



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the
Department of Jobs, Precincts and Regions

Inquiry into the Victorian on-demand Workforce

6 February 2019



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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

“promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct.”

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new residential construction and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support.



1. INTRODUCTION

HIA takes this opportunity to respond to the Terms of Reference (**TOR**) and corresponding Background Paper for the Inquiry into the Victoria On-Demand Workforce (**Inquiry**).

HIA understands that there is growing concern in relation to the treatment of those operating in the 'new' economy, variously called the 'gig economy', the 'on-demand economy' and the 'sharing economy'.

It is HIA's view that such concerns are misplaced.

Existing, well established legal and other arrangements apply to those operating in the 'on-demand economy'. Irrespective of commentary otherwise, evolving case law confirms that those operating in the sharing economy can be classified as either 'employees' or 'independent contractors'.

HIA is also concerned that responses to the 'on-demand workforce' may have unintended consequences for other sectors of the economy, including the residential building industry.

A long standing feature of the residential building industry is its reliance on independent contractors as a way of productively managing the needs of building businesses, especially smaller businesses.

HIA estimates that over 80% of the work completed in the sector is performed by independent contractors. Independent contracting is a quintessential part of the residential building industry, and is a legitimate business model which needs to be preserved for workers, businesses, and consumers within the industry.

For residential builders, it provides a flexible, workable and efficient model for engaging workers. Builders rely on access to good and reliable trade contractors to maintain competitiveness. For contractors it is a pathway to business ownership, career flexibility and entrepreneurship.

An independent contractor has the ability to choose his or her own hours, clients and manner in which the work is completed. Since they choose their own jobs and clients, the quantity and quality of work (in theory) is better related to the amount of money they make. Highly motivated, efficient and productive contractors are likely to earn more money than regular employees. For home buyers, independent contracting also helps housing affordability.

Independent contracting also provides a platform on which new and innovative businesses emerge. Many thousands of new contracting businesses start in domestic building each year; some prosper into growing enterprises and some fail.

HIA does not want to see measures targeted at a largely undefined sector adversely impacting well established modes of engagement.

HIA's submission will address elements of the Background Paper and the following:

- Avoidance of workplace laws and other statutory obligations;
- Limitations of Victoria's legislative powers; and
- The capacity of existing legal and regulatory frameworks.

Please find further detail in relation to these matters outlined below.



2. AVOIDANCE OF WORKPLACE LAWS AND OTHER STATUTORY OBLIGATIONS

The Inquiry must consider *‘whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations’*.

HIA does not consider that contracting arrangements are being used to avoid the application of workplace laws and other statutory obligations in the residential building industry. In fact, the examination of the on-demand economy is highlighting the challenges faced by workers and businesses in complying with the law.

Most of HIA’s members are small, award reliant businesses. Whilst many of these businesses trade through incorporated company structures, many also trade as sole traders or partnerships.

These businesses face unique challenges.

The average small business builder/principal contractor spends significant hours each week attending to paperwork and compliance arising from regulatory requirements that span national, state and local obligations. The compliance obligations not only include workplace relations requirements but also include GST, PAYG and payroll tax compliance; state based training regulations that apply to apprentice employees, workplace health and safety management, occupational licensing laws, planning regulations and state-based residential construction laws and requirements.

It is unsurprising than even a business seeking to comply with the rules finds those rules difficult to understand. The various regulatory agencies responsible for administering these laws also have their own rules of interpretation.

Impact on Consumers

Section 3.2 of the Background Paper also explores the specific impact of the on demand economy on the community and consumers, specifically that ambiguity may exist in relation to how safety, licensing, consumer protection, industry standards and the tax framework apply to these services.

In HIA’s view, the regulations that apply to the residential building industry apply to all those carrying out residential building work.

For example, the domestic building industry in Victoria is subject to extensive regulation, with matters such as the conduct of building work, the contents of contracts, the insurance arrangements, and the registration of building practitioners all covered by Victorian legislation.

