Ai GROUP SUBMISSION

Victorian Government Consultation

Recommendations of the Inquiry into the Victorian On-Demand Workforce

October 2020

INTRODUCTION

The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a submission to the Victorian Government's Consultation on the 20 Recommendations of the Inquiry into the Victorian On-Demand Workforce (**Inquiry**).

The Final Report on the Inquiry recognises the important ongoing role that platform businesses are playing in the labour market and the community:

> Platforms have greatly enhanced our choices and created flexible work, proving to be highly responsive and agile in enabling people to access services as, and when, we need.
>
> Flexibility and autonomy are highly desirable elements of a modern labour market. And platforms are a new way of facilitating this work, providing access to the labour market for workers who may encounter difficulties getting work.[1]

The Final Report also recognises the critical role that platform business have played, and are continuing to play, during the COVID-19 crisis:

> Platforms have played an important role in helping us manage the response to COVID-19. They have supported business to pivot to online delivery and enabled the self-isolating community to source what we need via our devices. Food delivery, rideshare, the buying and selling of goods, along with social interaction and work have all been driven online.
>
> Rideshare and food delivery platforms were among the first businesses to 'lean in' and cover lost income for workers needing to self-isolate due to COVID-19. These workers are not entitled to any sick or carers' leave – unlike regularised workers – so this measure seeks to overcome the incentive for them to 'soldier on' when sick so they can pay the rent. A global pandemic reinforces that these benefits are not just entitlements that benefit individuals but the community at large.[2]

In summary, Ai Group's views on the Inquiry's key recommendations are as follows:

- Consistent with a central recommendation in the Final Report, the reform process needs to be led by the Commonwealth, in collaboration with the States and in consultation with stakeholders. It would not be in anyone's interests for legislative or other changes to be introduced in Victoria when all the major platform businesses operate nationally and when Australia has a national workplace relations system.

- The Victorian Government should request that the Federal Government commence a consultation process, in collaboration with State Governments, platform businesses, industry groups and other stakeholders, to work through what reforms would be worthwhile.

- Ai Group supports the retention of the common law approach to defining an independent contractor. The common law is far better equipped to assess the substance of particular relationships than any statutory definition could. Any 'one size fits all' definition would prevent the facts and circumstances of individual cases being fully considered, and would disrupt, to the detriment of the parties, a very large number of existing contractual arrangements that are legitimate under common law.

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[1] Final Report, p.2.

[2] Final Report, p.1.

- It would not be possible, or desirable to align work status across workplace laws. The definitions used within income tax and superannuation legislation are workable for the purposes to which they are directed, but they would not be workable for the purposes of defining an 'independent contractor' under the *Independent Contractors Act 2006* (Cth) (**IC Act**) or the *Fair Work Act 2009* (Cth) (**FW Act**).

- Victorian businesses have clear primary obligations under Victorian work health and safety legislation to provide safe workplaces to workers, including those engaged other than as employees. These provisions clearly identify the WHS obligations of an employer to any worker they engage, in whatever way they engage that worker.

- It would be very inappropriate for the 'entrepreneurial worker' approach to defining an independent contractor to be adopted in legislation when three judges of the Federal Court (Allsop CJ, Jessup and White JJ) have rejected the approach.[3] Also, the approach is inconsistent with current High Court authority.[4] The Inquiry's recommended change would not be limited to platform businesses and their workers. If implemented, the change would have adverse implications for plumbers, electricians, truck drivers, graphic designers and countless other independent contractors who have no desire to be employees.

- There is no need to disturb the existing common law tests to give more emphasis to the relative bargaining positions of the parties. This issue is already addressed in various factors that Courts and Tribunals are required to take into account.

- Ai Group is pleased that the Inquiry has supported our position that measures designed to improve workers' safety and welfare must not be disincentivised because of the potential impact on work status.

- The Fair Work Ombudsman (**FWO**) is a clear primary source of advice and support for workers to help them understand their work status, and to address any disputes about work status. The creation of an additional body would lead to confusion and uncertainty.

