Working for business.
Working for Australia

Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce

Consultation Paper

ACCI Submission

18 February 2022

Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

WORKING FOR BUSINESS.
WORKING FOR AUSTRALIA
Telephone 02 6270 8000
Email info@australianchamber.com.au
Website www.australianchamber.com.au

CANBERRA OFFICE
Commerce House
Level 3, 24 Brisbane Avenue
Barton ACT 2600 PO BOX 6005
Kingston ACT 2604

MELBOURNE OFFICE
Level 2, 150 Collins Street
Melbourne VIC 3000

SYDNEY OFFICE
Level 15, 140 Arthur Street
North Sydney NSW 2060
Locked Bag 938
North Sydney NSW 2059

ABN 85 008 391 795

Australian Chamber of Commerce and Industry

CONTENTS

INTRODUCTION

Snapshot / Executive Summary

- Employers do not endorse the need for intervention in this area, nor concede the premises upon which the proposed standards have been developed.
- However, we recognise that the Victorian Government is likely to proceed with some form of standards.
- If standards are to proceed, they should be collectively led and driven by representatives of traditional industry, the digital platforms and unions coming together and taking forward the work that has been done to date.
- The Government should put the ball back into the court of the platforms, unions and employers.
- The Government should challenge the traditional social partners in Victoria, as well as the platforms themselves, to work together to come back with standards that will work and that will address agreed areas of concern.

Basis for Standards – Is This Justified or Necessary?

1. ACCI does not agree with the premises upon which this consultation and proposal for standards is proceeding.

2. We accept that the Victorian Government wants to do this and is very likely to proceed. However, foundations for regulation do need to be secure and accurate.

3. **There is no on-demand industry or on-demand workforce**: ACCI rejects any notion that workers in the gig economy or 'on-demand workers' are a 'workforce' in themselves.

4. According to the Cambridge Dictionary, 'workforce' means 'the group of people who work in a company, industry, country, etc.'[1] Clearly, the Victorian Government is not referring to all the employees in a particular geographical region nor those working for a particular company. Instead, the phrase 'on-demand workforce' is used in reference to the group of people who work in what the Victorian Government considers an industry.

5. Workers in the gig economy, the platforms through which they provide their services and the customers who pay for those services, do not comprise any specific industry. Rather, this economic activity contributes to wide range of industries, includes the provision of an extremely diverse range of services and the supply of them to a large variety of customers. A website designer who earns income through Freelancer cannot in any way be considered part of the same workforce or industry as an Uber driver.

[1] *Cambridge Dictionary* (online at 17 February 2022) 'workforce'.

6. Someone driving passengers is also distinguishable from someone delivering food, who may be different to someone delivering goods, who in turn is very different to someone doing tasks through Airtasker. A website designer who is contracted through Freelancer cannot seriously be considered in the same workforce or industry as a gardener who uses the same platform.

7. This is not a purely semantic distinction; it is fundamental to the business community's concerns about the standards proposed to date. These types of work are entirely heterogeneous and attempts to regulate them collectively or as a single industry risks being damaging, ineffective in achieving its intended purpose, and raising unintended consequences.

8. In essence, these standards attempt to paint with a broad-brush a quasi-employment relationship into the contracts between dozens of digital platforms and tens of thousands of independent contractors. Ignoring the diversity of these workforces and treating such working as homogeneous should be avoided in this process as it goes forward.

9. **Insecure work remains more slogan than substance**: Not only does the Consultation Paper express that these standards will apply to a particular workforce, but it also insinuates that the work that it involves is inherently or axiomatically 'insecure work'.

10. The Consultation Paper commences at [1] with:

> Insecure work is not a new phenomenon.[2]

11. The forms of work classified as on-demand cannot be widely described as 'insecure' and using this terminology obfuscates the nature of the various work in various industries which these standards would regulate. The label implies that workers in the gig economy predominantly face a lack of financial safety due to uncertainty about the permanence of their income flow.

12. This imputation is not supported by the Victorian Government's own commissioned research.

13. According to the *Digital Platform Work in Australia – Prevalence, Nature and Impact* national survey conducted by Queensland University of Technology, The University of Adelaide and the University of Technology Sydney, only 2.7% of current digital platform workers are entirely reliant on the income that such work produces.[3] Further, the survey report noted:

> Four in five current platform workers (80.7%), report that digital platform work makes up less than half of their total annual income.[4]

14. It cannot therefore be argued that workers in the gig economy broadly lack financial safety. The vast majority of these workers do not depend on their income derived from services provided through digital platforms for their livelihood.[5] Most of these workers consider this income 'nice to have but can live without it'.[6] The income earned by gig workers through digital platforms is also not particularly low, at an average hourly rate of $32.16.[7] This is approximately 70% higher than the minimum wage at the time of the survey.

[2] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) [1].
[3] Paula McDonald et al, *Digital Platform Work in Australia – Prevalence, Nature and Impact* (Report, November 2019) 7.
[4] See ibid.
[5] See ibid.
[6] See ibid.
[7] See ibid.

15. If gig work through digital platforms is not especially lowly paid nor would its deprivation cause widespread financial catastrophe, then by 'insecure work', the Consultation Paper can only mean that it is so because it is not permanent employment. By this same logic, all independent contracting is 'insecure work'.

16. The loose deployment of politicised language detracts from the seriousness of the proposed standards, and the significant consequences they may have for industry, thousands of workers and the multitude of small businesses that interact with them. There is an obligation for everybody in the industrial relations policy community, governments, employers and unions etc, to act with caution and based on evidence not supposition or ideology. We owe it to our fellow Victorians to do the work not to make policy based on the agendas of any sectional interests. Obligations to protect the security of jobs and to make sure our young people get the opportunity to work should be shouldered every bit as much by policy makers as by employers and all those who administer policy for government. Put another way, work and incomes are serious and fundamental to economic life. Any policy or regulation that is going to impact them has to be rigorous and well evidenced.

17. **It is not clear why Victoria can, would or should act**: The questionable foundations of these proposals to date does not end there. The subtitle on the front page of the Consultation Paper reads:

> Implementing Recommendations 13 and 14 of the Report of the Inquiry into the Victorian On-Demand Workforce[8]

18. Recommendations 13 and 14 of the Report of the Inquiry into the Victorian On-Demand Workforce advise (emphasis added):

> **The Commonwealth should**: … Collaborate and consult with stakeholders, including state governments, platforms, industry and employee representatives, to **lead the development** of Fair Conduct and Accountability Standards for platforms organising significant non-employee, on-demand workforces[9]

19. These proposed standards are not implementing Recommendations 13 and 14 but in fact, defying them by not at the national level. This is explicitly not to say that ACCI would support such national regulation, however, it is to say that the pretence that these standards are following the inquiry's recommendations is false.

20. It may be argued that these standards are following V10 of Recommendations 13 and 14, that (emphasis added):

> Victoria should: … **In the absence of Commonwealth action**, **work with other states**, businesses and stakeholders to develop principles-based Fair Conduct and Accountability Standards for platforms.[10]

21. However, it has not been demonstrated that there has been an absence of Commonwealth action that warrants this approach, given that the report of the inquiry was only released in July 2020, amidst extraordinary circumstances and other government priorities. Additionally, Victoria does not appear to be working with other states to develop these standards and is therefore still defying the inquiry's recommendations.

[8] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 1.
[9] Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (Report, June 2020) 196.
[10] Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (Report, June 2020) 196.

22. ACCI in no way endorses the Federal Opposition's Secure Australian Jobs Plan, but if it were implemented at the national level then the stated rationale for these standards falls away. Notwithstanding that, ACCI recommends a constructive approach that if standards are to proceed, it will need to be reviewed if there is a change of government at the federal level in coming months.

23. **The data does not backup the need for standards**: The Victorian Government has also justified these standards on the basis that:

> To support the Inquiry, the Victorian Government commissioned research, *Digital Platform Work in Australia – Prevalence, Nature and Impact*. Released in June 2019, the resultant survey found that 13.1 per cent of persons in Australia (Victoria 13.8 per cent) have at some time undertaken platform work, and 7.1 per cent (Victoria 7.4 per cent) were currently working (or offering services) through a platform or had done so in the previous 12 months. This survey demonstrated that the size of the on-demand workforce in Australia was much larger than previous estimates suggested.[11]

24. The survey data in question does not assist in rationalising or support the introduction of these standards, as the Victorian Government suggests.

25. That research found that the most commonly-used digital platforms were 'Airtasker (34.8% of platform workers), Uber (22.7%), Freelancer (11.8%), Uber Eats (10.8%) and Deliveroo (8.2%).'[12] The work opportunities provided by Airtasker and Freelancer are completely dissimilar to other forms of gig work, such as passenger and delivery driving, and can entail an enormously diverse range of services.

26. These platforms operate more like marketplaces for independent contracting, than their contractors comprising any larger 'on-demand workforce'. For instance, it is difficult to see how an individual who once a month mows their neighbour's lawn through Airtasker can be genuinely described as part of 'the on-demand workforce in Australia', particularly when considering that the survey found that 'only 5.4% of current platform workers report spending 26+ hours per week' 'working or offering services through all digital platforms with which they engage'.[13]

27. It is completely unforeseeable as to how the Victorian Government proposes to apply these standards to platforms such as Airtasker and Freelancer. For instance, collective bargaining and worker representation is impossible in these spheres. Conversely, if these types of platforms will be exempt, the Victorian Government should refrain from citing statistics that include them to justify their political endeavours.

28. Furthermore:

    a. Many of the activities facilitated by Airtasker and Freelancer were always overwhelmingly undertaken on a contracted rather than employed basis, and often traditionally without award coverage - well before the advent of mobile phones and platform apps.

    b. Many of these activities we're not only award free, but largely union free. We not clear the union eligibility rules even allow for the coverage of many of these activities.

29. Such problems demonstrate the incredible diversity of gig work and the fundamental problems for, and questionable basis for introducing these standards, particularly at a state level.

[11] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 8.
[12] Paula McDonald et al, *Digital Platform Work in Australia – Prevalence, Nature and Impact* (Report, November 2019) 6.
[13] See ibid.

30. At [30], the Consultation Paper lists 'potential benefits for industry' from having these standards. It says a benefit will be 'consistency across the economy or industry',[14] yet Victoria would be going it alone and defying the recommendations of the inquiry. Victoria risks taking a very different approach to every other state and territory, considerable collision and confusion with federal laws, both the existing *Fair Work Act 2009* and *Independent Contractors Act 2006*, and potentially anything done by a future Labor government.

