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Industrial Relations Victoria
Department of Premier and Cabinet
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To whom it may concern.

Fair Conduct and Accountability Standards for the On-Demand Workforce

Thank you for the opportunity to make a submission on the Victorian Government's Proposed Fair Conduct and Accountability Standards (**Standards**) for the Victorian on-demand workforce.

We refer to our organisations' related submissions to the Inquiry into the Victorian On-Demand workforce:

- WEstjustice Community Legal Centre (**WEstjustice**): available [here](#) (**WEstjustice Submission**)
- JobWatch Inc. (**JobWatch**) submission 37 on the Inquiry Report's list of submissions (**JW Submission**), and
- WEstjustice, JobWatch, South-East Monash Legal Service (**SMLS**): Joint Further Submission: Report of the Inquiry into the Victorian On-Demand Workforce: available [here](#) (**Further Submission**), (collectively **On-Demand Submissions**).

In summary, we applaud the Government's commitment to implementing recommendations 13 and 14 of the Inquiry Report of July 2020 (**Inquiry Report**), by taking steps to develop these Standards. However, we are concerned that the Standards alone (as currently drafted) will do little to address the key issues of exploitation and unfair working conditions which are highlighted in our related On-Demand Submissions listed above.

If the Government is truly committed to providing more certainty and fairness for on-demand workers (**gig-workers**), we recommend that changes be made that are focused on enforcement, so that the Standards cannot in future be criticised as being a "toothless tiger" or a hollow set of aspirational statements that fail to deliver on accountability.

General concerns about the Standards

Uncertainty around worker classification

As noted in paragraph 42 of the Consultation Paper, the Inquiry found that for many on-demand workers, work status is borderline. Clearly, and this is very much borne out by our respective experiences with our clients, there is much confusion among workers about their work status and whether they are employees or independent contractors. The proposed Standards apply to platforms and "non-employee on-demand workers," without defining who those non-employee workers are.

We are concerned that the Standards do nothing to alleviate the confusion around work status and this is a lost opportunity. Any attempt to protect gig-workers must first and foremost deal with this fundamental issue. Otherwise, our experience indicates that many vulnerable workers will continue to be exploited and denied basic rights such as minimum pay and entitlements.

Lack of enforceability/compliance measures

We strongly agree with the necessity to promote transparency and fair conduct by platforms operating in the on-demand economy in order to protect vulnerable gig-workers. As outlined in our Further Submission, we also agree that standards need to be put in place to underpin arrangements between platforms and gig-workers. However, it is unlikely that the proposed Standards, as currently drafted, will sufficiently protect gig-workers. A licensing scheme or an accreditation scheme (as outlined below) is better suited to adequately protecting gig-workers.

In circumstances where the proposed Standards take the form of voluntary, non-binding 'high level requirements', we doubt that the Standards can be effective in promoting or achieving:

- greater consultation with gig-workers about work status and arrangements;
- consideration of parties' leverage or bargaining power;
- fair conditions and pay for gig-workers;
- fair and transparent independent dispute resolution;
- worker representation, including the ability to seek better work arrangements; and/or
- safety.

We urge the Government to carefully consider how the above aims can be practically achieved and to acknowledge that they cannot be achieved through the proposed Standards alone.

As we noted in our earlier On-Demand Submissions, many of the most vulnerable gig-workers work in the on-demand economy due to the low barriers to entry.¹ Given the inherent power imbalance between these workers and platform providers, the risk of poor working conditions is extremely high and exploitation is common. These issues have been acknowledged in the Inquiry Report.²

In particular, we have the following general concerns about the proposed Standards:

