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7 April 2021

Senate Select Committee on Job Security
Department of the Senate
PO Box 6100
CANBERRA ACT 2600

Email: jobsecurity.sen@aph.gov.au

Dear Committee

**Liberty Victoria Rights Advocacy Project
Submission to Select Committee Inquiry on Job Security**

Liberty Victoria

1. Liberty Victoria is a peak civil liberties organisation in Australia that has worked to defend and extend human rights and freedoms in Victoria since 1936. For more than eighty years we have advocated for civil liberties and human rights. These are spelled out in the United Nations international human rights treaties, agreed to by Australia. We speak out when such rights and freedoms are threatened by governments or other organisations.
2. Liberty Victoria's Rights Advocacy Project ('RAP') welcomes the opportunity to provide a submission to the Select Committee Inquiry on Job Security (the 'Inquiry'). RAP is a community of lawyers and activists working to advance human rights in Australia. We work across a range of issues including equality, government accountability, refugee and asylum seeker rights and criminal justice reform.

3. Liberty Victoria acknowledges the work of the RAP Equality and Government Accountability team in drafting this submission. The team is comprised of early career lawyers and law students with expertise in industrial relations, employment law, and workers' rights. The team comprises Tiarne Crowther, Tim Sheehan, Gemma Hallett, Kate Ross, Josie Marchant and Madeleine O'Brien, under the mentorship of Oanh Tran, Gregory Buchhorn, Gemma Cafarella and Abbey Dalton.
4. The focus of our submissions and recommendations reflect our experience and expertise as outlined above.

Recommendations

5. **Recommendation 1:** Amend the *Fair Work Act 2009* (Cth) to define an 'independent contractor' as an individual who meets the three limbs of the ABC test (defined at paragraph 40 below), and to place a reverse onus of proof for meeting the ABC test on the worker's employer or principal.
6. **Recommendation 2:** Amend the *Fair Work Act (2009)* (Cth) to include a definition of 'employee' that includes all workers who do not meet the three limbs of the ABC test.
7. **Recommendation 3:** Extend the powers of the Fair Work Commission to deem particular groups of workers as having access to employment rights.

Liberty Victoria Submission

A. Introduction

8. Our submission is based on our research and preparation of a report concerning the characterisation of the employment relationship in Australia, and the extension of rights and entitlements associated with that relationship to all workers, including non-standard, 'on-demand' and 'gig' workers. Our submission is an abridged version of our report as it relates to the Inquiry and its terms of reference.
9. Our submission primarily addresses terms A, D and E of the Inquiry's terms of reference. It focuses on the insecure and precarious nature of 'on-demand' and 'gig' work, and the lack of legal protections afforded to these workers under Australia's current industrial relations framework.

B. On-Demand Workforce

10. In this submission, the 'on-demand' workforce refers to workers who are sourced on an 'as-needed' basis. Online platforms facilitate the large scale sourcing of workers 'on-demand', often to perform a particular 'gig' or work task, hence the term 'gig economy'.¹
11. There is limited data on the exact size of the on-demand workforce in Australia. However, estimates based on the collation of existing national research and survey data suggest the gig economy could make up the largest workforce of any Australian sector, comprising approximately 250,000 workers.² Research also indicates that the workforce increased dramatically over 2020, in light of the COVID-19 pandemic and associated

¹ Department of Premier and Cabinet, Parliament of Victoria, *Report of the Inquiry into the Victorian On-Demand Workforce* (Final Report, July 2020) 4.

² Actuaries Institute, *The Rise of the Gig Economy and its Impact on the Australian Workforce* (Green Paper, December 2020) 11.

lockdowns. For example, the Actuaries Institute estimated that the use of food delivery services increased by over 100% during this period.³

12. Workers in the on-demand workforce are more likely to come from vulnerable groups in society – including migrants, students, young workers, low-income earners and the formerly unemployed.⁴
13. There are significant economic incentives for platforms and firms that operate on a business model of externalising the costs associated with providing minimum employment entitlements. The existence of these incentives will likely lead to further growth of the 'on-demand' workforce. While 'on-demand' work is most commonly associated with transport and food delivery services, we are concerned that, if left unregulated, it will continue to expand into a variety of industries – including cleaning, security, personal and aged care, and other social and community services. Indeed, insecure 'on-demand' platform facilitated work in these industries is already a reality.