31. With respect to the other listed potential benefits, neither the inquiry nor the Victorian Government has demonstrated that:

    a. The reputation of these industries is poor, nor that work in these areas lacks support across the Victorian community.

    b. Stakeholder and investor confidence in the industry is low.

    c. Consumer dissatisfaction is high and complaints widespread.

32. ACCI does not share the characterisation of new and emerging work in the gig economy as 'insecure'. We would also support greater transparency and veracity about why standards may be set. We do not find it legitimate to be told that such standards will be beneficial for industry and that this consideration has in any way underpinned their development. Respectfully, employers have spent 120 years being told that regulation we oppose and that we do not think is merited is going to be good for us and is in our interests. We would rather proponents of additional regulation advance their prescriptions either in the interests of the community, of those they claim to be vulnerable, or even to be most straight forward and candid, in the interests of opposing interests to our own. We would rather be listened to about where our interests lie than told.

33. In the spirit of candour and openness, employers are firmly of the view the trade unions don't like the various forms of work they are labelling as insecure as they cannot organise them, the individuals undertaking such work are not choosing to join unions nor seeking their assistance, and the choices being exercised by most on-demand workers are individual ones, and are not collectivised.

34. We do not concede a number of the other premises that underpin this Consultation Paper:

    a. That workers in the gig economy comprise a specific workforce or industry.

    b. That these standards are implementing the recommendations of the inquiry.

    c. That benefits to industry have been at all taken into account during their development.

35. **Victorians have more options than ever**: The strength of the Victorian labour market means that more than ever before, those undertaking on-demand who would prefer to work under a different arrangement are likely to have alternative options.

36. On 17 February 2022, *The Age* reported:

[14] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 15.

Victoria's jobless rate falls to its lowest level in almost 50 years

By Shane Wright and Jennifer Duke
February 17, 2022 – 6.00pm

Save | Share | A A A | 3 View all comments

In Victoria, the jobless rate fell by 0.2 percentage points to less than 4.1 per cent. The last time unemployment in the state was that low was in 1974.

The number of Victorians deemed unemployed fell to 146,700, the lowest in almost a decade, while a record number of women across the state now have full-time work.

The low level of unemployment in Victoria is partly due to a sharp fall in the size of the state's labour force. There were 62,000 fewer people over the age of 15 across Victoria in January compared to March 2020, due to a drop-off in immigration and international student arrivals.

But the participation rate – the proportion of people in work or looking for it – remains at near-record levels.

Among Victorian women, it reached an all-time high level of 62.4 per cent, almost a full percentage point above its pre-pandemic level.

37. We are not saying that everyone undertaking on-demand work can exchange it for other forms of work, nor that they want to. Rather, in a strong labour market more of those doing on-demand work who may not want to will have other options. The very best thing the Victorian Government can do for job security is not to set standards in this area; it's to keep delivering results on jobs. If Victoria can bridge reopening with strong labour market demand and continued low unemployment and high participation, we will create positive pressures for job security as never before.

38. We urge the Victorian government to consider going forward the importance of general good governance in strong economic and labour market management and the extent to which this removes the need or the urgency for specific remedial measures such as proposed on-demand standards.

How to Proceed

39. Nevertheless, we want to proceed constructively and in good faith with the objective of trying to get the best outcome possible for job creators and the drivers of economic growth in the state of Victoria. For this reason, we would like to express our clear support for the proposal put forward by one of our members, the Victorian Chamber of Commerce and Industry (VCCI).

40. No other entity, including the Victorian Government, knows or understands on-demand work better than the digital platforms themselves.

41. Employer and industry representatives in turn have expertise in advocating for the best policies and laws that enable business growth and productivity, and major ACCI members in Victoria work regularly and constructively with the Victorian Government. Furthermore, employer organisations and representatives understand the needs of businesses and how to best communicate and consult with them.

42. Rather than the Victorian Government drafting flawed and ambiguous standards for digital platforms and the independent contractors they engage, we suggest that the businesses themselves and representatives should design and lead the implementation of the standards. This could be facilitated by the Victorian Government, with their own input also contributing to the project.

Recommendation 1

That digital platforms, industry and employee representatives lead the development and implementation of the Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce.

Scope of Standards

43. It is crucial that the scope of these standards be defined. It is bewildering that it has not been outlined in the Consultation Paper.

44. If it is not defined, there could be poor and fortuitous ramifications for a range of digital platforms which enable work for which the standards are entirely unsuitable.

45. According to the research commissioned by the Victorian Government, 45.8% of workers using digital platforms are engaged through Airtasker and Freelancer.

46. Many of the substandards simply cannot apply to these workers.

47. For instance workers using Airtasker could not possibly collectively discuss and advocate for changes or improvements to work arrangements.[15] On Airtasker, the renumeration is set not by the platform, but by the users. It varies significantly between the nature of the task, making collectivisation and bargaining impossible. A gardener and an IT consultant cannot be afforded collective representation in any real sense that is analogous to employee representation.

48. This illogic significantly undermines any attempt to engage with the Consultation Paper or the proposed standards. It is impossible to ascertain which digital platform they will even apply to, given that universal application is necessarily impossible.

49. Nevertheless, despite the Victorian Government citing research that references these platforms to justify the introduction of these standards, we will proceed throughout the rest of the submission with the assumption that the scope will not be extended to platforms such as Airtasker and Freelancer.

[15] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 31.

Recommendation 2

The scope of the Fair Conduct and Accountability Standards must be clearly defined, so that the types of digital platforms to which they will apply is specified.

Questions on Standards

50. It must be noted that the phrasing of the specific questions about each standard is highly questionable of not objectionable and simplistic places.

51. First, they are extremely leading, informing consulted parties that the standards are positive or provide 'best practices and processes' in the relevant subject area, then asking for agreement or disagreement. Proper consultation necessitates genuinely neutral questions that genuinely seek feedback from interested parties rather than their endorsement.

52. Second, most of the standards plainly do not 'set out best practices and processes'.[16] In fact they set out no practices and processes at all. They merely outline some broad ideals that those practices and processes should be based upon.

53. However, the Consultation Paper is prudent to avoid setting out 'best practices and processes' if the Victorian Government is intending to 'further consider … [whether there] should there be consequences for any failure to implement these Standards.[17] It is not the role of the Victorian Government to enforce 'best practices and processes'. If it wishes to enforce minimum standards, as the *Fair Work Act 2009* aims to do for employment,[18] then that is an entirely different matter and objective.

54. Finally, as we set out in response to each of the questions, this cannot be treated as simply tallying the number of people who agree against those who disagree. The information provided is clearly incomplete, the standards are early drafts, the questions are leading, and above all, not every response can or should be accorded equal weight or value.

55. The view of a platform provider working with tens of thousands of Victorians and based on direct experience cannot simply account for a one in a total, weighted identically to a single submitter or community organisation, that may have very little exposure or involvement to the complex issues raised.

Administering the Standards – Part 3

56. It is extremely difficult to engage in thorough consultation and consideration of a proposed regulatory model without knowing how it will be administered or whether it will be enforced upon digital platforms through penalties.

[16] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 19, 23, 30.
[17] Ibid 41.
[18] *Fair Work Act 2009* (Cth) s 3(b).

57. When each standard is examined, without knowing where its enforceability lies on a spectrum between 'high level requirements'[19] and regulations with 'consequences for any failure to implement' them, it is challenging to undertake policy evaluations.

58. The enforcement of the standards, or lack thereof, is critical to their merits, and to properly shaping them.

59. The administration of any standards cannot be simply an aspect that 'the Victorian Government will further consider'.[20] It must be decided upon before proceedings with any further development, or be properly clarified to the extent sufficient to inform how the standards will be shaped.

60. To illustrate, there is substantial difference between:

    a. A standard that requires platforms to negotiate with on-demand workers about their work status as either independent contractors or employees that is merely a high-level standard that the Victorian Government encourages digital platforms to aspire to; and

    b. The same standard, but with regulatory backing that penalises non-compliance.

61. These two standards are not even remotely similar because of their enforcement. Without knowing which of these two forms each standard takes, genuine consideration of them is unfeasible.

62. This has to be clarified for the next stage of development to proceed effectively. We stand by our recommendation that the social partners plus the platforms be tasked with looking further at this and taking forward the initial drafting towards actual standards.

63. What cannot occur in our view is leaving the application of the standards up in the air. it is dangerous to assume that you can settle terms of any law or regulation without knowing it's application. It's logical that this would change consultative behaviours. In this instance, ambiguity on how the standards are going to be applied would invite employers and platforms to be far more cautious and potentially less constructive or pragmatic than they may otherwise be able to be.

Recommendation 3

The administration and enforcement of the Fair Conduct and Accountability Standards must be determined before any further consultation, development or implementation.

Next Steps

64. The following is welcome:

> The Victorian Government will develop the Standards over the next six months in consultation with platforms, the broader business community and employer and industry associations, unions and workers, academics, and other interested members of the Victorian community.

[19] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 41.
[20] See ibid.

> This consultation process will inform the final form and substance of the Standards and their proposed application to platforms and non-employee on-demand workers.[21]

65. However, ACCI proposes that a bolder, more dynamic approach will deliver better standards that will have a stronger impact and will better deliver on the aspirations of the Victorian Government. Again, we don't see the need for these standards, but believe if it is to be pursued it should be done properly and with greatest chance of positive effect, and least chance of damage.

66. We recommend firmly putting the ball back into the court of the platforms, the unions and employers. Government has set its expectations of what it wants standards to cover — put the challenge to the traditional social partners in Victoria, plus the platforms, to work together to come back with standards that will work, that will deliver on agreed areas of concern, and that can enjoy the confidence of on-demand workers and on-demand platforms.

67. Again, we highlight paragraph [80] of the Consultation Paper and the National Food Delivery Platform Safety Principles. On-demand providers have demonstrated they are capable of driving industry-led regulation, developing relevant and impactful approaches, that can enjoy the confidence of all interests and importantly of government. This is the approach that should be taken to turning what we see as a rough initial draft of the areas to be covered by the standards in the Consultation Paper, into actual standards.

68. So we would re-express Paragraph 95 as follows:

> I will ask Victoria's leading employer representatives, the major platform providers, and Victorian unions to work together to take forward and operationalise the initial draft standards released by the Victorian Government in late 2021.