- The FWO already provides suitable avenues for workers to resolve their work status. This can be seen in the investigations that the FWO carried out into Uber and Foodora. After its investigations, the FWO concluded that:

    - Uber drivers are not employees; and

    - Foodora riders were employees. (The FWO then initiated Court proceedings to recover entitlements and pursue penalties).

- The major platform businesses have devoted, and continue to devote, a great deal of resources to ensuring that their work arrangements are lawful.

Ai Group's position on each of the 20 recommendations is outlined below.

[3] *Tattsbet Ltd v Morrow* [2015] 233 FCR 46.

[4] *Hollis v Vabu* (2001) 207 CLR 21.

RECOMMENDATION 1

The Inquiry recommends that the Commonwealth Government, in collaboration with state governments and other key stakeholders, lead the delivery of the recommendations in this report regarding the national workplace system.

Ai Group strongly supports this recommendation.

It would not be in anyone's interests for legislative or other changes to be introduced in Victoria when all the major platform businesses operate nationally and when Australia has a national workplace relations system.

Consistent with the Inquiry's recommended approach, the Victorian Government should request that the Federal Government commence a consultation process, in collaboration with State Governments, industry groups and other stakeholders, to work through what reforms would be worthwhile.

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.*

Ai Group opposes this recommendation.

It would not be in anyone's interests for legislative or other changes to be introduced in Victoria when all the major platform businesses operate nationally and when Australia has a national workplace relations system. Any reforms need to be developed and implemented in collaboration with the Commonwealth and the other States.

RECOMMENDATION 3

The Inquiry recommends governments should, in implementing change, consult and collaborate with stakeholders; including platforms, employees, industry groups and unions.

Ai Group supports this recommendation.

It is essential that any changes are developed and implemented through consultation and collaboration with platform businesses, industry groups and other stakeholders.

RECOMMENDATION 4

The Inquiry recommends governments cost the changes and consider those costs alongside the transferred costs of the current systemic uncertainty around work status – the impacts on workers, businesses, the economy and community more broadly.

Ai Group supports the need for appropriate costing of any legislative or other changes that are contemplated, before such changes are implemented.

The costing needs to take into account:

- The substantial economic benefits to the community that are being derived from platform businesses;
- The vital ongoing role that platform businesses are playing in creating jobs;
- The important role that platform businesses are playing in workforce participation through offering flexible work opportunities to many workers who would otherwise be unable to readily participate in the labour market (e.g. students, semi-retired people);
- The critical role that platform businesses have played, and are continuing to play, during the COVID-19 crisis;
- The costs to workers, businesses and the broader community if any new barriers are imposed on the expansion of platform businesses; and
- The economic benefits of labour market flexibility and the major economic costs that would result from a reduction in such flexibility.

RECOMMENDATION 5

The Inquiry recommends appropriate government funded surveys and evidence-based research to ensure policy makers are aware of critical developments in platform work.

Ai Group supports this recommendation. It is extremely important that further research is carried out to better understand the nature, characteristics and importance of platform work, and relevant trends.

RECOMMENDATION 6(a)

The Inquiry recommends that the Fair Work Act 2009 be amended to:

(a) codify work status on the face of relevant legislation (rather than relying on indistinct common law tests);

Ai Group opposes this recommendation.

Ai Group supports the retention of the common law approach to defining an independent contractor. The common law is far better equipped to assess the substance of particular relationships than any statutory definition could. Any 'one size fits all' definition would prevent the facts and circumstances of individual cases being fully considered, and would disrupt, to the detriment of the parties, a very large number of existing contractual arrangements that are legitimate under common law.

Ai Group was heavily involved in the development of the IC Act. When the Act was being developed, the Australian Government and the Commonwealth Parliament accepted our submissions that the meaning of an 'independent contractor' must be left to the common law to determine.

