JobWatch Submission to the

Select Committee on Job Security

JobWatch
Level 10, 21 Victoria Street
Melbourne VIC 3000
www.jobwatch.org.au

This submission was prepared by JobWatch Inc, with input from:

- Gabrielle Marchetti, Principal Lawyer
- Ian Scott, Principal Lawyer
- Tinashe Makamure, Senior Lawyer
- John O'Hagan, Lawyer
- Héloïse Williams, Lawyer
- Amanda Chan, Communications Manager
- Laura Boehm, paralegal
- Interns: Tamasan Freyer, Richard Lyons and Nicholas Mirgiannis

We wish to acknowledge the Wurundjeri people of the Kulin nation as the Traditional Custodians of the land on which we work, and pay our respects to Elders past, present and emerging.

We recognise First Nations peoples as the custodians of the lands and waters of Australia, and the more than 60,000 years of knowledge, strengths and expertise they bring to caring for country.

This land is Aboriginal land – always was and always will be.

About JobWatch

1. JobWatch is an employment rights, not-for-profit community legal centre. We are committed to improving the lives of workers, particularly the most vulnerable and disadvantaged.
2. JobWatch is funded by the Office of the Fair Work Ombudsman, Victoria Legal Aid and the Victorian Government. We are a member of Community Legal Centres Australia and the Federation of Community Legal Centres (Victoria).
3. JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. Our centre provides the following services:
    a. Tailored information and referrals to workers from Victoria, Queensland and Tasmania, via a free and confidential telephone information service (**TIS**);
    b. Community legal education, through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other relevant stakeholders;
    c. Legal advice and representation for vulnerable and disadvantaged workers across all employment law jurisdictions in Victoria; and
    d. Law reform work and advocacy aimed at promoting workplace justice and equity for all workers.
4. Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS. To date we have collected more than 210,000 caller records, with each record usually canvassing multiple workplace problems, including contract negotiation, recovery of wages, discrimination, harassment, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time across State and Federal laws.
5. JobWatch currently assists approximately 12,000 callers to the TIS per year. The vast majority of our callers are not union members and cannot afford to get legal assistance from a private lawyer. In order to become clients of the legal practice, workers must have an employment law matter that has legal merit and their cases must satisfy the requirements of our funding agreements (which typically focus on client vulnerability and public interest issues).

Case studies

6. The case studies referred to below are already de-identified. They are based on the experiences of callers to JobWatch's TIS and they are provided here as examples of the types of inquiries we receive in relation to insecure work.

#	Title
1	Dismissed for being over 65 during COVID-19

2	Worker with auto-immune condition has shifts reduced for following COVID-19 procedures
3	Casual worker with dependents not given work due to previously contracting COVID-19
4	Casual worker with carer responsibilities pressured to 'earn' JobKeeper payments
5	Casual worker with carer responsibilities fired for refusing to increase hours in order to 'earn' JobKeeper payments
6	Casual worker scared to lose her job by enforcing her right to refuse additional hours
7	Casual worker scared to lose her job by enforcing her right to refuse illegal directions
8	Threats, abuse and bullying through a labour hire role
9	Uber worker unclear about the legality of his employment status
10	Worker unsure whether she is an employee of an online platform
11	Uber driver suddenly out of work with no explanation
12	Uber driver assaulted on the job and loses job
13	Uber and Uber Eats driver has no recourse for underpayment
14	Foodora worker paid well below minimum wage is unsure whether he has any rights
15	Uber driver assaulted at work has no OHS protections
16	Additional case studies – see page 20.

Recommendations Overview

7. Our recommendations can be found at the following paragraphs:

#	Recommendations
1	Gig Economy Workers – see para 46
2	Causal Workers – see para 47
3	Fixed-term Contracts – see para 79
4	APS Workforce – see paras 91-92.

The extent and nature of insecure or precarious employment in Australia

8. Through the TIS database, JobWatch is able to track employment trends. Based on our data, we confirm that JobWatch has seen a rise in recent years in calls from people employed in insecure or precarious jobs.
9. Between 2012 – 2020, JobWatch's TIS saw the following increases in the number of calls:
    a. The number of calls from casual workers increased by more than 168%;
    b. The number of calls from workers employed under a fixed-term contract increased by more than 128%;
    c. The number of calls from independent contractors increased by more than 104%.
10. During the same period, the number of TIS calls in relation to labour hire arrangements increased by more than 620%.
11. During this period, JobWatch received funding which allowed us to increase our TIS calls. However, even considering this, as a proportion of total calls to the TIS, we have still witnessed a significant increase in calls from casual employees, workers employed under a fixed-term contract, independent contractors and labour hire employees.

The risks of insecure or precarious work exposed or exacerbated by the COVID-19 crisis

12. In JobWatch's experience, high-risk workers engaged in insecure or precarious work throughout COVID-19 are exposed to greater financial insecurities as employers reduce or completely remove work due to fears for the employee's health and safety.
13. According to the Australian Government Department of Health, older people or those with a disability are at risk of severe illness if they contract COVID-19.[1]
14. Between the period 1/03/2020 – 28/02/2021, the number of callers to JobWatch's TIS aged 60+, and engaged in insecure or precarious work, increased by 17% compared to the same period in the previous year.
15. Between the period 1/03/2020 – 28/02/2021, JobWatch's TIS experienced a 9.3 % increase in the number of calls from employees engaged in insecure or precarious work who cited discrimination based on a disability as a 'Problem Type', compared to the same period between 2019 – 2020. Of these calls, 75% reported either or both forms of adverse action involving termination or non-termination.