- Discretionary language:** We have concerns about the capacity for the Standards to be effectively implemented or enforced, noting that they are phrased in discretionary language. While the Standards have been described as high level 'requirements', the language implies that adherence to the Standards is optional. The use of discretionary language also creates ambiguity as to whether complying businesses are required to adhere to all or only some of the Standards. Allowing businesses to pick and choose between those of the Standards that best suit them will maintain the status-quo and the exploitation of gig-workers. To address this, we submit that explicit language must be used to confirm that full compliance with the Standards is necessary and that any non-compliance will be actionable.
- High-level nature of the Standards:** We also have concerns that the high-level nature of the Standards provides for a level of vagueness that may disincentivise business from making meaningful change and/or may lead to major inconsistencies in implementation between businesses. We therefore recommend the introduction of more prescriptive Standards outlining best practice processes to ensure fair pay and conditions for gig-workers.
- Lack of compliance or enforceability measures:** The Standards do not include or propose any mechanisms for enforcement. The Standards fail to include any:
 - consequences for non-compliance with the Standards,
 - regulatory body appointed to have oversight over compliance with the Standards; or
 - mechanism for parties to make an external complaint about a platform's adherence to the Standards.

In these circumstances, we cannot see how these 'accountability standards' can be said to hold businesses in the on-demand economy accountable. There must be repercussions for non-compliance with the Standards to ensure their integrity, with such measures to be enforced by an external regulator.

The Victorian Government has emphasised the importance of balancing the needs and interests of both gig-workers and businesses in developing the Standards. However, we note that any measures introduced to 'level the playing field' will necessarily be considered by businesses to be burdensome, noting that many of them have enjoyed largely unfettered discretion in how they structure their workforce. In many cases, this has allowed these businesses to circumvent employment law obligations and unduly shift business risk to gig-workers in order to increase their profit margins.

While there is a public interest in promoting innovation in the on-demand economy, this cannot be done at the expense of the basic human rights and minimum living conditions of the gig-workers who make up the backbone of this industry. In our view, the interests of gig-workers in obtaining fair pay and working conditions

¹ See, for example, WEstjustice Submission, p 18.

² See e.g. pp 44, 52, 70, 147.

must be paramount in the development of the Standards (or any variation of the Standards, as suggested below).

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| Specific concerns about the Standards |
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In addition, we set out below our specific concerns regarding the content and wording of the Standards.

| Standard | Reflective of best practice? | Further comments |
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| Standard 1 Consultation about work status and arrangements | No | <p>In order to set out best practice processes, the Standards must be phrased in mandatory language, i.e. platforms <u>must</u> comply with each of the requirements.</p> <p>Discretionary language allows unfair bargaining to continue as it provides the platform with a choice on whether to consult and engage with gig-workers.</p> |
| Standard 2 Consideration of parties' relative ability to change outcomes or bargaining power | No | <p>Mandatory language In order to set out best practice processes, at a minimum, the Standards must be phrased in mandatory language, i.e. platforms <u>must</u> comply with each of the requirements.</p> <p>Discretionary language causes unnecessary ambiguities, allowing confusion. For example, Standards 2.2 and 2.3 are incredibly vague. They do not require platforms to have fair contracts, just to <i>consider</i> whether contracts should be amended if it is discovered that they are unfair. While we recognise the intended use of discretionary language is to provide flexibility, it is not appropriate in this context as this Standard aims to minimise power imbalances between platforms and gig-workers.</p> <p>A requirement for fair contracts The requirement should be that platforms <u>must</u> put in place fair contracts, taking into account:</p> <ul style="list-style-type: none"> - whether the risks associated with platform work are distributed fairly between the platform and non-employee gig-workers - liability for damage arising in the course of the performance of work for platforms is treated or distributed fairly, <p>We consider there is an appropriate amount of discretion in this revised Standard, in that it allows for there to be choices on how fairness is achieved, not whether fairness is achieved.</p> <p>External complaints process In addition, to ensure fair bargaining power is achieved there must be an internal, but also an external complaints mechanism for gig-workers who are dissatisfied with the final decision made by the platform.</p> |
| Standard 3 Fair conditions and pay | No | <p>Mandatory language In order to improve the pay and conditions of gig-workers, at a minimum, this Standard must be phrased in mandatory language, i.e. platforms <u>must</u> comply with each of the requirements. Again, the use of discretionary language will do little to remedy the exploitation of gig-workers.</p> <p>There should be a specific requirement (rather than a suggested example) that platforms publish typical average take home earnings (which would be publicly available to workers and customers), which are benchmarked against the minimum wage.</p> <p>Pay that is comparable to minimum wage The term 'fair' here is also too nebulous to have any meaningful impact – in our view fair should be defined as 'at least comparable to minimum wage' (for typical average take home earnings).</p> <p>Internal and external complaints processes Both internal and external complaints processes are required to ensure accountability and compliance with these Standards. An internal complaint process should not be optional.</p> |
| Standard 4 Fair and transparent independent | No | <p>Mandatory language In order to set out best practice processes, at a minimum, the Standards must be phrased in mandatory language, i.e. platforms <u>must</u> comply with each of the requirements.</p> |

