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Inquiry into the Victorian On-Demand Workforce

Submission to Victorian
Government
February 2019



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Chamber of Commerce
and Industry**

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1. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (**Australian Chamber**) welcomes the opportunity to make a submission to the Victorian Inquiry into the Victorian on-demand workforce.
2. With the Inquiry touching on areas where Federal legislation applies, as well as established principles from longstanding case law applying to employees and independent contractors nationally, the Inquiry is of interest to the Australian Chamber.
3. We note the Terms of Reference and seek to assist the Inquiry / Victorian Government in relation to a number of these considerations. In doing so we have focussed on a selection of priority issues.
4. Despite media and community interest in on-demand working, on-demand work remains a marginal, non-statistically significant part of the Victorian labour market.
5. To the extent that on-demand work has emerged, we note this is not the first time innovation, and technological, social and other developments have impacted on work and potentially raised considerations for the regulation of work.
6. Over more than a century, despite misgivings and unease at the point of change, technological and other changes have ultimately proven overwhelmingly positive for workers and businesses, and have led to improvements in worker satisfaction, productivity, and growth in both employment and the economy.
7. In a world where many people will undertake multiple types of work and work under a variety of arrangements, whether as employees or through self-employment during their working lives, it is unsustainable to proceed on the basis that such forms of work are somehow inferior or undesirable, or to seek to regulate them so as to make them impracticable and uneconomic. Doing that would send investment and jobs elsewhere. Victoria is the second largest provincial economy in the world's 13th largest national economy; the considerations in this Inquiry for future jobs and economic success in this state and nationally are potentially considerable, particularly if any approach were pursued that proves inimical to future innovation and work opportunities.
8. The Australian Chamber sees no basis to recommend regulatory changes in this area. Long standing, robust and adaptable regulation already exists and there is no basis to conclude it cannot address changes in how work is undertaken during the next decade, as it has in preceding decades.

2. PREVALENCE OF ON-DEMAND WORK

9. As observed in the Background Paper to this Inquiry, it is difficult to measure the prevalence of on-demand work¹ due to a number of factors, including varying definitions of what constitutes 'on-demand' work.
10. There is no universally accepted definition of the 'on-demand' or 'gig' economy. However, for the purpose of this submission we have proceeded on the basis that it broadly relates to a sector in which digital platforms facilitate transactions between buyers and sellers, with some form of fee, consideration or return to the platform provider. This can include, for example, facilitating the provision of a task or work, engagement of temporary self-employed labour, or the short-term rental of assets.
11. This is clearly a broad concept, and any definition is seeking to capture an area of constant innovation and new business formation.
12. These working arrangements and business models, as well as being difficult to universally define, do not easily fit into official labour statistics. That said, the statistics that are available indicate that only a very small proportion of those working in the labour market are working on an on-demand basis. The Background Paper referred to the following statistics:
 - a. In 2016, the Grattan Institute estimated that fewer than 0.5% of adult Australians (80,000 people) worked on peer-to-peer platforms more than once a month.²
 - b. If we extrapolate this to Victoria on a population basis (Victoria accounts for 26% of Australians³), this would see approximately 20,700 Victorians working through peer-to-peer platforms, or just 0.005% of Victoria's working age population.
 - c. In 2017, a study by Deloitte Access Economics found that about 1.5% of residents in New South Wales had earned money via some type of digital platform in the 2015/16 financial year – noting the study was not limited to platforms that supply labour, and only a small number would frequently perform platform work.⁴ To be plain, this very small figure would be inflated by people 'renting' out their assets on a short-term basis such as through Airbnb.
13. The Productivity Commission in October 2017 said the prevalence of the gig economy is often 'grossly exaggerated'.⁵ It observed that the 'gig' economy is still in its infancy in Australia, and the inflated numbers sometimes cited do not reflect the amount of hours people work in traditional job.⁶

¹ Inquiry into the Victorian On-Demand Workforce: Background Paper, December 2018, pp. 7-8.

² Jim Minifie, Grattan Institute, Peer-to-peer pressure, policy for the sharing economy, April 2016, p 33.

³ ABS 3101.0 - Australian Demographic Statistics, Jun 2018.

⁴ Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28 *The Economic and Labour Relations Review* 420, 423.