[1] https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/advice-for-people-at-risk-of-coronavirus-covid-19#who-is-at-moderate-risk-of-severe-illness-

Case Study #1: dismissed for being over 65 during COVID-19

We received a call from Jane who is over 65 years old. Jane commenced work as a casual cleaner at the beginning of the COVID-19 crisis, for a large company. Jane's responsibilities included general cleaning duties and taking people's temperatures. Five weeks after commencing her employment, Jane received a phone call from Human Resources advising her that she was being dismissed because she is over 65 years old and at risk due to COVID-19.

Case study #2: worker with auto-immune condition has shifts reduced for following COVID-19 procedures

We received a call from Katherine who suffers from an auto-immune condition which means that she is at greater risk of contracting infections. Katherine has been employed on a casual basis as a swimming instructor for a couple of years, and her employer is aware of her disability. During the COVID-19 pandemic, Katherine's employer implemented a company policy on COVID-19 testing. The policy required all employees to call into work sick if unwell, undergo a COVID-19 test and remain at home until the return of a negative result. After developing cold-like symptoms, Katherine followed this procedure. Katherine had three COVID-19 tests, all of which came back negative. Her employer told her that they "needed consistency" and permanently removed Katherine from one of her regular shifts.

Case study #3: casual worker with dependents not given work due to previously contracting COVID-19

We received a call from Sally who is employed on a part-time casual basis as a bookkeeper for a large company in the retail trade industry. Sally and her family were required to self-isolate after they tested positive to COVID-19. During this period, Sally had no entitlements to any paid leave. On top of this, Sally's husband developed significant health complications due to the virus, requiring him to be in a medically induced coma. This extended the unpaid leave that Sally had to take from work. Once Sally and her family had fully recovered from COVID-19 and after receiving medical clearance from the DHHS, Sally contacted her employer to confirm that she was able to return to work. Her employer refused to give Sally any work because of her previous COVID-19 diagnosis.

16. JobWatch has also found that, as the majority of primary caregivers to children, women are at greater risk of experiencing discrimination in the workplace as a result of their caregiving responsibilities during government-mandated lockdowns.
17. Between the period 1/03/2020 – 28/02/2021, JobWatch's Telephone Information Service (TIS) experienced an 83 % increase in the number of calls from employees engaged in insecure or precarious work who cited discrimination based on parental and carers responsibilities as a 'Problem Type', compared to the same period between 2019 – 2020. Of these calls, 70 % were received from female callers.

Case study #4: casual worker with carer responsibilities pressured to 'earn' JobKeeper payments

We received a call from Nina who has been employed as a part-time casual child care worker for over 12 months. Whilst she hasn't received any shifts for some time, she suddenly received a $1,500.00 payment in her bank account from her employer. Nina then received a message from her employer stating that she had to work 3 days per week to justify the payment of $1,500.00.

Nina was unable to work 3 days per week as her husband works full-time and she bears the full responsibility of caring for her three young children and delivering home-schooling during the government mandated lockdown. Nina was told by her employer that if she declines the shifts, her employment would be terminated.

Case study #5: casual worker with carer responsibilities fired for refusing to increase hours in order to 'earn' JobKeeper payments

We received a call from Miranda who works 2 days per week on a casual basis as a sales assistant. After applying for JobKeeper, Miranda's employer told her that in order to earn the JobKeeper payments, Miranda would need to increase her hours from 22 hours per fortnight to 48 hours per fortnight. Miranda told her employer that she was unable to do this as she has four children, one of which has medical needs and needs to be in the company of an adult at all times.

The following week, Miranda found that she was rostered to work 47 hours a fortnight for the next month. She sent a letter to her employer stating that she could not commit to the extra hours. Miranda then received a letter of termination due to her inability to work the extra hours.

18. Further data from JobWatch's TIS indicates that workers engaged in insecure or precarious work are less likely to enforce their workplace rights, for fear of being dismissed and having difficulty securing other suitable employment.
19. The number of total calls received from workers engaged in insecure and precarious employment decreased from 17 % between 1/03/2019 – 29/02/2020 to 13 % of total calls for the 12-month period throughout the pandemic. From this data, we believe that these workers were likely concerned about remaining employed throughout the pandemic when there were fewer alternative employment opportunities available, and were subsequently reluctant to take steps to enforce their workplace rights.

Case study #6: casual worker scared to lose her job by enforcing her right to refuse additional hours

We received a call from Layla who has been employed on a casual part-time basis as a student advisor for an international agency for the last 8 or so years. She started working for her employer in Mexico and then later transferred to Australia on an international student visa. As soon as the pandemic hit, Layla's employer started bullying her at work and pressuring her to work more hours than her visa allowed. Layla was scared of enforcing her right to refuse the additional hours, as her employer said that if she didn't work more, she might lose her job.

Case study #7: casual worker scared to lose her job by enforcing her right to refuse illegal directions

We received a call from Freya who is employed on a casual part-time basis as a beauty-therapist. The salon that Freya is working for has closed as a result of client cancellations following the

outbreak of COVID-19. Despite the government mandated lockdown, Freya's employer contacted the staff and asked them to go into work to attend face-to-face training on facials.

Freya was concerned about the clear breach of social distancing rules in performing a facial for the training, and made some enquiries as to whether this work activity was permitted. Upon confirming that such work activity was not permitted, Freya advised her employer who then told her that her employment would now be 'under review.'

Freya contacted the TIS with the concern that she would be fired if she did not attend upcoming face-to-face training.

