that these reforms are successfully implemented.

While the lead agency on these issues should be the Commonwealth AIER submits that Victoria [and other States] could do certain things if the Commonwealth fails to act. AIER notes and supports the Report's Recommendation 2:

> *The Inquiry recommends that, 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.*

AIER's submission noted at least two measures that the Victorian Government can and should take within its legislative competence:

> *II. the approach of the Model Work Health and Safety Act be adopted in Victoria, with consideration given to potential loopholes 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;

AIER also supports the Report's finding that:

The Inquiry recommends that Victoria should, in so doing, lead a collaborative and consultative process to achieve this with stakeholders and other willing states.

Conclusion

The AIER believes that the Inquiry into the Victorian On Demand Workforce has produced a Report and Recommendations that, if implemented, will greatly serve the needs of workers engaged in the on demand/platform work economy. The implementation of these Recommendations by Governments at the Federal and State level will provide both certainty and fairness for businesses and workers engaged into those enterprises – including core labour protections for those workers – as well as for the Victorian community as a whole.

The current level of uncertainty as to the work status of workers in the 'on demand' economy ultimately serves no one's interest, other than certain employers which may be deliberately seeking to avoid providing fair employment protections and benefits to workers who are, in practice if not yet in law, their employees.

The current pandemic has caused the Commonwealth Government the initiate a process of seeking to reform industrial and employment laws in this country. Given the interaction between 'on demand' and other forms of precarious employment and the spread and scale of the pandemic, Victoria can and should act as an advocate for change in relation to the 'on demand' workforce as part of this process for the benefit of all Victorians.