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| <p>dispute resolution</p> | | <p>Proscribing fair and accessible processes for dispute resolution</p> <p>In addition, the Standards must be more prescriptive about what is required in offering a fair and accessible process to gig-workers to resolve disputes.</p> <p>For example, Uber has community guidelines and policies regarding sexual harassment and discrimination, but we have seen first-hand that these are ineffective, and often applied unfairly in favour of customers over drivers.</p> <p>This is evident in the following case studies from WEstjustice.</p> <p><i><u>Case study - Pavneet:</u> Pavneet, an international student, had been working as an Uber driver for three years. Within the period of a fortnight, he was the victim of racial discrimination and abuse on two occasions and then had his account deactivated with no recourse. On the first occasion, due to an issue with the app, Pavneet was directed to the wrong pickup location. Once the issue was corrected, the passenger, an intoxicated young man, verbally abused him and his family members with racial slurs and told him to ‘go back to his country’. Pavneet declined to take the passenger and reported the issue to Uber the next morning but they did not take any action to assist, nor did they disclose the identity of the passenger to Pavneet. Pavneet later learned that the passenger made a complaint to Uber about him. The following weekend, Pavneet provided a lift to a woman late at night, who screamed at him for driving too slow in a 40km/h zone and accused him of trying to steal more money from her. In response to this behaviour, Pavneet pulled over and asked her to book another ride. She responded with racial slurs. Pavneet lodged a complaint with Uber the next morning, but hours later his account was deactivated, as the passenger also lodged a complaint against him. Once his account was deactivated, he found it extremely difficult to challenge the decision. Each communication he sent to Uber was handled by a different customer service officer, and ultimately Pavneet gave up on exploring options for recourse due to hopelessness about the outcomes.</i></p> <p><i><u>Case Study – Irini:</u> Irini, an international student, worked as a driver for Uber. Irini did not have her own car, so she rented one from a company that had a contract with the ride-share company. One weekend Irini received a late-night job to pick up a group of male passengers. When Irini arrived, the men were noticeably intoxicated. During the trip, one of the men tried to climb through the sunroof of the car, causing significant damage. Irini stopped the car and the man jumped out. All the other men, except for one, got out. The man that stayed sexually harassed Irini. He made unwanted advances and said words to the effect of ‘do you want to kiss me?’ which made Irini feel very uncomfortable. Irini reported the incident to the ride-share company. They refused to cover the full cost of fixing the car, leaving her with a considerable debt to pay. Instead, they offered her a small amount of money on the condition that she would make no further attempts to claim money from them. The company also refused to take any steps to identify the passengers who damaged the car and sexually harassed her and told her she must obtain this information through the police. In addition, although the ride-share company has terms of use which prohibit sexual harassment, Irini was not aware of the ride-share company taking any action to investigate the incident or penalise the passengers for their conduct. WEstjustice advised Irini that, unfortunately as a contractor, her rights against the company were uncertain. WEstjustice suggested that, alternatively, Irini could pursue the men responsible for damaging the car to pay for the repair, however, this would require identifying them. Irini contacted the police to try to identify the men, but after months heard no response. Ultimately Irini gave up on making a claim because the process of trying to identify the perpetrators was too hard.</i></p> <p>Providing ‘clear support and complaints processes’ means the platforms <u>must</u> provide effective and accessible complaints processes. An internal support and complaints process must be clearly and readily available to gig-workers, being mindful of barriers including but not limited to age, language and disability.</p> |
