

**Select Committee on the impact of technological and other change  
on the future of work and workers in NSW**

**Answers to Questions On Notice – Monday 9 November 2020**

**QUESTION – Legal advice received on Chapter 6 of the *Industrial Relations Act 1996***

The CHAIR: It has been a while since I have done statutory interpretation, but the Independent Contractor Act is plain and clear, "Chapter 6 of the Industrial Relations Act of New South Wales and any other provision of that Act to the extent that it relates to or has effect for the purposes of the provision of Chapter 6 is exempt from the Independent Contractors Act."

The Hon. ADAM SEARLE: Not as a point in time.

The CHAIR: Not as a point in time, as in it is permanent. Equally, if I recall Mr Andrews, the then Minister, in this second reading speech made it explicitly clear that it was not to apply to New South Wales. All of which means that if you file under the Statutory Interpretation Act, where you look at the first instance of the actual Act, secondly the second reading speech, you would lead to the conclusion that chapter 6 has a pretty broad exemption from the Independent Contractors Act, not a narrow exemption at that point in time. Would you agree? Or am I taking too much liberty?

Mr HEUSTON: No, I think you are taking me—no, I would not agree. I think that is not entirely clear.

Mr DAVID SHOEBRIDGE: But you are basing that just on a gut feel. You have not had any advice on it, Mr Heuston.

Mr HEUSTON: We have had advice on some matters that touch on that question, and that indicates a view that the Act itself was intended to preserve the scope of chapter 6 as it was at that time.

Mr DAVID SHOEBRIDGE: You have that in writing, have you? Legal advice that it was intended only to preserve the scope of chapter 6 at the time that the Federal Act was passed—have you had that advice in writing?

Ms FOY: I am not aware of such advice existing but I am happy to take it on advice.

Mr HEUSTON: I am working off my memory here.

Mr DAVID SHOEBRIDGE: You can take this on notice.

The Hon. ADAM SEARLE: Yes, it is not a guessing game.

Mr DAVID SHOEBRIDGE: I do not want you speculating and filling the gap by speculation.

Ms FOY: Correct.

Mr DAVID SHOEBRIDGE: With all due respect, there has been a bit of speculation, from what I can tell in your answers, Mr Heuston, so I am trying to narrow it down and find out what the situation is.

Ms FOY: May I ask your specific question?

Mr DAVID SHOEBRIDGE: Was the summary or the sense of the legal position as put by Mr Heuston—has that advice been provided by lawyers in writing to the Government?

Ms FOY: We will take that question on notice.

Mr HEUSTON: We will take that on notice, thank you.

**ANSWER:**

In 2017, written advice was provided regarding the extension of Chapter 6 of the *Industrial Relations Act 1996* (IR Act) to bread, milk and cream carriers and the interaction with s7 of the *Independent Contractors Act 2006* (Cth) (IC Act).

**QUESTION – Relocation of jobs to regional areas**

The Hon. COURTNEY HOUSSOS: Is the Government currently investigating any plans to allow workers to relocate to regional areas and still continue to do their current jobs?

Ms FOY: We have a department of regional New South Wales and we have a public sector commission that looks at all of the workforce issues and the importance of regional New South Wales. I might refer that specific question to them but I am very happy to come back to you with some detail on that.

**ANSWER:**

This is a question that falls outside the remit of Employee Relations NSW. It is a question better directed to either the Public Service Commission or the Department of Regional NSW.

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**QUESTION – Flexible working as part of construction projects**

The Hon. COURTNEY HOUSSOS: That would be great. I have one final question. In today's The Daily Telegraph they talked about a large contractor—I think it was John Holland—that talked about the need for flexible working as part of construction projects. Is that something that you are looking at at the moment?

Ms FOY: I am not aware of it. On the quick read of the work that was released yesterday by Minister Ayres, I see a range of commentary about different industries. That is some work that Treasury and the council are doing there. I am happy to try to come back with some more information.

The Hon. COURTNEY HOUSSOS: That would be very helpful, thank you.

**ANSWER:**

The NSW Innovation and Productivity Council in early December released their first report, *NSW Remote Working Insights – Our experience during COVID-19 and what it means for the future of work*.

**QUESTION – Use of taxi lanes by rideshare vehicles**

The Hon. NATASHA MACLAREN-JONES: I have one question in relation to a submission that was put in requesting or suggesting that rideshare vehicles would be allowed to use taxi lanes. Do you have a comment on that?