C. Legal and regulatory frameworks

14. The *Fair Work Act 2009* (Cth) ('FW Act'), modern awards and enterprise agreements – together with equal opportunity and discrimination laws and the common law – are part of Australia's legal framework regulating the employment relationship.
15. Together with other legislation – including superannuation and health and safety legislation – the framework forms a safety net of minimum employment rights and entitlements. This safety net includes, among other things, the National Employment Standards and minimum wage provisions in Parts 2-2 and 2-6 of the FW Act, protection from unfair dismissal and general protections, long-service leave entitlements and the superannuation guarantee scheme.
16. Critical to accessing this safety net is the existence of an employment relationship. Independent contractors, in contrast to employees, are largely excluded from accessing these entitlements under the framework.
17. Importantly, the test for whether a worker is an employee is governed by a range of criteria established at common law and is not reflected in the legislative instruments governing work in Australia.
18. The majority of workers in the on-demand workforce are deemed independent contractors by the principal. This either directly or indirectly benefits the principal by allowing them to avoid the obligations of an employment relationship.⁵ While there are a proportion of on-demand workers who are genuine sole traders or independent contractors, the relationship is much less clear for the majority of these workers. The relationship is complicated by the use of an intermediary digital platform such as an app, which through its function places the obligations of the principal at arm's length.

D. Employee test

19. Despite the significance of the distinction between contracting and employment, there is no legislated definition of 'employee' or 'independent contractor' in either the FW Act or

³ Ibid 31.

⁴ Ibid 6; *Digital Platform Work in Australia, Prevalence Nature and Impact* (Report, November 2019) 81-82.

⁵ Department of Premier and Cabinet, Parliament of Victoria, *Report of the Inquiry into the Victorian On-Demand Workforce* (Final Report, July 2020) 16.

Independent Contractors Act 2006 (Cth). Instead, the determination is left to the common law.

20. There is no single, clear test to determine whether an employment relationship exists. The current approach requires a multi-factorial consideration of a number of indicia relevant to the totality of the relationship including, but not limited to, control, the provision of equipment, uniforms, rosters, and tax arrangements.⁶
21. The current test is widely criticised as unclear, lacking in certainty for practical application, and unresponsive to changes in the labour market.⁷ Business groups and employee organisations alike have criticised the test as unresponsive to the way in which labour is sourced and engaged by platforms utilising the on-demand workforce.
22. Courts will continue to apply the common law test unless and until Parliament legislates otherwise, as observed by the Fair Work Commission:

*'Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.'*⁸

23. The current approach also places the onus on workers to establish the existence of an employment relationship. Even if workers sought to establish such a relationship, the only avenue available to these vulnerable, low paid workers is through expensive, complex court proceedings. These practical barriers to accessing employment rights creates an incentive for businesses to engage in sham contracting, and exacerbates an imbalance in bargaining power.
24. Liberty Victoria is concerned that businesses sourcing labour from the on-demand workforce may be doing so in order to obfuscate the reality of their relationships with workers, and to exploit the uncertainty the current common law test creates.
25. The Young Workers Centre, a Victorian organisation which assists young workers to access their employment rights and resolve workplace disputes, recently surveyed workers impacted by the on-demand economy and insecure work.⁹ On-demand workers report that they need the rights and entitlements afforded to workers classified as 'employees':

'Companies such as Uber should better compensate drivers. Drivers have no choice but to accept the trips due to fear of having their account disabled. These companies don't pay any leave allowances which means you don't have any income coming in if you are unable work on any day, reclassifying drivers as employees would make expected income for drivers more certain and stable.' - Uber Driver, Young Workers Centre Survey

E. Social and human rights considerations

26. The International Labour Organisation has recognised that difficulties in establishing the existence of an employment relationship may create serious problems for 'those workers

⁶ Andrew Stewart & Jim Stanford, 'Regulating work in the gig economy: what are the options?' (2017) 28(3) *The Economic and Labour Relations Review*, ; see also; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 and *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 [229] - [231].