Courts and tribunals are accustomed to dealing with the distinction between employees and independent contractors, including in the context of workers engaged by platform businesses. For example:

- In *Hollis v Vabu* (2001) 207 CLR 21, the High Court of Australia determined that a bicycle courier was an employee rather than an independent contractor;

- In *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 (***Kaseris***) Deputy President Gostencnik of the Fair Work Commission (**FWC**) dismissed an Uber driver's unfair dismissal application on the basis that the driver was not an employee;

- In *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (***Janaka***), Commissioner Wilson of the FWC decided that an Uber driver was not an employee;

- In *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 (***Klooger***), Commissioner Cambridge of the FWC held that a Foodora bicycle courier was an employee rather than an independent contractor; and

- In *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 (***Gupta***), a Full Bench of the FWC upheld a decision of Commission Hampton that an Uber Eats delivery driver was not an employee.[5]

The conclusions reached by the FWC in *Kaseris*, *Janaka, Klooger* and *Gupta* demonstrate how the common law tests of employment are able to respond to the emergence of new systems of work, such as platform business models.

The common law is best placed to deal with the distinction between an employee and an independent contractor due to the adaptability of the common law tests, and their ability to deal with a multitude of work and business arrangements.

[5] The worker involved in this case (Amita Gupta), with the support of the Transport Workers Union, has filed an application in the Federal Court of Australia for judicial review of the FWC decision (NSD566/2020). The matter has been listed for hearing before the Full Court of the Federal Court on 27 November 2020.

RECOMMENDATION 6(b)

The Inquiry recommends that the Fair Work Act 2009 be amended to:

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(b) clarify the work status test including by adopting the 'entrepreneurial worker' approach, so that those who work as part of another's enterprise or business are 'employees' and autonomous, 'self-employed' small business workers are covered by commercial laws;

Ai Group opposes this recommendation.

The 'entrepreneurial worker' approach is described in the Final Report in the following manner:

> 738 The focus on 'entrepreneurial' factors has emerged in decisions of the Federal Court of Australia and the Full Bench of the FWC when considering the application of the FW Act.[6] They were also applied by the Federal Court of Australia in a case involving superannuation obligations – *On Call Interpreters and Translators Agency Pty Ltd v the Commissioner of Taxation (No 3)*[7] (*On Call Interpreters v Commissioner of Taxation*). His Honour, Justice Bromberg said, where a worker did not carry the risk of financial loss or possess the opportunity to make a profit, this pointed to an employment relationship. The Court looked beyond the words in the contract to the totality and real substance of the relationship – the parties' roles, functions and work practices, in considering the 'totality of the relationship'. Justice Bromberg described the approach as an intuitive test. The Court proposed that the central questions should be:
>
> Viewed as a 'practical matter':
>
> (ii) is the person performing the work as 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? If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.[8]
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> 739 This approach was applied by a Full Court of the Federal Court of Australia (Full Federal Court) in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*.[9] In that case, the Full Federal

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[6] *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWAFB 8307; *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.

[7] *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366.

[8] *On Call Interpreters and Translators Agency Pty Ltd v the Commissioner of Taxation (No 3*) [2011] FCA 366 [208].

[9] *Fair Work Ombudsman v Quest South Perth Holdings Ltd* [2015] FCAFC 37 (per North and Bromberg JJ) Quest Serviced Apartments sought to re-engage employees (providing housekeeping services to Quest Serviced Apartments), as independent contractors, via a triangular contracting arrangement with Contracting Solutions Pty Ltd. The decision was appealed in the High Court. The High Court did not consider the application of the entrepreneurship test on appeal but confirmed that the sham contracting provisions in s357 of the Fair Work Act 2009 (Cth) applied when a business contracted with a third party (labour hire firm) and that third party entered into contracts for services with two housekeepers.

