

# Submission to the Department of Jobs, Precincts and Regions

## Inquiry into the Victorian On-Demand Workforce

**To: Natalie James, Chair**

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### Contact:

Workplace Relations Section, Legal Policy

T: (03) 9607 9311

E: [workplacerelements@liv.asn.au](mailto:workplacerelements@liv.asn.au)

W: [www.liv.asn.au](http://www.liv.asn.au)



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# 1. INTRODUCTION

1.1. The Law Institute of Victoria ('LIV') welcomes the opportunity to provide a submission to the inquiry into the Victorian on-demand workforce.

## NATURE OF THE GIG ECONOMY:

1.2. The on-demand workforce, or 'gig economy', refers to a market where independent workers are contracted with businesses for short-term engagements.<sup>1</sup> These engagements can be observed in many industries,<sup>2</sup> and involve companies which have become household names, such as Uber, Airbnb, Airtasker, Deliveroo and Foodora.

1.3. The LIV submits that the expansion of business models built around flexible work on online platforms provide new opportunities for entrepreneurs, workers and consumers alike. The 'bidding-style' process, through which tasks are offered, assigned and performed, allows for real-time and mutual-rating of the performance of service providers, and the reliability of users.

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<sup>1</sup> Parliament of Victoria, Department of Parliamentary Services, Igor Dosen and Michael Graham, 'Labour Rights in the Gig Economy: An Explainer' *Research Note* No.7 (June 2018) at 2; United Kingdom, Department of Business, Energy and Industrial Strategy, *The Characteristics of Those in the Gig Economy: Final Report* (February 2018) at 4.

<sup>2</sup> Parliament of Australia, Senate Select Committee on the Future of Work and Workers, *Hope is Not a Strategy – Our Shared Responsibility for the Future of Work and Workers* (September 2018) at 4.59.

1.4. Arguably, the gig economy is a convergence of different overlapping trends:

- the increase in digitisation, especially the use of smart-phones and tablets, and the increasing dependence on them, for accessing information, comparisons in price, purchasing, booking services, searching for jobs and communication;<sup>3</sup>
- an extension of tele-working practices. This has made it increasingly normal for people to work outside the traditional 9am - 5pm working day in a formally-designed workplace;<sup>4</sup>
- the growth in self-employment in service industries;<sup>5</sup> and
- the increase in unpaid labour on online platforms, such as Wikipedia, social media platforms, and online volunteering sites, blurring the line between work and leisure.<sup>6</sup>

1.5. However, these trends may also create confusion as to the rights and entitlements of workers, adding to the potential for exploitation. The LIV is concerned about those working in the gig economy, in terms of their risk of job precariousness due to unstable working hours and income, lack of coverage of employment rights, uncertainty around superannuation, and lack of access to career development and training.

1.6. The LIV submits that the on-demand workforce is made up of, primarily, vulnerable workers (for example low-skilled workers, migrant workers, or those otherwise unable to secure work in the 'traditional' labour market). As such, legislative policy should reflect the need to protect the working conditions of those people. However, that goal needs to be weighed against the economic and social benefits of many of the services provided through the on-demand workforce, and the need for regulation to ensure the economic viability of those businesses in Australia. For example, Uber provides a number of social benefits with which the taxi industry has traditionally struggled. Because of the user-rating and route-tracking system (which, in turn, creates accountability for both the driver and user which does not arise when hiring a taxi off the street), Uber may provide greater personal safety for both drivers and passengers.

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<sup>3</sup> European Political Strategy Centre, *The Future of Work: Skills and Resilience for a World of Change* at 4-7 (10 June 2016).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

It also enables users to easily ensure drivers are taking the best available route, using the route identification system in the app.

- 1.7. Australia has recently seen the collapse of Foodora's business, following a finding by the Fair Work Commission that suggested all of its workers were employees.<sup>7</sup> This suggests that improvement to the current regulatory framework may be necessary to ensure Australians retain the social and economic benefits which on-demand services offer.

