



Victorian
Chamber of Commerce
and Industry



Inquiry into the Victorian On-demand Workforce

Victorian Chamber Submission

February 2019

Introduction

The Victorian Chamber of Commerce and Industry welcomes the opportunity to provide a submission to the Inquiry into the Victorian On-Demand Workforce.

As Victoria's leading business organisation, each year the Victorian Chamber informs and services more than 15,000 members, customers and clients across the state, encompassing all industry sectors and spanning small, medium and large-sized businesses.

This submission has been informed by input from our members, customers and clients reflecting businesses involved the operation of on-demand platforms, those that compete with on-demand platforms and those that use on-demand platform services.

In this submission we respond to key elements of the terms of reference most relevant to our members, making the following key points:

- Online platforms are disrupting and challenging the business models of many incumbent businesses, forcing them to change and adapt to compete. They are innovating through efficiently matching buyers and sellers, harnessing unused capacity, speed of delivery, data and analytics, rapid scaling, service levels, responsiveness to customer demand and competitive pricing.
- Independent contracting facilitates the on-demand economy due to its flexibility. Rather than forcing businesses to change their business models to adapt to old regulatory frameworks, the law may need to catch up with new business models to allow greater benefits to be offered to independent contractors without compromising their employment status.
- We support all workers, whether they are employees or independent contractors, receiving their correct legal entitlements and are opposed to genuine employment relationships being misrepresented as independent contracting relationships.
- Any policy or regulatory response to the on-demand economy should:
 - only occur at the federal level
 - not impair innovation or competition, while ensuring competitive neutrality between traditional and on-demand businesses
 - only target vulnerable workers, without impacting high-end on-demand work facilitated by platforms
 - not impede the broader use of independent contracting by businesses and consumers.
- There is scope for governments to help on-demand workers clarify their employment status and ensure online platforms are not misrepresenting employment relationships.
- The *Owner Drivers and Forestry Contractors Act 2005 (Vic)* provides a potential model for providing information to platform workers to help them make more informed decisions about pricing their services, accounting for tax and superannuation, covering input costs (such as fuel, maintenance and depreciation for vehicles) or whether to accept work.

Innovation, competition and the extent and nature of the on-demand economy in Victoria

The on-demand sector competes through innovation

On-demand and online platforms have rapidly established in response to technology developments and consumer demand. These platforms are disrupting and challenging the way Victorians work, the way consumers engage with

service providers, traditional business models (including labour hire businesses), and the regulatory environment. By using technology, they have changed the way many traditional services are provided, harnessing unused capacity, creating and using data and analytics to better match supply and demand as well as supporting partners, offer rapid scaling, new service levels (for instance integrated mobile phone applications), responsiveness to customer demand, competitive pricing and buyer and seller regulation.

Examples of the on-demand sector include ridesharing and food delivery services such as Uber, Didi, Ola, Shebah and Deliveroo, platforms for hiring freelance workers such as Airtasker, Freelancer and Upwork, as well as more specialised platforms providing professional services such as Cavalry and Expert 360.

The common feature of these platforms is that they match people or businesses wanting to provide a good or service with customers. Our interviews with platform providers highlight that there is no uniform business model for on-demand providers with platforms operating across a growing range of sectors, spanning high and low skilled activities and price points.

Business models also vary significantly with respect to:

- the range of services provided – with some platforms providing a single service, while others provide multiple services or allow the scope of service to be negotiated between buyers and sellers
- how prices are determined – with some platforms setting the price, while others allow prices to be negotiated between buyers and sellers
- whether work is allocated through an open marketplace or whether work is ‘pushed’ to individual workers or groups of workers by the platform
- how much control is exercised by the platform over how the work is performed
- the degree of vetting conducted by the platform over prospective workers and the equipment they use in providing services
- whether the platform provides ancillary services to workers such as insurance
- the level of regulation of services provided (i.e. taxi and hire car regulation, trade and occupational licensing).

While business to consumer on-demand services have been the focus of much discussion in respect of the on-demand sector, our interviews with platform providers also highlights the growing and diverse range of business to business on-demand providers, including legal, design, communications, IT, management consulting and administration services.

Business to business on-demand platforms can reduce the time taken to fill roles and allow businesses to scale up and down to respond to varying levels of customer demand. This is especially relevant to small business and start ups and can help them to grow. For instance, Lonely Planet report that using an on-demand platform “saves Lonely Planet time and money by removing the headache from the hiring process” while VicSuper reports that a platform means that “the hiring manager has more time to do their own stuff -the valuable things that make our business better”.^{1,2}

These platforms have also created new approaches to regulation. For instance, users of the Uber platform (consumers and providers) self-regulate through user verification, a ratings system and geographic tracking, helps to ensure driver and passenger safety.

The key benefit to the community and economy from on-demand platforms stems from innovation, the provision of new and better services, the creation of new markets and the efficient matching of buyers and sellers. In most cases, on-demand platforms compete on service and innovation rather than price alone.