20. Workers engaged under labour hire arrangements who have sought assistance from JobWatch are particularly unwilling to take steps in enforcing their workplace rights due to the nature of their employment. Whilst labour hire workers have various legal protections under workplace laws, industrial awards and equal opportunity legislation, host organisations are not regarded as the employer under the *Fair Work Act 2009* (Cth) (FW Act). This means that a worker has only limited protections available to them under the General Protections provisions of the FW Act. For example, a labour hire worker cannot rely on the protection from adverse action being taken by a host employer for raising an issue or inquiry in relation to their employment. Furthermore, the worker is unable to make an Unfair Dismissal claim against a host organisation.
21. Despite the availability of some General Protections under the FW Act, it is relatively easy for host organisations to evade their responsibilities under the FW Act by hiding behind a labour hire arrangement. The limitations and difficulties associated with enforcing their rights under the FW Act has resulted in the reluctance of labour hire workers to seek assistance.

Case study #8: Threats, abuse and bullying through a labour hire role

We received a call from Justin, who works through a labour hire company. Justin was threatened, physically and verbally attacked and bullied by a work colleague. Justin made a complaint to the boss but no action was taken and Justin was moved to a different work site. The labour hire company told Justin that they didn't want to lose the client. When Justin wrote a letter about the situation, they told him to delete certain words and phrases. When he didn't, they gave him less work shifts. When he called us, Justin told us that he had been feeling suicidal because of the bullying, and that he had been seeing a counsellor. He was also worried about paying rent because he wasn't receiving as many work shifts.

We explained to Justin how to apply for a stop bullying order, how to make a WorkCover claim to investigate the bullying, and how employers aren't allowed to take adverse action against employees when they exercise a workplace right. Because of Justin's mental state, we also referred him to Lifeline.

Workplace and consumer trends and the associated impact on employment arrangements in sectors of the economy including the 'gig' and 'on-demand' economy

22. There has been widespread debate regarding the casualisation of the Australian workforce and statistical research on this topic has been mixed. However, one study has been conducted to determine the number of temporary employees as a proportion of total employees in selected OECD countries in the years 1983-2016.[2] It found that:
    a. In 1983, 15.6 % of employees in Australia were temporary employees, a comparable figure to other OECD nations such as Portugal (14.4 %), Spain (15.7 %) and Greece (16.2 % - the highest at the time).
    b. By 2016, the percentage of temporary employees in Australia had risen to 25.1 %. This proportion is greater than that of the next highest country – Spain (21.5 %) – and considerably higher than other countries in the study, which were generally in the range of 10-15 %.
23. Further, the classification of employees as 'independent contractors' by employers seeking to avoid legal obligations (also referred to as 'sham contracting') has presented another issue within the Australian workforce.
24. Data from the ABS suggests there are over 1 million workers identified as independent contractors in Australia. Nearly one third of them are engaged in the construction industry. The CFMEU has suggested that between 26 % and 46 % of so-called independent contractors in their industry are engaged on sham contracts.[3]
25. The 'on-demand economy', or 'gig economy', has varying definitions among academic authors. Broadly defined, the gig economy is a "market in which individual workers sell their labour through fixed-term or fixed-task contracts that are of a temporary nature."[4]
26. For the purpose of this submission, however, we will use the terms 'on-demand economy' or 'gig economy' to mean a market in which companies and businesses operate online platforms which act as intermediaries between workers and customers.
27. Examples of companies operating in the gig economy include Uber (private transport), Airtasker (task-based services), and Deliveroo (meal delivery).
28. The gig economy, as facilitated by digital platforms in Australia, has grown rapidly in size over the past decade. Gig economy workforce estimates highlight significant growth between 2015 and 2019, with the workforce more than tripling during this period. Studies suggest that the Australian gig economy workforce in 2019 may have exceeded 250,000 workers – larger

[2] https://www.actu.org.au/media/1385243/d88-a4_the-rise-of-insecure-work_fa.pdf 14

[3] CFMEU, Race to the Bottom, CFMEU Research Paper, 2011 cited in https://www.actu.org.au/media/1385243/d88-a4_the-rise-of-insecure-work_fa.pdf

[4] *Macquarie Dictionary.*

than many major Australian sectors, including Arts and Recreation (216,000) and Mining (179,000).[5]

29. Consumer spend in the gig economy is also increasing rapidly, as the gig economy grew over nine times in market size from $0.7bn in 2015 to capture more than $6bn in consumer spend in 2019.[6]
30. Further, the COVID-19 pandemic and associated lockdowns across Australia profoundly affected the way consumers and businesses could safely interact. During that period, the gig economy has proved valuable to countless businesses, particularly restaurants and cafes, enabling them to quickly pivot their offerings onto digital platforms and help soften the impact on revenue and employment during the pandemic.
31. Overall consumer demand in the gig economy was negatively impacted during the initial COVID-19 lockdown period between March 2020 and April 2020, largely driven by a 70 % decline in private transport in April 2020. However, the gig economy has since recovered and by the end of October 2020, weekly spend growth in the gig economy comfortably surpassed growth in total consumer spend by approximately 40 %.[7]
32. Due to the rapid rise of the gig economy and the nature of contracting between digital platforms and their workers, the gig economy has attracted attention for its impact on the Australian workforce. For many workers in Australia, the gig economy provides a new source of flexible work with low barriers to entry. [8]
33. However, there are widely acknowledged worker frustrations and risks associated with work in the gig economy. These include: [9]
    a. The lack of basic worker entitlements such as minimum wage, employer-paid superannuation, sick leave, paid annual leave, paid parental leave, long service leave and (in some jurisdictions) workers compensation insurance due to a worker's classification as an 'independent contractor.'
    b. Low awareness among workers of the implications of being classified as an 'independent contractor' with respect to any entitlements they want to receive.
    c. Cases of worker misclassification where digital platforms have been prosecuted or are currently under-investigation.
    d. Weak or non-existent income security due to the demand-driven nature of work.
34. Accordingly, JobWatch is concerned about the exploitation of vulnerable gig workers, who fall into one of two categories:
    a. Those whose legal status is currently uncertain (i.e. they do not know whether they are an employee or a contractor). This includes:

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[5] See https://actuaries.asn.au/Library/Miscellaneous/2020/GPGIGECONOMYWEB.pdf, 11.