## **FOCUS OF SUBMISSION:**

- 1.8. This submission, informed by the LIV's Workplace Relations Section, will focus on the following Terms of Reference:

- the capacity of existing legal and regulatory frameworks to protect the rights of vulnerable workers;
- regulation in other countries, including how other jurisdictions regulate the on-demand workforce; and
- the limitations of Victoria's legislative powers over industrial relations.

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<sup>7</sup> *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

## 2. EXISTING LEGAL AND REGULATORY FRAMEWORKS

### THE FAIR WORK ACT:

- 2.1. In *NSW v Commonwealth* ('*WorkChoices Case*') (2006),<sup>8</sup> the High Court reasoned that s 51(xx) of the *Australian Constitution*, the 'corporations power', enabled the Commonwealth to enact a comprehensive regime of workplace relations law. This substantially replaced the traditional regime dependent on s 51(xxxv): the 'conciliation and arbitration power'. Since then, the Commonwealth has secured agreement from Victoria to extend coverage of its industrial relations framework,<sup>9</sup> that being the *Fair Work Act 2009* (Cth) (the '**FW Act**').
- 2.2. The FW Act provides for minimum terms and conditions of employment. It sets out rights and responsibilities of employees and employers, provides for compliance with and enforcement of the Act, and provides for the administration of the Act by establishing the Fair Work Commission and the Fair Work Ombudsman. In addition, it gives employees and employers a guaranteed safety net of fair, relevant and enforceable minimum standards and conditions through the National Employment Standards,<sup>10</sup> Modern Awards,<sup>11</sup> and National Minimum Wage orders.<sup>12</sup>
- 2.3. The National Employment Standards are mandatory in compliance for all Australian businesses, regardless of industry, size or circumstance. The purpose of the standards is to provide protection to all people in Australia, and cover the following areas: hours of work, right to request flexible working arrangements, parental leave, personal / carer and compassionate leave (including family and domestic violence leave), community

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<sup>8</sup> 229 CLR 1.

<sup>9</sup> *Fair Work (Commonwealth Powers) Act 2009* (Vic).

<sup>10</sup> Above n 8 Part 2-2.

<sup>11</sup> *Ibid* s 134.

<sup>12</sup> *Ibid* s 287.

service leave, annual leave, long service leave, public holidays, notice of termination and redundancy pay, and fair work statement.

- 2.4. Modern Awards are industry or occupation-based. They set out the minimum wages and conditions an employee is entitled to and will define to whom the relevant Modern Award covers.
- 2.5. However, these entitlements to National Employment Standards and Modern Award conditions apply only to “employees”. The FW Act is divided into Chapters and then Parts. At the beginning of each Part are definitions of ‘employee’ for use in that Part. There are two standard definitions used in different Parts:
  - 1) ‘employee’ in this Part has their ‘ordinary meanings, that is, their meanings at common law’; or
  - 2) ‘national system employee’, which refers to those employees that, for constitutional reasons, are regulated by the FW Act.
- 2.6. All private sector employers in Victoria are national system employers, as defined in s 14 of the FW Act, and extended by s 30D of the FW Act as a result of Victoria’s referral of powers to the Commonwealth.<sup>13</sup>
- 2.7. The FW Act was written before the popularisation of the gig economy and, as of yet, the Commonwealth has not explicitly legislated with regard to it. At the core of gig economy work is the idea that workers are not employees, they are instead independent contractors. The contentious legal issue is primarily whether on-demand workers constitute “employees” under the FW Act. This is an interpretative task which has been undertaken by the Courts and Tribunals.

## THE EMPLOYMENT INDICIA:

- 2.8. The dividing line between employment and independent contract has been described as “ill-defined”.<sup>14</sup> Ultimately, the analysis turns on the terms of the contract and the totality of the relationship. In *Hollis v Vabu* (2001),<sup>15</sup> the High Court set a test to determine whether an individual is an employee or an independent contractor. In this

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<sup>13</sup> Above n 9.