Mr DAVID SHOEBRIDGE: I think bus lanes and taxi stops.

The Hon. NATASHA MACLAREN-JONES: Yes, bus lanes.

Ms FOY: I am afraid I do not. I suspect that that would be within the Transport portfolio as it relates to the use of roadways again but I would be very happy to come back with some detail if that is helpful.

The Hon. NATASHA MACLAREN-JONES: That would be great, thank you.

Mr DAVID SHOEBRIDGE: If you are doing that, the other point they asked was about getting some guaranteed drop-off and pick-up points when major events have been run.

Ms FOY: Okay, sure.

**ANSWER:**

Taxis and HC-plated hire vehicles currently have access to transit and bus lanes. Hire vehicles operating under newer ridesharing platforms like Ola and Uber do not have access to these lanes.

As part of the point to point transport reforms, the NSW government announced that hire car number plates would be recalled by 30 June 2020 and hire car access to bus and transit lanes would be revoked. Access to those lanes has now been extended until 31 March 2021.

In March 2020, Ms Sue Baker-Finch was appointed to undertake an independent review of the point to point transport industry, which includes the rideshare industry. The independent review was asked to consider access to special purpose lanes, including bus and transit lanes and kerbside access. The NSW Government is currently considering the recommendations of the review.

Transport for NSW will continue to monitor the efficiencies of special purpose lanes, ensuring that our customers using buses are not negatively impacted. For more details please contact Transport for NSW direct. For more details please contact Transport for NSW direct.

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**QUESTION – Department working on relationship between workers compensation law and gig economy employees**

The Hon. GREG DONNELLY: Let us deal with workers compensation first because that got raised earlier. Who should the Committee be talking to in terms of the Government with respect to the matter of the relationship between workers compensation law and people working in the gig economy in New South Wales?

Mr HEUSTON: I might be needing to take that on notice, I think.

The CHAIR: Could I invite you? Is it the NSW State Insurance Regulatory Authority [SIRA] and icare?

Mr HEUSTON: That is my first thought but I am not quite sure.

The CHAIR: Rest assured. They are coming next week because they think they are.

The Hon. GREG DONNELLY: Okay, that is good.

Ms FOY: But rather than waiting for something on notice, if it is helpful—

The Hon. GREG DONNELLY: We are working out what the boundary lines are. That is good. No, that is fine. So, with respect to workplace health and safety laws, who will have a stab at who we are likely to have to talk to?

Ms FOY: Work health and safety laws: That would be through, I believe, the Department of Customer Service. But rather than take something on notice and have the normal time, I am very happy to work with the committee secretariat to provide advice about where that might be.

The Hon. GREG DONNELLY: Sure. Just with some precision so we know who we might be directing it to.

Ms FOY: Yes, of course.

**ANSWER:**

Enquiries undertaken by Employee Relations NSW have confirmed that neither Safework nor the State Insurance Regulatory Authority (SIRA) hold this data.

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**QUESTION – Collection of demographic data of gig workers in NSW**

The CHAIR:

She made certain statistical and/or demographic findings, namely, 13 per cent of Australians have worked in the gig economy, gig economy workers are overwhelmingly tertiary educated, young workers make up 20 per cent of the gig economy and 14.8 per cent of workers now work in the gig economy.

Ms FOY: Yes.

The CHAIR: You are aware of those findings that she made?

Mr HEUSTON: Yes, I have read the report. I cannot recall the exact statistics that she reported.

The CHAIR: Fair enough. You cannot be expected to recall the exact statistics. I am asking whether we have any comparable data in New South Wales that you are aware of, either that the Government has commissioned or collected or that you are aware that others are commissioning or collecting?

Ms FOY: Not that I am aware of but I am happy to go back and check if that is the case.

Mr HEUSTON: Not in New South Wales. There is some data available from overseas jurisdictions about the extent that the gig economy is underway but I think, in terms of New South Wales, I am not aware of any other dataset that is specific to New South Wales, other than what is in the Victorian report.

The CHAIR: The information in the Victorian report was gathered at the behest of the Victorian Government. Have you made any representations to the Government that it should be collecting such evidence or commissioning such studies?

Ms FOY: Not at this point; no, we have not.