[6] Ibid 14.

[7] Ibid 32.

[8] Ibid 22.

[9] Ibid.

i. Workers who are told they are an independent contractor but who could potentially have a good case of sham contracting and underpayment of wages under the FW Act; and

ii. Workers who are paid cash-in-hand, without the use of an ABN or a TFN.

b. Those who would be likely to fall into the category of independent contractor under current law, but who need additional legal protection. These include workers who, in the words of the *Employment Rights Act 1996* (UK) "perform work for a third party in circumstances where that third party could not accurately be described as a client or a customer; and ... work as an integrated part of a profession or business undertaking carried on by that third party."

35. Unfortunately, workers in the first category above often do not understand that they could potentially have a strong claim to employment entitlements until they receive legal advice and/or issue legal proceedings to test whether they are truly an employee. Meanwhile, whilst they continue to be treated as independent contractors or to be paid on a cash-in-hand basis, they commonly believe they are not entitled to (and accordingly do not seek to enforce their rights to) entitlements such as minimum wages, superannuation contributions, long service leave, workers' compensation insurance, and statutory protections such as occupational health and safety or unfair dismissal.

36. As the law currently stands, many workers in the second category above are not regarded as employees and do not have the legal protections available to employees, for example, under the Fair Work system or occupational health and safety law.

37. An example of an innovative legislative approach to extending protections in this way is the proposed *Fair Work Amendment (Making Australia More Equal) Bill 2018* (Bill). Section 789FBB of the Bill effectively widens the range of relationships that can be regulated by the Act. The Bill proposes that the Fair Work Commission (FWC) would be able to make "minimum entitlement orders"[10] in favour of workers who do work for the benefit of a business, regardless of the nature of the legal relationship between the workers and the business.[11] Such orders would have the effect of applying particular provisions of the Act, a modern award or enterprise agreement to the workers as if they were employees of the business.

38. As outlined in the Second Reading Speech, the Bill would "introduce a presumption that all workers, however classified, are entitled to at least the same minimum standards as employees".[12] This means that situations where companies are purportedly reclassifying workers as contractors, outsourcing work, or using labour hire, those workers would be entitled to minimum pay and conditions[13] if the FWC considered it appropriate.

39. Therefore, regardless of each company's legal arrangements, where work is ultimately benefiting the lead company/head contractor, they would be responsible for their supply chains. This would act as a deterrent against the artificial use of legal devices such as

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[10] FWA Bill, s789FBA.

[11] Ibid s. 789FBB.

[12] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 May 2018, 3858 (Adam Bandt).

[13] Ibid.

independent contracting arrangements as way of avoiding minimum pay and conditions obligations.[14]

40. JobWatch accepts that there are many legitimate uses for contracting arrangements, and the approach taken in the Bill would still allow employers to utilise any legal arrangement they prefer. However, it would not allow them to artificially undercut the legal minimums that would apply to employees doing the same work.[15] In JobWatch's view, this would render many current arrangements otiose and their use would decline markedly.
41. An advantage of the approach adopted in the Bill is that it circumvents a wide range of artificial arrangements designed to avoid liability for employee entitlements, including those as yet unforeseen, because it looks only at whether work is being done for the benefit of the business. This approach has the potential to give a broader range of workers' rights to minimum payments and protection against unfair dismissal and the avoidance of length-of-service-based entitlements such as redundancy pay and even long service leave through such arrangements.
42. If the Act were amended to cover relationships such as that proposed by the Bill, it would give the FWC more powers to regulate a broader range of "work-related relationships existing in Australia",[16] improving job security for workers and sending a strong message to employers that artificial legal arrangements will not relieve them of employment obligations.
43. JobWatch believes that a similar approach should be taken in extending the obligation to provide WorkCover insurance to workers in the second category above, as occupational health and safety is an essential element of job security.

Case Study #9: Uber worker unclear about the legality of his employment status

Josh is an Uber driver and after hearing about the Fair Work Commission's decision about a Foodora worker being deemed to be an employee, contacted JobWatch. He couldn't understand why a Foodora worker would be an employee and an Uber worker would continue to be treated as an independent contractor. He believes the signage on his car required by Uber should be treated in the same way as the uniform that was required by Foodora.

Case study #10: worker unsure whether she is an employee of an online platform

Samantha got a job with Jarvis by completing an online form on the Jarvis website. The form mentioned the need for an ABN but did not require her to have one in order to complete the form. She was next contacted by someone from Jarvis, who provided the details of her shifts to start working without further mention of the ABN. Samantha performed multiple shifts, without payment. Samantha contact JobWatch, unsure as to whether she is an employee or independent contractor.

[14] Ibid.

[15] Ibid.

[16] Explanatory Memorandum, *Fair Work Amendment (Making Australia More Equal) Bill 2018*.