69. We propose the government provide secretariat and research support, unless the proposed consultation group wishes to take standards forward on its own. Consideration could be given to joint chairing by the Victorian Chamber and Trades Hall Council.

70. The difference is that rather than government taking this forward with the mere initial input of social partners (which is not really tripartism), government should instead empower the social partners to find a model that both addresses concerns and can enjoy wide confidence and support. In addition, of course you must add the voice of the platforms as an equal partner in such discussions to make this work.

Introduction of the Standards [7.2][22]

71. If there is an expectation that platforms will put any standards into practise, we urge government to work with the platforms together with established employers and unions to create standards that they can have confidence in and want to apply. Government should seek to deliver standards that offer to the platforms constructive and valued mechanisms to act on areas of concern, and be recognised to be acting on such concerns.

[21] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) [95].
[22] Ibid 41.

72. This means ensuring that complying with standards, and going a step further to embrace and champion the opportunities properly designed standards would offer, has to be rewarding and attractive to the platforms. Adopting standards and not seeing any reduction in the opprobrium or attacks on one's business model or legitimacy as a commercial actor doesn't seem to stack up. There is a reason that ceasefires are a precondition to peace talks, and formal accords to work together going forwards.

73. Done well, taking these standards forward cooperatively might lead to some disarmament and understanding between the platforms and many of those hostile to them to date. At the very least, cooperatively developed standards offer a far greater prospect of such a positive outcome than imposed standards.

74. We are concerned about the suggested dichotomy between high level requirements and further guidance (paragraph [91]), and in particular about the extent to which guidance materials may create enforceable obligations. If that remains the case then the Victorian Government is not actually setting standards, you would be setting mere goals or aspirations, with standards to achieve those goals to follow. Again, we think this ambiguity is best taken forward by discussion between Victorian social partners, with the inclusion of the platforms. The meeting of social partners and platforms, as proposed by ACCI members in Victoria will be best placed to land the role of standards, and whether any further materials can or should play a role.

75. A further ambiguity comes from paragraph [92], which seems to want to have it both ways on whether standards would be voluntary or mandatory. Good standards to which the industry would want to opt in would be the best approach, and if there are to be imposed standards or expectations, then those that are developed by employers, unions and platforms working together with government, stand the best prospect of both success and effectiveness, and enjoying the confidence of those subject to such standards.

76. The reference to a public record of those said to have signed up to the standards implies they would be voluntary or opt in. That appears the most positive approach. If you want any industry to opt in, give it voice and give it interests to work with that are legitimate and representative.

77. We also read that paragraph [92] is hinting at an accreditation scheme. This can't be done in hints and subtleties - if you want employers unions and platforms to work together, please be clear on what they're working towards and tasked with delivering.

78. There also needs to be clarity on the matters raised in paragraph [93] whether the next step towards standards is taken by government (which we do not recommend) or instead is developed jointly by employers, unions and platforms working together constructively. This latter approach is the right one.

The National Workplace System / Relationship Between Commonwealth and State Laws [7.1][23]

79. Respectfully, we did not find Section 7.1 particularly useful, and whilst this is not the place, we dispute a number of the characterisations of the law and the asserted scope of Victoria's constitutional capacity to legislate in a national system of industrial relations regulation.

[23] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 39.

80. Technical assistance and legal advice from government to a working group of employers, unions and platforms that rolls up its sleeves to progress these standards may usefully be provided in regard to the constitutional scope either facilitated or precluded by the coverage of the Fair Work Act and Independent Contractors Act. If there are clear lane markings and limitations on what can be done in regard to the matters covered in the standards, then it's not appropriate to ignore them or seek to test them, instead it's appropriate to recognise them and think about the extent to which concerns that are to be addressed in the standards can best be tackled without overstepping constitutional boundaries.

81. These considerations also significantly reinforce the need to resolve any ambiguity on enforcement, enforceability and enforcement mechanisms. Again, that is something that employers and unions coming together with platforms should be charged with discussing and advising the government upon.

STANDARD 1: CONSULTATION ABOUT WORK STATUS AND ARRANGEMENTS

Negotiability of work status

82. Substandard 1.1 requires digital platforms to 'consult and negotiate with non-employee on-demand workers and their representatives on … work status'.[24] In the subsequent paragraphs, by 'work status', the Standards are clearly referring to the nature of the relationship between the worker and the platform, being engaged as independent contractors, rather than employees.

83. In paragraph [42], the Discussion Paper claims that 'for many on-demand workers, work status is borderline such that they are not clearly "employees" or "independent contractors"'. Evidently, the usage of the term 'work status' refers to the worker's 'status as employee or independent contractor' to navigate any ambiguity (which ACCI suggests is often exaggerated).[25]

84. To require digital platforms to 'consult and negotiate with non-employee on-demand workers and their representatives on … work status' therefore can only mean that the status of workers as independent contractors must be negotiable,[26] with contracting them as employees being the alternative arrangement.

85. Otherwise, there would be nothing to negotiate regarding their work status specifically, given that it is a dichotomous component of a contractual relationship. Either the work status of a worker engaged by a digital platform is that of an employee or that of an independent contractor. It is not a spectrum of status that can be negotiated marginally in different directions.

86. If this is the intention of the Victorian Government in these standards, it should be made explicit and not obfuscated. Enforceable negotiability in work status would be a very serious (and we say damaging) change to Australia's industrial relations system that could not be executed without considerable consultation with industry and its representatives.

87. Requiring digital platforms to negotiate with those who use them to facilitate work about their work status appears somewhat analogous to the casual conversion laws introduced by the federal government in March 2021,[27] however, enabling a conversion from the status of independent contractor to employee, rather than from casual employee to permanent employee.

88. This Consultation Paper does not deliver or support the degree of analysis necessary to assess the significance and impact of such a massive change. The gravity of it would require consultation and extensive discussion of it in isolation, not confined to a single line in a 50-page Consultation Paper.

[24] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 18.
[25] *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597.
[26] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 18.

89. While it also included other major areas of industrial relations reform, the federal casual conversion laws passed last year were subject to substantial a consultation and review process. Round table discussions were facilitated by the Attorney-General which included representatives of government, employers and unions. The Senate Standing Committee on Education and Employment then conducted an inquiry into the legislation that brought the conversion laws into effect,[28] which held multiple days of public hearings and received over 130 submissions.[29]

90. The casual conversion laws were not contained in a single, unexplained and ambiguous sentence in a Consultation Paper.

91. Given that the reference of legislation to parliamentary committees is rare in the Parliament of Victoria, proper consultation must be conducted prior to the introduction or drafting of any legislation which sought to impose such a requirement.

92. Again, this needs to be properly conceded by a coming together of the social partners and the platforms. It would be for our members in Victoria to consider this issue further but we can indicate that such a change would be unlikely to find wide favour not only amongst platforms, but also amongst the wider business community that contracts both for services and enters into contracts of service (i.e., employment).

93. If the Consultation Paper does not intend to propose the creation of a standard for the gig economy where digital '[p]latforms and their representatives should … negotiate with non-employee on-demand workers and their representatives on work-related matters, including … work status',[30] then these standards should be amended, and far greater care given to the drafting of these documents in the future.

94. If the Consultation Paper does intend to make this proposal, then this requirement should be divorced from the other standards to be reviewed and consulted on in isolation, given its gravity.

95. It should also be noted in regard to the purported 'lack of clarity about work status' as advanced by the Consultation Paper in paragraph [42],[31] that the recent High Court decisions in *Jamsek v ZG Operations*[32] and *CFMMEU v Personnel Contracting*[33] may assist in demystifying the true nature of the relationship between gig workers and digital platforms.

Recommendation 4

It must be clarified as to whether a requirement for work status conversion is an intended outcome of the negotiability of work status.

[28] Senate Standing Committee on Education and Employment, Commonwealth of Australia, *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions]* (Final Report, March 2021).
[29] Ibid 128.
[30] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 18.
[31] See ibid.
[32] [2022] HCA 2.
[33] [2022] HCA 1.

Consultation and negotiation of work-related matters

96. Substandard 1.1 requires platforms to 'consult and negotiate … on work-related matters, including major changes to work arrangements, work status or contractual terms.'

97. The non-exhaustive list of 'work-related matters' leaves open a question of what other matters besides 'work arrangements, work status or contractual terms' would fall within the standard and therefore be required to undergo consultation and negotiation. This is an extremely broad phrase that could pertain in a large variety of matters.

98. For instance, 'work-related matter' in the *Anti-Discrimination Act 1991* (Qld) is defined as 'a complaint or other matter relating to, or including, work or the work-related area.'[34] It essentially refers to any matter related to work.

99. If a similar definition is intended in Substandard 1.1, then a requirement to consult and negotiate on all work-related matters may be a major impediment to the operation of digital platforms. No legislative or regulatory framework in any jurisdiction or industry requires consultation and negotiation on all work-related matters because the burden on doing business would be monumental.

    a. There is no precedent in the ILO for such an obligation even in relation to direct employment, and where consultation arrangements are required, this is specifically identified, such as in relation to redundancies.

    b. Not even European works councils require such onerous and wide-ranging consultation obligations.

100. Companies should not be required to consult and negotiate on every matter related to gig work. If they decide to alter, replace or update their digital platform or phone application they should not be expected to consult widely with independent contractors. Nonetheless, such a decision would undoubtedly be a matter related to the work which they engage contractors for and thus seems to fall within the standard. The same point can be made about an immense variety of matters that are work-related but for which it would be unreasonable to impose a negotiation requirement.

101. As with the negotiability of work status, if this is not the intended application of this standard, then it is indicative of the imprecision with which they have been drafted to date and the greater attentiveness required for issues which are of such significance. Put another way, this ambiguity shows yet again why more work is required to turn the initial drafting into anything approaching actual standards.

102. While it is arguable that consultation is 'a key principle built into the industrial relations framework' to some degree, it is not an object of the *Fair Work Act 2009* and only applies to specific areas of industrial relations,[35] such as the requirement for consultation terms in enterprise agreements and changes to rosters or hours of work under modern awards.[36] We also caution against confusing dispute settlement based consultation which arose from the constitutional foundations of our system and high levels of industrial action in decades past, with at large requirements to consult or change the balance of managerial decision-making.

[34] *Anti-Discrimination Act 1991* (Qld) sch 1.
[35] *Fair Work Act 2009* (Cth) s 3.
[36] *Fair Work Act 2009* (Cth) ss 205 and 145A.

