

Committee Secretary
Senate Select Inquiry on Job Security
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Senate Select Inquiry on Job Security Feedback on First Interim Report

With thanks to the Committee for the invitation to provide feedback, the Australian Institute of Employment Rights ('AIER') makes the following comments on the recommendations in the Committee's first Interim Report.

General Comments

We congratulate the committee on its first interim report which focuses, appropriately in our view, on gig economy workers, many of whom are amongst the nation's most insecure and vulnerable workers. We welcome the Committee's recommendations. These include measures to better measure and track gig work and to expand various safety and fair pay and conditions protections beyond employees to all gig workers, and, if implemented, should go some way to addressing the many known issues with gig economy work. We make the following comments and suggestions regarding specific recommendations:

Recommendations 7 and 9

Recommendations 7 and 9 would see the definitions of 'employment' and 'employee' under the Fair Work Act expanded to capture new and evolving forms of work, and empower the Fair Work Commission to extend rights, standards and protection under the Act to workers falling outside this definition. Further, the Fair Work Commission would be given broad powers to resolve disputes and make orders for minimum standards and conditions in relation to all forms of work.

The AIER considers that measures to extend standard protections to non-employees and novel forms of engagement are essential in order to avoid growing structural inequities in the labour market and to future-proof the industrial relations system against creative business practices aimed at regulatory arbitrage. However, as a technical issue, expanding the definition of 'employee' to cover new and evolving forms of work may have unwanted

consequences, given the current wording of other provisions of the Act. Many of the provisions in the National Employment Standards are framed on the assumption of certain work patterns which are not easily accommodated to the nature of all forms of gig work. Also, experience has shown that hirers are adept at drafting labour engagement contracts in ways that deliberately evade classification according to statutory definitions. So the inclusion of a new statutory definition of 'employee' may not resolve all problems, and may create new ones.

We suggest the recommendations should be amended to clarify that the Fair Work Act should be amended to expand its scope beyond regulating employment to regulating all forms of work (regardless of contractual form) and the Fair Work Commission should be empowered to make orders for minimum standards and conditions in relation to all forms of work and assign appropriate rights and protections to non-employees to ensure a universal safety net.

Recommendation 10

Recommendation 10 urges the Australian government to empower the Fair Work Commission to provide pathways to permanency via arbitrations for casual conversion and to arbitrate disputes regarding work status. Presently, there is no general right to arbitration regarding casual conversion requests. The model enterprise agreement term for dealing with disputes does provide a right for a party to refer a dispute to the FWC and empowers the FWC to arbitrate the dispute if necessary. However, the FWC can only arbitrate disputes about casual conversion requests made under awards or the NES if both parties consent. Hence, in those cases, employers are able to veto an employee's request for arbitration.

We suggest that the recommendation make clear that casual employees should have an unqualified right to the arbitration of disputes about casual conversion requests by the FWC. Further, the FWC should be empowered to develop a gradual deeming mechanism, whereby casual employees gradually accrue NES entitlements, as outlined in our submission.

Recommendation 11

Recommendation 11 calls for the establishment of a national tribunal to advise on, oversee, and make rulings related to 'low-leveraged' independent contractors; that is, so-called independent contractors who supply only their own labour and basic equipment, but do not operate businesses of their own in a substantive sense. This would include gig workers undertaking rideshare, food delivery and other on demand work on digital platforms.

We suggest this recommendation should make clear that this tribunal, amongst other things, should be tasked with setting generally binding minimum standards of remuneration and other conditions for these contractors to ensure they receive functionally equivalent minimum protections to employees under the Fair Work Act. Given the overlap between this body and the expanded functions of the Fair Work Commission under Recommendation 9, we suggest this body could be the FWC or a body within it with devolved functions.

We note with approval that this and several other of the Committee's recommendations give expanded powers to the Fair Work Commission to address issues in the gig economy. However, we also note that commentators have observed the emergence of serious problems with the appointment process of Fair Work Commissioners in recent years and the erosion of the principle of non-partisanship and a balance between representatives from unions and industry.¹ We suggest that this or a separate recommendation should call for a strengthening of the Fair Work Commission appointment process to guarantee non-partisanship and to ensure the public's continued faith in the Commission's balance, representative diversity and independence that is necessary for the Commission to perform its role.

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On behalf of the Australian Institute of Employment Rights

¹ See, for example, [Stewart, A. McCrystal, S., Howe, J. Submission to the Productivity Commission Inquiry into the Workplace Relations Framework, September 2015](#); [Marin-Guzman, D., 'Employers push for 'full scale' review of Fair Work Commission', Australian Financial Review, 3 February 2020](#); [Myer, R., 'Is the Coalition "Stacking" tribunals? No Shortage of Ideological Pals Getting Jobs Before Election', The New Daily, 21 January 2019 \(updated 22 January 2019\)](#).