Court found that sham contracting had occurred, meaning that employment relationships had been 'disguised' as independent contracting arrangements. The Court said that it is necessary to consider if someone is operating a business and then consider the hallmarks of the business. The Full Federal Court concluded housekeepers working for Quest serviced apartments did not possess any of the true characteristics of a business.[10]

740 This entrepreneurship approach has been adopted in some subsequent cases,[11] but questioned in others.[12] Its application is yet to be authoritatively determined by the High Court.[13]

In *Tattsbet Ltd v Morrow* [2015] 233 FCR 46, Jessup J (with whom Allsop CJ and White J agreed) roundly rejected the notion of focussing on whether or not the worker is an "entrepreneur".

Similarly, in *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296, White J rejected the approach. His Honour relevantly stated: (emphasis added)

78. In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR 846 the Full Court (North and Bromberg JJ, with whom Barker J agreed) considered that the question of whether workers were employees or independent contractors should be determined by examining first whether they were engaged in the conduct of their own businesses: at [175]-[200]. However, in *Tattsbet v Morrow* Jessup J (with whom Allsop CJ and White J agreed) said that the framing of the issue in this way could distract attention from the true question for the Court's consideration, namely, whether the person is an employee:

> [61] [The trial Judge] ultimately saw the question as one which involved, in effect, a dichotomy between a situation in which the putative employee works in the business of another and a situation in which he or she conducts his or her own business as an "entrepreneur". To view the matter through a prism of this kind is, however, to deflect attention from the central question, whether the person concerned is an employee or not; or, perhaps, as Mason J put it in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 28, to "shift the focus of attention" to a no less problematic question. As Buchanan J put it in *ACE Insurance*, "[w]orking in the business of another is not inconsistent with working in a business of one's own" (209 FCR 146, 182 [128]). On the other hand, if the putative employee's circumstances exhibit the characteristics of a business, that will undoubtedly be a matter proper to be taken into account in determining the question at hand, so long as sight is not lost of the question itself. The question is not whether the person is an entrepreneur: it is whether he or she is an employee.

As can be seen, this passage indicates that, while it may be appropriate to take into account that the putative employee's circumstances exhibit the characteristics of a business, the focus of the judicial enquiry should remain on whether the person is an employee.

[10] *Fair Work Ombudsman v Quest South Perth Holdings Ltd*; J. Murray, 'A Subtle Judicial Conversation About How to Define the Employee: Recent Cases on 'Working in the Business of Another'; Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 8.

[11] See for example, *Fenwick v World of Maths* [2012] FMCA 131; *Fair Work Ombudsman v Grouped Property Services Pty Ltd* [2016] FCA 1034.

[12] See for example, *Tattsbet Ltd v Morrow* [2015] 233 FCR 46; *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296.

[13] Stewart and McCrystal, 'Labour Regulation and the Great Divide', p. 8.

It would be very inappropriate for the 'entrepreneurial worker' approach to be adopted in legislation when three judges of the Federal Court (Allsop CJ, Jessup and White JJ) have rejected the approach. Also, the approach is inconsistent with current High Court authority (i.e. *Hollis v Vabu* (2001) 207 CLR 21).

The Inquiry's recommended change to the definition of an independent contractor to reflect the 'entrepreneurial worker' approach would not be limited to platform businesses and their workers. If implemented, the change would have adverse implications for plumbers, electricians, truck drivers, graphic designers and countless other independent contractors who have no desire to be employees. The three industries which employ the most independent contractors (in order) are Construction; Professional, Scientific and Technical Services; and Agriculture, Forestry and Fishing.[14] Approximately 10% of the workforce are independent contractors who do not employ any other people.[15]

RECOMMENDATION 6(c)

The Inquiry recommends that the Fair Work Act 2009 be amended to:

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(c) provide that the:

(i) provision of safety protections and entitlements such as superannuation, training, occupational health and safety and worker consultation is not disincentivised because of the potential impact on work status;

(ii) party asserting a worker is not an employee, bears the onus of proving work status; and

(iii) the relative bargaining positions of each party are expressly considered when determining work status.

Ai Group supports recommendation 6(c)(i), opposes recommendation 6(c)(ii), and notes that recommendation 6(c)(iii) largely reflects the current law.

