Response to Questions on Notice

Transport Workers Union

20 Jan 2021

Re: Hearing for "Submission to the "Select Committee on the impact of technological and other change on the future of work and workers in New South Wales"

Question Taken on Notice – Item 1

Mr DAVID SHOEBRIDGE: Did you hear Mr McMaster's evidence just before you came in, from the Australian Road Transport Industrial Organisation?
Mr KAINE: No, we did not.
Mr DAVID SHOEBRIDGE: His position was, and I might ask if you want to consider this on notice, that in terms of all of those delivery workers, whether they are bike couriers, Ola drivers, Uber drivers, Deliveroo bike riders, that a contribution should be made from each of those gigs that they do into a workers compensation pool, which then provides coverage across the board for those drivers or riders as they move from gig to gig. What do you say to that pooled-base approach, so that you get ubiquitous coverage?

While the TWU welcomes a proposal to provide workers compensation to transport workers in the gig economy, we have serious reservations about how a 'pool' or 'levy' workers compensation would operate.

First of all, the proposed 'workers compensation pool' would risk undermining worker pay and safety. Such a system could lead to the costs of workers compensation being passed onto already lowly paid transport workers in the gig economy through the corresponding reduction of rates of pay. Such an adverse and unintended outcome is likely given that (1) working conditions for gig workers remain unregulated (2) the hypercompetitive market in which gig economy companies operate (3) the fact that rates, terms and conditions are unilaterally set by companies with no minimum floor to payment levels.

The impact of such an outcome would be catastrophic for workers who, as made evident in our submission, are already paid well below minimum wage. Furthermore, reductions in pay will undermine safety by encouraging risk-taking behaviour like working while fatigued or speeding, costing lives and in turn, increasing the total cost of any like scheme. This link between remuneration structures and safety was discussed in our submission and tragically made to evident in recent months following the deaths of five food delivery workers.

Second, the proposed 'pool' approach fails to provide economic incentives to companies to ensure a safe workplace. The existing workers compensation system provides a market-based mechanism which economically incentivises safe work practices through fluctuating

premium rates. The proposed approach would effectively aggregate such premiums on an industry-wide basis, leading to industry to disproportionately share the costs of poor safety practices, while failing to penalise those companies with high rates of injuries or deaths.

Question Taken on Notice – Item 2

The Hon. COURTNEY HOUSSOS: Can I just ask a follow-up on that specific question? That is something we have heard some different testimony around. I notice you talk about it coming out of your survey that there is a real lack of transparency over that black box—that algorithm. Are you able to provide us with any feedback about what the factors in the algorithm are? Have you received feedback as part of your survey or elsewhere? I mean, obviously they are different on different platforms, but that would be very helpful for us.

The algorithms which assign work and manage the performance of these workers are quite simply, a mystery. Companies operating in the transport sector of the gig economy have generally refused to provide workers with meaningful information about how these algorithms function, despite algorithms being used to control work and influence earnings, job security and safety.

Notwithstanding this, we do know from workers that a range of data is collected and monitored by companies and is likely factored into such algorithms. This includes job completion times, acceptance rates, customer ratings, support requests, vehicle type, job completion rates, deviation from designated delivery/trip routes, incomplete orders and total hours worked.

Question Taken on Notice – Item 3

The CHAIR: We might forward you the transcript of Mr Charlie Heuston's evidence from the Department of Premier and Cabinet, in which he alluded to whether he thought that there were some constitutional issues to do with the State Government acting, particularly whether the intention of the Government at the time it exempted chapter 6 from the Independent Contractors Act was to cover the field, and whether that would bar State governments from acting any further—or, at least, that there is a question. If you could respond to that on notice, that would be useful.
Mr KAINE: Yes, I will do that.

The TWU has reviewed the transcript of Mr Charlie Heuston and can provide additional information to answer the questions raised through his evidence in relation to the ability to extend the scope of Chapter 6 of the Industrial Relations Act 1996 (NSW) (**Chapter 6**).

In his evidence, Mr Heuston suggested that the extension of Chapter 6 and its application to the gig economy, may not be possible given that extending Chapter 6 to new classes of transport workers could trigger constitutional issues. Mr Heuston stated that:

> *"The Independent Contractors Act when it commenced operation in 2006 was directed at preserving the existing scope of chapter 6, so if it was a proposal to expand that into additional classes of work, and I think this has been raised*

previously, at least in the submissions, that then might cause a conflict with the operation of those Federal laws. That would call into question whether or not they can have application" p.46

Mr Heuston followed on to state that he had not received legal advice supporting this view.

The TWU does not believe that there would be a constitutional issue triggered by such amendments. This view is informed by legal advice obtained by the TWU when amendments to Chapter 6 had been previously considered by the NSW Parliament. We see no reason that the same legal rationale would not apply in this case.