<sup>14</sup> *Abdalla v Viewdaze Pty Ltd* [2003] AIRC 504 at 49; *Rabba v PeleGuy Pty Ltd* [2013] FWC 70 at 92.

<sup>15</sup> 207 CLR 21.

case, Vabu traded under the business name of 'Crisis Couriers' – a business delivering parcels and documents. The business had 20-30 bicycle and motorcycle couriers. Hollis, the applicant, was injured by a courier. The contentious issue was whether the courier was an employee of Vabu, who would then be held vicariously liable for damages to Hollis. The following factors were found to evidence an employment relationship:

- **control:** Vabu set the rates of remuneration of its bicycle couriers, there was no scope for negotiation. Vabu allocated the work with no scope for bidding by individual riders;
- **equipment:** Vabu provided couriers with equipment, which remained its property;
- **uniform:** Vabu provided the couriers with a uniform to wear whilst delivering parcels and documents;
- **tax:** insurance and deductions from pay were imposed by Vabu on the bicycle couriers.

2.9. The common law approach, however, may contribute to uncertainty for on-demand workers and for businesses that wish to engage only on the basis of independent contract and not on the basis of employment. This is because the nature of the test in *Vabu* is such that it does not admit a clear answer in every case. What follows from an objective analysis of the work relationship is that it cannot be changed simply because the parties agree to label it differently.

2.10. One particular area of uncertainty that has arisen is in regard to unfair dismissals. Section 382(a) of the FW Act establishes when a person is protected from unfair dismissal, if, at that time, "the person is an employee who has completed a period of employment with his or her employer of at least the minimum period". Section 380 of the Act provides for the meanings of employee for this Part, referring to the terminology of a "national system employee". In *Joshua Klooger v Foodora Australia Pty Ltd* [2018],<sup>16</sup> the Fair Work Commission reasoned that the applicant, a food delivery rider contracted by Foodora, was an employee, and thus protected from unfair dismissal. The Commission, applying the test set in *Vabu*, found that:

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<sup>16</sup> FWC 6836.



- the delivery riders had to identify as being from Foodora, with cl 4 of the service contract establishing an expectation that they dress in Foodora brand attire, and utilise equipment displaying the Foodora brand;
- Foodora had considerable capacity to control the manner in which the delivery rider worked; and
- it was Foodora's reputation which suffered, if the riders did not perform to customer expectations.

2.11. However, this decision contrasts with that of *Kaseris v Rasier Pacific V.O.F* [2017] ('**Kaseris**').<sup>17</sup> In this case, the applicant launched an unfair dismissal application against Uber. In response, Uber objected on jurisdictional grounds, arguing that the applicant was not an employee and, thus, not protected by the FW Act. The Fair Work Commission reasoned that there was no employment relationship between the applicant and Uber. Deputy President Gostencnik stated that a contract of employment is a 'work-wages bargain', where one side is obliged to perform work that may be demanded and the other side is obliged to pay for such work.

2.12. Using the test set out in *Vabu*, an independent contractor relationship was found to exist because:

- **control:** the applicant had almost complete control over the way he conducted his services. Although Uber had some control in increasing the rate for fare charges, and requiring the applicant to comply with service standards, there was no real obligation on the applicant to attend and perform work;
- **equipment:** the applicant provided his own equipment for the service, being the car, smart phone and wireless plan;
- **uniform:** the applicant was not required to display any of Uber's names, logos or colours; and
- **tax:** the applicant was not subject to PAYG tax, and Uber did not deal with the ATO on behalf of the plaintiff.

2.13. A similar decision was made in *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] ('**Janaka**').<sup>18</sup> In this case, Commissioner Wilson found against the applicant as an

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<sup>17</sup> FWC 6610.

<sup>18</sup> FWC 2579.

employee of Uber for the purposes of s 380 of the FW Act, finding that the matter did not contain the indicia of an employment relationship.