Removing disincentives for businesses to implement measures to improve their workers' safety and welfare

Recommendation 6(c)(i) is consistent with the following submission that Ai Group made to the Inquiry:

> **Definition of an 'independent contractor'**
>
> It is essential that the current common law approach to defining an 'independent contractor' is not fundamentally disturbed. This approach caters for the very wide range of legitimate independent contracting arrangements.

[14] ABS *Labour Force, Australia, Detailed, Quarterly.*

[15] ABS *Labour Force, Australia, Detailed, Quarterly*

There is currently a great deal of focus on the definition of an 'independent contractor', in the context of the public debate about the entitlements of 'gig workers'.

It is apparent that 'gig economy' businesses are sometimes reluctant to offer benefits that would improve the working arrangements of their workers because of concern that the provision of such benefits could be held by a Court to constitute exercising too much control for a genuine 'independent contracting' arrangement.

It is in everyone's interests for independent contractors to work in a safe environment, to receive appropriate training, to be covered by accident insurance, to be consulted about workplace changes and to be paid on time at a fair price.

The FW Act does not define an 'independent contractor'. However, the following clarification is provided in s.12 of the Act:

> ***Independent contractor*** *is not confined to an individual.*

To reduce any disincentives to 'gig economy' businesses improving the working arrangements of their independent contractors, we propose that the following additional wording be inserted into section 12 of the FW Act:

> ***Independent contractor*** *is not confined to an individual and has the common law meaning, except that the provision of the following benefits by the person engaging the contractor shall not be taken into account in determining whether there is a contract for services:*
>
> a. *Safety systems and equipment;*
>
> b. *Training;*
>
> c. *Insurance;*
>
> d. *Standard prices or payment terms;*
>
> e. *Consultation processes.*

Reverse onus of proof

A reverse onus of proof already exists under the sham contracting laws in the FW Act. Ai Group opposes any extension of the reverse onus of proof to other laws.

Consistent with longstanding, widely recognised principles of justice, a party making a legal claim should bear the onus of proving that the claim is valid.

Consideration of relative bargaining positions

There is no need to disturb the existing common law tests to give more emphasis to the relative bargaining positions of the parties. This issue is already addressed in various factors that Courts and Tribunals are required to take into account. For example, Courts and Tribunals are required to consider whether there is any scope for the worker "to bargain for the rate of their remuneration".[16]

[16] *Hollis v Vabu* (2001) 207 CLR 21 (Gleeson CJ, Guadron, Gummow, Kirby and Hayne JJ); para 54.

RECOMMENDATION 7

The Inquiry recommends that governments review the approach to 'work status' across work laws (e.g. Independent Contractors Act, superannuation, workplace health and safety, tax) with the purpose of more closely aligning them, specifically, considering:

(a) the need for clarity, consistency and simplicity;

(b) the policy imperatives of each regulatory framework;

(c) appropriate coverage for low-leveraged workers; and

(d) the need to appropriately protect platform workers.

Ai Group opposes this recommendation. It would not be possible, or desirable to align work status across workplace laws.

The definitions used within income tax and superannuation legislation are workable for the purposes to which they are directed, but they would not be workable for the purposes of defining an 'independent contractor' under the IC Act or the FW Act.

Victorian businesses have clear primary obligations under Victorian work health and safety legislation to provide safe workplaces to workers, including those engaged other than as employees. These provisions clearly identify the WHS obligations of an employer to any worker they engage, in whatever way they engage that worker.

WorkSafe Victoria has released easy to use Guidelines for businesses that inform businesses when and how they should treat contractors as workers for the purposes of workers' compensation, including platform workers.

RECOMMENDATION 8

The Inquiry recommends there be a clear primary source of advice and support to workers to help them understand and use dispute resolution or other informal options to resolve their work status.

Ai Group supports this recommendation. However, it is already in operation.