Case study #11: Uber driver suddenly out of work with no explanation

Belinda has worked for Uber for the past 2.5 years. She has contacted JobWatch after she was recently "dropped off the app" without any notice or reason. Belinda acknowledged there have been occasions when she was unable to find her passenger but nothing was communicated to her at the time and this has come as a total shock to her.

Case study #12: Uber driver assaulted on the job and loses job

Filip had been driving for Uber for the past year. He has an ABN and is aware that he is likely an independent contractor. He was assaulted by an Uber passenger and his car was damaged. He complained to Uber about the passenger but Uber denied any responsibility for the event and terminated Filip's agreement. Filip contacted JobWatch, seeking information about whether he has any rights to get his job back under existing Federal or Victorian laws.

Case study #13: Uber and Uber Eats driver has no recourse for underpayment

Enrico and Maria are a married couple and contacted JobWatch to seek assistance. Enrico works as an Uber driver and also as a "delivery partner" for Uber Eats. He sometimes delegated work to Maria who worked off Enrico's Uber accounts. Uber discovered this and terminated Enrico's agreement. Enrico's pay was always less than $20/hour. He calculated that if he were an employee, he would be owed thousands of dollars in underpayment of wages, but is unsure as to whether he would have any recourse through employment law avenues.

Case study #14: Foodora worker paid well below minimum wage is unsure whether he has any rights

Santiago delivers food for Foodora, who treat him as an independent contractor. He became concerned that he and his co-workers were bring treated unfairly by Foodora. Foodora pay Santiago well below the minimum wage and although he thinks he doesn't have any employment entitlements, he contacted JobWatch to check if there is anything he can do.

Case study #15: Uber driver assaulted at work has no OHS protections

Muhammad made a verbal complaint to Uber over the phone about a passenger who was rude and tried to punch him. When Uber seemed to do nothing about this, he followed it up in writing. After Muhammad's Uber account was suddenly blocked and Uber cited the reason as being due to poor quality of service, he contacted JobWatch to find out if there's anything he can do.

The effectiveness, application and enforcement of existing laws, regulations, the industrial relations system and other relevant policies

44. It is JobWatch's position that the effectiveness and application of current industrial laws to workers in areas considered insecure and precarious is inadequate. This is particularly the case with gig-economy workers who, despite extensive litigation questioning their status

(most noteably involving Uber and UberEats drivers) both in Fair Work Commission[17] and the Federal Court of Australia,[18] remain unprotected by industrial legislation due to their categorisation as independent contractors and not employees.

45. Additionally, while other categories of insecure work, such as casual employment, are afforded a greater degree of legal protection, it is JobWatch's position that this type of employment is over-utilised and ripe for exploitation. Recent changes to the FW Act as implemented by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* go some way to strengthening protections for casual workers; however, there is more that needs to be done in this area.

46. Summary of recommendations (Gig Economy Workers):

    a. That current Australian industrial laws be widened so as to protect vulnerable workers operating within the 'gig-economy', most noteably workers for online platforms such as Uber and Airtasker.

    b. That the scope of the FW Act be broadened so as to afford protection to all 'workers' and not merely 'employees'. Or, in the alternative, that there be a statutory presumption in favour of the employment relationship when a worker's status is in dispute.

    c. That workers' compensation laws be extended to protect all workers operating in the gig-economy space, regardless of worker classification.

    d. That the *Independent Contractors Act 2006 (Cth)* be amended to:

        i. include a statutory definition of independent contractor

        ii. widen the grounds upon which a contract for services may be reviewed by the courts so as to include 'unconscionability';

        iii. increase the remedies available for workers subject to harsh or unfair contracts

47. Summary of recommendations (Casual Workers):

    a. The courts not be statutorily barred from considering the subsequent conduct of either party beyond the initial offer of employment when considering claims for unpaid entitlements; OR

    b. in the alternative, section 66B of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) 2021 (Cth)* (the Amendment) be amended to mandate a period of 3 months before casual conversion must be offered; and

    c. section 66AA of the Amendment be repealed so as to bind small business employers as well as employers of medium to large businesses.

    d. that employer's obligations with respect to casual conversion be made into civil remedy provisions.

[17] See for example *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Gupta v Portier Pacific Pty Ltd* [2019] FWC 5008.

[18] The applicant in the *Gupta* case appealed to the Federal Circuit Court; however, the case settled.

e. the legislation be amended so as to provide an inalienable right for all employees, regardless of their coverage, contract of agreement, to appeal to the FWC in the event of a dispute concerning casual conversion.

Gig-economy workers

48. JobWatch acknowledge that not all workers who take part in the gig economy are vulnerable to exploitation.
49. JobWatch is not concerned with situations where there is a clear employment relationship (albeit casual) and the employer complies with all its statutory obligations with respect to the employee who is performing the gig work.
50. Nor are we concerned, for present purposes, about workers who genuinely operate their own businesses and perform work for a client or customer as true independent contractors.
51. Rather, we are concerned about the exploitation of vulnerable gig workers.
52. JobWatch proposes the following changes be made to Australia's existing industrial relations laws re their application to gig economy workers. These changes would widen the application of Australia's industrial relations laws to this class of worker and hence improve their effectiveness. This would, in turn, facilitate enforcement of these laws against 'platforms' such as Uber and Airtasker that currently afford no such protections to their workers.
    a. We propose that the *Fair Work Act 2009* (the FW Act) be amended so as to protect the more broadly defined category of worker rather than employee. Such a move would be in line with the United Kingdom's position, where the *Employment Rights Act 1996 (UK)* and *National Minimum Wage Act 1998 (UK)* protect a worker who works under a contract of employment or any other contract, whereby the individual undertakes to do or to perform personally any work services for another party whose status is not that of a customer or client.
    b. Even if the broader category of worker is not protected and Australia continues to afford minimum entitlements (including collective bargaining rights) only to employees under the FW Act, then JobWatch proposes that there be a statutory presumption in favour of the employment relationship. This statutory presumption in favour of the employment relationship already exists in several legal systems across the world, including Spain, France and Germany.
    c. Occupational health and safety laws (whether federal or state) must protect all vulnerable gig economy workers.
    d. Additionally, we propose that the *Independent Contractors* Act *2006 (Cth)* be amended. These amendments are as follows: that Part 2 of the IC Act, including the exclusion of 'deeming' provisions in State or Territory industrial laws (which deem certain contractors to be employees) be abolished.
    e. The IC Act should define who is an independent contractor rather than continuing to rely on the common law test for distinguishing employees from contractors.