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| | | <p>Currently, for major platforms such as Uber, Ola and Deliveroo there are no clear processes by which legal representatives can submit written complaints on behalf of clients who are gig-workers. Written correspondence can only be submitted through a web form, or via the relevant app.</p> <p>The Standards should require that platforms provide, at a minimum:</p> <ul style="list-style-type: none"> - A direct phone line, and identifiable email address for submitting complaints. This will allow legal representatives of non-employees to submit complaints on their behalf; - Consistency of carriage of complaints by platforms; and - Release of the details of alleged perpetrators of discrimination, sexual harassment or other misconduct to the legal representatives of gig-workers. <p>External complaints process In order to ensure procedural fairness and accountability to the Standards, gig-workers should have an external complaints avenue available to them if the internal complaints procedure has not been adhered to or provided a satisfactory resolution. This is necessary to ensure accountability and compliance with the Standards.</p> <p>Clarification of terms and timeframes We also note that the term 'deal with' the dispute is vague. What does this term mean? Is it a commitment to respond to a complaint, or finalise the dispute? Platforms must commit to resolve a dispute within the specified timeframe. A reasonable time frame should be defined for platforms to resolve disputes to avoid unfair lengthy delays; we propose 21 days.</p> |
| <p>Standard 5 Non-employee on-demand worker representation, including the ability to seek better work arrangements</p> | <p>No</p> | <p>Mandatory language In order to enable workers to be represented and freely associate, the Standards must be phrased in mandatory language, i.e. platforms <u>must</u> comply with each of the requirements.</p> <p>Funding to support free legal advice for gig-workers There must be a greater focus on ensuring gig-workers have the ability to understand their rights. To 'level the playing field' gig-workers should be given the same opportunities as platforms to independent legal advice. Given financial, language and other barriers faced by gig-workers, further funding needs to be provided to a specialised government agency and/or Community Legal Centres to provide such advice and representation. We reiterate the comments in our Further Submission (pages 1-4) about the vital role that Community Legal Centres play in addressing a critical service gap for workers who are not in a union (or not eligible to join a union), cannot afford legal advice and/or are in need of targeted, in-situ legal services.</p> |
| <p>Standard 6 Safety</p> | <p>No</p> | <p>Mandatory language In order to assist platforms and gig-workers to understand and comply with work health and safety obligations, at a minimum, all the Standards must be phrased in mandatory language, i.e. platforms <u>must</u> comply with each of the requirements.</p> <p>Mandatory insurance policies for the benefit of gig-workers The Standards should also require that platforms <u>must</u> have insurance policies in place to compensate workers for loss of income if they are unable to work due to a work-related injury and cannot access statutory workers compensation schemes.</p> <p>There are limited options for insurance for non-employee gig-workers, particularly food-delivery drivers, who are not eligible for workers compensation schemes. Due to the high-risk nature of this work, premiums are often exorbitant, and economically unviable given the low rates of pay earned by workers. In these circumstances, those of our clients who take up this work rarely have insurance in place and are left with no recourse for compensation if they are injured at work. This often leads to periods of unemployment which can have devastating effects on vulnerable gig-workers.</p> |