The FWO is a clear primary source of advice and support for workers to help them understand their work status, and to address any disputes about work status.

The creation of an additional body would lead to confusion and uncertainty.

RECOMMENDATION 9

The Inquiry recommends that a Streamlined Support Agency (whether stand alone or incorporated into the functions of an existing suitable body) should:

(a) have dedicated and sufficient resources;

(b) be accessible to and prioritise platform workers, particularly low-leveraged workers;

(c) help resolve work status through advice and dispute resolution;

(d) help workers understand the entitlements, protections and obligations of their work status; and

(e) where work status is borderline, escalate the question to Fast-tracked Resolution (see Recommendation 10) prioritising a determination.

Ai Group supports this recommendation, so long as the proposed Streamlined Support Agency is the FWO.

The FWO is a clear primary source of advice and support for workers to help them understand their work status, and to address any disputes about work status.

The creation of an additional body would lead to confusion and uncertainty.

RECOMMENDATION 10

The Inquiry recommends that a fit-for-purpose body provides a mechanism for accessible, fast resolution of work status that:

(a) produces authoritative and binding determinations for all parties;

(b) is available to all workers and businesses;

(c) is as informal as possible;

(d) is appropriately funded so as to provide access;

(e) has decision makers with appropriate expertise;

(f) allows for resolution from the outset of the work arrangement;

(g) allows groups of workers under similar arrangements to seek resolution;

(h) is inexpensive and helps fund applications and costs of low-leveraged workers; and

(i) operates in a coordinated way with the Streamlined Support Agency, enabling seamless referrals and support.

The FWO already provides suitable avenues for workers to resolve their work status. This can be seen in the investigations that the FWO carried out into Uber and Foodora. After its investigations, the FWO concluded that:

- Uber drivers are not employees;
- Foodora riders were employees. (The FWO then initiated Court proceedings to recover entitlements and pursue penalties).

In addition, the FWC provides avenues for workers who wish to challenge their work status, e.g. through an unfair dismissal claim or a general protections claim. The Federal Court and the Federal Circuit Court also have jurisdiction to deal with work status disputes.

The creation of an additional body would lead to confusion and uncertainty.

RECOMMENDATIONS 11 AND 12

Recommendation 11

The Inquiry recommends that governments encourage platform businesses with significant non-employee, on-demand workforces to seek a work status determination.

Recommendation 12

The Inquiry recommends that, if platforms do not voluntarily seek a proactive determination, governments consider requiring platforms to initiate a determination process, or governments could facilitate this.

(a) Proactive work status determinations should be targeted at enterprises of an appropriate size, maturity and number of workers and consider the costs for businesses, particularly small and emerging businesses.

(b) Platforms should be given appropriate timeframes to apply and react to potential consequences and effect any changes.

These recommendations appear to be predicated on the incorrect assumption that platform businesses have one standard, static model of operation and of engaging workers. In reality, the business models of platform businesses are constantly evolving to adapt to market changes, technological changes and customer needs.

The major platform businesses have devoted, and continue to devote, a great deal of resources to ensuring that their work arrangements are lawful.

To the extent that they need external advice, they are able to obtain this from industry groups like Ai Group, external lawyers and the FWO.

It is not appropriate for Governments to pressure platform businesses into obtaining work status determinations.

RECOMMENDATION 13

The Inquiry recommends that platforms should be transparent with workers, customers and regulators about their worker contracts. Arrangements should be fair and consider the nature of the work and the workers.

Platform businesses need to be open with their workers about contractual terms and provide any information that regulators require.

However, any requirement that platform businesses publicly display the terms of their contractual arrangements with their workers, is unnecessary and inappropriate for the following reasons:

- Other types of businesses are not required to publicly display the terms of their contractual arrangements with their independent contractors and employees.
- This recommendation appears to be based on the incorrect assumption that platform businesses have one standard contract for workers. This is not correct. Often a business will have many different contracts with different workers.
- Similar to the remuneration details in many employment contracts, the remuneration details in contracts between platform businesses and individual workers will sometimes contain information of a private nature that the relevant worker would object to the publication of.