⁵ <https://www.pc.gov.au/inquiries/completed/productivity-review/report/productivity-review.pdf>

⁶ Future of Work, citing <https://www.pc.gov.au/inquiries/completed/productivity-review/report/productivity-review.pdf>

14. More recently, the Association of Superannuation Funds of Australia in 2018 estimated that around 150,000 workers nationally (1.2% of the workforce), utilise digital platforms to obtain work on a regular basis.⁷ As these are national figures, it follows that the amount of workers in the on-demand workforce in Victoria, if using this measure, will be much lower than the 150,000 Australia-wide figure. Again, on a population basis this would be more like 39,000 Victorians.
15. We are yet to see any significant compositional change in the labour market towards a wide take up of on-demand work. The Productivity Commission has observed that ‘most people gaining employment through platform websites are employed as independent contractors’ and that ‘the proportion of independent contractors has remained constant in recent times’.⁸
16. Self-employed independent contractors make up less than 9% of the workforce in Australia, a figure that has remained stable for at least a decade.⁹ This is a point the Australian Chamber has made consistently in the face of the inaccurate claims being made in the ACTU’s Change the Rules campaign, and erroneous claims that independent contracting is growing and is growing as part of a wider trend towards “insecure work”.
17. 2018 research found a downward trend in self-employment, when excluding those who employ others (so as to appropriately capture the cohort of people who work for themselves and by themselves on commercial contract terms).¹⁰ The report included the following chart, which shows that self-employed people ‘are getting harder to find’:



⁷ Andrew Craston, The Association of Superannuation Funds of Australia Limited, Superannuation balance of the self-employed, March 2018.

⁸ Productivity Commission, Digital Disruption: what do governments need to do, June 2016, p 77.

⁹ ABS 6291.0.55.003 (2015 onwards), ABS 6359.0.

¹⁰ <https://www.abc.net.au/news/2018-07-17/australian-jobs-arent-becoming-less-secure/10002026>

18. Future growth of the 'on demand' workforce is also uncertain. 2018 research found predictions that the 'gig economy' would lead to the demise of traditional employment have been greatly exaggerated, and that most employers still prefer a permanent workforce.¹¹
19. Based on the scale of change at the time of its report, the Productivity Commission did not consider it appropriate to recommend changes to workplace relations regulations at this stage.¹²
20. The Australian Chamber submits that this inquiry should conclude that:
 - a. On-demand working remains a marginal, non-statistically significant part of the Victorian labour market.
 - b. Notwithstanding community and media interest in talking about on-demand working, it is not increasing or becoming more common.
 - c. There is no basis to conclude that on-demand working is set to increase significantly in Victoria.
 - d. The weight of evidence does not point to an issue which requires a policy response at this stage.
 - e. Considerable caution is needed to guard against any unwarranted, misplaced or premature policy response.

¹¹ See AFR, [Gig economy and casualisation threat to employment model 'a myth', expert says](#), 25 July 2018.

¹² Productivity Commission Research Paper, [Digital Disruption: What do governments need to do?](#) June 2016.

3. EXISTING LEGAL FRAMEWORK

21. The Terms of Reference for this Inquiry include consideration of “the legal or work status of persons working for, or with, businesses using on-line platforms.” The Background Paper poses the question “what if workers are employees, misclassified as ‘independent contractors’”.
22. Those operating in the on-demand economy can be classified as either an employee or an independent contractor. This is an important point, on-demand working or platform models do not necessarily or in all cases generate work on a basis other than a contract of service (i.e. employment).
23. Turning to relationships other than employment, the Australian Chamber submits that the common law generally provides a proper and sufficient basis on which the law should give legal recognition to a contract for services and a proper basis for setting out the necessary elements of a contract for services.
24. Where there is ambiguity in relation to the classification of those who work in the ‘on-demand’ economy, the Australian Chamber submits:
 - a. There are established legal tests which have evolved across more than a century to delineate employment from independent contracting, which can and will be applied if there is disputation or ambiguity on whether a particular on-demand worker should be deemed to be in employment.
 - b. This case law has shown a demonstrated capacity to change and evolve to meet changing circumstances.
 - c. The case law can evolve further to provide greater clarity in this area as may be required, as it has done for all other innovations in the legal triggering of work, for more than a century.
25. In terms of considering an alternative to the longstanding independent contracting test, the *Victorian Inquiry into the Labour Hire Industry and Insecure Work* in 2016 considered the definition of independent contracting, and proposals for a statutory definition of independent contracting or other regulation directed at limiting the mischaracterisation of employees as independent contractors.
26. The Inquiry in its Final Report found:

...recent decisions suggest an increasing willingness by the courts to assess the genuineness of independent contractor arrangements by considering whether the worker is genuinely working in his or her own business, rather than for the business of the other party. The common law test has proved to be flexible enough to permit an assessment of the true nature of an engagement, irrespective of its label. I do not consider it desirable to replace the common law test with a statutory test.

