

By email: OnDemandInquiry@ecodev.vic.gov.au

Dear Inquiry Team

Submission to the Inquiry into the Victorian On-Demand Workforce

About JobWatch

1. JobWatch Inc (**JobWatch**) is an independent, not-for-profit, employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It provides assistance to Victorian, Queensland and Tasmanian workers regarding their rights at work. JobWatch is a member of the Federation of Community Legal Centres (Victoria) and is funded by Victoria Legal Aid, the Office of the Fair Work Ombudsman and the Victorian and Federal Governments.
2. JobWatch was established in 1980 and is the only service of its type in Victoria. It is funded to deliver four key services, which are as follows:
 - a) A free and confidential telephone information service (**telephone service**) which provides information and referrals to Victorian, Tasmanian and Queensland workers;
 - b) Community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers and community groups;
 - c) A casework legal practice which provides advice and representation to vulnerable and disadvantaged workers; and
 - d) Law reform work, with a view to promoting workplace justice and equity for all workers.
3. Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone service. To date we have collected more than 200,000 caller records with each record usually canvassing multiple workplace problems, including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time.

4. In the 2017-18 financial year, JobWatch's telephone service responded to over 16,000 calls and assisted over 12,000 callers. The majority of our callers have nowhere else to turn to for assistance as they are not union members and they cannot afford private lawyers.
5. The de-identified case studies provided in this submission are taken from our telephone service database and our legal practice client files.

The nature, extent and impact of the on-demand economy

6. The 'on-demand economy', or 'gig economy', has varying definitions among academic authors. Broadly defined, the gig economy is a "market in which individual workers sell their labour through fixed-term or fixed-task contracts that are of a temporary in nature."¹
7. For the purpose of this submission, however, we will use the terms 'on-demand economy' or 'gig economy' to mean a market in which companies and businesses operate on-line platforms which act as intermediaries between workers and customers. Examples of companies operating in the gig economy include Uber, Airtasker, and Deliveroo.
8. We acknowledge that not all workers who take part in the gig economy are vulnerable to exploitation.
9. JobWatch is not concerned with situations where there is a clear employment relationship (albeit casual) and the employer complies with all its statutory obligations with respect to the employee who is performing the gig work.
10. Nor are we concerned, for present purposes, about workers who genuinely operate their own businesses and perform work for a client or customer as true independent contractors.
11. Rather, we are concerned about the exploitation of ***vulnerable gig workers***. These are workers who fall into either of these groups:
 - I. Those whose legal status is currently uncertain (ie, they do not know whether they are an employee or a contractor); and

¹ Cory Fogliani, 'The Gig Economy: Rescuing the Scapegoat' (2018) 45(4) *Brief* 19 at [14].

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- II. Those who would be likely to fall into the category of independent contractor under the present laws (which limit us to the binary employment categories of employee vs independent contractor) but who need some additional protection from the law, which they are currently not getting.
 12. Gig workers whose legal status is currently uncertain include:
 - I. Those who are told they are independent contractors but who could potentially have a good case of sham contracting and underpayment of wages under the *Fair Work Act 2009 (Cth)*; and
 - II. Those who are paid cash-in-hand, without the use of an ABN or a TFN.
 13. Unfortunately, workers in this category often do not understand that they could potentially have a strong claim to employment entitlements until they receive legal advice and/or issue legal proceedings to test whether they are truly an employee. Meanwhile, whilst they continue to be treated as independent contractors or to be paid on a cash-in-hand basis, they commonly believe they are not entitled to (and accordingly do not seek to enforce their rights to) minimum wages, superannuation contributions, long service leave, workers' compensation insurance, and statutory protections such as occupational health and safety or unfair dismissal.
 14. Gig economy workers who are likely to fall into the category of independent contractor under the present laws but who need some additional protection from the law, which they are currently not getting, are those who:
 - I. *“perform work for a third party in circumstances where that third party could not accurately be described as a client or a customer; and*
 - II. *work as an integrated part of a profession or business undertaking carried on by that third party.”²*
 15. The following case studies, taken from JobWatch's telephone service database and legal practice files, reflect the kinds of workers about whom JobWatch is concerned: the ones we refer to as *vulnerable gig workers*. They are the kinds of workers who need additional legal protections.

² Fogliani (n1) at [17].

16. Bill – Uber – working holiday visa

Bill has just arrived in Australia and has been told that he will need an ABN to start working for Uber. Bill wants to know what his rights are if he does this.

17. Josh – Uber – citizen

Josh has just heard about the Fair Work Commission’s decision about a Foodora worker being deemed to be an employee. He cannot understand why a Foodora worker would be an employee and an Uber worker would continue to be treated as an independent contractor. He says the signage on his car required by Uber should be treated in the same way as the uniform that was required by Foodora.