RECOMMENDATION 14

The Inquiry recommends that governments lead a process to establish Fair Conduct and Accountability Standards or principles, to underpin arrangements established by platforms with non-employed on-demand workforces.

Ai Group's support for the establishment of a set of Fair Conduct and Accountability Standards or Principles is dependent on the content of any such standards or principles.

Any consideration of this idea should be led by the Commonwealth Government because it is important that different standards are not established in different States, given that all the major platform businesses operate nationally and Australia has a national workplace relations system.

RECOMMENDATION 15

The Inquiry recommends Commonwealth competition laws remove barriers to collective bargaining for non-employee platform workers and ensure workers may access appropriate representation in dealing with platforms about their work arrangements.

Ai Group does not agree that the *Competition and Consumer Act 2010* (Cth) imposes an excessive barrier to collective bargaining by non-employee platform workers.

Non-employee workers are able to bargain collectively with the authorisation of the ACCC. There is no evidence that the ACCC is blocking applications by non-employee platform workers for authorisation to bargain collectively. The ACCC has issued numerous authorisations for groups of owner drivers, and many other types of contractors, to bargain collectively with particular businesses.

RECOMMENDATION 16

The Inquiry recommends that the Fair Work Commission work with relevant stakeholders, including platforms and representatives of workers and industry, about the application of modern awards to platform workers, with a view to ensuring fit-for-purpose, fair arrangements that are compatible with work enabled by technology.

This recommendation is unnecessary. There are currently 121 modern industry and occupational awards which apply to employers and employees in a very diverse range of businesses.

Employees of platform businesses are already covered by relevant awards. Non-employees are of course not covered by awards. Awards are industrial instruments that only cover employees.

RECOMMENDATION 17

The Inquiry recommends that governments clarify, enhance and streamline existing unfair contracts remedies so that they:

(a) are accessible to low-leveraged workers;

(b) enable system-wide scrutiny of platforms' arrangements;

(c) introduce penalties and compensation to effectively deter unfair contracts; and

(d) allow materially similar contracts to be considered together and orders made with respect to current and future arrangements.

This recommendation is unnecessary.

The IC Act already provides protection against unfair contracts for independent contractors covered by Part 3 – Unfair contracts, of the Act. If a relevant court determines that a contract is harsh or unfair, the Court may set aside the whole or part of the contract or vary the contract.

The Inquiry's main criticism of the unfair contract provisions of the IC Act appears to be a lack of advice and support available to independent contractors who may wish to use the provisions. The Final Report states: *"The Inquiry is not aware of any platform worker seeking to bring a claim using this remedy. The avenue does not appear to have been highly utilised or well supported".*[17] This is not a ground for changing the law; it is a potential ground for more information to be provided by the Commonwealth Government about the remedies available under the law.

[17] Final Report, p.167.

RECOMMENDATION 18

The Inquiry recommends that the Streamlined Support Agency be responsible for and sufficiently resourced to provide effective support to self-employed platform workers and to prioritise actions against systemic deployment of unfair contracts involving these workers.

The FWO is a clear primary source of advice and support for workers to help them understand their workplace rights. The FWO is a large, well-resourced and effective regulator.

The creation of an additional body would lead to confusion and uncertainty.

RECOMMENDATION 19(a)

The Inquiry recommends strengthening provisions to counter sham contracting to:

(a) reflect the recommendations of previous reviews including the Black Economy Taskforce and the Productivity Commission, to capture conduct where it would be reasonable to expect the employer knew, or should have known, the true character of the arrangement was 'employment', and apply appropriate penalties to this conduct;

Sham contracting provisions are included in the general protections in Part 3-1 of the FW Act. The Act leaves the definition of 'independent contractor' to be determined through the application of the common law tests and includes a very substantial maximum penalty (currently $63,000) for breaches of the sham contracting provisions. The sham contracting laws are appropriate and effective, and do not need to be amended.

