Senate Select Committee on Job Security, Interim Report on *On-Demand Platform Work in Australia.*

Comments on Report Recommendations by Dr Michael Rawling and Professor Joellen Riley Munton.

We are pleased to accept invitation of the Senate Select Committee on Job Security to comment on the recommendations made in its Interim Report, tabled on 24 June 2021.

We make the following comments on the Recommendations, in order:

Recommendations 1 – 3: Improved data collection

We agree that it is vital that reliable, independent data be collected on the participation of workers in on-demand platform work, and on injuries and fatalities arising from on-demand work. The absence of extensive and reliable data (and the tendency of parties with particular interests to dismiss issues on the basis of a lack of extensive data) is an obstacle to effective policy development. We support each of these recommendations.

Recommendation 4

We agree that Safe Work Australia should be charged with the task of developing guidelines for the implementation of Work Health and Safety (WHS) standards for application to on demand work, and these guidelines should recognize that in many sectors, particularly ride share and delivery work in the transport industry, the workers are rarely 'persons conducting' their own enterprises for the purposes of WHS legislation. The influence of the platform operators themselves must be acknowledged in developing guidelines for practices to encourage safe work.

Recommendation 5

We agree that legislation or regulations should clarify that platform operators are 'persons in control of businesses and undertakings' (PCBUs) for the purposes of WHS legislation, and as such owe duties of care to workers engaged to perform services in their businesses, whether or not those workers are classified as 'employees' under the *Fair Work Act* 2009 (Cth) or according to common law tests.

Recommendation 6

We agree that the Australian government should lead reform of state-based workers' compensation laws, to ensure that the 'presumed' or 'deemed' worker provisions that already exist in most state schemes are clearly expressed to presume that on demand workers engaged through platforms are deemed workers, and the platform operators are deemed employers, for the purposes of the responsibility to provide workers' compensation insurance coverage. (We

refer to the state laws cited in our original submission to this Inquiry.[1]) Presently, it is uncertain whether these workers do fall within the existing extended definitions in various states' legislation. Uncertainty leads to cost and delay in resolving claims. Also, provisions expressly identifying that these workers are covered by workers' compensation schemes is likely to foreclose attempts by platform operators to use contract terms that attempt to exclude workers from workers' compensation coverage.

For example we have viewed the contract that the food delivery platform, Hungry Panda uses to engage food delivery cyclists. One of the terms of this contract states: that the 'Contractor warrants and agrees that during the Term it will offer and provide services that are the same as or similar to the Services to persons, business or organisations other than Hungry Panda (Third Party Services)'. It also states

> 'If the Contractor operates in Victoria, the Contractor warrants and agrees that it will derive at least 20% of its gross income each year from parties other than HungryPanda for such Third Party Services'.[2]

We believe that this clause is deliberately directed at ensuring that Hungry Panda avoids classification as an employer of the workers under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3(b) and Schedule 1, Clause 8. This provision deems owner drivers to be 'workers' for the purpose of coverage under the Act if they drive their own vehicle 'mainly for the purposes of providing transport services to [a] principal', unless they have been named as an independent business operator by Work Safe Victoria. In July 2014, Work Safe Victoria published a 'Premium Guideline' which determined that an owner driver 'must not earn less than 80 percent of their income from the hirer' in order to be a deemed worker.[3] Notwithstanding this contractual clause, media reports suggest that Hungry Panda drivers, even in Victoria, are riding for the platform for up to 12 hours a day for most of the week. This leaves them very little time, in reality, to find another 20% of working hours to ride for other platforms.[4] Specific regulation dealing with rideshare and food delivery cyclists is necessary to curtail this kind of regulatory avoidance.

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[1] Our original submission attached a research report prepared for the Transport Education Audit Compliance Health Organisation (TEACHO). See Michael Rawling and Joellen Munton *Proposal for Legal Protections of On-Demand Gig Workers in the Road Transport Industry, A report prepared for the Transport Education Audit Compliance Health Organisation* (TEACHO), Faculty of Law, UTS, January 2021. (https://opus.lib.uts.edu.au/bitstream/10453/147286/2/TEACHO%20Report%20-%20%20Final%2027012021.pdf), (TEACHO Report.) The section on worker's compensation laws is on pages 27-30 of this Report.

[2] Copy of extracts from Hungry Panda contract dated 2 February 2021 are on file with the authors. See cll 4.8 and 4.9 of that contract.

[3] See TEACHO Report, 29.

[4] Ursula Malone 'Hungry Panda food delivery company under scrutiny over riders' insurance, failure to report death to SafeWork NSW', *ABC News* (on-line, 23 February 2021) www.msn.com/en-au/news/australia/hungry-panda-food-delivery-company-under-scrutiny-over-riders-insurance-failure-to-report-death-to-safework-nsw/ar-BB1dX9SO.

Recommendation 7 – expansion of the definition of employee and employment in the *Fair Work Act* 2009 (Cth).

Without other complementary measures, merely expanding the definition of employee and employer in the *Fair Work Act* may present difficulties in terms of ensuring that *Fair Work Act* entitlements are extended to gig workers. It may not be the most effective mechanism for extending appropriate work rights and entitlements to on-demand workers. The business model underpinning most digital labour platform companies is predicated on evasion of employment legislation.[5] These companies will go to significant lengths to get around employment legislation in order to keep engaging their workforces as contractors, thereby avoiding minimum pay and conditions. We are not convinced that expanding the definitions of employer and employee will sufficiently guard against that type of evasion. An expanded definition of employment may just set up another artificial boundary which can be manipulated to the advantage of digital labour platforms.

