Submission No 26

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

Organisation: Department of Premier and Cabinet Employee Relations

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Employee Relations

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

Introduction

1. On 24 March 2020, the NSW Legislative Council resolved to establish a Select Committee to conduct an Inquiry into the impact of technological and other change on the future of work and workers in New South Wales

2. The full range of matters canvassed in the terms of reference are beyond the remit of NSW Employee Relations, so this submission focuses on what might be termed workplace relations issues. Specifically, these terms are:

   1(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,

   (v) regulatory systems in other Australian jurisdictions and in other countries, including how jurisdictions regulate the on-demand workforce and are adapting to the automation of work.

   1(h): whether current laws and workplace protections are fit for purpose in the 21st century, including workplace surveillance laws and provisions dealing with workplace change obligations and consequences.

Legal Status (ToR 1(g)(i) and (ii))

3. The legal status of workers in Australian jurisdictions is determined by their status as workers. Workers may either be employees, in a contract of service (written or implied), or alternatively, independent contractors, in a contract for services (more often written than implied).

4. Employees have access to workplace regulation such as the *Fair Work Act 2009* (Cth), the *Industrial Relations Act 1996* (NSW), and the *Long Service Leave Act 1955* (NSW), amongst others, Independent contractors are subject to the *Independent Contractors Act 2006* (Cth), as well as commercial law such as *Competition and Consumer Act 2010* (Cth).

5. Following the referral by the NSW Government of powers to make laws regulating private sector industrial relations in 2009[1], NSW private sector employees are subject to the provisions of the *Fair Work Act 2009*, and awards and agreements made pursuant to that Act.

6. Establishment of worker and therefore legal status is a matter for Courts and tribunals, who perform this task by analysing the totality of the work relationship in terms of common law concepts of employment developed over many decades[2]. The Federal Court recently described this task as follows:

> *'There is no single standard for whether an employment relationship exists…It is instead necessary to undertake what is commonly referred to as a "multi-factor test" or a "multi-factorial assessment", which requires the consideration and synthesis of all relevant indicia…This does not entail a "mechanical exercise of running through items on a check list… Rather, "the totality of the relationship between the parties" is relevant.*[3]

7. The Court went on to list the relevant indicia as follows:

> *'The terms of the contract; the intention of the parties; whether tax is deducted; whether sub-contracting is permitted; whether uniforms are worn; whether tools are supplied; whether holidays permitted; the extent of control of, or the right to control,*

[1] Per the *Industrial Relations (Commonwealth Powers) Act 2009* (NSW)
[2] See, for example *Zuijs v Wirth Bros. Pty. Ltd* (1955) 93 CLR 561; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu* (2001) 207 CLR 21; *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWAFB 8307 (2 December 2011) etc
[3] *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 (16 July 2020) per Anderson J at [179], citations omitted

the putative employee whether actual or de jure; whether wages are paid or instead whether there exists a commission structure; what is disclosed in the tax returns; whether one party "represents" the other; for the benefit of whom does the goodwill in the business inure; how "business-like" is the alleged business of the putative employee — are there systems, manuals and invoices; and so on ...[4]

8. The result of this process is that:

'After examining all relevant considerations, the broad fundamental distinction, as traditionally framed, is between a person employed under a contract of service, who serves the employer's business, and a contractor engaged under a contract for services, who conducts a trade or business of his or her own..[5]

9. Each such case will turn on its relevant facts, so that a particular finding in one case may or may not be relevant to another.

10. Gig economy work arrangements are considered to **not** be employee-employer arrangements, but to instead involve a principal-contractor arrangement, with individual workers having the status of independent contractors.

11. The Fair Work Commission has examined platform work arrangements, applying the established multifactor test to establish worker status.

12. To date, six such cases have been decided by the Fair Work Commission, five involving Uber rideshare or delivery drivers, and one involving a Foodora delivery rider.[6] All of the applicants were former drivers/riders. The most recent case was determined by a Full Bench of the Fair Work Commission. Broadly speaking, in each case, the applicant sought a determination that they were employees, in a contract of service.

[4] Ibid at [180]
[5] Ibid at [181]
[6] *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* [2019] FWC 5008; *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698; *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836

13. In each of the Uber cases, the Commission found that the applicants were independent contractors rather than employees.

14. However in the Foodora case, the Commission found that the applicant was an employee, and that he had been unfairly dismissed by Foodora. [7]

15. Noting the outcomes of the Uber cases, the Fair Work Ombudsman conducted an investigation into Uber's arrangements with its drivers in 2019. The conclusion reached by the FWO was that the parties were **not** in an employment relationship, and as a consequence, the FWO would not take compliance action in relation to Uber's arrangements with its drivers.[8]

Regulatory Systems – Australia (TOR 1(g)(v))

16. As noted above, gig workers, as independent contractors, are regulated by means of the *Independent Contractors Act 2006*, and other relevant legislation such as the *Competition and Consumer Act 2010*.

17. It should also be noted that the *Independent Contractors Act 2006* is a Commonwealth statute intended to cover the field.[9] Consequently, any State laws seeking to regulate workplace arrangements for independent contractors, and by inference gig economy workers, would be vulnerable to constitutional challenge.

18. The Report of the Inquiry into the Victorian On-Demand Workforce makes several recommendations for the regulation of gig workers, including legislative changes to the *Fair Work Act* to codify and clarify the test for work status. This would remove the need for the current common law test. The Report acknowledges the primacy of Commonwealth legislation, and specifically recommends that:

    '…the Commonwealth Government, in collaboration with state governments and other key stakeholders, lead the delivery of the recommendations in this report regarding the national workplace system.'[10]

19. The Victorian Government has yet to announce whether or which of the Report's recommendations will be implemented.

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[7] *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 (16 November 2018)
[8] https://www.fairwork.gov.au/about-us/news-and-media-releases/2019-media-releases/june-2019/20190607-uber-media-release
[9] See *Independent Contractors' Act 2006* s7(1)
[10] Report, Inquiry into the Victorian On-Demand Workforce, Chapter 7

Are Current laws fit for purpose? (TOR 1(h))

20. Whether or not current laws are fit for purpose remains a matter for discussion.

21. 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.

22. To this end, the NSW Government notes that any change to the current legislative framework is not solely a matter for the NSW Government and as such would require extensive consultation with the Commonwealth.

23. In any event, unilateral regulation of gig economy workers by individual States does not seem to be a sensible policy option. Providing a single national industrial relations system for national enterprises, and departing from a variety of different State regulatory regimes, was and still remains one of the key aims of referring industrial relations powers to the Commonwealth. To now seek to do otherwise would obviously undermine that aim.

24. As such, regulation of gig economy workers is clearly a matter for national action, as has indeed been recommended by the recent Inquiry into the Victorian On-Demand Economy.[11]

25. That said, the NSW Government reaffirms its commitment to ensuring that all workers are fairly treated and free from exploitation. That should naturally apply to workers in the gig economy.

26. As an active partner in the national Fair Work System, the NSW Government will continue to monitor this issue and consult with the Commonwealth and other States to develop a national approach to regulating the gig economy.

[11] See para 18 above