27. We see no basis to reach a conclusion in this inquiry that differs from that of Professor Forsythe, “The common law test has proved to be flexible enough to permit an assessment of the true nature of an engagement, irrespective of its label”.
28. While the above was in the context of labour hire, the Productivity Commission in its 2015 Workplace Relations Framework report found more generally that “While the existing common law definition of a subcontractor may not always be easy to apply, it is hard to develop a better legislative definition or test.”¹³
29. The Australian Chamber submits that the existing legal framework in relation to the classification of workers remains the right one. Evolving common law tests have proven a robust mechanism to deliver one of the most important delineations for how we regulate work in Australia and have proven themselves capable of delivering a foundation for the regulation of both employment and independent contracting. We need to be very careful not to impose any regulatory response to apparent (although in reality marginal or at best nascent) recent changes that would impact legitimate existing employee/employer and independent contractor/principal relationships.
30. To the extent that further guidance in this area is pursued, there may be scope for additional advice and support to be provided to on-demand sector workers in relation to their classification and entitlements.
31. A recommendation from this Inquiry might therefore be for the Victorian Government to help ensure that those doing on demand work through platforms in this state have access to information on their contractual status and considerations that arise from entering into a contract for services style relationship for on-demand work.
32. The reality is however that Victoria operates in a national system and has (more comprehensively than other states) referred its powers to regulate work to the Commonwealth (a decision the Australian Chamber and its members have very strongly supported). Any advisory or information services to on-demand workers should come from the Commonwealth, through the Fair Work Ombudsman (FWO), but there could be a role for Industrial Relations Victoria in instigating the project and contributing to the collateral that would better explain the current law.

¹³ Productivity Commission, Inquiry into the Workplace Relations Framework, 2015, p 47.

4. PREVALENCE OF ‘SHAM CONTRACTING’

33. The Inquiry’s terms of reference include consideration of “whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations”.
34. The Australian Chamber is opposed to sham contracting: deliberately misrepresenting an employment relationship as a contractual relationship. Employers strongly support scope for individual Australians and businesses to be able to choose in an informed manner to enter into both contracts of service and for services, and recognise that mischaracterisation can detract from those choices.
35. There are circumstances in which contracting arrangements have been, and can be, misused through the deliberate disguising of an employment relationship as a contractual relationship or “sham contracting”. That is why there are anti-sham contracting provisions in the *Fair Work Act 2009* (Cth) (Fair Work Act).
36. However, there are still widely divergent views about whether sham contracting is in fact a widespread problem, and whether it is decreasing, stable or increasing in incidence, both in relation to the ‘on-demand’ workforce and more broadly.
37. As recently as November 2018, the Australian Government acknowledged that “it is difficult to estimate the size of the issue around sham contracting.”¹⁴ Most of the independent reviews and inquiries into sham contracting have either been inconclusive, needed more information or have found that the practice is not widespread.¹⁵
38. As it stands, the Australian Chamber is not aware of any concrete evidence of a groundswell of ‘sham’ arrangements designed to exploit or avoid workplace obligations, or any reliable data or evidence to suggest that there is a growing number of instances of sham contracting that could justify any revisiting of the regulatory framework in this area. This observation applies both to sham contracting generally, and specifically in relation to the ‘on-demand’ economy.
39. We see no basis for any changes to the law in this area.
40. Governments should resist any temptation to over-regulate and legislate for every conceivable behaviour or occurrence, particularly based on instances where negative publicity around a particular set of developments is not translating into real and reliable facts and figures that could justify a policy or regulatory change.

¹⁴ <https://static.treasury.gov.au/uploads/sites/1/2018/11/Consultation-Paper-Improving-black-economy-enforcement-and-offences.pdf>

¹⁵ See, for example, Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation (June 2012), p.224; ABCC, ‘Sham Contracting Inquiry’ (Report, Australian Building and Construction Commissioner, 29 November 2011).