103. The same should apply for the gig economy, if at all, with consultation and negotiation requirements relating to very specific work-related matters. Substandard 1.1 must be amended to specify the list of these, rather than impose a broad requirement of consultation and negotiation.

Recommendation 5

Consideration of a consultation requirement on work-related matters be restricted to a specific list of work-related matters and subject to ACCI member input, not exceed the legitimate scope of such obligations in contractual relationships more generally.

Consultation and negotiation of contractual terms

104. Substandard 1.1 proposes to implement a requirement that '[p]latforms and their representatives should consult and negotiate with non-employee on-demand workers and their representatives on work-related matters, including … contractual terms.'[37]

105. While consultation on contractual terms between parties contracting for services is always desirable and conducive to better commercial relationships, it is already an avenue available to digital platforms and workers in the gig economy.

106. At any time, independent contractors and those to whom they provide their services are free to renegotiate and vary contractual terms. If either party decides that previously agreed upon terms or a proposed variation terms are non-negotiable, that is their prerogative. If the parties cannot reach an agreement, they are able to discharge their obligations by mutual agreement or otherwise be released under the principles of contract law.

107. Under section 12 of the *Independent Contracts Act 2006* (Cth), applications can be made to the Federal Court of Australia or Federal Circuit Court for a review of a proposed contract variation if it is either harsh or unfair.[38] This includes situations where harshness or unfairness arises in the terms themselves or the circumstances surrounding their formation.[39]

108. It is open to the Victorian Government to contend that the sheer size of digital platforms in comparison with individual independent contractors necessitates some requirement of negotiation on contractual terms, if many are provided on a 'take it or leave it' basis, as suggested by in paragraph [43].[40]

109. However, this view is not shared by ACCI because this basis for contract proposals arises as a consequence of the significant number of workers that are engaged through digital platforms, which makes consultation and negotiation on contractual terms unfeasible.

110. For instance, Uber cannot practically negotiate with 20,000 drivers about their individual contracts.

[37] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 18.
[38] *Independent Contracts Act 2006* (Cth) s 12.
[39] *Keldote Pty Ltd & Ors v Riteway Transport Pty Ltd* (2009) 185 IR 155.
[40] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 19.

111. Furthermore, and the platforms will need to bring this to the table, our understanding is that the frequency and breadth of concern with platform working arrangements is exaggerated, often vastly. We are sure that there are grumbles from any community of persons that rely on a central facilitator for working whether a labour hire company, an event organiser, or a platform. Those of us able to remember conversations with taxi drivers prior to the Internet and GPS technologies might usefully recall their complaints about the dispatch process and the fair sharing of work. Again, these issues need to be taken as prompts or initial pointers to be further developed and considered by the social partners plus the platforms working together.

112. There is also a great deal of contractual change in our commercial and financial lives which is notified to us rather than consulted upon. We receive information from insurers, banks, even online sellers which says 'our terms and conditions have changed please read carefully'. This is not consultation, it's notification, and if it's not liked as a consumer or customer they change who they do business with. We would understand at the moment that platforms would similarly change contractual terms or arrangements centrally, and would identify changed terms to users who would then choose to avail themselves of the platform to facilitate working or not.

113. This is not analogous to an employer unilaterally changing terms and conditions of employment, and on-demand workers increasingly have options to facilitate their on-demand working in different ways. One of the realities for disruptors is that they get disrupted, and we understand for example that a massive proportion of those who facilitate work on one platform to deliver food are also on a competing platform or platforms to facilitate work. Changes of contractual terms can be met by exit voice, at consumers in a particular area will soon wake up that their food from service A comes quicker than service B if the available drivers choose to offer their services in that direction.

Recommendation 6

Digital platforms should not be required to negotiate on proposed contractual terms and notification of changes by platforms to the wide numbers of registered users should not be prohibited.

STANDARD 2: BARGAINING POWER

On-demand workers' bargaining power

114. The Consultation Paper repeatedly and erroneously attempts to analogise the working relationship between gig workers and digital platforms with that of employment. The difference between these two forms of work is not semantic and greatly affects the lens through which we should assess the relevance and applicability of concepts such as bargaining power.

115. Protection and avenues for redress in the imbalance in bargaining power between employers and employees is generally argued for on the basis of the nature of the relationship. While often these measures upend the imbalance and reverse it , constraining employers and their ability to grow and manage their workforce, they are underpinned by the fact that the nature of the employment relationship is such that 'the employer has power, not only to direct what work the [employee] is to do, but also the manner in which the work is done.'[41] Given this significant degree of control, it is argued that greater power ought to be provided to employees in the negotiation and determination of their contract, as well as because of the difference in leverage that arises from competition for jobs (although this is currently the complete inverse with 4.2% unemployment).

116. This degree of control is unique to the employment relationship and thus bargaining power arguments cannot be straightforwardly translated across to the relationship between businesses and independent contractors.

117. There are numerous areas of our personal financial affairs, of contractual relations beyond employment, and for the running of small businesses in which there is asymmetry in the size and resources, sophistication and capacities of the contractual parties. Australians don't negotiate the price of their health insurance, we don't negotiate the price of petrol or the extent to which it is inflated by tax, we don't negotiate with our banks - we the take it or we take our business elsewhere.

118. Going back to the nature of this work and the technologies that facilitate it, very few of us even read the terms of participating in online technologies and applications, let alone try to renegotiate them. In an app-based world, you increasingly either opt in to what's on offer or you exercise other choices. Being realistic the choice is Facebook or not Facebook, not being able to renegotiate the terms of participating in Facebook. Why would it be any different for Uber, Airtasker etc?

119. While it is not disputed that many digital platforms operate on a 'take it or leave it' basis as contended by the Consultation Paper,[42] it is also true that the very reason why gig work is attractive is because of the power which independent contractors have over their work. Although Uber drivers may be often unable to negotiate every line in a contract that applies to tens of thousands of workers, they can decide what hours they work, when they work them, when they want to take time off driving and an incredible amount of flexible working arrangements. Uber drivers can decide to log off and finish their shift at whatever time they desire. They can and do register to drive with competing services. With the Victorian labour market the best it's been in decades, more and more Uber drivers that may have concerns would also be able to seek other forms of work, including employment if it interested them.

[41] *Commissioner of Taxation (Cth) v J Walter Thompson (Australia) Pty Ltd* [1944] 69 CLR 227, 231.
[42] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 22.

120. These drivers are not beholden to any boss and can even perform work for multiple different digital platforms during the same shift. These and similar arrangements confer upon on-demand workers an extraordinary amount of power that is completely foreign to employees.

121. An employee who is party to a contract of service cannot work for a competitor in all but very limited circumstances, and this advantage of on-demand work should be properly taken into account.

122. It is with this reality in mind that bargaining power should be considered. The mere fact that "non-employee on-demand workers are often presented with a take it or leave it' standard form contract arrangement, with no ability to negotiate" does not in and of itself warrant serious reform to bargaining between digital platforms and independent contractors.[43]

Recommendation 7

Standards on bargaining power for on-demand workers should be considered in light of the extraordinary power they have over their working arrangement, the nature of the mass facilitation of work through platforms, and the extent to which all members of the community are party to dozens, if not hundreds, of contractual arrangements presented on a 'take it or leave it' basis.

Consistency of terms and conditions with the nature of the engagement

123. Substandard 2.1 proposes that '[p]latforms should also ensure that the terms and conditions are consistent with the nature of the actual engagement.'[44]

124. It is not clear what is meant by: 'the nature of the actual engagement.' If this phrase refers to the nature of the worker being engaged as an independent contract, i.e. 'work status' as phrased in Standard 1, then this standard is completely misguided and mistaken.

125. The terms and conditions of a contract cannot be inconsistent with work status because they the dominant factors that determine it. In the recent High Court decision of *CFMMEU v Personnel Contracting*[45], Kiefel CJ, Keane and Edelman JJ held that although '[a]n employment relationship will not always be defined exclusively by a contract between the parties':[46]

> … where the terms of the parties' relationship are comprehensively committed to a written contract, the validity of which is not challenged as a sham nor the terms of which otherwise varied, waived or the subject of an estoppel, there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship.[47]

126. ACCI is unaware of any plethora of rights or duties that may arise peripherally to the written contract between digital platforms and gig workers. If they do exist, it is unreasonable to suggest, as the Consultation Paper does, [48] that they are so significant that they are decisive of a 'nature of the actual engagement' which is not consistent the terms and conditions of the contract.

[43] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021), 21-22.
[44] Ibid 20.
[45] [2022] HCA 1.
[46] Ibid [41].
[47] Ibid [43].
[48] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 20.

127. The Victorian Government must clarify what is meant by the second sentence of Substandard 2.1 and what is the intended effect on digital platforms. Preferably, it should be omitted. Again, consistent with our overall message, this is illustrative of the standards in the paper being initial drafts that are not by any means in a fit state for implementation.

Recommendation 8

The second sentence in Substandard 2.1 should be omitted.

Fairness of contract

128. Substandard 2.2 proposes that processes to assess the fairness of work contracts with on-demand workers should be established by digital platforms. As noted in the Consultation Paper and above, under the *Independent Contracts Act 2006* (Cth), applications can be made to courts for a review of a proposed contract variation if it is unfair.[49] There is therefore already a process for assessing fairness of these contracts. This covers the field to the exclusion of any attempt in Victoria to cover similar ground.

129. It is also quite unclear what meaning the Consultation Paper intends to convey by 'fair'.[50]

130. In section 24(1) of the Australian Consumer Law,[51] a contract term is unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

131. In our view, the bar for an applicant to prove that the matters in ss 24(1)(a) and 24(1)(c) accurately describe the contractual term is rather high, and the onus for the respondent to prove that the matter in s 24(1)(b) accurately describes the contractual term appears not.[52] However, it should be noted that in *Paciocco v ANZ*[53], Chief Justice Allsop of the Federal Court noted that 'unjustness and unfairness are of a lower moral or ethical standard than unconscionability'.[54] Section 25 of the ACL also usefully provides a fourteen point list of examples of terms that would be unfair.[55]

132. On the other hand, the questions posed by Substandard 2.2 ask whether risks and liability for damage are distributed fairly, as its two key examples for the assessment of fairness. On its face, this conception of fairness appears more concerned with evenness given its reference to whether risks and liability are 'distributed fairly'. This is somewhat contrary to the meaning expounded in the ACL, which is primarily concerned with *significant* imbalance, unreasonableness and detriment.