18. Usha – Uber - international student

Usha is an international student who works as an Uber driver. She wants to know which hours count towards her 40hr per fortnight maximum. Does she count the time that she is signed on, waiting for a fare, and not paid, or only the time when she is completing trips?

19. Jose – Uber – citizen

Jose has been driving for Uber for the past year. He has an ABN and is aware that he is likely an independent contractor. He was assaulted by an Uber passenger and his car was damaged. He complained to Uber about the passenger. Uber denied any responsibility for the event and terminated Jose’s agreement. Jose wants to know whether he has any rights to get his job back under existing Federal or Victorian laws.

20. Kunle – Uber - citizen

Kunle worked as an Uber driver for 2 years. He had his account deactivated on the basis of 8 passenger complaints over that time. Kunle never had an opportunity to respond to the complaints and it appears that his over 10,000 positive reviews throughout his time as an Uber driver were not taken into account by Uber.

21. Fernando – Uber – permanent resident

Fernando is an Uber driver who made a complaint about some drunk passengers. The passengers responded with a complaint themselves. Uber terminated Fernando’s access to his account.

22. Belinda – Uber - Citizen

Belinda has worked for Uber for the past 2.5 years. She has recently, without notice, been “dropped off the app” without any reason. She acknowledges there have been

times when she was unable to find her passenger but nothing was communicated to her at the time and this has come as a total shock to her.

23. Enrico – Uber - Citizen

Enrico and Maria are a married couple. Enrico works as an Uber driver and also as a “delivery partner” for Uber Eats. He sometimes delegates work to Maria who works off Enrico’s Uber accounts. Uber discovered this and has terminated Enrico’s agreement. Enrico’s pay was always less than \$20/hour. He calculates that if he was in fact an employee he would be thousands of dollars in underpayment of wages, but he doubts he has any recourse through employment law avenues.

24. Alex – Uber – Citizen

Alex works as an Uber driver. Uber recently notified him that a passenger secretly recorded a conversation they had in the car and they Uber has been provided with a copy of the recording. Alex wants to know what his rights are in his situation.

25. Muhammad – Uber – Citizen

Muhammad made a verbal complaint to Uber over the phone about a passenger who was rude and tried to punch him. When Uber seemed to do nothing about this, he followed it up in writing. Then Muhammad’s Uber account was suddenly blocked and the reason given was poor quality of service. Muhammad wants to know if there is anything he can do.

26. Arjun – Uber – visa status unknown

Arjun worked for Uber for approximately 7 months. He rented the car through Splend, an Uber partner rental agency. When he returned the car (about which he’d given the correct amount of notice), he checked that he had no payments pending. He believed he would receive the deposit he’d paid within a fortnight. He has now been notified that he still owes Splend certain amounts and he doesn’t understand what they relate to.

27. Pablo – Uber – Citizen

Pablo has been an Uber driver for over 6 months. His account was deactivated pending an investigation after Uber received a passenger complaint. Pablo went to pick up this passenger and discovered she was in a wheelchair. His vehicle was not wheelchair accessible and this is what resulted in the complaint.

28. Ismail – Uber – Citizen

Ismail has been an Uber driver for over 6 months. Uber requires drivers to maintain a rating of 4.5 or above. Ismail's rating has consistently been 4.68. Recently he received an email stating that his driver rating had fallen below 4.5 and that his Uber account was being deactivated. He can no longer access the app which holds all the information regarding his agreement with Uber, his rating history etc.

29. Dan – Deliveroo - Citizen

Dan has been working as a delivery driver with Deliveroo. Deliveroo treats him as an independent contractor. Dan thinks he should be treated as an employee and he wants to pursue an underpayment of wages claim. He also wants to complain about the fact that Deliveroo essentially punished him for complaining about being underpaid.

30. Anna – Jarvis – Citizen

Anna recently applied for and obtained work through an online cleaning company called Jarvis. Jarvis required Anna to provide a police check and obtain an ABN. Jarvis also required Anna to sign a non-compete agreement (whereby she could not work for any Jarvis client). When Anna was ready to leave the business she was required to provide 1 month's notice.

31. Rob – Airtasker – Citizen

Rob got a job through AirTasker as a laborer for a few months. He was dismissed for refusing to clean up asbestos dust. He raised the issue of asbestos with Worksafe before his dismissal but he has not yet heard back from Worksafe. Rob does not have an ABN but he invoiced his employer for the hours he worked. He did not wear a uniform but he was provided with all the necessary tools and materials. Rob is confused about his status as a worker and what his entitlements are.

