

## **Analysis of and commentary on Report of the Inquiry into the Victorian On-Demand Workforce**

20 July 2020

This is an analysis and assessment of the Victorian government's [Report of the Inquiry into the Victorian On-Demand Workforce](#) released on 15 July 2020.

In this analysis we first summarise the main points of the 228-page report and then make comment, most seriously upon five of the Report's key Recommendations (see section 12 below). Recommendation 6 is the core conclusion of the report.

### **Overview**

We find the recommendations of the report to be highly dangerous and a direct attack upon the right of all Australians to be self-employed.

- The report effectively recommends the outlawing of self-employment in Australia. (Rec 6) It thus specifically attacks the jobs and incomes of the 2,154,000 Australians who are currently self-employed.
- Consequently we tag this report as 'JobKiller'

Further the reports' recommendations are not supported by the research presented in the report. That is there is a disconnect between the research and the recommendations. In fact the research points to the valuable contribution self-employment and gig platforms make to society and the economy.

On the research aspects we find the following:

- a) The report provides helpful data on the gig economy in Australia.
- b) Overwhelmingly the report shows the valuable, but comparatively small, contribution that gig platforms make to the economy, society and individuals.

The reports states that:

- c) Only 0.19 per cent of the workforce use gig work for their full-time income; and
- d) Around 7 per cent of the workforce use gig platforms to earn extra income. That is, it's essentially a 'pocket money' opportunity.

However:

- e) Despite noting the positive contribution made by the gig economy, the report then 'discovers' a problem. The steps that the report uses to move from a 'positive' to a 'problem' are thin, cursory, illogical and, we say, 'manufactured'.
- f) The 'solution' to this 'problem' put forward by the report is to make self-employment illegal.

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### *Summary and commentary*

- 1) **Percentages:** The report conducted a national survey (Report, page 14) of 14,000 people that found the following:
- 7.1 per cent were currently doing gig work
  - 13.1 per cent had done gig work at some time.
  - That is, 6 per cent had done gig work but had stopped.
  - 2.7 per cent of gig workers (that is, of the 7.1 per cent) reported gig work as their full-time income source.

*Comment:* Assuming that the survey represents the full workforce, this means that

- **0.19 per cent** of the workforce use gig work for their full-time income (2.7 per cent of 7.1 per cent).

- 2) **Pocket money:** The report says (page 16)

Secondary income

Platforms are commonly used by workers to generate additional or supplemental income to that earned through other activities. This may be a ‘traditional’ job or other platform work. The high flexibility of platform work: in terms of when and where it is done, means that it can be done around other commitments, and therefore provides access to ‘additional’ opportunities to generate income.

[Emphasis added.]

This was supported by the National Survey responses.

- 3) **National work profile:** The report cites Australian Workforce by Employment status (Fig 1, page 17)

Full-time	49.5 per cent
Casual	20.2 per cent
Part-time	13.1 per cent
Business owners who employ others	9.1 per cent
Independent contractors	8.1 per cent

That is, some 17 per cent of the workforce are self-employed at around 2.2 million people.

- 4) **Motivations:** The report says (page 31) that

- The strongest motivation for undertaking platform work was ‘earning extra money’.
- Other key motivations related to flexibility: ‘working the hours I choose’, ‘doing work that I enjoy’, ‘choosing my own tasks or projects’, ‘working in a place that I choose’, and ‘working for myself and being my own boss’.

The report says (page 37):

- Platform work is highly flexible and enables workers to choose their own participation and hours.
- Most platform workers are not working ‘full-time’ with any one platform.
- People can earn additional, supplementary income by accessing work via platforms.

*Comment:* The evidence from the report is that the bulk of people who do gig work:

- Do it to earn extra income. That is, for many/most it is ‘pocket money’.
- Most would be in employment of some sort anyway—full-time, casual or part-time.
- Many, of course, are already independent contractors.
- They did/do gig work because it suits their lifestyle.
- Not mentioned in the survey is that gig work is ideal for work-from-home parents, retired people, the disabled, students, etc.

**5) Types of work.** The report states (page 32) that

Over 100 platforms were accessed by workers in Australia... across  
 transportation and food services; professional services;  
 odd jobs and maintenance work; writing and translation;  
 clerical and data entry; caring;  
 creative and multimedia; software development;  
 skilled trades work; sales and marketing support.

There is a large and diverse range of work available through platforms, from simple to complex.

The five most commonly used platforms (page 33) were:

- Airtasker – 34.85 per cent
- Uber – 22.7 per cent
- Freelancer – 11.8 per cent
- Uber Eats – 10.8 per cent
- Deliveroo – 8.2 per cent.