We do note that Mr Heuston's evidence, as indicated in his transcript, had not been informed by legal advice. The TWU would like to submit a copy of the legal advice in relation to this matter, which has been prepared by Mark Gibian SC and provided in **Annexure A**.

Question Taken on Notice – Item 4

The Hon. ADAM SEARLE: Just briefly, you talk about the problem of telematics, which is in relation to the issue of surveillance in the workplace and the problems for worker privacy from these apps that the workers must download to interact with these digital platforms. If we do not have enough time I am happy for you to take it on notice about how the workplace surveillance legislation needs to be changed to take account of the evolving technology being locked in some very old technological notions.

Mr KAINE: Thank you, Mr Searle, we will take that on notice.

The Hon. SHAYNE MALLARD: I do think we could spend a whole day on surveillance. I want to talk about surveillance as well.

The Hon. ADAM SEARLE: We might invite you back for that. The Hon. SHAYNE MALLARD: That will be next year.

The CHAIR: You have taken it on notice, we appreciate that. It might be the case that the Committee is likely to hold specific hearings on workplace surveillance matters and you may receive an invitation to return to give evidence specifically on that given that you did make a lengthy submission on it and you have had extensive exposure to a lot of this in conjunction with artificial intelligence as well. We might invite you back. I note that you have taken a few questions on notice. You will have 21 days to return those answers to the Committee staff. The Committee staff will be in touch with you. We thank you for the time you have taken to provide evidence and the forthright way in which you have answered questions, equally your very extensive submission, which has been of help to the Committee.

The TWU welcomes the opportunity to discuss the issue of workplace surveillance in greater depth at the subsequent hearings, but in short, current workplace surveillance laws in NSW are not able to deal with the emerging forms of surveillance technology in the transport sector and are consequently, leading to an increasing amount of ethical and privacy concerns for workers. The TWU would strongly support reforms to expand the scope of existing workplace surveillance laws in NSW.

Annexure A – Constitution Advice Mark Gibian SC

PROPOSED AMENDMENT TO CHAPTER 6 OF THE

***INDUSTRIAL RELATIONS ACT* 1996 (NSW)**

MEMORANDUM OF ADVICE

Introduction

1. I have been requested to provide advice in relation to a proposed amendment to Chapter 6 of the *Industrial Relations Act* 1996 (NSW) ("the IR Act") which I understand is currently before the NSW Parliament.

2. As is well-known, Chapter 6 contains provisions permitting the Industrial Relations Commission of NSW to make contract determinations and approve collective agreements, deal with disputes and determine applications relating to the termination of the contracts of certain types of independent contractors involved in the transport industry. The Chapter applies to "contracts of bailment" and "contracts of carriage" as defined in that legislation.

3. Relevantly, the phrase "contract of carriage" is defined in s 309 of the IR Act as being a contract for the transportation of goods by means of a motor vehicle or bicycle in the course of a business of transporting goods of that kind by motor vehicle or bicycle. Section 309(4) excludes certain types of contracts from that definition, including in subsection (4)(d) a contract "for the carriage of bread, milk or cream for sale or delivery for sale."

4. I am instructed that a Bill has been introduced into Parliament by Labor to amend the IR Act to remove the exception at s 309(4)(d) relating to the carriage of bread, milk or cream known as the *Industrial Relations Amendment (Contracts of Carriage)*

Bill 2018. I understand that the amending legislation has had its second reading speech but is yet to go to a vote. In the course of discussions relating to the proposed amendment, a question has arisen in relation to the interaction between the *Independent Contractors Act* 2006 (Cth) ("the IC Act") and the IR Act and whether any constitutional issues may arise as a result of the amendment.

5. In those circumstances, I have been requested to provide advice as to the following question:

> *Could the amendment to Chapter 6 of the IR Act contained in the Industrial Relations Amendment (Contracts of Carriage) Bill 2018 give rise to any s 109 Constitution inconsistency issues in relation to Independent Contractors Act?*

Independent Contractors Act

6. The IC Act introduced certain provisions for the regulation of a "services contract" to the extent of the competence of the Commonwealth Parliament, including the capacity to apply for remedies with respect to an unfair contract. The IC Act, in a manner similar to the *Fair Work Act* 2009 (Cth) when dealing with employees, contains a provision indicating that it intends to operate to the exclusion of relevant State and Territory laws.