These regulatory requirements, often described as consumer protection and safety regulation, will apply to all those operating in the residential building industry in Victoria. The characterisation or classification of individuals does not change how such laws apply to the work being carried out.

3. LIMITATIONS OF VICTORIA’S LEGISLATIVE POWERS

The Inquiry must have regard to *‘the limitations of Victoria’s legislative powers over industrial relations and related matters and the capacity to regulate these matters’*, and *‘the ability of any Victoria regulatory arrangements to operate effectively in the absence of a national approach’*.

Overall, the regulation of the gig or on-demand economy, sits largely within the federal jurisdiction.



The national approach to workplace laws through the *Fair Work Act 2009* (Cth) (**FW Act**), taxation, and *Independent Contractors Act 2006* (Cth), will hamper any efforts by the Victorian Government to effectively regulate the on-demand workforce, with any reform efforts likely to focus on workers compensation, health and safety, and payroll tax.

HIA would also observe that any state based approach could hinder efforts for a consistent approach to regulation in this space with the possibility of further layers of different statutory approaches adding to an already complex regulatory framework.

4. CAPACITY OF EXISTING LEGAL AND REGULATORY FRAMEWORKS

The inquiry is required to consider *‘the capacity of existing legal and regulatory frameworks to protect the rights of vulnerable workers’*.

Section 2.3 of the Background Paper also explores the legal status of on-demand workers, noting that *“[i]t is difficult to characterise the working arrangements in the on-demand economy in a general sense because of the scope and diversity of these arrangements”*.

New and evolving styles of workplace organisation have been a feature of the Australian economy for decades. Celebrated court cases have considered the status of encyclopedia salespeople, cleaners, bicycle riding couriers and labour hire workers among others. Importantly all these cases were resolved using the long standing distinction between common law employees and independent contractors.

On-demand economy workers can and should be managed using these long standing and well developed legal tools.

A recent example of this was the shutdown of the Foodora business operations in Australia and the outcomes of its recent administration. Foodora was recently pursued, albeit after going into voluntary administration, by several regulatory authorities to determine the legal status of their workers, via Revenue NSW, Australian Taxation Office (**ATO**), and Fair Work Ombudsman (**FWO**). Subsequently Revenue NSW and the ATO determined that Foodoras workers were employees (the FWO matter is still ongoing).

Another example of the use of the well-developed legal frameworks being applied to the on-demand economy workers, involved Uber, and two unfair dismissal cases.¹ In both cases the Fair Work Commission applied the well-established common law indicia to determine that the workers were independent contractors.

Where state and federal governments have sought to legislate to codify independent contractors and deem some to be employees that invariably added complexity, confusion and cost to business operations; particularly for small businesses.

There is no reason why the common law tests cannot be applied to ‘on-demand’ workers.

Section 4 of the Background Paper also seeks feedback on the existing mechanisms available and approaches adopted to determine the application of the law to on-demand workers.

¹ Mr Michail Kaseris v Rasier Pacific V.O.F [2017] FWC 6610 (21 December 2017); and Janaka Namal Pallage v Rasier Pacific Pty Ltd [2018] FWC 2579 (11 May 2018)



There are already a plethora of tests and tools available to determine the application of the law to on-demand workers.

Sham Contracting provisions

The concept of sham contracting is found in the “sham arrangement” provisions of the FW Act (ss.357-359), which is where an employer attempts to deliberately disguise an employment relationship as an independent contracting relationship.

These provisions prohibit an employer from:

- Representing to an individual that the contract of employment under which the individual is (or would be) employed by the employer is in fact a contract for services under which the individual performs (or would perform) work as an independent contractor (s.357(1)).
- Dismissing, or threatening to dismiss, an employee who performs particular work for the employer in order to engage them as an independent contractor to perform the same or substantially the same, work (s.358).
- Making a statement to an employee or former employee that it knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform the same, or substantially the same, work as an independent contractor (s.359).
- Under subsection 357(2) a defence is available to an employer if at the time they made the representation they did not know, and were not reckless as to, the true nature of the relationship i.e. whether contract was a contract of employment.