f. The grounds on which service contracts may be reviewed by a court should be amended so as to include unconscionability.

g. The remedies available for unfair or harsh contracts should be improved.

Casual Workers

53. The recent changes to the FW Act that will be implemented by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (the Amendment) go some way to addressing the issue of insecure casual work.

54. The introduction of a statutory definition of casual work is welcomed as it eliminates ambiguity and over-reliance on common law. However, while it may help to provide clarity, the definition itself is problematic not the least of which being because it codifies the principle that the status of a casual worker is determined by the initial contract entered into and **not** by the ensuing conduct of the parties.[19]

55. The Amendment also provides a (qualified) statutory right for a casual employee who has been working for a medium to large employer for a period of 12 months or more to be 'converted' from casual to permanent.[20] This would, presumably, seek to prevent an ensuing 'casual' engagement that could more properly be described as permanent from continuing for more than a year. The fact remains, however, that for that year a casual worker working permanent hours would be denied the benefits afforded permanent employees (e.g. paid leave entitlements).

56. Additionally, s66AA of the Amendment provides that the obligation to offer conversion to casual employees does not apply to small business employers (employers who employ less than 15 employees).[21] There is every likelihood, therefore, that subject to the statutory definition an employee of a small business employer who was initially engaged as a casual would have no recourse to seeking unpaid entitlements despite the fact that the reality of their engagement reflected permanency.

57. Subsequently, JobWatch proposes that:

    a. the courts not be statutorily barred from considering the subsequent conduct of either party beyond the initial offer of employment when considering claims for unpaid entitlements; OR

    b. in the alternative, section 66B be amended to mandate a period of 3 months before casual conversion must be offered; and

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[19] Section 15A(4) of the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (the Amendment) stipulates that the 'question of whether a person is a casual employee of an employer is to be assessed on the basis of the **offer** of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.'(formatting my own).

[20] *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* Subdivision B.

[21] It is important to note, however, that the right to **request** casual employment still applies.

c. section 66AA of the Amendment be repealed so as to bind small business employers as well as employers of medium to large businesses.

58. The casual conversion provisions contained in the Amendment provide a level of security to long-term casual employees. However, as mentioned in previous JobWatch submissions, we note that ss66B (employer offers), 66E (acceptance of offers), 66G (employer must give a response) and 66J (grants of requests) are not civil remedy provisions. It is an unfortunate reality that compliance with workplace laws often relies on the severity of the penalties that might be incurred for failing to do so. To that end, we would propose that these provisions be amended so as to be capable of inviting monetary penalties should an employer fail to comply.

59. Subsequently, JobWatch proposes that:

    a. that employer's obligations with respect to casual conversion be made into civil remedy provisions.

60. Section 66M provides that disputes about the casual conversion provisions may be referred to the Fair Work Commission (FWC), if discussions at the workplace level fail to resolve the matter. However, in our view s66M(2) makes it too easy for employers to circumvent the dispute resolution powers of the FWC. Not only can an employment contract potentially exclude the FWC from a dispute resolution procedure, but, of even greater concern is the fact that if 'another written agreement between the employer and employee' provides a dispute resolution procedure, then it will prevail. Potentially, an employee could be presented with an agreement to sign at the first sign of a dispute about casual conversion; the agreement could set out a dispute settlement procedure which requires the employee to financially contribute toward the costs of a mediator or it may exclude the FWC from any dispute settlement procedure. The employee may feel pressured to sign the agreement and go ahead and agree to it. This is not a desirable outcome.

61. Subsequently, JobWatch proposes that:

    a. the legislation be amended so as to provide an inalienable right for all employees, regardless of their coverage, contract of agreement, to appeal to the FWC in the event of a dispute concerning casual conversion.

The interaction of government agencies and procurement policies with insecure work and the 'on-demand' economy

62. Federal government agencies should be model employers, adhering not just to the letter but also to the spirit of the law.

63. As such, it is JobWatch's position that the federal government should only be employing employees on a non-ongoing basis where absolutely necessary. Additionally, the federal government should not be manufacturing the conditions whereby resorting to external contractors (particularly through labour hire agencies) is fundamental to meeting project outcomes.

64. As it stands, federal government agencies contribute to insecure work in two significant ways:

65. through their own employment practices leading to a growing proportion of 'non-ongoing' workers, and;
66. through the federal government's restrictive procurement policies that have led to an increase in the privatisation of public services and the use of labour-hire and/or on-demand workers.