41. There is clearly community and media interest in how our society is changing more broadly, from big data and the internet of things to the gig economy. It is human nature that at the same time as we embrace change, we can often worry over it.
42. Both play into key parts of the Australian psyche; we are some of the world's best early adopters of new technologies, but we also enjoy a simultaneous national conversation on how it is changing our lives for the worse.
43. The challenge for policymakers is to transcend the tabloid, to err on the side of being cautious to change law and regulation, and to make decisions based on evidence and proof. Furthermore, in the absence of a proven case for change or an evidentiary base, sound regulation errs on the side of not changing approach. This is particularly the case where there is an existing regulatory system, which has proven itself capable of adapting to changing circumstances (as the common law tests and anti-sham contracting provisions have done).
44. In the absence of credible data or evidence to the contrary, in relation to the classification of workers, this Inquiry should conclude that:
 - a. The system is working as intended.
 - b. Contracting or other arrangements are not being used to avoid the application of workplace laws and other statutory obligations, and were this to occur the law already accounts for this.

Effectiveness and enforcement of current 'sham contracting' penalties

45. The Inquiry's Terms of Reference also includes consideration of "the effectiveness and enforcement of those [workplace] laws".
46. While there is no credible basis for concluding that contracting or other arrangements are being used to avoid the application of workplace and other laws, where there may be risk of misclassification, the existing laws are an effective deterrent and are appropriately enforced.
47. The majority of businesses seek to 'do the right thing' and classify workers appropriately. Businesses generally, and those in the 'on-demand' economy, are even further incentivised to properly consider the classification of those using the digital platforms because of the high penalties faced if workers are misclassified.
48. There is also some contestability of the social license of platforms from some quarters, and the interests of the disrupters and the disrupted have collided in various areas, including in the media and public discourse. This public perception element adds to incentives for platforms to 'do the right thing' and classify workers appropriately.

49. Sham contracting is specifically prohibited by the Fair Work Act. Where a business has been found to have entered into a sham arrangement, the current penalties available under the Fair Work Act reflect the seriousness of the offence and serve as an appropriate general and specific deterrence. The Fair Work Act allows the courts to impose a maximum penalty of \$63,000 per transgression for corporations and \$12,600 for individuals.¹⁶ This adds up pretty quickly across multiple platform workers if errors are made.
50. Furthermore, if someone is misclassified and subsequently found to be an employee, there may well be monies owing under an award / the Fair Work Act, in addition to penalties for not applying an award / the National Employment Standards.
51. The deterrent effect of the numerous other penalties (outside of the Fair Work Act) that an employer is likely to also be subject to as a consequence of contravening the sham contracting provisions is also a relevant consideration.
52. For example, the Australian Taxation Office is likely to pursue the employer for a range of penalties under superannuation and taxation legislation. Under state workers' compensation and long service leave laws, businesses are also likely to be the subject of serious penalties including significant fines. A payroll tax liability may also arise.
53. Businesses may also face penalties under the common law for breach of contract, tort, equity and misleading and deceptive conduct in trade or commerce.
54. Some of Australia's top labour law academics have noted:¹⁷

In recent times, Australia's federal courts have become much more inclined to look at the substance or practical reality of an arrangement, as opposed to the formal terms agreed by the parties. Coupled with a willingness by agencies such as the FWO to enforce statutory provisions prohibiting certain forms of 'sham contracting', it has become both harder and riskier for businesses to evade employment obligations in this way.

55. We emphasise this point from independent academic analysts as directly germane to what should be concluded in this inquiry:

...Australia's federal courts have become much more inclined to look at the substance or practical reality of an arrangement, as opposed to the formal terms agreed by the parties...

... it has become both harder and riskier for businesses to evade employment obligations in this way.

¹⁶ Fair Work Act 2009, s 539(2).

¹⁷ (Roles and Stewart, 2012; Johnstone and Stewart, 2015).