Our TEACHO Report explains the weaknesses in the approach behind this recommendation:

> ". . .[T]here would be considerable stakeholder resistance to expanding [the definition of employment] in the *Fair Work Act*. . . [I]t is clear that businesses engaging workers through digital platforms do not want their workers being designated as employees. . . . Work providers such as Uber have made it part of their business model to avoid being covered by employment protection regimes such as the Fair Work system. Given this commitment to evading employment protection regimes, it is possible that work providers would find more ingenious means to avoid the application of any statutory presumption of employment or expanded definition of worker inserted into the *Fair Work Act*.
>
> "This is why effective government action to protect gig economy workers cannot solely rely on changing the legal definition of employee in the *Fair Work Act*. This just sets up another artificial boundary that could be circumvented . . . By tweaking their arrangements with their workforce, gig companies could find new grounds to argue their workers are contractors, not employees . . . Indeed . . . the NSW Parliament abandoned the approach of expanding employment in favour of directly regulating the contractor/principal arrangement (under Chapter 6 of the *Industrial Relations Act 1996* (NSW)) because of problems with the deemed employment approach."[6]

Furthermore, we are of the view that this approach may raise the questions as to whether all other provisions in the *Fair Work Act* (e.g., related to leave entitlements, etc.) are appropriate to all kinds of on-demand work.

However, if the Senate Committee is firmly wedded to taking an approach to expanding the definition of employment, the idea of a general 'deeming' power for the Fair Work Commission (FWC) is preferable, because the FWC could deem workers to be employees for appropriate purposes but not others.

[5] Pollman E and Barry J (2016) 'Regulatory Entrepreneurship' 90(3) Southern California Law Review 383
[6] TEACHO Report, 14-15.

Having said that, overall, a more effective method of ensuring that vulnerable gig workers are legally protected is to take a 'beyond employment' approach and institute a legislative regime that applies regardless of whether the workers are employees or contractors. That is, work standards might be explicitly applied to digital labour platforms who engage gig workers even if they are engaged as contractors. This approach has been tried and tested in the road transport industry for a number of decades under Chapter 6 of the NSW *Industrial Relations Act*. It was also the approach taken under the (now abolished) federal road safety remuneration system.

Recommendation 8

We agree that a federal regulator should be empowered to gather data on pay and hours and other working conditions from platform operators engaging contract workers. Without adequate record keeping it is impossible to assess whether minimum standards are being observed. This kind of data supports and makes more meaningful the data recommended for collection in Recommendations 1-3.

Recommendation 9

We agree that the Fair Work Commission's powers should be extended to setting minimum wages and conditions for contract workers, and that the FWC should be empowered to arbitrate contract termination disputes (much in the same way that the FWC considers unfair dismissal applications, by conciliation first, and then by compulsory arbitration). We agree that the FWC should be empowered to make class orders, similar to contract determinations made under the *Industrial Relations Act 1996* (NSW) Chapter 6**.**

Recommendation 10

We agree that the National Employment Standards (NES) right to request conversion from casual to permanent status should be a matter that the FWC can supervise. We also agree that the FWC should be able to make a determination that an employee who is in fact working regular and systematic hours of work with a reasonable expectation of continuity (regardless of the terms of an initial employment contract) should be afforded permanent status, from the time of the order being made. The enactment of the *Fair Work Act 2009* (Cth) s 15A by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) has exacerbated the risk that many employees will be engaged on precarious casual contracts without any entitlement to paid leave. At a time of public health crisis, this is of concern. Workers without paid leave are tempted to work while ill. The problem of permanent workers being classified as casuals arises because s 15A(4) asserts that 'any subsequent conduct of either party' cannot be taken into account in determining the employee's status. The prohibition on taking 'subsequent conduct' into account means that employees may be engaged on terms that deliberately forswear any intention to offer them ongoing work, even though they are assigned to regular shifts, scheduled well in advance. The Explanatory Memorandum for the Omnibus Bill stated:[7]

> the absence of a firm advance commitment is only to be assessed on the basis, and at the time, of the offer and acceptance of employment, and any subsequent conduct is

[7] Explanatory Memorandum, *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* (Cth), House of Representatives, [19].

irrelevant. This means a person's employment status cannot unintentionally change over time.

Employees in this position must rely only on the periodic offer of permanency that may come many months after they have commenced regular work. We recommend that any employee who has become – in reality – a permanent employee in the interim between initial engagement and an entitlement to be offered or request permanent status – should be able to apply to the FWC for a determination of the reality of their status. The FWC's determination of the issue should have effect going forward and not retrospectively, to avoid any concern by employers that they will acquire retrospective obligations.

Recommendation 11

We agree that a tribunal (or a division of the FWC) should be empowered to deal with disputes between hirers and contractors who merely supply their own labour and equipment, but do not operate a genuinely separate, entrepreneurial business of their own. If this approach is taken there will (perhaps) be a need to establish specialist divisions of the tribunal with expertise in the relevant sector.

Recommendations 12, 13 and 14

Our original submission to the Inquiry focused on transport workers and we have not conducted any independent research into the position of workers in the health and care system. Nevertheless, it makes a great deal of sense to us that the NDIS system should also take responsibility for oversight of the arrangements under which people provide services within the system, and that persons working in the NDIS system should enjoy the benefits of a portable leave entitlements system.

Recommendation 15

We also support a recommendation that the federal government (and indeed governments at all levels) should ensure that they set an example in the provision of fair and sustainable working conditions by requiring that contractors providing services to the government comply with minimum standards.

Thank you for the opportunity to make further comment to the Committee. We look forward to seeing the Committee's final report.

Michael Rawling and Joellen Riley Munton

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