[49] *Independent Contracts Act 2006* (Cth) s 12.
[50] Victorian Government, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce* (Consultation Paper, December 2021) 20.
[51] *Competition and Consumer Act 2010* sch 2 s 24(1).
[52] *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204, [43].
[53] [2015] FCAFC 50.
[54] Ibid [363].
[55] *Competition and Consumer Act 2010* sch 2 s 25.

133. If this interpretation is accurate, then Substandard 2.2 may be very problematic for digital platforms. It is inherent in the relationship between independent contractors and businesses that commercial and operational risk and liability is borne by the worker. For this reason, businesses generally cannot be held vicariously liable for the actions of independent contractors except for circumstances where non-delegable duties of care arise. The Victorian Government must be careful to not attempt to circumvent the existing laws that relate to independent contractors and confer upon those who engage them duties which pertain to employers, although a significant proportion of the proposed standards appear to have that objective.

134. Additionally, care should be taken to not create additional rights and duties through statute that may alter the nature the relationship. While the High Court in *CFMMEU v Personnel Contracting*[56] did find that the employment relationship is 'principally based in contract',[57] it was also recognised that it 'may be affected by statutory provisions'.[58] Here and elsewhere in the Consultation Paper, it appears that new rights and duties are being created by statute, which could incidentally affect a court's finding about the nature of the relationship. It is crucial to the operation of digital platform's businesses and the accessibility of work for contractors that the existing work status of on-demand workers is not tampered with or clandestinely converted.

Recommendation 9

The notion of fairness in Standard 2 should be defined and explained.

[56] [2022] HCA 1.
[57] Ibid [41].
[58] See ibid.

STANDARD 3: FAIR CONDITIONS AND PAY

Fair and decent renumeration and conditions

135. It is unclear how or by what measure the 'fair and decent renumeration and conditions' will be determined, as Substandard 3.2 proposes should be committed to by digital platforms.

136. As we have previously outlined, we also do not have a basis to conclude that this is a major problem in the gig economy, with according to the government's own commissioned research, workers earning approximately 70% higher than the minimum wage at the time of the survey.[59] The demonisation of digital platforms as somehow perpetrators of underpayment and exploitation is unnecessary and presumptuous.

137. We also note that the concepts of "fair and decent" seem like community shorthand or aspiration rather than the actual parameters for minimum wage fixation under the Fair Work Act, which are in turn derived from ILO Convention 131 on minimum wages. The expert panel of the Fair Work Commission responsible for operating minimum wages in Australia doesn't get to simply decide based on subjective notions of fairness and decency, it must weigh competing employee needs macroeconomic and job considerations.

138. We also think this observation ignores the existence of the market entirely. Let's look at what is actually going on:

    a. Victoria is recording its best employment numbers in decades.

    b. Minimum wages in this state are set by the Fair Work Commission based on internationally accepted parameters, and imposes one of the highest levels of minimum wages in the world.

    c. This means that on-demand work is increasingly competing with the alternative of highly paying direct employment, to the extent that people are relying on-demand work for their base load pay or core remuneration. If someone is not earning enough through their on-demand work, there has never been a better time in the state of Victoria to move from on-demand work into actual employment.

    d. The platforms will soon become aware of a drop-off in the availability of those who undertake service delivery for them, and will seek to regain access to on-demand workers, either through pay or through other benefits or innovations.

139. It would be more than strange if direct employment in Victoria required meeting a minimum wage obligation but on-demand working required the meeting of some subjective consideration relating to fairness and decency.

Recommendation 10

The arbitrariness of 'fair and decent renumeration' requires explanation of how it will be measured or assessed and by whom.

[59] Paula McDonald et al, *Digital Platform Work in Australia – Prevalence, Nature and Impact* (Report, November 2019) 7.

Gender disparity

140. ACCI rejects the notion that digital platform work causes inherent disparity or unequal outcomes based on gender, as suggested in paragraph [57]. Given that the *Gendered Dimensions of Digital Platform Work* research cited for this proposition does not seem to have been made publicly available on the inquiry website, it is impossible to undertake any the examination of the research results and whether it supports the Victorian Government's claim.

141. It can often be appropriate to cast a gender lens over how work is being undertaken, any proposals in regard to the nature of that work. We see however some unfortunate assumptions that need to be questioned regarding an inherent negative impact on women in forms of working that trade unions do not like or control, and forms of work in which working people do not seek to join unions. These are hypotheses to be tested and cannot be treated as givens in the absence of supporting evidence.

142. There is equal basis to suggest that the flexibility and self-determination of when and how people work facilitated by platforms or on-demand can support more parents and carers being able to work. A couple seeking to shift parenting and reconcile work with school pick-up and drop-off might find options for on-demand work far more supportive of what they're attempting to do than more traditional forms of work.

143. We also note the inflexibility in rostering, insisted upon by trade unions in a number of areas of employment.

144. We are reluctant to accept the Consultation Paper's contention that women who undertake digital platform work earn less than men, unless this claim is supported by findings that do not take into account the type of work performed. Otherwise, the Victorian Government should not be referencing this as fact in a Consultation Paper and instead ensuring that the relevant businesses are held liable under the *Sex Discrimination Act 1984* (Cth) for discrimination against contract workers on the basis of sex.[60] To be very clear about this, if any on-demand provider were expressly providing different rates of return on services on the basis of gender, or excluding anyone from work on the basis of their gender, that is directly discriminatory and should be investigated and potentially acted upon.

145. We of course, suspect that this is not the case, and instead that this area of workplace relations in the gig economy is being permeated by politics, with men and women taking up different forms of digital platform work at different times, which may result in some pay disparity when aggregated across the entire workforce. If it were the case that women seeking to drive through a platform were less willing to drive in periods of peak demand when customers may be more likely to be drunk or aggressive, they may not have access to peak pricing — but that's a hypothesis, not a fact that is proven by evidence.

146. Further, there appears to be emerging evidence that the prevalence of digital platform work actually alleviates, rather than exacerbates, economic disparities and inequality between men and women. It was recently reported that Sydney University industrial relations researcher, Lisa Gulesserian, found that 34% of surveyed Uber drivers were fathers who used the flexibility to enable childcare, either as full time carers or sharing the responsibility with their partner.[61]

[60] *Sex Discrimination Act 1984* (Cth) s 16.
[61] '"Uber dads" using gig flexibility to meet caring responsibilities', *Workplace Express* (online, 14 February 2022).

147. The benefits of this may be significant for women, who would consequently have more time to participate in the workforce and pursue their careers, while the father can take on a greater share of childrearing responsibilities. The flexibility of gig work cannot be understated, particularly on-demand driving.

148. Although we have been unable to obtain a copy of this research beyond the reporting of it thus far, we encourage the Victorian Government to attempt to do so given that it may assist in discontinuing the unnecessary narrative that the growth of the gig economy has detrimental effects on gender equality.

Recommendation 11

The benefits to gender equality derived from the gig economy should be investigated before imposing regulations attempting to address it.

Information for workers

149. ACCI is broadly supportive of greater provision of information to workers about earnings, conditions, measures that penalise job non-completion and others. Efficient markets depend on the availability and transmission of information.

150. We would however default to the views of the digital platforms themselves about these particular standards. There may be certain constraints in the structure and operation of their businesses that inhibits the straightforward fulfillment of these standards.

Recommendation 12

The digital platforms should be comprehensively consulted on information distribution considerations for those they work with.

Discrimination and harassment

151. Any references in a standard to anti-discrimination need to properly take into account the protections that already exist, recalling that Victorian anti-discrimination legislation has long encompassed not only employment but the provision of goods and services, potentially already addressing discrimination in accessing work through platforms. Understanding the status quo has to be the starting point.

152. Anti-discrimination protections already extend beyond, and do not rely solely upon, the employment relationship, and this may well reduce the need for any standard to do much more than reference existing legal protections. Any further work in this area should be based on actual experiences or demonstrated concerns that have come to light in relation to demand work, not hypotheticals or presumptions of problems that are not being borne out in practice. It is also important to not extend any duties or obligations beyond what any organisation or individual can know and can control.

STANDARD 4: FAIR AND TRANSPARENT INDEPENDENT DISPUTE RESOLUTION

153. Disputes can and do arise between a myriad of contracting parties, including both those working under both contracts of service and for services.

154. Most disputes are successfully resolved using pragmatism and common sense. Only a small subset need to avail themselves of additional processes or assistance.

155. We note that most disputes in commerce generally do not justify the state providing or imposing a dispute resolution service or assistance. Nor does the state often lend its resources to support the development of industry driven or specific approaches. Small commercial disputes are dealt with through the courts, or in some limited areas by VCAT.

156. Industrial relations has been unique in Australia in substantial part because of the constitutional approach taken at federation, and the aspiration of our system to eliminate disputation through extensive regulation. However again consistent with one of our central premises it cannot be assumed that industrial relations thinking and approaches be translatable across into non employment facilitated by platforms.

Cooperation not imposition

157. This area seems particularly ripe for cooperation and discussion towards industry driven approaches that can enjoy the support and confidence of platform providers and platform users / Those doing on-demand work.

158. As set out below it is also an area able to draw on considerable expertise in Australia.

159. Standard 4 and its six sub-standards as included in the Consultation Paper should proceed as a draft to be further progressed by the employer community trade unions and platform providers working together, cooperatively through social dialogue; an industry driven approach through cooperation not imposition from government.

160. A dialogue or project group should take away items 4.1 to 4.6 as a starting point for further discussion, starting with **whether users are interested in an actual model dispute resolution procedure for on-demand work, and the scope of matters it may be applied to**. Or do you instead agree broad framework elements for dispute resolution and qualities of a dispute resolution procedure for on-demand work which are then populated or fleshed out in relation to different on-demand activities. Providing one off consulting or temporary work activities for example may be very different to driving, which may raise different areas of disputation to food delivery, and so on.

161. It might be the Airtasker uses most frequently dispute with the ultimate client, have disputes on release of payment et cetera, where some other forms of on-demand work see workers more frequently in dispute with the platform itself.

162. The main thing seems to be the importance of listening and cooperation in progressing this, not imposing one size fits all solutions from above.

163. For clarity, Standard 4 as presented appears a good initial start on rough parameters and expectations to be carried forward through dialogue, particularly those are actually going to be involved in disputes.