⁷ *Ibid*; see also; above n1.

⁸ *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 at [66].

⁹ See Victorian Trades Hall Council, *Supplementary submission into the response to the Inquiry into the On-Demand Workforce's recommendations*, 27 October 2020.

concerned, their communities, and society at large'.¹⁰ Central to our submission is the human rights imperative to extend minimum protections and entitlements to workers, so that more Australian workers can enjoy just and favourable conditions of work, equal pay for equal work, leisure, and a fulfilling and meaningful life.¹¹

27. During the COVID-19 pandemic, the distinction between employees who had access to employment-related rights and entitlements — such as sick leave and carers leave — and on-demand workers who did not, has underscored the human rights imperative at stake. Many frontline workers are on-demand workers, particularly in the cleaning and aged-care sectors. With no entitlement to paid leave, on-demand workers are more likely to attend work despite health risks.¹² The pandemic has exacerbated existing inequalities between on-demand workers and employees, and emphasised the urgent need for reform to accommodate the proper characterisation of the employment relationship and expansion of employment-related rights and entitlements to on-demand workers.

*'A critical task for governments is to provide adequate safety nets for workers laid off or losing jobs, in line with ILO standards and guidance. Governments must pay special attention to individuals and groups that are particularly vulnerable...in developed economies, those with no or little social protection, such as workers in the "gig" economy as well as women and migrant workers.'*¹³

28. Liberty Victoria is concerned that the Australian Government is failing to uphold its international and domestic human rights obligations in relation to the on-demand workforce. Many protections enshrined in the FW Act do not extend to on-demand workers who are not characterised as employees under the common law test.
29. One of the objects of the FW Act is to 'provide workplace relations laws that are fair to working Australians...and take into account Australia's international labour obligations'.¹⁴ As set out in the Explanatory Memorandum to the FW Act, Australia's long-held international labour obligations include promoting equal opportunity and anti-discrimination in employment,¹⁵ protecting workers against unlawful termination,¹⁶

¹⁰ *Recommendation Concerning the Employment Relationship*, ILO R198, (15 June 2006).

¹¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), Art 23(1)-(3), 24.

¹² Mark Stabile, Bénédicte Apouey and Isabelle Solal, *COVID-19, inequality, and gig economy workers* (Web Article, 1 April 2020) <https://voxeu.org/article/covid-19-inequality-and-gig-economy-workers>; Kaelyn Ford, *Coronavirus highlights lack of safety net for gig workers* (Web Article, 13 March 2020) <https://www.aljazeera.com/economy/2020/3/13/coronavirus-highlights-lack-of-safety-net-for-gig-workers>; Kristin Van Barneveld, Michael Quinlan, Peter Kriesler and Anne Junor, 'The Covid-19 pandemic: Lessons on building more equal and sustainable societies' (2020) 31(2) *The Economic and Labour Relations Review*, 149.

¹³ *United Nations Human Rights Office of the High Commissioner, Report of the Working Group on Business and Human Rights (2020) Statement: Ensuring that business respects human rights during the Covid-19 crisis and beyond: The relevance of the UN Guiding Principles on Business and Human Rights*

<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25837&LangID=E>>

¹⁴ *Fair Work Act 2009* (Cth), s 3(a).

¹⁵ *Discrimination (Employment and Occupation) Convention*, ILO C111, 25 June 1958; *ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (Geneva, 23 June 1981) [1991] ATS 7.

¹⁶ Including for reasons such as union membership or activity, making complaints against an employer, protected attributes such as pregnancy or family responsibilities: *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer* (Geneva, 22 June 1982) [1994] ATS 4.

promoting safe working conditions, a living wage, and paid holidays.¹⁷ These rights, enshrined in the FW Act, are only extended to workers who meet the common law definition of 'employee' and not to the on-demand workforce.

30. On-demand workers surveyed by the Young Workers Centre spoke of the personal impact of a lack of basic employment rights:

One worker told the YWC: 'I am on a part-time research internship at the University of Melbourne. The rest of the time I work doing deliveries for DoorDash. Currently I can only afford to buy eggs (my low income goes to rent and bills) and jointly with church donations I get to put food on my table. I am currently looking for a job because my dream is to perform as a professional researcher here in Australia.'

