Submission
No 2

INQUIRY INTO IMPACT OF TECHNOLOGICAL AND OTHER CHANGE ON THE FUTURE OF WORK AND WORKERS IN NEW SOUTH WALES

Organisation: Australian Lawyers Alliance

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Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Inquiry into the impact of technological and other change on the future of work and workers in New South Wales

Submission to NSW Parliament Legislative Council Select Committee on the Impact of technological change on the future of work and workers in New South Wales

24 July 2020

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the NSW Legislative Council Select Committee Inquiry into the impact of technological and other change on the future of work and workers in NSW.

2. The focus of this submission will be the increased reliance on the 'on-demand' or 'gig economy', enabling entities to exploit outdated legislative and regulatory frameworks. The ALA is concerned that this has a disproportionate impact on the most vulnerable members of the workforce who rely on insecure work arrangements and receive very low pay. The ALA is particularly concerned that many entities that rely on the 'gig economy' for their workforce classify their workers as independent contractors, which enables them to avoid many of their statutory obligations as employers.

3. In this submission, the ALA will respond to the following Terms of Reference:

   (g) the application of workplace laws and instruments to people working in the 'on-demand' or 'gig economy', including but not limited to:

   (i) the legal or work status of persons working for, or with, businesses using online platforms;

   (ii) the application of Commonwealth and New South Wales workplace laws and instruments to those persons, including superannuation and health and safety laws;

   (iii) whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations;

   (iv) the effectiveness of the enforcement of those laws and regulations.

   (l) whether, and what, legislative or other measures should be taken to:

   (i) reform workplace laws and instruments to account for the emergence of the 'on-demand' or 'gig economy' and the automation of work.

The legal or work status of persons working for, or with, businesses using on-demand platforms

4. The ALA is concerned that with the increased reliance on the 'on-demand' and 'gig economy', the legislative framework governing industrial laws and occupational health and safety has not sufficiently kept pace with this development and can easily be circumvented by entities to avoid their employer obligations. Many employment entitlements are determined by the existence of an employment relationship. This relationship is determined by the nature of contract and common law, and is generally not defined in statute. The increased use of independent contractors across many sectors has created an environment where these contractors are denied basic minimum labour standards. Of particular concern is that many of the people who work as independent contractors are often low paid and vulnerable in their work status.

5. According to the Productivity Commission, approximately 17% of workers are not covered by the protections of the *Fair Work Act 2009* (Cth) (FW Act) because they are either independent contractors or business owners.[2]

6. Many workers in the 'on-demand workforce' are classified as independent contractors by the on-demand businesses that engage them (for example, riders and drivers employed by Deliveroo, Uber Eats and Uber). The ALA submits that the relationship between the persons engaged by these on-demand companies should be classified as an employment relationship, affording these persons the protections and entitlements of employees.

7. Such a position would be consistent with a 2018 decision by the Fair Work Commission (FWC) in *Joshua Klooger v Foodora Australia Pty Ltd*.[3] The matter involved an application for unfair dismissal by a food delivery bicycle rider for Foodora. In deciding whether the applicant's dismissal was unfair, the FWC had to first decide whether it had jurisdiction to hear the application. The key question was whether the applicant was an employee or an independent contractor. The FWC considered that two factors gave substantial weight to the existence of an employment relationship between the applicant and Foodora:

[2] Productivity Commission Inquiry Report, Workplace Relations Framework, Volume 1, 30 November 2015 at page 107.

[3] [2018] FWC 6836.

- The contract contained many provisions that were indicative of an employment contract, despite there being an express provision stating that the applicant was an independent contractor.
- The rostering system was designed and controlled by Foodora. Specifically, there was no ability for the applicant to work outside the rostered hours, nor was there an ability for the applicant to choose his location.

The FWC concluded that from the overall picture obtained, the applicant was working in the respondent's business as part of that business, and was therefore an employee.

The application of Commonwealth and NSW workplace laws and instruments to persons working for, or with, businesses using on-demand platforms

8. The predominant test for determining whether a worker is covered by workplace laws including the FW Act, accident compensation, payroll tax and superannuation is the common law multi-factorial test set out by the High Court in *Hollis v Vabu*.[4] These factors are:

    (1) the employer's power of selection of his or her worker;
    (2) the payment of wages or other remuneration;
    (3) the employer's right to control the method of doing the work; and
    (4) the employer's right of suspension or dismissal.

9. In addition, s12 of the *Superannuation Guarantee (Administration) Act 1992* provides an extended definition that includes work performed by persons who would not otherwise come within the definition of an employee at common law. This includes a person who works under a contract that is wholly or principally for the labour of the person.[5]

10. The ALA submits that while some on-demand workers are covered by the expanded definition included in the *Superannuation Guarantee (Administration) Act 1992*, many are still excluded from the definition of 'employee'. For example, the legislation includes an 'income derived'

[4] *Hollis v Vabu Pty Ltd* [2001] HCA 4.

[5] Section 12(3), *Superannuation Guarantee (Administration) Act 1992* (Cth).

test deeming contractors to be included if at least 80% of their gross income is derived from the contract with the person engaging them. If a worker's on-demand job is a second income stream or the work is performed under a series of short-term contracts, many on-demand workers may not be caught by the 'income derived' test.