Recommendations for effective administration of the Standards

We propose the following additional measures to accompany the Standards (incorporating our recommended changes) to achieve their intended outcomes.

A. AN ACCREDITATION/LEADING-PRACTICE RECOGNITION SCHEME

This is the most preferable means to implement to the Standards

We propose that the Government introduce a best-practice “Accreditation Scheme”, where businesses receive a ‘tick of approval’ accreditation as a ‘Platform Provider of Choice’ for providing fair and safe working conditions for gig-workers.

Under this arrangement, accreditation would be conditional upon compliance with all the Standards and could be revoked in the event of non-compliance. Accreditation would be granted by an authorising agency, who would also be responsible for managing an external complaints process in relation to adherence with the Standards.

In order to receive accreditation, platforms would need to first demonstrate full compliance with the Standards. Ideally, platforms would be required to renew their application for accreditation every 1-2 years. Platforms would also be required to provide annual reports to the authorising agency to demonstrate accountability to the Standards and may be audited randomly or if a complaint has been made to the authorising agency.

There must also be repercussions for non-compliance with an accreditation scheme, such as demerit points, notices of non-compliance, investigations by the authorising agency, and suspension or expulsion from the accreditation scheme. Details of platforms who have had their accreditation suspended or cancelled should be made publicly available. This will help in ensuring that platforms are held accountable to the Standards.

As with many other various regulatory schemes, there are both benefits and downsides to the introduction of an accreditation scheme. We have set out these considerations in the table below.

| Positives | Negatives |
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| Still voluntary – like the proposed Standards. Therefore, not overly burdensome on businesses. | As the accreditation scheme is still voluntary, platforms may not willingly sign up to adhere to the Standards. |
| Would have comparatively minimal costs associated, as compared to a licensing scheme (below). | There is a risk that any costs/fees associated with accreditation may still be indirectly passed on to gig-workers or intermediary businesses (such as restaurants in the case of food delivery platforms). However, this is unlikely to be a significant risk if costs are low. |
| Would offer a competitive advantage to complying businesses as the publicly available reports and the ‘tick of approval’ would incentivise customers to use platforms that have signed up to the scheme. | |
| Would offer a larger pool of workers (and therefore more market power) for complying businesses, who are likely to be a more attractive option for prospective gig-workers who have the knowledge that that Platform has signed up to a set of standards that are in place to protect gig-workers’ rights. | |

Ultimately, we consider that an accreditation scheme most effectively balances the interests of platforms and gig-workers. While platforms will not be overly burdened due to the voluntary nature of the scheme, gig-workers can take comfort in having an enforceable set of measures which are designed to achieve fair pay and working conditions.

Example:
 The Workplace Gender Equality Agency (WGEA) provides a citation to Employers of Choice for Gender Equality, which is a voluntary leading-practice recognition program designed to encourage, recognise and promote organisations’ active commitment to achieving gender equality in Australian workplaces. In order to receive this citation, businesses must pay a fee and demonstrate that they are compliant with the *Workplace Gender Equality Act 2012* and must meet all the Employer of Choice for Gender Equality criteria.

B. A LICENSING SCHEME FOR THE ON-DEMAND ECONOMY

The introduction of a licensing scheme, similar to the Victorian Labour Hire Licensing Scheme, would protect vulnerable gig-workers and achieve more effective enforcement than voluntary, high-level Standards. Under this scheme, the proposed Standards would take the form of **mandatory** regulations and would be presided over by a regulator.

The regulator should be empowered to revoke licenses, issue fines, and prosecute for non-compliance and acting without a license (see our Further Submission, p12, WEstjustice submission p 41, JobWatch submission p 8).

We appreciate that there may be substantial costs associated with the implementation of a licensing scheme (such as costs to platforms for registration and participation.) We are also concerned that any such costs might be passed on from platforms to gig-workers.

However, a licensing scheme would allow for healthy competition whilst ensuring a level playing field among platforms. A licensing scheme would also ensure that platforms are held accountable for providing fair and safe working conditions.

Example:

We note that Commercial Passenger Vehicles Victoria has been successful in introducing a scheme to regulate the commercial passenger vehicle industry – however this scheme is focused on providing protections to consumers, rather than to the drivers themselves.

Impact Assessment Considerations

If these Standards (or a variation of these Standards such as our proposed accreditation scheme) are implemented, they must be vigorously monitored - in consultation with platforms, gig-workers, their representatives (including Community Legal Centres) and other relevant stakeholders - to capture whether they are working and to capture and resolve any unintended side effects.

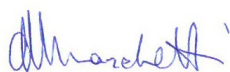
We note that an external complaints mechanism would provide valuable information on the effectiveness of the Standards, and their cost and benefit impact. We reiterate our view that Government cannot meaningfully analyse the impact of the Standards without such a mechanism in place.

We welcome the opportunity to meet and discuss our recommendations with the relevant staff, if this would be of assistance.

We also remain available for further consultation on any developments in relation to the proposed Standards.



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Endorsements

This submission has been endorsed by the following organisations:

1. Eastern Community Legal Centre
2. Youthlaw Young People's Legal Rights Centre Inc.
3. UMSU Legal Service
4. Justice Connect