Failure to comply with the sham arrangement provisions attracts potential penalties of up to \$51,000 per breach for corporate entities and up to \$10,200 per breach for involved individuals.

In 2006, the then Minister described the purpose of these provisions which are

“aimed at preventing employers from entering into 'sham contracting arrangements ...where an employer seeks to avoid taking responsibility for the legal entitlements due to employees by seeking to disguise as an independent contracting relationship what is in reality an employment relationship.”²

HIA is a strong advocate and supporter of these laws.

These provisions and penalties apply to sham arrangements irrespective of the categorisation or classification of individuals operating on the ‘on demand economy’.

Employee v Contractor

The on-demand economy is shining a spotlight on the confusion that surrounds the legal distinction between an employee and a contractor.

For workplace relations purposes, the FW Act relies on the common law approach.

² Workplace Relations Minister's Second Reading Speech on the IC Bill 2006



It is understood that some academics have argued that the common law is open to manipulation by employers who want to construct 'sham' contractor arrangements in order to avoid award, statutory other legal obligations to employees. Some have also criticised the common law as lacking certainty.

When applying common law tests to individual circumstances, differences in interpretation inevitably occur as each contract must be considered on its own merits.

The Commonwealth superannuation guarantee laws unfortunately move beyond the common law providing that if a person works under a contract that is wholly or principally (more than half) for the labour of the person, the person is deemed to be an employee of the other party to the contract.

Whilst subsequent case law and Superannuation Guarantee Rulings have elucidated a contract for a result was outside the scope of the description 'a contract that is wholly or principally for the labour of the person', there remains considerable uncertainty about who is an employee and who is a contractor for superannuation purposes.

The income tax legislation adopts the Alienation of Personal Services Income Test (**APSI**). This test differentiates independent contractor arrangements in relation to taxation from PAYG employees. There are 2 main elements to the APSI test. Firstly individuals may self-assess against the "results test". If the results test is passed, the taxpayer is not affected by the alienation measures regardless of the proportion of their income derived from a single source.

The results test in particular is based on the traditional criteria used to distinguish independent contractors from employees. To satisfy the 'results test' the individual must:

- work to produce a result; and
- provide plant and equipment or tools of the trade (if required); and
- be liable for rectification of any defects in work performed.

At a state level, any contractor can be separately defined under payroll tax laws, workplace health and safety laws, workers compensation laws, long service leave:

- workplace health and safety legislation imposes duties on beyond the traditional concept of the employment relationship applying obligations on "person as carrying out a business or undertaking" regardless of whether or not they are an employer;
- workers' compensation legislation applies benefits to certain workers under a "contract for service";
- harmonised payroll tax provisions covers contractors performing work other than pursuant to a trade or business which they carry on and do not sub-contract to anyone else;
- anti-discrimination legislation applies to both contractors and employees; and
- construction industry long service leave in some jurisdictions extends to "labour only" subcontractors.

The differing legislative approach at a state and Commonwealth levels have led to uncertainties about the status of contractors, imposed considerable costs on industry and progressively eroded the independent status of subcontractors. These tests often conflict are subjective, and for practical purposes are unreliable.

HIA supports the common law. It is relatively clear about who is an employee and who is a contractor. Under the common law, employees are engaged under a "contract of service" whereas independent contractors are engaged under a "contract for service".



A statutory definition of independent contracting

For these reasons, HIA considers that a national approach is necessary and that the *Independent Contractors Act 2006* could be amended to provide a statutory definition of a contractor based on the current APSI criteria. This is a proven, workable definition that reflects and codifies the common law.

The advantage of the APSI “results” test, is that instead of defining ‘employee’ the APSI rules merely identify who is an independent contractor. This leaves the common law untouched, and does not require forming additional definitions in the legislation.

HIA sees that this approach would aid those operating as a part of the ‘on demand workforce’.