2.14. The decisions in *Kaseris* and *Janaka* raise a fundamental question: is the multifactorial test from *Vabu* inadequate for the gig economy, and in need of legislative intervention to provide certainty for workers and businesses?

2.15. In the British case of *Uber BV v Aslam* [2018],<sup>19</sup> the plaintiffs, Aslam and Farrar, worked as drivers for Uber. They claimed that they were entitled to be paid the minimum wage, under the *National Minimum Wage Act 1998*, and receive paid annual leave, under the *Working Time Regulations 1998*. The respondent, Uber, submitted that the plaintiffs were self-employed, independent contractors and, as such, were not owed work or employee obligations. Uber's employment contracts described the plaintiffs as "partners" and stated that "nothing shall create an employment relationship between Uber and the partner". Similarly, in *Kaseris*, the contract between Uber and the plaintiff stated that the "Agreement is not an employment agreement, nor does it create an employment relationship".<sup>20</sup> However, the judicial findings in *Uber BV* contrasts with those found by Deputy President Gostencnik in *Kaseris*. Although Uber's operations in the UK are similar to those in Australia, the relevant legislation is "materially different".<sup>21</sup> The definition of "worker" under the *Employment Rights Act 1996* (UK) is broader than the Australian common law definition of "employee", covering independent contractors.

2.16. Further, in April 2018, the Supreme Court of California set out new criteria which an employer must meet in order to justify classifying a worker as an independent contractor.<sup>22</sup> That is: 1) the worker must be free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the work and in fact; 2) that the worker performs work that is outside the usual course of the hiring entity's business; and 3) that 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. The commentary on this decision suggests that it

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<sup>19</sup> EWCA Civ 2748.

<sup>20</sup> *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 at 19.

<sup>21</sup> *Ibid* at 63-65.

<sup>22</sup> *Dynamex Operations West, Inc. v Supreme Court of Los Angeles*, No.S222732 (Cal. Sup. Ct. Apr. 20, 2018).

could impact the viability of gig economy businesses, which may be forced to provide workers with rights they are entitled to.

## 3. OVERSEAS JURISDICTIONS

### VICTORIA'S LEGISLATIVE RESTRICTIONS:

3.1. It is important to note that Victoria's ability to legislate on industrial relations is limited for two reasons. First, due to Victoria's referral of legislative power in regard to industrial relations,<sup>23</sup> and second, s 109 of the *Constitution*, which states that:

“when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”.

3.2. By “covering the field”,<sup>24</sup> the FW Act operates to the exclusion of Victoria's industrial laws. As such, an exploration of laws and regulations in overseas jurisdictions, many with differing legal systems to Victoria, may prove unhelpful.

### CANADA:

3.3. In determining the nature of the relationship, the key question is: ‘whether the person is engaged to carry out services as a person in business on his or her own account, or as an employee’.<sup>25</sup> A two-step approach is used to answer this question. Firstly, the parties' intentions in entering the contract are established. Secondly, the practical nature of the working relationship is established. Matters which are relevant to this question are similar to the *Vabu* test:

- the level of control the payer has over the activities of the worker;

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<sup>23</sup> Above n 9.

<sup>24</sup> *Jemena Asset Management (3) Pty Ltd & Ors v Coinvest Limited* [2011] HCA 33 at 40 (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

<sup>25</sup> Above n 2 at 15.

- whether the tools and equipment are provided by the worker or payer;
- whether the worker can subcontract the work or hire assistants;
- the degree of financial risk the worker takes;
- the degree of responsibility for investment and management the worker holds;
- and
- the worker's opportunity for profit.