Insecure work within the APS workforce

67. Section 10A(b) of the *Public Service Act 1999* (Cth) ('PSA') states that the Australia Public Service ('APS') is a 'career-based' public service that 'recognises that the usual basis for engagement is an ongoing APS employee'.
68. However, in practice we are seeing the rise of APS workers on non-ongoing contracts of employment.

The changing landscape of the APS workforce

69. As of 31 December 2020, the Australian Public Service Commission recorded a total of 148,736 APS employees.[22] 17,293 (11.6 %) of these employees were engaged on a non-ongoing basis. Of this figure, 8,570 non-ongoing employees were on fixed contracts or specific task contracts, and 8,723 were employed on a casual basis.
70. The recent data also shows that non-ongoing employment is increasing in the APS.[23] This is a concerning development.
71. Employees on fixed-term contracts are not entitled to bring an unfair dismissal claim against their employer if their contract is not renewed unless an argument can be made that the employee is an ongoing employee at law. Additionally, genuine fixed-term contract employees are not entitled to redundancy pay.
72. Genuine casual workers are engaged 'as needed' and have no entitlement to ongoing work at the end of each engagement.
73. The upward trend in employing non-ongoing workers in the APS suggests that federal government agencies are in a position where they are deviating away from the statutory goals of the PSA, where the usual basis of engagement is as an ongoing APS employee.
74. A 2019 independent review of the APS (the 'Thodey Review') makes the point that whilst there is undeniably a benefit to engaging external experts in order to maximise efficiency in the APS from time to time, the APS should ultimately be focused on retaining and developing the capabilities of ongoing APS employees in order to reduce reliance on external contractors.[24]

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[22] https://www.apsc.gov.au/sites/default/files/2021-03/APS%20Employee%20Database%20Release%2031%20December%202020.pdf

[23] https://www.apsc.gov.au/sites/default/files/2021-03/APS%20Employee%20Database%20Release%2031%20December%202020.pdf, 9

[24] https://www.pmc.gov.au/sites/default/files/publications/independent-review-aps.pdf, 187

Fixed-term contracts

75. At JobWatch, we consider that the FW Act should be amended so that workers who are on fixed term contracts for longer than 24 months are automatically converted to permanent employment unless the employer refuses the conversion on reasonable grounds.
76. Factors to be taken into account in deciding whether there are reasonable grounds for refusing the conversion would need to be outlined in the FW Act. This would need to be a civil penalty provision in order for it to have any real weight and any dispute should be able to be taken to the Fair Work Commission for resolution.
77. Such a provision would not only extend protections of the unfair dismissal laws to many long-serving workers who are currently excluded. It would also allow these workers to enjoy the minimum entitlements set out in the National Employment Standards (NES) such as notice of termination and redundancy entitlements.
78. Such a provision would, in our view, minimise the disadvantage and insecurity that is associated with contiguous fixed term arrangements and accordingly, it would be one way of achieving greater social inclusion.
79. **Recommendation:** the FW Act should be amended so that workers who are on fixed term contracts for longer than 24 months are automatically converted to permanent employment unless the employer refuses the conversion on reasonable grounds with the Fair Work Commission being able to arbitrate any disputes about conversion.

Insecure work: the non-APS workforce

80. There are constitutional issues raised by a federal agency utilising a non-APS workforce for work that could otherwise be accomplished by the APS.
81. Section 67 of the *Commonwealth Constitution* requires the appointment of APS staff to vested in the Governor-General. Therefore, the rise in the use of public funds to engage labour-hire companies to perform duties otherwise ordinarily and/or traditionally performed by the APS is concerning.
82. Section 10 of the PSA ensures that all APS workers are bound by the APS values of being committed to service, ethical, respectful, accountable and impartial. Private companies such as labour hire agencies do not have these same requirements. This leads to the unusual outcome whereby contract workers might be used alongside APS staff in the same workplace and yet the contract workers are not bound by the same standards.
83. The federal government has often stated that it uses non-APS workers (including labour hire workers, contractors and consultants) to assist government agencies to reach their outcomes, particularly during peak times in business cycles.
84. The Thodey Review shows that the expenditure on labour contractors by federal government agencies increased by $738 million in the 2016-17 financial year, for consultants it was $545m and for APS employee wages and salaries there was only an increase of $13.94m.
85. The Thodey Review also points out that government spending on labour contractors and consultants has been rapidly increasing over the last decade alongside significant increases in the size of programs administered by the APS, and a lack of additional funding for departments.

86. A more recent analysis by the ABC on federal government spending on contractors shows the market for private labour is now worth roughly $5 billion a year.[25]
87. Both the Thodey Review and the ABC highlight the current staffing-level caps that were introduced by the Abbott Government 2015 as a key contributing force behind the increased spending on external labour-hire.
88. The staffing caps might also account for the growing preference for fixed-term contracts, as federal agencies need to navigate extremely tight staffing levels and be capable of restructuring if necessary.
89. The 2019 Thodey independent review of the APS points out that 'all agency heads should be accountable for managing their workforce and delivering government priorities within allocated budgets, not for adhering to a cap'.[26]
90. In JobWatch's opinion, the federal government and its agencies should be promoting and adhering to best employment practises and not exacerbating the issue of insecure work in the Australian economy and community.
91. **Recommendation:** Abolish the federal government's average staffing level procurement policy.
92. **Recommendation:** Increase funding for APS staffing on an ongoing basis.

If you have any queries about this submission, please contact Gabrielle Marchetti or Ian Scott on 03 9662 9458.