The type of work currently performed by gig workers (percentages) is as follows (page 34):

Type of digital platform work		%
Transport and food delivery	Taxi services; food delivery; package delivery or goods delivery	18.6
Professional services	Accounting; consulting; financial planning; legal services; human resources; project management	16.9
Odd jobs and maintenance	Running errands; general maintenance; removalist work	11.5
Writing and translation	Academic writing article writing; copy writing; creative writing; technical writing; translation	9.0
Clerical and data entry	Customer service; data entry; transcription tech support; web research; virtual assistant	7.8
Creative and multimedia	Animation; architecture; audio; logo design; and multimedia photography; presentations; voice overs; video	7.7
Software development and technology	Data science; game development; app, and technology software or web development; server maintenance; web scraping	7.2
Carer	Aged or disability care; pet care; pet services; babysitting; nanny services	7.0
Skilled trades work	Carpentry; plumbing; electrical work	5.8
Sales and marketing support	Social media; marketing; ad posting; lead generation; search engine optimisation; telemarketing	5.0
Education	Tutoring; teaching; mentoring; online coaching	1.2
Personal services	Sport / fitness coaching; massage; adult entertainment; tattoo and piercing	0.9

## 6) Gig = opportunity not available in existing labour market for the vulnerable

The report says (page 47):

- Platforms provide highly flexible opportunities for work.
- Platforms have generated new job opportunities.
- Platforms have relatively low barriers to entry and provide a diverse range of entry-level and skilled job opportunities.
- Australia's labour market conditions inhibit job opportunities for some workers: fewer entry-level jobs, high youth unemployment and underemployment are creating more competition, particularly for lower skilled workers.

The report says (page 64):

- Platform workers can choose when, or if, to accept work via the platform.
- Natural peaks in demand impact on these choices.
- Some platforms, particularly in rideshare and food delivery, strongly incentivise workers to be ready to work in peak periods and there may be negative consequences for workers if they do not make themselves regularly available.

### 6a) The report somehow sees this opportunity as a negative

The reports says (page 47):

- Labour market conditions and the personal characteristics of some platform workers can place them in a precarious position in the labour market.
- These 'low-leveraged' workers have fewer alternatives to earn income and face higher competition for work, including from under-utilised employees seeking additional income.
- Systemic non-compliance with employment laws is impacting the quality of available entry-level/low-skilled jobs for workers. This affects their choices.
- Because of their relatively fewer choices, low-leveraged workers are more likely to accept structurally precarious job arrangements.
- Low-leveraged workers are more reliant on platform work.

*Comment:* The report takes an 'opportunity' for vulnerable people which looks to be a positive and because these people face competition for work it somehow concludes that the 'opportunity' is instead a negative. It would seem to suggest that the report wants to stop people with a job from doing gig work as extra income.

## 7) Income

The report says (page 54):

- Income generated from platform work varies, with some workers (particularly skilled ones), earning relatively well.
- Conversely, some platform workers get less than the 'federal minimum wage' (whatever methodology is used to arrive at the rate).
- Most platform workers are paid per completed task.
- Remuneration is set either by the end user or the services or the platform.
- Most workers don't get an hourly rate and may not estimate or convert their income this way.
- It is hard to work out equivalent 'rates' of pay to enable a direct comparison with minimum wages paid to employees for a range of reasons, including factoring in costs and 'real time' worked.

- Other factors impact on platform earnings, including workers' skill levels and performance and their choices about how often and when to work and platforms' settings.

*Comment:* Effectively the report in this section is describing how a market economy works. That is, the very nature of commercial transactions is what is described above. If the report sees something wrong with this, then the report is effectively arguing that a market economy is bad, at least 'bad' where individuals engage in a market economy as a single person. What the report seems to argue is that if some regulator does not set the remuneration for tasks that individuals may do, then that is bad. The report is effectively a rejection of a market-based economy operating at the level of individuals.

## **8) Dispute resolution**

The report argues (page 71) that gig workers do not have access to dispute resolution services and can be refused work by gig platforms.

*Comment:* The report ignores the fact that cheap commercial dispute resolution services are available for gig workers through state Small Business Commissioners (Victoria introduced the first one) and the Federal Small Business Ombudsman. These have proven to be highly effective. The report also ignores the fact that in a market economy a service provider has a 'right' to not offer a service (other than on grounds of discrimination) if someone does not agree to the terms of service. For example, when someone enters a phone service, the person must agree to the terms of the service. If they do not, the provider does not have to provide the service. This is an essential part of 'offer and acceptance' of contract that makes a market economy work. The report seems to see something wrong with this.

## **9) The existing common law definition doesn't work**

The report says (page 103):

- Independent, self-employed workers are a critical part of the labour market.
- The distinction between self-employed workers and employees is today commonly described as follows: contractors run their own business and sell their services to others, while employees work in someone else's business.
- The work status of some workers is 'borderline': they are not clearly 'employees' or 'independent contractors'.

And (page 105)

- The definition of 'employee' is not set out in most work laws.
- Employment arrangements are identified using an established, but not always clearly set out, work status 'test' made up of multi-factor legal indicia, developed by courts..