An Uber driver the YWC spoke with said that: 'Uber is ripping off us...we're working at \$10/hr or sometimes we get nothing. It takes all of our time and we can't enjoy our lives...even working up to 12hrs per day we aren't making a money equal to minimum wage...we use our own cars, bike, petrol and still we get insulted by customers, restaurants and uber would do nothing about it...we feel like we're living a miserable life...while we came crossing seas for a better life and work balance.'

Another worker told the YWC: 'I feel like it's pretty basic. Don't screw over workers when they're doing the exact same job as genuine employees. There needs to be penalties for things like this.'

F. Economic impact

31. Not only does the expansion of the on-demand workforce significantly disadvantage its workers, it also has harmful macroeconomic effects. The Australian Institute of Employment Rights and the Fair Work Commission have both noted the large body of evidence which demonstrates a compelling association between economic growth and strengthened workers' rights.¹⁸ In contrast, there are few, if any, long term negative economic impacts arising from Liberty Victoria's recommendations.
32. Workers in the on-demand workforce are paid on a per-task basis, which often leads to significant unpaid work hours and misallocation of labour resources. Using the ride-share industry as an example, the Rideshare Drivers Association of Australia notes that drivers must commit to working the busiest (peak) hours in urban areas to 'reduce the hourly cost base sufficiently to bring after-cost and GST remuneration up to somewhere approaching minimum wage'.¹⁹
33. An oversupply of drivers working peak times means drivers must work longer hours in off-peak times. As a result, the average wage of a rideshare driver has been estimated to be \$14.62 per hour, or just 80 percent of the minimum wage.²⁰ This peak time oversupply means workers are engaged at times when their labour would be more purposefully utilised elsewhere.

¹⁷ *International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Art 7.*

¹⁸ The Australia Institute, *'Turning Gigs into Decent Jobs'* (Submission to Inquiry into Victoria On Demand Workforce, 2019), 7; Australian Institute of Employment Rights, *Productivity Commission Inquiry: the performance of the workplace relations framework*, (Submission, 2015), 13.

¹⁹ Rideshare Drivers Association of Australia, Submission to Dept of Premier and Cabinet, Parliament of Victoria, *Inquiry into the Victorian On-Demand Workforce* (27 March 2019).

²⁰ Jim Stanford, Centre for Future Work at the Australia Institute, *Subsidising Billionaires, Simulating the Net Incomes of UberX Drivers in Australia* (Report, March 2018) 4.

34. Further, companies utilising on-demand workers have retreated from business models that invest in the professional development of the workforce.²¹ Training and career development is an important part of the Australian economy: improved employability increases productivity and leads to higher worker retention in the labour market. Expansion of the on-demand workforce may result in reduced engagement with the labour market, and a larger pool of underemployed or unemployed workers — with negative personal consequences including mental health issues and financial stress.²²
35. Lower pay also means on-demand workers make far lower real superannuation contributions. The government is facing a costly exercise upon the retirement of on-demand workers through the pension. The potential cost of increasing the pension and the associated administrative costs can be avoided by ensuring the superannuation system is extended to on-demand workers through this submission's recommendations.²³
36. In addition, the low pay and long hours experienced by on-demand workers – a growing workforce – means less money to spend and less time to spend it. Low-income earners are far more likely to spend the majority of their earnings and so support communities and small businesses. By reducing consumer power, these communities and businesses are suffering along with underpaid workers.²⁴ Legislative reform to set minimum pay for on-demand workers — by characterising them as employees entitled to the prescribed minimum in accordance with the applicable industrial instrument — would increase the strength of the consumer base and spending power of the on-demand workforce.

G. Proposed reforms

37. There must be a legislated resolution of the question of employment that extends the rights and entitlements afforded to employees to as many workers as possible.
38. A leading model addressing this question is in place in California, United States. *California Assembly Bill 5 (2019)* came into effect on 1 January 2020 and codified the so-called 'ABC test' used by the California Supreme Court.²⁵ The ABC test consists of three limbs, each of which must be satisfied in order for a worker to be deemed an independent contractor and not an employee. The three limbs are paraphrased below:

²¹ Dawson E & Lyons, T (Per Capita) *Senate Select Committee on the Future of Work and Workers* (Submission, 2018).