Look beyond employment and industrial relations

164. Dispute resolution is not a purely industrial relations matter – far from it.

165. Dispute resolution between commercial entities, even where very differently sized and resourced, is a mainstay of commercial life and doing business in Australia. Australia has some world leading thinkers and practitioners to drawn on in relation to dispute resolution, seems that expertise on commercial dispute resolution rather than industrial relations dispute resolution may have the most to offer in this area.

    It seems appropriate that a positive dialogue on the issues raised by draft Standard 4 be informed by commercial good practices, particularly between smaller and larger entities more than industrial relations based dispute resolution. There is an industry of thinkers and practitioners on commercial and litigation dispute settlement which is results driven, constructive and dispassionate. Industrial relations disputes, and dispute resolution mechanisms are a very different matter, and approaches to them a mired both in history and in the statutory architecture in which they operate.

Properly understand the role of exit voice

166. One of the predicates or assumptions behind the settlement of employment disputes is an ongoing extended relationship after the dispute is resolved. Not only is this more questionable in employment than traditional assumptions might suggest, but it does also not hold true for commercial disputes which are at least equally analogous to the matters at hand.

167. In commerce the caravan rolls on, often with that tacit understanding that parties are unlikely to do business again, or at least not rapidly.

168. There needs to be a recognition that some part of the settlement of any dispute in this context may lie in not wanting to do business through Platform A in future and to go to Platform B instead, or indeed to give up platform work entirely in favour of direct employment or some other form of work if you have a bad experience. Indeed in an area which inherently involves disruption, competitors and disruptors emerge with some regularity – and part of healthy dispute resolution will lie in packing up one's skills and availability and doing different work for the same work for a different provider.

169. This cannot be assumed to involve the same considerations as an employment relationship. In delivery driving for example, we understand there is already a strong propensity towards presence on multiple apps for securing work through multiple platforms.

Substandards 4.1 – 4.4

170. ACCI's primary suggestion is the representatives of employers employees and platforms come together to attempt to cooperatively and constructively address these issues. This will also inject proper experience on how these issues play out with platforms, in factual clarifications from the platform providers are not available at this point. To not pre-empt progressing this with those most directly concerned, we will decline to address in detail the proposals under 4.1 to 4.4.

171. Two points may need however to be engaged with downstream of this initial input:

    a. We need to be cautious in applying human, subjective expectations or characterisations to automatic processes under online platforms. Some of the so-called decisions behind Standard 4 are not decisions; they are processes, driven by apps.

    b. There is nothing inherently wrong with automaticity, which is one of the hallmarks of the modern world, and so long is there is transparency and clarity, there is no need for automatic process is to be appealable or subject to additional mechanisms.

    c. A number of the assumptions regarding timing and ongoing legal and commercial relationships upon which Standard 4 is based arise from employment or from the formation of open-ended commercial relationships. This thinking needs to be critically evaluated in the context of platform work, in potentially between different kinds of platform work.

Substandard 4.5

172. Confidentiality seems logical and likely positive for productive resolution of disputes. It would remain to be determined whether in practice any actual concerns arise in relation to the confidentiality of disputes in this context.

Substandard 4.6

173. Reasonable timeframes for the settlement of disputes, along with clarity of process and next steps at each stage seem positive.

Questions on fair and transparent dispute resolution

Do you agree that the proposed standards provide best practices and processes for resolving disputes between platforms and non-employee on-demand workers in a fair, transparent and independent manner?

174. No, we do not agree. Question 7 cannot be agreed to at this point. It may prove to be a foundation for best practice in future if well-executed, but at this point it's purely aspirational, and at a very broad level. It's not yet a standard as such and it's not yet sufficiently detailed to be described as a dispute settlement mechanism or procedure.

175. **This is not a simple tallying exercise**: We again caution that this not proceed based on a simplistic toting up to say we received X replies for and Y replies against, and that as X > Y, this should proceed.

    a. That is not proper social dialogue or engagement. It is quite inconsistent with the sprit and DNA of Australia's ILO commitments / treaty obligations.

    b. Employers and trade unions cannot be treated as simply one voice or vote amongst many. The voices of Victorian Chamber and other major Victorian employer bodies, the Trades Hall Council, the platforms must count for more than individuals, some of who may have little direct engagement with platform work and dew of whom would understand what freedom of association means. Strong or partisan views from any policy direction are not substitutes for representativeness, institutional voice, policy expertise or direct interest.

Should anything else be included or altered in the standards on fair and transparent dispute resolution?

176. **Anything else Q8**: More thinking and work is clearly required. The text under 6.4 is not a standard at this point but rather an early stage draft statement of aspiration. It remains an early draft a couple of steps before a standard – and there is now the opportunity to take it forward cooperatively by the key interests involved, including with the leadership of the traditional employer community.

How to proceed

177. Again, we recommend sitting down with social partners plus on-demand providers / platforms to take this initial draft and progress it into something that can meet the stated aims.

178. ACCI has focused our input on how to make fair transparent and independent dispute resolution work, if it is to be overlaid on platform working, rather than spending time disputing the necessity of this being addressed or making a standard on dispute resolution.

179. That said if any form of dispute resolution procedure is to be considered or developed further it would seem rather nonsensical to not start with the question of what is required, where disputes arise, and which disputes need to be able to be resolved using such a process.

180. We also note the contribution that could come from academic experts in dispute resolution and from an organisation such as the Australian Dispute Resolution Advisory Council (ADRAC) and the commercial arbitrators that work with the courts.

181. If this was able to be approached constructively and practically, Australia has world leaders in the practice of dispute resolution who could advise on any standard and on best practises. This advice could inform the work of various interests coming together constructively.

STANDARD 5: NON-EMPLOYEE ON-DEMAND WORKER REPRESENTATION

182. As Australia's permanent representative of employers at the International Labour Organisation (ILO), ACCI representatives have over many decades actively participated in the global shaping and application of fundamental rights to freely associate and to collectively bargain.

183. These are not simple matters and at the time of writing even for workers clearly employed under contracts of service there are major contests of ideas and application in relation to ILO Conventions 87 and 98.

184. Collective bargaining by commercial entities against another entity to fix a price or collude to alter contractual terms is inherently both (a) potentially in collision with competition law, and (b) an arguably constitutes tortuous interference.

185. In fairness some might make the same observation of employees colluding to take industrial action, however the point is that it took a century to evolve the system of protected and unprotected action that we have under the Fair Work Act, and even then, there remain significant powers to pursue damages arising from industrial action that is not legally protected.

186. There are numerous examples in commercial in other spheres of the legal lives of Australians in which bargaining parties are not symmetrical in size, power or resources (if that is the premise behind Standard 5).

    a. In some spheres such as in industrial relations there are powers of legalised collusion and action.

    b. In others, the state regulates in place of collective action, so smaller parties in asymmetrical relationships have their interests protected by regulation of the larger entity.

    c. However, in most spheres, asymmetry is simply a reality to be navigated. There are numerous areas in Australians' choices a limited to whether or not to undertake an activity, without then being able to determine the terms of that activity or the relative costs and rewards.

187. There are numerous areas of life in which Australians are "low leveraged and not well positioned to engage with" or to dispute the actions of terms set by larger entities. If you want a mortgage you play by the rules of lenders, who in turn played by the rules set by governments, if you want to operate in a major shopping centre storeowners will not be as powerful as centre owners, if you want to run payment terminals you need to accept the terms dictated by banks. Employers don't have that many choices when it comes to workers compensation contributions for example, saying nothing of the impact of petrol pricing determined by forces not able to be impacted by motorists.

188. Some on the libertarian side of thinking may question why a society would ever empower small commercial actors in this area to have choice and be able to dictate terms, and why we don't similarly create choices to improve our interactions with government, or to opt into or out of particular taxes and charges.

Jamming platform work into the employment slot

189. This is perhaps the starkest example in the proposed standards of an assumption, and a flawed assumption, that we can treat platform work like employment:

    a. Uncritically and without sufficient consideration of the practical ramifications and justifications for doing so.

    b. Simply because employment is the known and established area of law, and that's where existing concepts have been derived.

190. Industrial association (as a verb not a noun, and an activity that employed persons and employers have a right to do) and freedom to pursue collective improvements in terms and conditions remain fundamentally indivisible from the employment relationship.

191. At this point we cannot see how this concept that is inherently grounded in employment can be applied beyond the employment context. There's a lot more thinking and working through to be done before this could be countenanced.

Understand the ILO use of language

192. Those who operate at arms' length from the ILO can misunderstand the use of language. The use of 'workers' rather than 'employees' in ILO standards is a linguistic and historical matter for the most part, and it is quite clear from any proper reading of ILO Convention 87 and Convention 98 that they apply to employment relationships and not to other legal relationships.

193. It is certainly the case that when the world came together post war to ensure respect for freedom of association and collective bargaining it did so unambiguously with an intention to address employment and not in any other legal relationships.

Hard and unavoidable questions

194. Some hard questions need to be tackled before there could be any consideration of progressing a standard in this area. These include:

    a. **If you have the preceding standards in particular Standard 3 (6.3) why would you need the additional rights in proposed Standard 5?**

        i. If pay and conditions are fair why would the additional standard be required?

    b. **Do on-demand workers actually want collective representation?**

        i. Do they want to associate and jointly pursue improved terms and conditions?

        ii. Has anyone asked them? [This is a really fundamental question].

iii. How satisfied or dissatisfied are those working on-demand or through platforms, any if there is net satisfaction why should this be taken further?

1. If you genuinely respect association and worker voice, don't you need to maintain a status quo where there is not actually a majority pressure for change?