56. Indeed, decisions being handed down by the courts signal an increasing willingness to impose significantly high penalties, which reflect the seriousness of the offence. For example, in 2018, the Federal Circuit Court, a Pizza Hut franchisee on the Gold Coast was penalised a total of \$216,700 (\$36,700 ordered against the director and \$180,000 against the company) for engaging a delivery driver under a sham contract, despite the underpaid wages and entitlements owed to the worker amounting to just over \$6,000.¹⁸
57. In addition to the high penalty, Judge Jarrett also ordered the director and his company to commission retrospective and future audits of their pay practices and to display a workplace notice containing information about minimum lawful pay rates and the FWO's contact details.
58. The FWO is extremely active in bringing sham contracting proceedings and seeking penalties against companies and their directors, having made the pursuit of such claims a priority.¹⁹
59. While the above examples do not directly relate to the on-demand workforce, there is no reason to believe the FWO's approach would differ for those in the on-demand workforce. The FWO continues across recent years to reiterate that the agency takes a "zero tolerance approach" to sham contracting and that companies involved in such behaviour "risk significant penalties from the court".²⁰
60. In the Australian Chamber's view, the FWO's active approach to pursuing contraventions of sham contracting arrangements coupled with the courts' preparedness to impose significantly high penalties, in combination with accessorial liability for advisors demonstrates existing penalties act as an appropriate deterrent to any attempts to deliberately manipulate the law – including in relation to businesses in the 'on-demand' workforce. Consequently, there is no cause to warrant any amendment to the current system.

¹⁸ Fair Work Ombudsman v Skyter Trade Pty Ltd & Anor [2018] FCCA 1483.

¹⁹ Media release, [Fair Work Ombudsman commences legal action against Foodora](#), 12 June 2018.

²⁰ FWO, Over \$165,000 penalties for tour bus operator, 14 December 2018.

5. IMPORTANCE OF ON-DEMAND WORK

61. In considering issues relating to the on-demand workforce, it is important to note that genuine and consensual contracts for services under which work is performed as principal and contractor or are in and of themselves a legitimate, welcome and beneficial form of commercial arrangement, and as welcome and beneficial work option for Australians as contracts of employment.

62. The Productivity Commission observed:²¹

There is little question that some members of the workforce see work that is not performed with a permanent employment relationship as a one-sided bargain... However, this perspective on non-standard work is an overly negative one. What holds for some does not hold for all.

63. This is an important point, we understand that the vast majority of those doing on demand work are satisfied with it. And for many, we have to question how significant a concern it should be if they are not. It is logical that if someone doesn't enjoy or doesn't feel they have secured a due return for platform work, they log off and don't return. This is analogous to someone for whom labour hire engagement doesn't work, they simply don't make themselves available for future work.

64. This is not to be blithe or glib about the need for work and income, or to assume that employed jobs are easy to come by, but it is to make the point that platform work is largely genuinely casual in the ordinary meaning of that word. Barriers to entry are low, investments are low and the consequences of stopping and seeking other work are generally less than they are for employees. This is not to say that many platform workers are not using this avenue to obtain their living, but all of us have the option to engage or not engage with platforms if they fail to meet our needs or expectations.

65. It is challenging for some to accept, but as recognised by the Productivity Commission many workers do not want to be employees²² and actually enjoy the freedom and financial incentives associated with self-employment. As we make the point above, if people don't want to make their services available on a platform they are not obliged to (although it may be that in time some professions or specialist occupations may in time require some online presence or availability through platforms).

66. The Productivity Commission further noted that the development of a gig economy will suit some workers due to a number of factors, examined below:

- a. **Flexibility:** Technological developments have supported a greater level of connectivity providing broadened options around when, how and from where people can work.

²¹ Productivity Commission, Draft Report, p. 100.

²² Productivity Commission, Inquiry into the Workplace Relations Framework, 2015, p 802.