32. Laura – Airtasker – international student

Laura got a job as a cleaner through Airtasker. The person who originally contacted her on Airtasker offering her the job referred Laura to Kathy for payment and rostering queries. Laura was paid on a cash in hand basis, based on each hour she worked. When Laura was not paid for 18.5 hours she had worked, she queried this with the person who had originally contacted her through Airtasker but he denied being responsible. Laura then turned to Kathy, who insisted that Laura was engaged

as an independent contractor and that Laura had in fact been overpaid. Airtasker has taken no responsibility for this matter.

33. Santiago – Foodora delivery driver- international student

Santiago recently started delivering for Foodora. Foodora treats him as an independent contractor. Santiago is paid well below the minimum wage. Santiago doesn't think he or his co-workers are treated fairly but he thinks they probably don't have any employment entitlements. Nevertheless, he has been encouraged to get some legal advice so he has come to JobWatch to check if there is anything he can do.

34. Samantha – [Text redacted] cleaner – international student

Samantha got a job with [text redacted] by completing an online form on the [text redacted] website. The form mentioned the need for an ABN but did not require her to have one in order to complete the form. She was next contacted by someone from [text redacted], who provided the details of her shifts to start working without further mention of the ABN. Samantha has now performed multiple shifts, without payment. She is unsure whether she is an employee or independent contractor.

JobWatch's recommendations for improving protections for vulnerable gig workers

35. JobWatch has a number of recommendations for improving protections for vulnerable gig workers.
36. Some of JobWatch's proposals require changes to Federal laws. Namely:
 - I. We consider that the *Fair Work Act 2009 (the FW Act)* should be amended so as to protect the more broadly defined category of *worker* rather than employee. Such a move would be in line with the United Kingdom's position, where the *Employment Rights Act 1996 (UK)* and *National Minimum Wage Act 1998 (UK)* protect a *worker* who works under a contract of employment or any other contract, whereby the individual undertakes to do or to perform personally any work services for another party whose status is not that of a customer or client.
 - II. Even if the broader category of *worker* is not protected and Australia continues to afford minimum entitlements (including collective bargaining rights) only to employees under the FW Act, then JobWatch recommends

there be a statutory presumption in favour of the employment relationship.

This statutory presumption in favour of the employment relationship already exists in several legal systems across the world, including Spain, France and Germany.

- III. Federal work health and safety laws must protect all vulnerable gig economy workers.
- IV. The *Independent Contractors Act 2006 (Cth)* (**the IC Act**) must be amended:
 - i. Part 2 of the IC Act, including the exclusion of 'deeming' provisions in State or Territory industrial laws (which deem certain contractors to be employees) must be abolished.
 - ii. The IC Act should define who is an independent contractor rather than continuing to rely on the common law test for distinguishing employees from contractors.
 - iii. The grounds on which services contracts may be reviewed by a court should be amended so as to include unconscionability.
 - iv. The remedies available for unfair or harsh contracts should be improved.

37. In Victoria, JobWatch recommends the following:

- I. That consideration be given to introducing something similar to the Victorian Labour Hire Licensing Scheme to protect vulnerable gig workers. A person conducting a business or undertaking in the gig economy in Victoria (with an online platform) would be required to apply for a license and undertake to:
 - i. Pay workers in line with minimum wages (inclusive of a casual loading where there is no annual and personal leave) plus superannuation;
 - ii. Provide workers with minimum annual and personal leave (where there is no casual loading) plus long service leave; and
 - iii. Register for WorkCover insurance in respect of all their gig workers.

The regulator would need appropriate powers to revoke licenses, issue fines and prosecute (for non-compliance and for acting without a license).

- II. That the *Occupational Health and Safety Act 2004 (Vic)* and accompanying Regulations be amended so as to impose obligations not only on employers but rather on any person conducting a business or undertaking in the gig

economy in Victoria. Similarly, the protections need to extend to all vulnerable gig workers. WorkSafe's powers should be extended so as to investigate alleged breaches and enforce the law with respect to vulnerable gig workers.

- III. Vulnerable gig workers must be protected by WorkCover insurance (not be expected to pay for their own insurance).
- IV. That a litigation fund be made available for community legal centres (CLCs) and unions to run test cases involving vulnerable gig workers. Representing clients in test cases is extremely resource intensive but it is imperative that proceedings be issued in public interest cases so as to build a body of precedents that will help to clarify the law regarding the status and entitlements of vulnerable gig workers.

Queries/comments

JobWatch thanks this Inquiry for considering this submission. We would be pleased to meet with you or to organise for you to meet with some of our callers/clients. Please contact Gabrielle Marchetti on [text redacted] if you have any queries or for further comment.

Yours faithfully,



Gabrielle Marchetti
Principal Lawyer
JobWatch Inc