²² Productivity Commission, 'Upskilling and Retraining, Shifting the Dial: 5 year Productivity Review, Supporting Paper No. 8.

²³ Actuaries Institute, *The Rise of the Gig Economy and its Impact on the Australian Workforce* (Green Paper, December 2020), 16.

²⁴ Stephen Koukoulas, 'Economic growth more likely when wealth distributed to poor instead of rich', *The Guardian* (online, 4 June 2015) <<https://www.theguardian.com/business/2015/jun/04/better-economic-growth-when-wealth-distributed-to-poor-instead-of-rich>>; Laura Berger-Thomson, Elaine Chung and Rebecca McKibbin, 'Estimating Marginal Propensities to Consume in Australia Using Micro Data' (Research Discussion Paper 2009-07, Reserve Bank of Australia, November 2009), 3; Nahum, D & Stanford, J, (Centre for Future Work) *Technology, Standards and Democracy*, Submission to Select Committee on the Impact of Technological Change on the Future of Work and Workers in New South Wales (2020), 15.

²⁵ *Dynamex Operations West, Inc. v. Superior Court*, 903 416 P.3d 1, 232 (Cal, 2018).

- a. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
 - b. The worker performs work that is outside the usual course of the hiring entity's business; and
 - c. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.
39. The ABC test, critically, includes a reverse onus whereby if the status of the worker was in question, the onus lay with the employer (or principal contractor) to prove it was a relationship of contracting and not one of employment.²⁶
40. The ABC test should be legislated in Australia for two key reasons:
- a. it recognises and addresses the inherent power imbalance between workers and their employer or principal; and
 - b. it enshrines the default position that workers should have access to the rights and entitlements of employment, as these are universal human rights which promote dignity and economic freedom for all workers.
41. By creating a clear distinction between employees and contractors, the ABC test also enacts the ILO's recommendation that the Australian government '*promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship*'.²⁷
42. The ABC test also reflects principles found in Australian precedent, such as in *On Call Interpreters*,²⁸ which established that independent contractors must meet the indicia of genuine entrepreneurs, otherwise the relationship must be deemed one of employment.
43. Another means of extending employment-related rights and entitlements to a wider group of workers, including on-demand workers, is if the Fair Work Commission were given powers to deem groups of workers within a particular industry or subset of industry, or working for a particular entity, as employees. These workers would then be able to access the minimum rights and entitlements under the FW Act.
44. This recommendation echoes a similar one made by the ILO in 2006, that member states should provide effective access to fair and efficient mechanisms for settling disputes regarding the existence of an employment relationship, and consider deeming workers in certain sectors employees.²⁹ Following this recommendation would enable the Fair Work Commission to set minimum standards in respect of pay, leave, and protection from unfair dismissal for workers previously denied access to these rights and entitlements.

²⁶ We note for completeness that there are some exceptions to California Assembly Bill 5 (2019) which carve out certain occupations from its operation. This submission does not consider the merits of those exceptions or advocate for similar exceptions in Australia.

²⁷ International Labour Organisation R198 - Employment Relationship Recommendation, 2006 (No. 198), 10.

²⁸ *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* [2011] FCA 366.

²⁹ International Labour Organisation R198 - Employment Relationship Recommendation, 2006 (No. 198), Arts. 4(e), 11(c).

45. As such, our key recommendations are that the Australian Government:

- a. **Recommendation 1:** Amend the *Fair Work Act 2009* (Cth) and the *Independent Contractors Act 2006* (Cth) to define an 'independent contractor' as an individual who meets the three limbs of the ABC test, and to place a reverse onus of proof for meeting the ABC test on the worker's employer or principal.
- b. **Recommendation 2:** Amend the *Fair Work Act* (2009) (Cth) to include a definition of 'employee' that includes all workers who do not meet the three limbs of the ABC test.
- c. **Recommendation 3:** Amend the *Fair Work Act* (2009) (Cth) to extend the powers of the Fair Work Commission to deem particular groups of workers as having access to employment rights.

Julia Kretzenbacher
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