2. Cannot be the case but the disquiet of some employed persons through trade unions compels change in how non employed persons work, when those persons are not seeking change. That would be a denial of the rights of the on-demand workforce

iv. Even if there was demonstrated support for association and collective action as set out in Standard 5 in the context of the status quo, why would it be assumed that would still exist if for example there was the imposition of Standard 3? Wouldn't that need to be made out?

c. **Do established unions represent on-demand workers?** Why should the voice of traditional unions and directly employed persons be treated as a proxy or successful agitation of the interests of on-demand workers?

i. Our understanding is that beyond perhaps the TWU the eligibility clauses of the rules of almost all unions are based on employment. Arguably it would be inconsistent with those rules for a union to represent, or have as a member a person who is not employed in the industry or calling the union covers. It may also be particularly difficult for a non-employee to be able to play a democratic part in the running of a union.

ii. If we are correct and a number of unions cannot sign up non-employees, then we request considerable caution in assuming established trade unions can or should represent those undertaking platform or on-demand work. Australia should not countenance industrial representation by any interest in which someone may not exercise a vote or have a voice. We are unfortunately somewhat reminded of long-past decades during which trade unions had voice on terms and conditions for women prior to equal pay, but with little or no coverage or accountability to them.

iii. More generally what confidence can we have that unions utterly dominated by those directly employed will actually represent the interests or views of on-demand workers?

iv. Put another way, the Trades Hall Council and its members are very interested in on-demand work, often hostilely so, and democratically accountable to union members who are directly employed. This seems an inescapable conflict of interest, and a failure of the premises behind proposed Standard 5 - why would it be assumed that the traditional representatives of those in employment would be motivated by maintaining opportunities to work beyond that relationship.

v. Our overall recommendation is to sit down with both traditional employers and the platforms, and the Trades Hall Council in constructive dialogue to progress any standards. However, it will remain to be seen the extent to which union input reflects the needs and preferences of on-demand workers.

d. **Are representation, association and collective action the right paradigms or concepts?** Some ACCI members are historically registered organisations under workplace relations legislation, however:

i. Many employer bodies both industry and multi-industry were never registered.

ii. Even for those who were registered, membership also relied on their relevance and value proposition to individual businesses. It's been many years since any business joined an employer body for award coverage, or was forced to do so.

iii. Employer bodies have always competed amongst themselves to an extent unknown to the union movement, even with the existence of the conveniently belong rule.

iv. We also have a vastly increased pantheon of competitors, including in house expertise, law firms, consultants etc.

v. The point of raising this is that:

1. No one should be gifted representative voice without any reference to their actual support from those being said to be being represented.

2. Unions should need to demonstrate their value and relevance to on-demand workers, just as employer bodies do.

e. **Do all spheres of work need collective representation?**

i. The Paper is correct in pointing to the historic achievements of the Australian trade union movement, such as at paragraph 66.

ii. However, it is not correct to assume that collectivism or trade unionism is necessary for any form of work or economic activity to find its place in Australia or to be a positive for the community and those who do the work.

iii. Tradies working alone and the self-employed found their way to become a core part of community life in every part of the country without collective representation, or any rights to change the terms under which they work.

iv. Whilst small businesses are massively represented as a sector by ACCI member organisations, small businesses cemented their place in Australia's commercial and community life without any forced collective voice or artificially bolstered power against banks, landlords, local governments etc.

THE REALLY HARD QUESTION - CAN THEY STRIKE?

Standard 5 makes reference to pursuing improved terms and conditions, to collectively advocating for improvements to work arrangements and for platforms to recognise and engage with non-employee on-demand workers and their representatives collectively.

Some people would tell you that these rights only exist historically, and some argue in the contemporary sphere, because the backdrop to them is always the threat of strikes or bans.

Some argue that rights to association don't mean anything unless you can ultimately withdraw labour and damage employers. That's not the ACCI view, and we think that Australia is and we hope remains a largely post-industrial, post-strike economy and labour market.

However, this review should not shirk the hard question. Is the premise behind Standard 5 that there be a right to strike or to take collective action that harms platforms?

If that is the case it needs to be more straight forward and expressed upfront for discussion.

Alternatively, this is one of the hard questions that needs to be worked through, and further demonstrates that the draft standards in the consultation paper are in no way ready to go live.

Recommendation 13:

Clarify whether the Standard provides a right to strike.

Substandards 5.1, 5.2 and 5.3

195. We will not address the proposed 3 sub-standards to Standard 5 in detail as there is just not sufficient work behind them to engage with and the hard questions about what they mean in practise are neither properly drawn out, nor tackled.

196. More work is needed to shape any standards in the directions embarked upon in Standard 5, some hard in difficult matters need to be tackled.

Questions on representation

The proposed standards should enable nonemployee on-demand workers to be represented and freely associate with one another, do you agree?

Should anything else be included or altered in the standards on representation for non-employee on- demand workers?

197. With due respect to all those taking an interest in this area, we are not confident that many those who answer these questions will have sufficient idea what they're talking about.

198. International labour law through the ILO, and the development and application of Australia's industrial relations laws centre on expert representative voices of employers and employees. Fellow travellers and interested members of the community whether from the left or the right may take an interest but are often not expert and are certainly not able to be treated as representative.

199. The relevant voices here are the established representatives of employers and employees, the platform providers and on-demand industry, and to the extent it's possible to capture them the voices of those working with the facilitation of on-demand technologies, applications etc.

200. **This is not a simple tallying exercise:** We again caution that this not proceed based on a simplistic toting up to say we received X replies for and Y replies against, and that as X > Y, this should proceed.

    a. That is not proper social dialogue or engagement. It is quite inconsistent with the sprit and DNA of Australia's ILO commitments / treaty obligations.

    b. Employers and trade unions cannot be treated as simply one voice or vote amongst many. The voices of Victorian Chamber and other major Victorian employer bodies, the Trades Hall Council, and the platforms must count for more than individuals, some of who may have little direct engagement with platform work and few of whom would understand what freedom of association actually means. Strong or partisan views from any policy direction are not substitutes for representativeness, institutional voice, policy expertise or direct interest.

201. **Anything else Q10:** If the thinking behind Standard 5 is to proceed then there will be numerous other considerations raised. This thinking and input must come from representative organisations and those directly engaged in platform working, and not at large and not academically.

202. We strongly caution that the fundamental principles behind the ILO privilege the voices of those who do the work and direct the work. We don't concede that employment regulation or rights should attach to platform working or on-demand work, but to the extent this is embarked upon Australia has an established approach to who has voice and shapes regulation and rights, and this cannot and should not be departed from. In a tripartite world, all voices are not equal in shaping the matters addressed in the sub-standards of draft Standard 5.

How to proceed

203. It is quite difficult to recommend a way forward on Standard 5. We do not agree to the necessity any of the proposed sub-standard, nor that they will make a positive contribution. However if standards are to be made, they should be made as well and operate as relevantly and practically as possible for all concerned.

204. In this spirit and with some reluctance we suggest that these considerations also be handed over to Victorian social partners, in particular the established voices of employers and unions along with appropriate representation and dialogue from the on-demand industry.

    a. We are not confident that the established union movement represents on-demand workers, nor has sufficient respect for the basis upon which they are working under such arrangements.

    b. However if such a grouping is to practically take forward the wider body of standards, to progress this initial draft into something that can have its intended effect (and do so positively and constructively), and given the legacy expertise in perspective of trade unions and established employer bodies, it seems logical that it also be tasked with addressing the considerations raised by proposed Standard 5.

STANDARD 6: SAFETY

Safety standards should be developed with industry

205. Consistent with the overall approach we commend to government, the safety considerations canvassed in relation to Standard 6 should be further developed with industry, not imposed on industry.

206. The draft standards to date should be handed to the social partners plus platforms to take forward, constructively and together. There is a well-established policy community on safety involving trade unions and employers and the Victorian government. With the integration of representation of platforms for this purpose, Government would have sound architecture to develop useful, relevant and widely supportable standards that can enjoy confidence and be positively impactful.

207. We remain very struck by Paragraph 80 of the paper:

> Food delivery platforms DoorDash, Menulog, Deliveroo and Uber Eats have recently established Food Delivery Platform Safety Principles (Safety Principles). The Safety Principles mirror work health and safety duties owed by platforms, and set out standards for safety policies and procedures, training and information, access to personal protective equipment, and consultation and incident reporting and investigation. The Standards being developed by the Victorian Government will be informed by these Safety Principles.

208. This is the on-demand industry already demonstrating its capacity to recognise areas of concern, and rather than resisting standards or tacitly treating safety as a non-issue, coming together to realistically engage with concerns being raised .

209. This should be very persuasive to the Victorian Government, and it should seize the opportunity to proceed in partnership with on hire providers, not through dictating to them.

    a. This will deliver better standards, more widely supported, with greater impact.

    b. The industry has already proven its capacity to engage, and that should be harnessed not disregarded in developing any standards.

Dialogue is obligatory not optional

210. ILO Convention 155, the Occupational Safety and Health Convention, 1981, is very clear that occupational health and safety (OHS) policy and regulation must proceed through dialogue between employers and employees, with the engagement of representatives where present.

211. OHS law provides a prescribed role for OHS representatives as dialogue and communication facilitators.

212. Dialogue, engagement and cooperative development in the discharge of what can be very grave and impactful responsibilities lies in the very DNA of WHS in this country. Whether through the composition of the Safe Work Australia board, through the need for tripartite consultation prior to the ratification of any safety standards, or work with OHS representatives in workplaces - safety rules are not something governments do to industries, they are something governments do with industries, or facilitate employers and unions driving for themselves.

213. This must carry through into the current proposals in Standard 6. The draft to date needs to be taken forward by employers, on-demand providers and unions working together. The draft is not legitimately actionable at this point.

214. We reviewed Victoria's Occupational Health and Safety Act 2004 (OHS Act) to prepare this submission. One of the absolute fundamentals of the legislation is listening to and harnessing the input of those with the most direct experience and most stake in working safely, not seeking to impose from above. The same thinking that places such emphasis on safety representation and employee voice in workplaces needs to translate through into ensuring that industry has voice and ownership of rules and approaches in this area.

Progress through WorkSafe

215. If there is to be any further progressing of Standard 6 or the matters raised in Standard 6, this should be through open dialogue as stated and WorkSafe Victoria must play a lead role in that dialogue, and should be the facilitating agency or secretariat to any sub-group that might take this forward.

216. At present the roles of IR Victoria and WorkSafe seem somewhat opaque, and confidence in this process and any standards would be increased by clarity and by confidence that safety matters are being led by safety experts, and are being led by those with knowledge and experience of social dialogue in the application of OHS.

Substandards 6.1, 6.2 and 6.4 — Caution in duplicating existing law

217. A general or threshold concern must be to properly understand the implications of replicating OHS law in the standards, whether there needs to be such a replication, and what the practical consequences would be of doing so.

218. There seems to be a substantial legal question here on the extent there is any attempt to make the standards enforceable or actionable. It seems difficult to sustain that a known area of regulation could be applied administratively to an extended scope of coverage, where the more direct mechanism would be amending the law itself to have wider application. We are not saying the OHS legislation should extend beyond its current scope, but equally this cannot be done as a proxy through an administrative process.