The CHAIR: Is there a reason why you have not made such a recommendation?

Mr DAVID SHOEBRIDGE: Actively monitoring.

Mr HEUSTON: I might take that on notice if I may?

The CHAIR: Of course. Ms James also found that more than one in 10 gig economy workers earn near or below the Federal minimum wage. Do you have any comparable data that you can point to in New South Wales that would lead us to reject that finding, or should we accept that as being fair and representative of what might be happening in New South Wales as well?

Mr HEUSTON: I am not aware of any data that goes to that point one way or the other.

Ms FOY: But we might go back and check.

The CHAIR: Ms James' study did encompass New South Wales, so what I am asking, therefore, is whether or not you are aware of anything else that would cause us to not take Ms James' finding effectively at its word.

Ms FOY: If we could check because Treasury may hold such data but I am not sure. I apologise that I am not—

The CHAIR: Would you like to take that on notice?

Ms FOY: Yes, of course.

**ANSWER:**

Employee Relations NSW is not currently collecting data on the number of gig economy workers in NSW or their wage rates and has not commissioned any third party to gather the data. NSW Treasury has also advised that they do not collect or hold this data.

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**QUESTION – Advice provided to the Commonwealth on gig economy**

The CHAIR: Has the Commonwealth sought the input of the New South Wales Government in any such respect that you are aware of?

Mr HEUSTON: In relation to the gig economy?

The CHAIR: Yes.

Mr HEUSTON: Not in relation to the gig economy, no.

The CHAIR: Has the New South Wales Government or any New South Wales Government Minister or any Commonwealth forum said to the Commonwealth that this should be a matter that needs to be looked at?

Mr HEUSTON: I do not know.

The CHAIR: Okay, fair enough. Is it possible that you could take that on notice to see if you could find out?

Mr HEUSTON: I will take it on notice. I am not sure how much success I will have, but yes.

The CHAIR: Okay. Can you take on notice whether or not the Department of Premier and Cabinet has initiated any discussion at a Commonwealth level about reform of Commonwealth laws in respect to the gig economy?

**ANSWER:**

Employee Relations NSW, which sits within the Department of Premier and Cabinet, has not initiated any discussions with the Commonwealth regarding amendments or legislative reform in respect to gig economy workers.

**QUESTION – Parental leave entitlements in NSW government departments**

The Hon. COURTNEY HOUSSOS: I have one that is unrelated. Ms Foy, can you tell me if the Department of Premier and Cabinet has a standard paid parental leave policy that goes across the whole of government or is it just for DPC?

Ms FOY: Mr Heuston is best placed for that one.

Mr HEUSTON: Generally, the parental leave arrangements are included in awards, of which there are many across the public sector. For the most part they are fairly comparable, providing 14 weeks' paid maternity leave and one week of other-parent leave. There are some variations to that, which have been negotiated at enterprise level, but for the most part they are the key elements that would be common across most of government.

The Hon. COURTNEY HOUSSOS: Sorry, you said it is fairly common. Can you tell me if there are any others that have more than one week for other-parent leave?

Mr HEUSTON: I will take that on notice.

The Hon. COURTNEY HOUSSOS: Yes, that is fine. I am happy for you to take this on notice again: Do you have a DPC policy or guide about what is best practice?

Ms FOY: For?

The Hon. COURTNEY HOUSSOS: For paid parental leave, what it should be. That would be great, thank you.

**ANSWER:**

Standard provisions for parental leave in NSW are 14 weeks' paid maternity leave and one week of paid other parent leave.

Parental leave provisions are set out in industrial instruments, managed by each agency.

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**QUESTION – Superannuation entitlements & Independent Contractors Act**

The CHAIR: Great. And therefore, to the extent to which the State Government has power to establish superannuation entitlements for people who are on contracts for services, do you expect there to be any issue with the Independent Contractors Act?

Mr HEUSTON: I am not able to—I might take that on notice.

The CHAIR: Could you?

Mr HEUSTON: I am not sure if that is something that I can answer now.

The CHAIR: Yes, fair enough.

Mr HEUSTON: It may also be an item that better fits within another area of government that we may need to consult. The superannuation policy responsibility is not one that falls within employee relations and neither is workers compensation.

The CHAIR: Yes, I accept that. And if you would take it on notice, I would appreciate that.