In addition to the sham contracting provisions, there are various other provisions of the FW Act that provide protection to employees who are faced with sham contracting arrangements, including the following:

- Underpayment orders and penalties for breaches of:
    - the National Employment Standards; and
    - modern awards;
- The unfair dismissal laws;
- A prohibition on taking adverse action against an independent contractor because the contractor has a workplace right, has or has not exercised a workplace right, or proposes to exercise a workplace right (s.340). Adverse action includes:
    - Terminating a contract;
    - Injuring the independent contractor in relation to the terms and conditions of the contract;
    - Refusing to engage an independent contractor;

- Discriminating against an independent contractor; and
- Refusing to supply goods to an independent contractor.

- A prohibition on coercion in relation to workplace rights (s.343); and
- A prohibition on misrepresentations in relation to workplace rights (s.345).

The Federal Government's *Fair Work Amendment (Protecting Vulnerable Workers) Amendment Act 2017* (Cth) provides additional protection to vulnerable workers and increases obligations on employers. Operative from September 2017, the FW Act was amended to include a new 'serious contravention' penalty – up to $630,000 per breach for a company (10 times the previous maximum penalty). The FWO was also given the power to require persons to participate in interviews.

In 2015 the Productivity Commission (**PC**) conducted a Review into Australia's Workplace Relations Framework. In its final report (released on 21 December 2015), the PC recommended the following amendment to the sham contracting laws in the FW Act. Ai Group's position, as set out in our January 2016 Response to the PC Review Recommendations, is reproduced below. Our position has not changed.

No.	***Recommendation***	***Ai Group's position***	***Comments***
25.1	The Australian Government should amend the FW Act to make it unlawful to misrepresent an employment relationship or a proposed employment arrangement as an independent contracting arrangement (under s. 357) where the employer could be reasonably expected to know otherwise.	**Not supported**	Ai Group opposes the replacement of the "recklessness" test in the sham contracting laws with a "reasonableness test". The small number of sham contracting cases which have been pursued by the FWO to date highlights that the laws are not being widely breached. The sham contracting laws were tightened when the FW Act was implemented and a further tightening is not justified.

The Black Economy Taskforce made the following recommendation in its Final Report (October 2017):

> **Recommendation 10.3: Bolster the sham contracting penalty provisions**
>
> We recommend that the Government implement the Productivity Commission's recommended changes to the sham contracting provisions of the Fair Work Act 2009.

It can be seen that the Black Economy Taskforce recommended the implementation of the above PC proposal. Ai Group continues to oppose the proposal for the reasons outlined above.

RECOMMENDATION 19(b)

The Inquiry recommends strengthening provisions to counter sham contracting to:

- - -

(b) require a court to consider each party's relative bargaining position and how much genuine choice a worker has over their presumed work status.

The existing sham contracting provisions in the FW Act appropriately rely on the common law tests to determine whether a worker is an employee or an independent contractor.

There is no need to disturb the existing common law tests to give more emphasis to the relative bargaining positions of the parties. This issue is already addressed in various factors that Courts and Tribunals are required to take into account. For example, Courts and Tribunals are required to consider whether there is any scope for the worker 'to bargain for the rate of their remuneration'.[18]

RECOMMENDATION 20

The Inquiry recommends that regulators proactively intervene to resolve cases of 'borderline' work status, especially where it is occurring at a systemic level and impacts on low-leveraged workers, including by initiating test cases.

The FWO already proactively intervenes in matters relating to the work status of platform workers. This can be seen in the investigations that the FWO carried out into Uber and Foodora. After its investigations, the FWO concluded that:

- Uber drivers are not employees;
- Foodora riders were employees. (The FWO then initiated Court proceedings to recover entitlements and pursue penalties).

[18] *Hollis v Vabu* (2001) 207 CLR 21 (Gleeson CJ, Guadron, Gummow, Kirby and Hayne JJ); para 54.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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