219. This underscores the particular importance off Standard 6 being developed through further dialogue. Safety experts from industry, from unions and from government need to work together with the on-demand industry in a constructive dialogue which might early in its work address the case for and implications of replicating existing statutory duties in any standards.

Gender-based violence

220. As Australia's permanent employer representative to the International Labour Organisation (ILO) ACCI well understands the global discussion that accompanied and flowed from the creation of ILO Convention 190 in 2019.

221. ACCI has strongly supported renewed actions against sexual harassment in Australia, and engagement with workplace violence as a safety issue where brought to WHS authorities.

222. There may well be issues relating to gender based violence for example in relation to driving.

223. We do note however that the words 'gender' and 'violence' do not appear in Victoria's *Occupational Health and Safety Act 2004*. Would proposed substandard 6.2 direct platforms to address matters in policies that are not obligations for employers generally, or only become obligations where there are discernible levels of risk to justify it?

224. We also caution that not all on-demand work is the same. It may be that platforms that facilitate driving may wish to tackle violence against those working facilitated by their technology, but other platforms may simply not create any discernible level of risk that would trigger such a consideration.

225. Again, we recommend:

    a. Work with industry to understand the diversity in the nature of on-demand work, in safety risks, and frankly in any priorities for any such policies.

    b. As part of this work focus on cooperatively producing resources to assist, inform and support.

Substandard 6.3 — Information

226. As a general principle anyone undertaking work can benefit from being informed as to how that work can be undertaken safely, whether self-employed, employed, or working in opportunities facilitated through on-demand platforms. By analogy, whether an owner operates a machine, their employee operates the machine, a labour hire employee operates the machine, or a contractor who comes into the workplace operates the machine, each would benefit from information on how to operate it safely.

227. This seems an area where the most opportunities lie in promotion rather than imposing obligations upon any entity. We suggest driving squarely at the outcome, that people have an opportunity to be informed, without becoming too caught up on imposing obligations in regard to information. Pending the downstream dialogue and engagement that we so strongly emphasise throughout this submission; we caution against elevating means over ends in this area.

228. Training risks being very problematic or inapplicable when an individual may engage only occasionally or even as a one off with a platform to facilitate a business or work opportunity. A conversation needs be had about whether this information should be coming from platforms, or the extinct to which it should be coming from platforms, versus the extent to which it is the role of government through WorkSafe to provide such information, instruction etc.

229. Dialogue and cooperation will resolve many of the clear unknowns in this area. Imposing standards from above without any ownership or engagement with industry, unions etc risks the opposite effect.

230. That said platforms have a unique channel of dialogue with those to use the platform to facilitate working for themselves, through apps. Creatively and working cooperatively with platform providers this may offer a unique channel to disseminate information.

231. For example, is the best way to think about this in terms of an obligation on platforms to provide training, or would a better approach be for WorkSafe to develop materials such as online training modules with the support of industry and experts, which in turn the platforms might distribute through their apps to those who work facilitated by their services?

Substandards 6.5 and 6.6 — Workers' compensation

232. Again, we emphasise cooperation and harnessing existing mechanisms and dialogue processes, and not bypassing them to directly impose underdeveloped standards from above.

233. We do appreciate the work to date, but it now needs to proceed as a draft for further development led by the workers compensation authorities, and the policy community that surrounds workers compensation, and from the on-demand industry.

234. Such an approach seems obvious reading draft Substandard 6.6. It's a should statement of aspiration, but clearly raises very complex matters for insurability that need to be worked through.

235. We also see on the WorkSafe website considerable existing materials directed to workers' compensation for contractors. This may not be fully determinative of all issues for those undertaking on-demand work, but it should be the starting point .

236. We also note the Heads of Workers' Compensation Authorities (HWCA) group. The Chief Executive of WorkSafe Vic sits on HWCA, and on-demand is going to be being considered by others. So in emphasising the importance of dialogue and further policy engagement from those affected, there will also be others grappling with these issues and their work should be considered.

237. This underscores the importance of WorkSafe taking a leading role in progressing Standard 6 in dialogue with the policy interests that need to be at the table to make this work. Specifically WorkSafe should convene further dialogue on Standard 6.

Road safety

238. The starting point for the subset of on-demand work undertaken as riding, driving etc should be that (a) someone is injured on Victoria's roads, and (b) they should have the rights and protections of any road user, and (c) there are long-standing approaches to when accident claims proceed through workers compensation and when they should proceed through the TAC.

239. If there is to be any additional or bespoke compensation it needs to be developed through dialogue between industry, on-demand providers, unions, workers compensation providers, with TAC support. WorkSafe Vic, which incorporates the Victorian WorkCover Authority, must lead and coordinate any further dialogue in this area, and we maintain further dialogue is needed rather than the making of the standards as drafted at this point.

Reflection: All of us are taught as one of the first and most fundamental principles of driving not to rush. The fundamental obligation of every driver or rider on Victorian roads is to not endanger their safety or the safety of others by rushing, speeding or failing to drive or ride with due care.

Whether someone's rushing to the birth of their child, to secure a once in a lifetime investment opportunity, risks the breakdown of their relationship by being late, even driving to hospital - you cannot rush or speed on the roads or fail to drive or ride safely because you perceive or experience urgency. A small business-person would have no excuse for hitting someone on our roads because they were rushing to sign up a client - and the same principle must apply to platform workers.

This fundamental personal obligation every time any Victorian gets behind the wheel or throws their leg over a bike or motorbike does not change when an individual may perceive a platform algorithm puts time pressure on them – it doesn't matter how fair or unfair the time or earnings pressures may be, individual drivers and riders make choices to speed or drive unsafely and there is never an excuse for making unsafe choices.

Questions on safety

Do you agree that the proposed standards assist platforms and non-employee on-demand workers to understand and comply with their workplace health and safety obligations?

240. No, not at this stage. This aspiration cannot be met by any standards unilaterally imposed by Government rather than properly developed with industry and union engagement.

241. Any leap frogging and acting separately to considerations by Safe Work Australia will not assist understanding and compliance; it possesses a very real risk of having the opposite effect. Any standards operating separately to and in parallel with WHS law risk complication and ambiguity.

242. The best measures for understanding and compliance lie in:

    a. Working with industry (traditional and on-demand) not imposing on it, and with unions, and developing approaches that on-demand platform providers will want to promote and educate their app users on.

    b. Not cutting off an industry that's working creatively and constructively such as through the Food Delivery Platform Safety Principles, and not ending it's positive innovation and willingness for dialogue through imposing standards from above

243. There seems no reason that apps cannot promote the principles referred to in paragraph 80 of the paper for example, and themselves become agents of understanding and compliance, using the technology that is inherent in their business and engagement with on-demand workers. However they will need to have some ownership and stake in the formulation of standards for this to occur.

Should anything else be included or altered in the standards on non-employee on-demand workers' safety?

244. Perhaps, but this would need to come from industry (traditional and on-demand) working together to develop the standards, with unions, and not be imposed or added through this process.

245. If the Victorian Government accepts our constructive proposal to take the standards forward through dialogue and for driving this through industry / union engagement, then any further ideas or proposed additions coming into this review should be collated and put before those developing standards further for consideration.

246. The risk of not proceeding in this manner is that any additions that don't progress in the manner we propose will not have been subject to dialogue and input.

247. As we caution in regard to each of the Questions in Part 6 this cannot proceed based on a simplistic toting up to say we received X replies for and Y replies against, and that as X > Y, this should proceed.

    a. That is not proper social dialogue or engagement. It is quite inconsistent with the sprit and DNA of Australia's ILO commitments / treaty obligations.

    b. Employers and trade unions cannot be treated as simply one voice or vote amongst many. The voices of Victorian Chamber and other major Victorian employer bodies, the Trades Hall Council, the platforms must count for more than individuals, some of who may have little direct engagement with platform work. Strong or partisan views from any policy direction are not substitutes for representativeness, institutional voice, policy expertise or direct interest.

ABOUT ACCI

The Australian Chamber of Commerce and Industry (ACCI) 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.

OUR MEMBERS

Australian Chamber of Commerce and Industry

CHAMBER

Business SA Chamber of Commerce and Industry South Australia

Canberra Business Chamber

Chamber of Commerce Northern Territory

CCIQ Powering business potential

Chamber of Commerce and Industry WA

NSW Business Chamber

TCCI Invigorating Business

Victorian Chamber of Commerce and Industry

INDUSTRY ASSOCIATION

accord

AMCA

Animal Medicines Australia

afa Great advice for more Australians

ais nsw

Australia Arab Chamber of Commerce & Industry

AADA

Australian Beverages

ADA Australian Dental Association

ADIA Australian Dental Industry Association

AFEI Australian Federation of Employers & Industries

Australian Gift & Homewares Association

AHA

Australian Institute of Credit Management

Australian Made

AMPC

AMMA Australian Resources & Energy Group

AMTA Australian Mobile Telecommunications Association

APMF

ARIA Australian Recording Industry Association

ARITA

Australian Retailers Association

ARTA

ASMI Australian Self Medication Industry

Australian Steel Institute

ATEC

ATIC Australian Tourism Industry Council

ATA Australian Trucking Association

AVA Australian Veterinary Association

BIC Bus Industry Confederation moving people

Business Council of Co-operatives and Mutuals

Caravan Industry Association of Australia

Cement Concrete & Aggregates Australia

Chemistry Australia

CAA

CMAA

Consult Australia

COPHE Council Of Private Higher Education

CPA Australia

CLIK Australasia

Customer Owned Banking Association

Direct Selling Australia

Exhibition & Event Association of Australasia

Fitness Australia

Franchisee Federation Australia

HIA

LFRA Large Format Retail Association

Live Performance Australia

Master Builders Australia

master plumbers Expert. Committed. Professional.

MTAA Medical Technology Association of Australia

Medicines Australia

NALSPA

NDS National Disability Services

neca national electrical and communications association

nesa national employment services association

National Fire Industry Association

NRA National Retail Association

NRMA MYNRMA.COM.AU

NSW HCA The voice of the Hire Car Industry

OUTDOOR MEDIA ASSOCIATION

The Pharmacy Guild of Australia

ppca

Primerus The World's Finest Law Firms

rcsa Leading in the world of work

Restaurant & Catering

S P

THE TAX INSTITUTE

THINK BRICK AUSTRALIA

VACC You're in good hands