Kind Regards

Ian Scott
Principal Lawyer
Job Watch Inc
Level 10, 21 Victoria Street,
MELBOURNE 3000
Tel: (03) 9662 9458 Fax: (03) 9663 2024
ians@jobwatch.org.au
www.jobwatch.org.au

[25] https://www.abc.net.au/news/2020-09-10/contractors-and-the-public-service-gig-economy/12647956

[26] https://www.pmc.gov.au/sites/default/files/publications/independent-review-aps.pdf, 191.

ADDITIONAL CASE STUDIES

Case study: Casual working regular and consistent hours stood down after making a sexual harassment complaint

We received a call from Laura, who was working regular and consistent hours as a casual for over three years. After making a complaint to her supervisor about a colleague who was sexually harassing her, she was told that there were no more casual hours available and that they would be in touch with her if any work comes up. Her employer then hired new people to perform her work.

We explained to Laura how she could use constructive dismissal as an argument as part of an Unfair Dismissal or General Protections Dispute Termination claim, but encouraged her to seek further tailored legal advice and support for her case.

Case study: Uber driver had his account deactivated

We received a call from Luke, who had been working as an Uber driver for over five years with 8000 rides and no previous negative feedback on his account. Uber deactivated his account with no warning one day, as a passenger complained that he was racist after a conversation about the #BlackLivesMatter protest. Luke explained that he had said he thought it was unwise to hold a protest during a pandemic, but believes that the passenger twisted his words to make it seem like Luke was more severe and racist. He had been unable to speak to a supervisor at Uber to plead his case.

We explained to Luke that because he was considered an independent contractor, he was unable to seek an Unfair Dismissal or General Protections claim. His only option was to claim for discrimination on the basis of political opinion under the Equal Opportunity Act.

Case study: Not paid for Airtasker work

We received a call from Dan, who did a job through Airtasker but was not paid for the work. The client had paid Airtasker, but Airtasker had not sent the money through to Dan. Dan was unable to reach a supervisor at Airtasker to plead his case.

We explained to Dan that because he was considered an independent contractor, he was unable to pursue an underpayments claim. His only option to recover his money was to go through the Victorian Civil and Administrative Tribunal.

Case study: 14 years service with no long service leave

We received a call from Margaret, a 62 year old woman from regional Victoria who had been a customer service officer for the same business for over 14 years. However, she had been contracted through three labour hire companies over that time which made her ineligible for long service leave as she hadn't had a single employer though she was doing the same work for the same company.

We explained to Margaret that her case was complex, and while there had been some legal precedent for arguing that the host organisation is the employer even if the labour hire company is the paymaster, it would difficult to pursue a claim. We referred her to a few different places for more tailored advice and support.

Case study: Incurring medical costs through labour hire

We received a call from Carrie who had sustained a back injury at work through a labour hire role. The labour hire company hired a third party to handle appointments related to Carrie's injury, including GP appointments and MRI scans. They lodged an application with WorkCover and told her that all the medical costs would be covered. A year later, Carrie was asked for $2300 payment for the MRI as the labour hire company had not paid the bill. The labour hire company then told her that the WorkCover claim was denied (which she had never been told about), and that they never authorised an MRI in the first place.

We explained to Carrie that the time limit may have passed to appeal the WorkCover decision, but she could ask for the time limit to be extended as she never received the rejection letter. We also told her that her employer could not require her to spend an amount which is for the employer's benefit and unreasonable.

Case study: Working Holiday Visa workers exploited on farm

We received a call from Jose, who was recruited to work on a farm. He never received a contract, and all correspondence from the farm employer was via WhatsApp in a group with 15 other working holiday visa workers. Jose was underpaid, earning between $20-$60 a day depending on the fruit, payments were often late, and the payslips were not accurate.

We explained to Jose how to make an underpayments claim, and urged him to pursue the case through the Fair Work Ombudsman.

Case study: Working Holiday Visa worker not paid for work

We received a call from Pierre, who did two weeks worth of plum picking on a small farm. He was promised $600 for 40 hours of work. His boss texted him on a Friday to let him know he would be

paid on Monday, but Pierre didn't get paid. Pierre tried following up on Monday, Tuesday and Wednesday, but his boss stopped taking his calls.

We explained to Pierre that the rate agreed was below the award rate for the work, and that he was entitled to be paid for the work he had done. We explained how he could recover his wages through a letter of demand, a request to the Fair Work Ombudsman, or through the small claims process.

Case study: Student visa worker underpaid for hours worked

We received a call from Joanne, who was working in a pharmacy. Her student visa stipulates that she can only work a maximum of 40 hours per fortnight during school term, but she had already completed her final exams and graduated, and still had three months left on her visa. She had taken on extra shifts over the 40 hour per fortnight limit, but her employer only paid her for the 40 hours, and stated on her payslip that they wouldn't pay her any more than that because of her visa.

We explained to Joanne that the 40 hour work limit generally does not apply during holiday periods, so she was eligible to file a claim for underpayment of wages for hours worked above 40 hours. Given the circumstances, we also advised her to speak to a migration lawyer about the implications of her working more than 40 hours.

Case study: Employer sponsoring visa exploiting worker

We received a call from Ishaan, whose employer was sponsoring him for permanent residency. His employer was exploiting the position, making him work over 50 hours a week, and verbally abusing him. When he had a few days off because his wife had an emergency Caesarean, his employer alleged that he had been working somewhere else, initiated a performance review and suspended him. Ishaan wanted to know what would happen if he left his job because of the exploitation and whether it would have an adverse effect on his visa application.

We explained to Ishaan how to apply for a stop bullying order, and referred him to another community legal centre that specialised in migration law to support him further.