**ANSWER:**

Superannuation, and specifically the superannuation guarantee charge legislation is administered by the Australian Tax Office.

**QUESTION – Potential barriers to establishing a dispute resolution function for gig workers**

The CHAIR: Does the New South Wales Government have any expertise in this that the Committee can call upon, because it is a complicated question which, to be fair, Commonwealth authorities have not looked at either?

Ms FOY: Would it be more helpful, again, for us to liaise with the committee secretariat—

The CHAIR: Yes, it would be.

Ms FOY: —rather than wait for an answer on notice?

The CHAIR: Yes, it would be most helpful in that respect as well.

Ms FOY: Yes, thank you. We will do that.

The CHAIR: In terms of dispute resolution procedures that could be available under the New South Wales laws, do you have a view that we have referred our powers to establish any dispute resolution procedures, other than chapter 6?

Mr HEUSTON: Sorry, can you repeat the question?

The CHAIR: To the extent to which we are able to establish a dispute resolution function, be it through the NSW Civil and Administrative Tribunal or otherwise, is it your view that there are any legal-ish barriers for us being able to establish such a scheme for gig workers that we should be aware of?

Ms FOY: I am afraid I have to plead ignorance on that one and, again, get advice on where that would be appropriate because our domain is fairly narrow. Again I would not want to give legal opinion, not being a lawyer et cetera. But I am very happy to come back with some advice on that one.

**ANSWER:**

The NSW Government no longer has the power to make effective laws regulating private sector industrial relations, in regard to both employees and independent contractors. Any such NSW law would be highly vulnerable to constitutional challenge.

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**QUESTION – Number of requests for advice from gig workers**

The CHAIR: Mr Heuston, one thing that you said you do is provide services and advice about compliance with New South Wales law.

Mr HEUSTON: That is right.

The CHAIR: How many requests for advice have you had from gig workers?

Mr HEUSTON: Very few, if any.

Ms FOY: It is very small.

Mr HEUSTON: But I can take that on notice.

The CHAIR: Fair enough. Have you had contact with any platform or gig company itself that sought any advice or assistance about its compliance obligations under New South Wales law?

Mr HEUSTON: Not that I am aware of but I will take that on notice because I might just not know about it.

**ANSWER:**

Employee Relations NSW provides a telephone inquiry and web-based email inquiry service. Data is maintained regarding the nature of the complaints, but specific information about the industry is not recorded.

**QUESTION – Requests for advice on compliance obligations from employers gig workers**

The CHAIR: Fair enough. Have you had contact with any platform or gig company itself that sought any advice or assistance about its compliance obligations under New South Wales law?

Mr HEUSTON: Not that I am aware of but I will take that on notice because I might just not know about it.

**ANSWER:**

There have been no approaches from any platform or gig economy company regarding compliance obligations under NSW industrial relations legislation. There has been discussion about potential new areas of work that directly overlap with existing classes of workers that Chapter 6 applies to, and specifically the possible application of existing Contract Determinations as made pursuant to Chapter 6.

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**QUESTION – Public sector agency use of gig platform worker / companies**

The CHAIR: Yes, and that is part of the reason I was asking. But you would make the point that you are responsible for compliance with New South Wales laws and, equally, you are somewhat responsible for compliance with the public sector awards and determinations. Would you agree?

Mr HEUSTON: Industrial laws; not as far as fair trading or workers compensation.

The CHAIR: Yes, sure, industrial laws. But to the extent to which any public sector agency is engaging gig platform work, it would be your responsibility to ensure that that is compliant with the award, would it not?

Ms FOY: Is that such as Uber or—

The CHAIR: So, for example, if NSW Health was looking to source people from Mabel, for example.

I am not saying that they are. I am saying that could be one incidence of a public sector agency using it. Equally if a local government was responsible for seeking to hire labour through Airtasker, for example, is that something that you would be responsible for?

Ms FOY: No, we would not be responsible. We are not aware. That would generally come down to—so while Treasury has NSW Procurement and provides that kind of centralised coordination and support, agencies have their own procurement practices. To be perfectly honest, I have not heard of anyone using such platform, but it is not something that we monitor at all.

The CHAIR: Okay, fair enough.

Ms FOY: But if there is that information captured by agencies, again I am very happy to ask the question.

**ANSWER:**

Preference should be given to public transport or walking if appropriate, but taxi or ride share may be utilised.