¹ <https://www.weployapp.com/case-study/lonely-planet>

² <https://www.weployapp.com/case-study/vicsuper>

Benefits of flexible work for business and workers

The nature of work in the modern economy has changed. Flexible forms of employment have become an established part of the economy, with independent contractors and other business operators now comprising around 17 per cent of total employed persons in Australia.³

Flexibility is necessary for Australian businesses. Flexible forms of employment assist firms to structure their business operations in the most efficient and productive manner which increases the efficiency of the labour market and the productivity of the economy.

Enterprises operating in industries like retail, tourism and hospitality must be able to respond to peaks and troughs in demand. Flexible forms of employment provide this and are increasingly important to high skill, high wage sectors such as information technology, design, communications and professional services.

Flexible forms of working, including those enabled by the on-demand economy, can benefit workers by providing them with work that best suits their lifestyle and aspirations, for example those with study, caring or parenting responsibilities. It can also provide a pathway to building skills and experience that leads to more traditional work opportunities.

Submissions made by platforms (including Deliveroo, Uber and Airtasker) to the *Senate Select Committee on the Future of Work and Workers* highlight and provide evidence of how workers value the flexibility that platforms provide.

A business the Victorian Chamber interviewed in response to this inquiry also reports that workers undertaking high-end independent contracting assignments in IT and consulting are drawn to the work by both the flexibility and high levels of remuneration and that the majority of these workers prefer 'gig' work to traditional employment.

Legal frameworks for flexible work

There are a broad range of State and Federal legislation and regulation relevant to employment, covering pay and entitlements, long service leave, equal opportunity, occupational health and safety, owner drivers, workers compensation, working with children, outworkers, labour hire licensing, payroll tax, competition and consumer protection, independent contracting, migration, superannuation, taxation and anti-discrimination.

The Victorian Chamber supports all workers, whether they are employees or independent contractors, receiving their correct legal entitlements and is opposed to any employment relationship that is purposely misrepresented as an independent contracting relationship.

A common theme in our business engagement (including on recent reforms to labour hire and portable long service leave) is that businesses that meet their obligations to employees and comply with workplace laws resent being put at a competitive disadvantage by competitors that may not be meeting their legal obligations, under workplace and other laws (such as taxi laws prior to recent reforms or laws applicable to accommodation providers).

We strongly condemn businesses that compete by deliberately and unlawfully avoiding regulatory costs and have repeatedly sought the increased attention of the Fair Work Ombudsman to address illegal activities. These businesses bring disrepute to businesses that seek to operate strictly within the law, and disadvantage legitimate employers and genuine independent contractors. Illegal business operations facilitate tax avoidance and impact on retirement savings, which is ultimately borne by taxpayers. Such practices have also existed since well before the emergence of on-demand platforms.

The Victorian Chamber considers that the existing well-established test for determining whether a worker is an employee or independent contractor remains broadly fit for purpose. The regulatory framework works effectively to

³ ABS, 6333.0 - Characteristics of Employment, Australia, August 2018, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6333.0Main+Features1August%202018?OpenDocument>

target those who seek to avoid their obligations in relation to pay and conditions under the *Fair Work Act 2009*. The consequences for breaching these provisions are already significant.

While the application of the existing independent contractor test to people working for on-demand platforms has been complicated due to the lack of case law, we expect that the further development of case law will facilitate the easier application of the independent contracting test to new online platforms.

In its 2015 Workplace Relations Framework report, the Productivity Commission found that “While the existing common law definition of a subcontractor may not always be easy to apply, it is hard to develop a better legislative definition or test.”⁴

The 2016 Victorian Inquiry into the Labour Hire Industry and Insecure work also looked at the independent contracting test, finding that it remained fit for purpose:

“Many submissions proposed a statutory definition of independent contracting, or other regulation directed at limiting the mischaracterisation of employees as independent contractors. However, recent decisions suggest an increasing willingness by the courts to assess the genuineness of independent contractor arrangements by considering whether the worker is genuinely working in his or her own business, rather than for the business of the other party. The common law test has proved to be flexible enough to permit an assessment of the true nature of an engagement, irrespective of its label. I do not consider it desirable to replace the common law test with a statutory test.

Further, the Independent Contractors Act 2006 (Cth) significantly curtails Victoria’s capacity to regulate independent contractor relationships, and accordingly the Victorian Government is limited in its ability to direct address most of the concerns raised by critics of independent contracting arrangements. However, Victoria can advocate for changes to improve the regulatory framework for independent contractor arrangements operating under federal law.”⁵

As identified in the discussion paper’s analysis of overseas regulatory approaches, there is also no clear international trend in the legal treatment of on-demand platform workers.

The application of workplace laws to on-demand workers

As independent contractors, platform workers do not currently receive the majority of protections available to employees under the *Fair Work Act 2009*, accident compensation, superannuation and health and safety laws. This is no different to the conditions and protections for other sole traders and business owners. Payroll tax is only applicable to payments to independent contractors in very limited circumstances.

Rather, independent contractors are responsible for negotiating their remuneration, choosing whether or not to accept work, setting their own hours of work, making their own insurance arrangements; contributing to their retirement savings (although this is not mandatory) and reporting their income and remitting tax to the Australian Tax Office.