3.4. In January 2018, a matter was brought before the Superior Court of Justice, Ontario.<sup>26</sup> The plaintiff there sought to bring a class action against Uber, seeking a ruling that drivers of Uber are employees and as such are entitled to relevant employment law rights. The case was primarily concerned with how the dispute should be handled in arbitration. The case is relevant in that the Court stated that the working relationship between Uber and its drivers could be an employment relationship. Similarly, it could be an independent contractor relationship. Here, the Court confirmed that a finding on that issue should be conducted by a 'fact-based determination' of the actual working relationship, as opposed to the terms of the written agreement between the parties.<sup>27</sup>

## NEW ZEALAND:

3.5. Similar to Australia, New Zealand operates an approach where there are two classifications of work: employee work and independent contractor work. Employees and contractors are defined according to the *Employment Relations Act 2000* (NZ). However, the definitions are subject to judicial reasoning.<sup>28</sup> Recently, the government stated their intention to introduce statutory support and legal rights for 'dependent contractors' who are effectively workers under the control of an employer, but who do not receive the legal protections that are currently provided to employees under the law.<sup>29</sup>

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<sup>26</sup> *Heller v Uber Technologies Inc.*, 2018 ONSC 718 (CanLII).

<sup>27</sup> Above n 2 at 15.

<sup>28</sup> *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132.

<sup>29</sup> Above n 2 at 14.

## UNITED KINGDOM:

- 3.6. In 2017, the government of the United Kingdom introduced a concept of ‘dependent contractors’, which provides certain employment-type benefits to workers which might otherwise be considered independent contractors at common law.<sup>30</sup> However, as discussed, given the distinction between independent contractors and employees is already cause for great confusion in Australia, it is possible that introducing a third category would only add to this uncertainty. As noted, the Fair Work Commission has confirmed that Foodora is an employer of its bicycle couriers,<sup>31</sup> however it has twice confirmed that Uber is not the employer of its drivers.<sup>32</sup> This may add to the confusion for other participants in the on-demand industry, particularly those who provide for services which are not immediately comparable to those provided by Uber and Foodora (such as Air-Tasker), as to the status of their workers. Further, Uber has confirmed that the confusion as to the status of its workers is a disincentive for it to offer “training, as well as other perks and benefits” to its drivers, and that it supports the introduction of laws that would give it more freedom to provide safety nets and other benefits.<sup>33</sup>
- 3.7. Therefore, any protections which are introduced should apply to a clearly defined set of workers, for example, work performed in circumstances where a third party (the Principal) facilitates the engagement of a service-provider by an end-user, including by providing a digital platform to assist the end-user to contact and engage the service-provider.
- 3.8. One protection which is already offered by some organisations in the transport (courier) industry, and would be a beneficial entitlement for workers in the on-demand industry, is to offer independent contractors a “safety-net” entitlement of a minimum rate of pay

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<sup>30</sup> Ibid at 13.

<sup>31</sup> *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

<sup>32</sup> *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610.

<sup>33</sup> Uber, Submission to Senate Select Committee on the Future of Work and the Worker (2018).

which applies to work performed. For workers in the on-demand industry, this would mean that if they “log on” to a platform and are available to perform work for a minimum period of time, but do not earn at least a specified minimum amount, the Principal would be required to “top-up” the worker’s remuneration for that period of time.

## 4. CONCLUSION

4.1. In addition to these comments, the LIV notes the recommendations made by the final report of the Victorian inquiry into the labour hire industry and insecure work:

- changes to Victorian government procurement practices,
- advocate for clarification in the *Independent Contractors Act 2006* (Cth), and
- recommend legislative reform at the federal level.

4.2. Should you have any queries about this memo, please contact Jacquie Goodwin, Policy Lawyer to the Workplace Relations Section (03 9607 9324 or [JGoodwin@liv.asn.au](mailto:JGoodwin@liv.asn.au)), or Alexander Laurence, Paralegal to the Workplace Relations Section (03 9607 9565 or [ALaurence@liv.asn.au](mailto:ALaurence@liv.asn.au)).

Yours sincerely,

A handwritten signature in blue ink that reads "Stuart Webb".

Stuart Webb

President

Law Institute of Victoria