7. Section 7(1) of the IC Act provides as follows:

> ***7. Exclusion of certain State and Territory laws***
>
> *(1) Subject to subsection (2), the rights, entitlements, obligations and liabilities of a party to a services contract are not affected by a law of a State or Territory to the extent that the law would otherwise do one or more of the following:*
>
> *(a) take or deem a party to a services contract to be an employer or employee, or otherwise treat a party to a services contract as if the party were an employer or employee, for the purposes of a law that relates to one or more workplace relations*

matters (or provide a means for a party to the contract to be so taken, deemed or treated);

(b) confer or impose rights, entitlements, obligations or liabilities on a party to a services contract in relation to matters that, in an employment relationship, would be workplace relations matters (or provide a means for rights, entitlements, obligations or liabilities in relation to such matters to be conferred or imposed on a party to a services contract);

(c) without limiting paragraphs (a) and (b)--expressly provide for a court, commission or tribunal to do any of the following in relation to a services contract on an unfairness ground:

(i) make an order or determination (however described) setting aside, or declaring to be void or otherwise unenforceable, all or part of the contract;

(ii) make an order or determination (however described) amending or varying all or part of the contract.

8. Section 7(1) is to be taken as a statement that the Commonwealth legislation intends to cover the field so in relation to the regulation of independent contractors covered by the IC Act for the purposes of s 109 of the Commonwealth Constitution: see *New South Wales v Commonwealth* (2006) 229 CLR 1 at [370]. Subject to the express exception in s 7(2) of the IC Act, the provisions of Chapter 6 would be overridden by s 7(1)(b) and/or (c).

9. However, s 7(2) indicates that the exclusion in subsection (1) does not apply to certain State or Territory laws. Relevantly, s 7(2)(b)(i) has the effect that subsection (1) does not apply in relation to "Chapter 6 of the *Industrial Relations Act* 1996 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, a provision of Chapter 6)." In short, s 7(2)(b)(i) of the IC Act dictates that no inconsistency is intended to exist between the IC Act and Chapter 6 of the IR Act and the provisions of Chapter 6 can continue to apply to contractors also covered by the IC Act.

10. The question which arises here is whether the reference to Chapter 6 of the IR Act in s 7(2)(b)(i) of the IC Act extends to Chapter 6 as it exists from time to time or is limited to Chapter 6 as it existed when the IC Act was originally enacted. This is a not uncommon difficulty which arises when one piece of legislation refers to or incorporates a provision of another Act. The common law position was that, in the absence of an indication that a reference to another piece of legislation was intended to be ambulatory, the reference was taken to be to the legislation in the form it took at the date the referring legislation was made.

11. However, interpretation legislation in all jurisdictions has reversed the common law presumption. Relevantly, s 10 of the *Acts Interpretation Act* 1901 (Cth) provides as follows:

> ***10 References to amended or re-enacted Acts***
>
> *Where an Act contains a reference to a short title that is or was provided by law for the citation of another Act as originally enacted, or of another Act as amended, then:*
>
> *(a) the reference shall be construed as a reference to that other Act as originally enacted and as amended from time to time; and*
>
> *(b) where that other Act has been repealed and re-enacted, with or without modifications, the reference shall be construed as including a reference to the re-enacted Act as originally enacted and as amended from time to time; and*
>
> *(c) if a provision of the other Act is repealed and re-enacted (including where the other Act is repealed and re-enacted), with or without modifications, a reference to the repealed provision extends to any corresponding re-enacted provision.*

12. As such, the ordinary position dictated by s 10(a) is that a reference to another piece of legislation is to be construed as including a reference to the legislation as amended from time to time and not limited to the legislation as it existed at a particular point in time. The operation of s 10 of the *Acts Interpretation Act* is subject

to contrary intent in the IC Act: see s 2(2) of the *Acts Interpretation Act*. However, I do not believe that there is any reason to find contrary intention in the IC Act.

13. The purpose of s 7(2)(b)(i) of the IC Act is clearly to enable independent contractors in the transport industry to continue to have access to the provisions of Chapter 6 of the IR Act. I do not believe that there is any reason to read into the IC Act an intention that s 7(2)(b)(i) be limited to Chapter 6 as it existed at the time the IC Act was enacted so as to freeze the provisions of Chapter 6 as they existed in 2009. Such an interpretation would be inconvenient, have perverse consequences and be contrary to the apparent intent of preserving of the Chapter 6 jurisdiction notwithstanding the enactment of the IC Act.

14. By operation of s 7(2)(b)(i) of the IC Act, no inconsistency arises between the IC Act and Chapter 6 of the IR Act as amended from time to time. For these reasons, I do not believe that that the proposed amendment to Chapter 6 of the IR Act contained in the *Industrial Relations Amendment (Contracts of Carriage) Bill* 2018 gives rise to an inconsistency with the IC Act for the purposes of s 109 of the Commonwealth Constitution.

13 March 2018

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