Independent contracting facilitates the on-demand economy due to its flexibility. From our consultations with platform operators we understand that engaging workers as employees rather than independent contractors may require fundamental changes to the business models of platforms. In particular, the attraction to platform partners and the nature of on-demand services would be compromised by minimum engagement periods, fixed hours, fixed locations and limits on working for multiple platforms at the same time.

Independent contracting provides flexibility, efficiency and productivity that adds value to the parties, the economy and society as a whole. The values of entrepreneurship, risk taking, investment and choice which underpin contracts for services should be welcomed, encouraged and viewed favourably by policy makers.

Independent contractors may not always have a full understanding of how to successfully operate a small business. This is where the *Owner Drivers and Forestry Contractors Act 2005 (Vic)* (which already applies to food delivery platforms) provides a potential model for providing information to platform workers to help them make more informed

⁴ Productivity Commission 2015, Workplace Relations Framework, Final Report, Canberra, p.47.

⁵ Victorian Inquiry into the Labour Hire Industry and Insecure Work, p.32.

decisions about pricing their services, accounting for tax and superannuation, covering input costs (such as fuel, maintenance and depreciation for vehicles) or whether to accept work.

The response by some platforms (such as Uber, Deliveroo and Airtasker) to provide personal accident insurance to partners is a welcome trend and helps workers ensure they have appropriate levels of cover.

However, platforms report that in offering personal accident and public liability insurance they feel they are taking a risk as a court could use the provision of such benefits to support a conclusion that a worker is an employee rather than an independent contractor.

While platforms (including Deliveroo, in its submission to this inquiry) indicate that they would like to expand the range of benefits available to their partners to include things like sickness insurance, pregnancy insurance or training and education benefits, current regulatory arrangements prevent them from doing so because the provision of such benefits could result in workers being found to be employees, which would require fundamental changes to their business models and service offerings to consumers.

Rather than forcing businesses to change their business models to adapt to old regulatory frameworks, the law may need to catch up with new business models to allow greater benefits to be offered to independent contractors without compromising their employment status.

As occurred with Victorian Taxi and hire car industry reforms, the regulatory model has adapted to accommodate new business models without restricting innovation or competition.

The provision of personal accident insurance to platform workers by WorkSafe Victoria, either directly or through platforms, could be considered as long as it is provided on a commercial basis and with no impact on the premiums of current employers or the financial viability of the scheme.

Effectiveness of the enforcement of workplace laws and capacity to protect vulnerable workers

Where a business has been found to have entered into a sham arrangement, the current penalties available under the *Fair Work Act 2009* reflect the seriousness of the offence and serve as an appropriate general and specific deterrence.

The Fair Work Act allows the courts to impose a maximum penalty of \$63,000 per transgression for corporations and \$12,600 for individuals.⁶

Decisions being handed down by the courts signal an increasing willingness to impose significantly high penalties, which reflect the seriousness of the offence.

Further, when the High Court in 2015 unanimously held that employers could not avoid sham contracting provisions by utilising 'triangular' arrangements (i.e. where independent contractors are engaged through labour hire companies) the deterrent nature of s357 received a significant boost as prosecutions for sham contracting now pose an ever-greater risk to employers through third party engagements.

The Fair Work Ombudsman (FWO) is active in bringing sham contracting proceedings and seeking penalties against companies and their directors, having made the pursuit of such claims a priority.

We consider the FWO's active approach to pursuing contraventions of sham contracting arrangements coupled with the courts' preparedness to impose significantly high penalties, in combination with accessorial liability for advisors demonstrates existing penalties are sufficiently strong and are acting as an appropriate deterrent to any attempts to deliberately manipulate the law.⁷

⁶ Section 539(2)

⁷ Australian Chamber of Commerce and Industry Submission to Treasury on Improving Black Economy Enforcement and Offences, December 2018

There may be scope for an increased role for government to provide advice and support to on-demand sector workers to ensure they are aware of and receive their correct legal entitlements as either independent contractors or employees and in prosecuting cases where there is clear evidence that sham contracting is occurring.

Constitutional and enforcement issues

As noted in the discussion paper, Victoria has referred almost all its industrial relations powers to the Commonwealth. This means that subject to a few limited exceptions, Victorian workers and businesses are covered by federal industrial relations laws that are administered by the Federal regulator.

It is likely that a state-based response to the regulation of on-demand workers would face constitutional barriers based on inconsistency between state and commonwealth laws, on the basis that federal laws already 'cover the field'.

State based regulation could also result in a fragmented regulatory approach with overlapping state and federal regulators.

Recent work undertaken by researchers at the Melbourne School of Government highlights the legal and implementation issues associated with overlapping state and federal workplace laws.⁸

If any new regulatory approach is proposed, it would make far more sense for this to occur at the federal level.

Conclusion

The Victorian Chamber looks forward to continuing to engage with the inquiry through the facilitation of business consultations and by providing case studies highlighting businesses experiences in the provision of on-demand services, competing with on-demand services and the use of on demand services.

⁸ <https://pursuit.unimelb.edu.au/articles/can-victorian-labor-really-make-wage-theft-a-crime>