- i. The benefits of flexible working arrangements for individuals can include increased satisfaction at work, significantly improved work-life balance, and enhanced wellbeing. Many value the opportunity to work at their own pace and to work their own hours without detailed supervision. People can tailor independent work around the lives and other commitments, such as study and caring responsibilities.
 - b. **Increased opportunities:** Increased flexibility offered by ‘on demand’ work can also lead to greater opportunities for under-represented workers such as carers, older workers and those with disabilities, to participate in the labour market, leading to a more diverse and inclusive workforce.
 - i. The Grattan Institute found there is evidence digital platforms are boosting employment and income for those on the ‘fringe’ of the labour market (such as those who are unemployed or underemployed due to age or ill-health).²³
 - ii. The Productivity Commission has also recognised that the development of a gig economy can make it easier for some demographic groups to find work.²⁴
 - iii. It has been found that this type of work can act as a ‘stepping stone’ for employment,²⁵ if that is what the individual is seeking, and there is great opportunity to use side work to gradually transition between occupations.²⁶
 - c. **Financial benefits:** People are becoming more creative in how they generate personal income, and platform technologies in the on-demand economy provide opportunities for them to do so.
 - i. ‘On-demand’ work is often used to supplement other streams of income from paid work. Greater economic security may be achieved by diversifying sources of income via self-employment, contracting or by working in a combination of ways for more than one person or business, sometimes at the same time. Indeed, a ‘portfolio’ of income streams may in future provide greater security than working for one employer in a traditional, permanent form of employment.
 - ii. International research has looked at how self-employed contract work is used to offset unexpected expenses and allow workers to gain new skills for a smoother occupational transition.²⁷ That is, for many people, ‘gig’ work is both a tool for economic security and upward mobility.²⁸
67. While working in the on-demand economy will not suit everyone, the benefits of on-demand work for those who want to do it are clear.

²³ Jim Minifie, ‘Peer-to-peer pressure: Policy for the sharing economy’, Grattan Institute, April 2016, p 1.

²⁴ Productivity Commission Research Paper, [Digital Disruption: What do governments need to do?](#) June 2016, p. 78.

²⁵ Productivity Commission, Draft Report, p. 100.

²⁶ Gregory Ferenstein, [How the Gig Economy Can Help Workers Thrive Through Automation](#), 31 March 2018.

²⁷ Gregory Ferenstein, [How the Gig Economy Can Help Workers Thrive Through Automation](#), 31 March 2018.

²⁸ Gregory Ferenstein, [How the Gig Economy Can Help Workers Thrive Through Automation](#), 31 March 2018.

68. The values of entrepreneurship, risk taking, investment and choice which underpin contracts for services are values that should be welcomed, encouraged and highly regarded by policy makers. The extent to which Australians are able to seize the opportunities of, address the challenges of, and innovate in on-demand work will be important to Australia's ability to compete in the globalised world we will face in the future. If competing countries learn and innovative new ways of working, and unleash new innovations in entrepreneurship and in new products and services, through on-demand work more successfully than Australia we will be placed at a future competitive disadvantage.
69. The CSIRO report *Tomorrow's Digitally Enabled Workforce: Megatrends and scenarios for jobs and employment in Australia over the coming twenty years* observed:²⁹
- In order to continue to foster a successful entrepreneurial environment, entrepreneurship needs to be supported as a valid and respected career choice, removing the associated stigma of failure and assisting in the creation of networking opportunities.*
70. Working for profit rather than a wage carries some risk but the contracting model rewards productivity and allows individuals to reap the benefit of their own effort. The focus of policy should be on educating the self-employed about ways to guard against risk rather than trying to shut down their status as a self-employed person by creating obstacles to self-employment, or obstacles to on-demand work opportunities.
71. Governments should not be in the business of deciding what working arrangements suit businesses or individuals. This has never been the role of government or regulators, nor has this been the role of how Australia has regulated contract work through the common law or the sham contracting provisions.
72. Requiring true independent contractors to become employees is a regulation of entrepreneurship, and something that not even the International Labour Organisation has recommended. Indeed, the Productivity Commission has found:³⁰
- Were all platform-mediated employment to be re-defined as involving contracts of employment (an employee) rather than contracts for employment (a contractor) it could thwart the adoption of improved services (including in disability care). It could also deny people who want flexible jobs the chance of a job at all.*
73. In formulating its recommendations, we urge the Inquiry to ensure that any recommendations or regulatory responses would not have the effect of disrupting legitimate and longstanding forms of work such as independent contracting, or stymieing further innovation. It is important that our system encourages and facilitates innovation and the opportunities that the workers of today are seeking.

²⁹ Hajkowicz SA, Reeson A, Rudd L, Bratanova A, Hodges L, Mason C, Boughen N (2016) , *Tomorrow's Digitally Enabled Workforce: Megatrends and scenarios for jobs and employment in Australia over the coming twenty years*, CSIRO, Brisbane, p.41

³⁰ Productivity Commission, *Shifting the Dial: 5 year productivity review*, October 2017.