And (page 107)

- Most platforms do not employ workers but arrange work under commercial arrangements.
- Platforms determine the form of the arrangement which may not be aligned with the legal/economic reality.
- Some platform workers' arrangements are 'borderline' or finely balanced: they have features of employment and non-employment relationships.

And (page 109)

- Most platforms do not require workers to perform work at any particular time, or at all, meaning a key aspect of the traditional work status test, the 'work-wages' bargain, is absent, and making it less likely that the worker would be an 'employee' under the current test.

*Comment:* The foregoing statements are a combination of truth and misleading comment. Employment status is clearly known at law and can be discovered through well-applied common law tests in the courts. For example, the gig platforms of Uber and Uber Eats have been thoroughly investigated in Australian courts over the last few years and found to be commercial arrangements (that is, independent contracting). The report's claim that there is a problem is really a statement that the report does not like the current processes of common law. In other words, this section of the report is a statement of opinion rather than fact.

#### **10) International Labour Organisation Obligations** (pages 180 to 183)

The report discusses international obligations under ILO Conventions and Recommendations in several places. However, it does not mention the most important and relevant of ILO Recommendations that directly addresses self-employment and consequently the gig economy.

In 2006, after a decade-long debate, the ILO declared that employment law should not interfere in the commercial relationship. The key clause in the 2006 ILO Recommendation reads:

*(Clause 8) 'National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships...'*

This was predated by a 2003 ILO Conclusion that reads:

*The term employee is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship.*

*The term worker is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee*

*Self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.*

The effect of the 2006 Recommendation and the 2003 Conclusion is that the ILO affirms that self-employment operates within commercial legal contracts. In common law countries such as Australia, commercial contracts are defined at common law.

Following the 2006 ILO Recommendation the Federal Parliament passed and enacted the *Independent Contractors Act 2006* that locks in under statute the common law definition of self-employment. This Australian Act conforms with and is in accord with the ILO obligations of 2003 and 2006.

The proposal of this report into the gig economy to abolish common law as the test for self-employment would breach the ILO Obligations (more below).

#### **11) 'The Compelling Case for Change'** (page 185)

After some 180 pages of information, facts (many helpful to understanding the gig economy), and opinion (often presented as if the opinion is fact), the report concludes that there is a problem due to

##### **The inherent uncertainty of the work status test**

This, in the Inquiry's view, is the 'root cause' of the current system's failings. It, in turn, causes uncertainty about the application of work laws. This uncertainty is amplified, rather than assuaged, by the remaining aspects identified by the Inquiry.

*Comment:* There is nothing presented in the body of the report that could force the conclusion that there is a 'compelling' problem. In fact there is every reason to conclude that the gig economy provides a 'compelling opportunity' for (particularly) vulnerable people (retired,

student, disabled, work-from-home people with families, etc) but also large numbers of people who have work/income but want more, even if it's just 'pocket money'.

The report comes to a conclusion that appears out of 'thin air' and is not at all supported by the research. On the evidence presented, the conclusion is a fabrication.

## 12. **Recommendations** (pages 189 to 206)

The most relevant recommendations are listed below, with recommendation 6 being the overarching one. The list of Recommendations is as follows:

- The Commonwealth should change the definition of self-employment. If the Commonwealth does not act, Victoria should act. (Recommendation 2)
- The common law test for self-employment should be trashed and replaced with a new invention they call the 'entrepreneurial test'. This is only described in general terms. (Recommendation 6)
- Collective bargaining for gig workers should be allowed. (Recommendation 15)
- Unfair contract laws should be strengthened. (Recommendation 17)
- Sham contracting laws should be changed. (Recommendation 19)

### RECOMMENDATION 2 — Commonwealth Act (page 189)

The Inquiry recommends that, if the Commonwealth does not act, Victoria, in consultation and collaboration with other states, should pursue administrative and legislative options .....

*Comment:* We support the existing *Independent Contractors Act* and call on the Federal government to oppose any attempts to interfere in common law. We call on the Federal government to use all means available to oppose including in the courts any attempt by Victoria, or any other state, to interfere in common law.

### RECOMMENDATION 6 — Remove existing common law (page 193)

The Inquiry recommends that the FW Act be amended to:

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

*Comment:* We totally oppose this. This proposal is a sham, a con targeted to do immense harm to self-employed people. It will destroy jobs, trash opportunity in the economy and create more vulnerable people in the community.

### RECOMMENDATION 15 — Collective bargaining (page 202)

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.

*Comment:* Collective bargaining is already available to the self-employed through the Australian Consumer and Competition Commission.

**RECOMMENDATION 17 — Unfair Contracts** (page 204)

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

*Comment:* We strongly support the 'beefing up' of unfair contract laws. Legislation is currently before the federal parliament to do this and we call for these laws to be passed quickly. This is the only recommendation in this report that we find is valid and evidentially-based.

**RECOMMENDATION 19 — Sham contracting** (page 206)

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
- (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.

*Comment:* The existing sham contracting provisions are already strong and successful prosecutions have occurred. We oppose any changes to these laws.