11. The FW Act does not contain an extended definition of the term 'employee' and relies on the common law definition. Workers who are not covered by the FW Act, including independent contractors, are not entitled to the same protections and entitlements as employees, including minimum rates of pay, annual leave, personal leave, unfair dismissal and collective bargaining rights. The Senate Education and Employment References Committee noted that for a large class of workers:

    'There is also no security of income, no insurance for the worker in case of accident, no superannuation, no personal, annual or paid leave of any description.'[6]

12. The ALA submits that a consequence of this denial of legislative safeguards for independent contractors and people working for 'on-demand' platforms is that there is an effective cost-shifting from the business to the taxpayer, for such things as medical expenses for work injuries and the need for reliance on the aged-pension due to lack of access to superannuation. In addition, the most marginalised workers are over-represented in precarious working arrangements such as in the 'gig economy', leaving them vulnerable to wage theft.

Using contracting or other arrangements to avoid the application of workplace laws and other statutory obligations

13. The ALA is concerned that the ability to shift costs, together with ambiguities in the legal test for establishing when a person is an employee, has resulted in some entities using contracting and other arrangements in order to avoid the application of workplace laws and other statutory obligations. The ALA is particularly concerned that businesses in some industries deliberately attempt to misclassify employees in order to avoid their employment obligations.

[6]<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report/c08, section 8.2>.

For example, a 2011 targeted audit of 102 employers in the cleaning services, hair and beauty and call-centre industries conducted by the Fair Work Ombudsman assessed 23% of enterprises as misclassifying employees.[7]

14. The ALA is concerned that this sort of sham contracting and misclassification of employees often occurs in sectors where there is a pronounced power difference between the worker and the employer; there is a general industry practice to use insecure forms of work; the business operates within a highly competitive industry; and the workers feel powerless to do anything about unfair practices due to the fear of losing their jobs or residential status.

The effectiveness of the enforcement of those laws and regulations

15. The common law test applied by the courts to distinguish independent contractors from employees is set out in the High Court decision *Hollis v Vabu* (see above). Unfortunately, the test is complex, carrying with it an uncertainty in application and an ability to be manipulated in order to achieve a desired outcome. Despite these flaws, the common law test for determining whether a worker is an employee pervades labour and industrial regulations in Australia, including the FW Act.

16. The ambiguity in the common law test can lead to disputes over the rights and entitlements of workers that turn on the application of a test, the results of which cannot be predicted with certainty. As noted above, the ALA is concerned that some on-demand businesses are attempting to exploit this uncertainty by wrongly classifying workers as independent contractors to avoid their employer obligations.

17. The common law test is also used to attribute vicarious liability. The doctrine of vicarious liability makes employers liable for the actions of their employees. However, persons who engage an independent contractor are not usually liable for the acts of the independent contractors they engage. This means that the risk and associated costs of performing work, such as obtaining public liability insurance, are borne by the independent contractor.

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[7] 2011, Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries, November.

18. The vulnerability of many on-demand workers often places them at a distinct disadvantage in accessing their workplace rights. For many of these workers there is little or no engagement with unions or forms of workforce organisation, with the on-demand business engaging the worker having significantly more resources than the worker. This imbalance of power may cause the worker to feel intimidated and may prevent them from questioning any inappropriate behaviours of businesses due to fear of retribution or being unable to find alternative work. Accordingly, workers may be reluctant to seek external information on entitlements.

19. In addition, on-demand economy workers face several barriers in initiating cases that test the legal status of their engagement. These include:

    - Inability to afford the costs of litigation;
    - Lack of awareness of what they are entitled to;
    - Fear of reprisals if they initiate proceedings;
    - The fact that the costs of pursuing unpaid entitlements arising from misclassification often exceed the amounts owed; and
    - The reality that businesses operating in the on-demand economy have a strong monetary incentive to avoid an adverse decision from a court or tribunal that might set a precedent. This means that they can and do spend large sums of money defending and settling litigation where they perceive they will be unsuccessful.

20. The main avenue through which workers in the on-demand economy seek to address exploitation or denial of workplace rights is through making a complaint to the Fair Work Ombudsman (FWO) or seeking the assistance of a union or community legal centre. The FWO has shown some willingness to bring test cases regarding on-demand workers. However, the FWO does not have the resources to address all of the legal and regulatory issues that arise from the on-demand economy.

Needed reform of workplace laws and instruments to account for the emergence of the 'on-demand' or 'gig economy' and the automation of work

21. The ALA submits that the definition of 'employee' should be extended by legislation to be broader than the present definition at common law. The ALA notes that in August 2018, the Supreme Court of California handed down a decision adopting the 'ABC test' for determining whether workers were independent contractors or employees. According to the 'ABC test', in order for a worker to be an independent contractor all three of the following criteria must be satisfied:

    a. The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
    b. The worker performs work that is outside the usual course of the hiring entity's business; and
    c. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

    If the worker does not satisfy all three criteria then he/she is deemed to be an employee.[8]

22. The ALA submits that the above test should be inserted into Australian industrial and other legislation that uses the common law definition of employee as a means of determining whether a worker is an employee or contractor. The ALA further submits that the above test should apply in addition to the common law definition, so that if a worker is considered an employee under either test they will be classified as an employee.

23. The ALA recommends that the NSW Government enact legislation to make businesses who hire workers vicariously liable for the conduct of those workers if the worker does not satisfy the ABC test.

24. The ALA also advises this inquiry to make a recommendation that the Federal Government amend the FW Act to include a provision deeming workers who do not satisfy the ABC test to be employees.

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[8] *Dynamex Operations West, Inc. v Superior Court of Los Angeles*

Conclusion

25. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission to the NSW Legislative Council Select Committee Inquiry into the impact of technological and other change on the future of work and workers in NSW. The ALA would be available to further assist the Committee in its consideration of these issues.

Joshua Dale

NSW President
Australian Lawyers Alliance