6. LIMITATIONS ON VICTORIA'S LEGISLATIVE POWERS

74. The Background Paper provides that in making recommendations, the Inquiry should have regard to “the limitations of Victoria’s legislative powers over industrial relations and related matters and the capacity to regulate these matters.”
75. This is a welcome reminder that in addition to there being no basis for somehow attempting to take new or altered regulatory actions in this area, any capacity for Victoria to take action is limited by the referral of workplace relations powers to the Commonwealth.
76. The Background Paper rightly observes that “a key challenge in addressing these issues is that Victoria may have limited capacity to regulate in areas where Federal legislation applies.”
77. To the extent that the Inquiry is considering making recommendations that may impact the existing legal framework concerning independent contracting, we note that most independent contractors are covered by the *Independent Contractors Act 2006* (Cth).
78. The Independent Contractors Act excludes certain State and Territory laws that provide employee-like entitlements to independent contractors, allowing the contract, common law and Commonwealth law to govern independent contractor relationships.³¹ Specifically, it excludes the operation of State and Territory laws that:
- a. Take or deem a party to a services contract to be an employer or employee;³² and
 - b. Confer or impose rights, entitlements, obligations or liabilities on a party to a services contract in relation to matters that are similar to those of employees or employer in an employment relation.³³
79. In this regard, the Victorian Inquiry into the Labour Hire Industry and Insecure Work found:³⁴
- the Independent Contractors Act 2006 (Cth) significantly curtails Victoria’s capacity to regulate independent contractor relationships, and accordingly the Victorian Government is limited in its ability to direct address most of the concerns raised by critics of independent contracting arrangements.*
80. The Australian Chamber submits that this observation continues to hold true and that the Victorian Government remains limited in its ability to regulate independent contracting arrangements.

³¹ *Independent Contractors Act 2006* (Cth), ss 7 and 8.

³² *Independent Contractors Act 2006* (Cth), 7(1)(a)

³³ *Independent Contractors Act 2006* (Cth), 7(1)(b).

³⁴ Victorian Inquiry into the Labour Hire Industry and Insecure Work, *Final Report*, August 2016, p 32.

81. To the extent the Inquiry may seek to make recommendations concerning legal entitlements and obligations for work carried out under employment relationships, as noted in the Background Paper, Victoria has referred almost all of its industrial relations powers to the Commonwealth since 1996. This means that subject to a number of limited exceptions, Victorian workers and businesses are covered by Federal industrial relations laws.³⁵
82. In any case, the Australian Chamber submits that fragmented state-based approaches to the on-demand workforce would inevitably add further complexity to the system and cause difficulties with enforcement.
83. Further, the Australian Chamber submits the Inquiry should approach any recommendations concerning Federal matters with caution. Any recommendations impacting Federal matters would need to be examined in their entirety – that is, nationally – and the full impacts of the change assessed.

³⁵ *Fair Work (Commonwealth Powers) Act 2009* (Vic).

7. CONCLUSION

84. This inquiry should conclude that:
- a. There is insufficient evidence to justify Victoria attempting to take any further or additional action in this area.
 - b. On demand working remains a very marginal part of the Victorian labour market.
 - c. There is no massive / significant growth in on-demand employment in Victoria.
 - d. Contracting or other arrangements are not being widely or increasingly used to avoid the application of workplace laws and other statutory obligations.
 - e. Were that to occur, the existing law can account for such an eventuality.
 - f. No additional or altered regulation is warranted.
 - g. Victoria has limited legal capacity to regulate in this area.
85. If the inquiry were to conclude that there are concerns that should be addressed, the Victorian Government could work with the FWO to provide information resources to Victorians working via platforms, aimed at assisting them in knowing their rights and evaluating whether platform work is right for them.
86. Victoria should not attempt to go it alone. It might instead engage with the responsible regulators to put more information into the hands of Victorians as its 'response' to changes in how work is being undertaken, were such a response considered.
87. In terms of changes to law, the national workplace relations system still provides Victoria with a 'voice' in shaping workplace relations regulation following the referral of powers. Nothing stops Victoria raising any concerns through joint federal-state meetings of ministers for workplace relations, which could include requesting changes to federal law.
88. Our overall point remains that no changes to the law are warranted. Were changes to be recommended in this Inquiry, the way to pursue them would be for Victoria to seek changes in Commonwealth law and regulation from the Australian Government.

ABOUT THE AUSTRALIAN CHAMBER

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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