

Uber-confusing!

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Gig-economy

- Trend of temporary and freelance work
- Examples: Uber, Uber Eats, Ola, Deliveroo, Foodora
- Employee or contractor?
- Implications for employers who misclassify; and
- Workers who are mistreated



Australian position: FWO's investigation

- FWO's investigation - commenced June 2017
- Review of contracts, log records, interviews, ABN documents, payment statements, banking records, pricing schedules
- Finding (limited to Uber):
 - Relationship between Uber and drivers is not an employment relationship:
 - No obligation to perform work
 - No requirement to work at certain days or times

Employee v Contractor – Leading Cases

- *Hollis v Vabu Pty Ltd* [2001] HCA 44
 - Multi-factor test
 - ‘Totality’ of relationship (bicycle courier an employee)
 - No special skills or qualifications required for the job
 - No prospect of freelancing
 - Worker could not refuse work
 - No scope to negotiate rates
 - Worker required to wear company branded uniform
 - Hirer provided and maintained equipment
 - Worker had little control over how he performed his work or the hours/conditions of the job
- *Stevens v Brodribb Sawmilling Company* (1986) 160 CLR 16
 - Multi-factor test
 - degree of control over the workers of importance

Employee v Contractor

- Multi-factor test

Indicia	Employee	Contractor
Hirer exercises control over worker	✓	
Worker 'integrated' into hirer's organisation	✓	
Worker required to wear uniform	✓	
Worker supplies own tools		✓
Worker paid per task, rather than wages based on time worked		✓
Worker bears risk of loss and can make profit from the work		✓
Worker free to work for others		✓
Worker can subcontract the work or delegate to others		✓
Hirer deducts tax from worker's pay	✓	
Worker responsible for insuring against work-related injury		✓
Worker receives paid annual/personal leave	✓	
Contract describes the worker as a contractor		✓

Common Law Position

- *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610
 - Uber driver claimed unfair dismissal following poor passenger ratings
 - Driver - a contractor
 - Service agreement - Uber was not a party to the 'direct business relationship'
 - obligated to provide access to the App and remittance of the fares
 - ? Need for evolution of current indicia
- March 2017 – Uber makes modifications to its app relevant to control (2 min trigger) if the driver failed to accept trips on 3 consecutive occasions

Common Law Position

- *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579
 - Uber driver held to be contractor because:
 - Could choose own start/finish times
 - Not required to wear uniform
 - Did not display company's branding
 - Provided own vehicle
 - Could work for others
 - Had irregular remuneration

Common Law Position

- *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* [2019] FWC 5008
 - Unfair dismissal by Husband and wife driving team – suspended then banned due to vehicle registration requirements
 - Paid \$19,000 over 18 months, but paid \$9,000 in work expenses
 - Driver cancellations of delivery requests
 - Capability to ‘log off’ the App and accept varying number of requests
 - Contractors because:
 - Drivers never obligated to provide any service (i.e. could choose whether or not to work)
 - Drivers had the ability to reject jobs
 - TWU appeal in play

Common Law Position

- *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836
 - Rider engaged under contract titled “INDEPENDENT CONTRACTOR AGREEMENT”
 - Change to Foodora App in 2017 - worker could not choose when to work
 - Employment found in light of the “overall picture”, in particular:
 - contract indicative of an employment relationship
 - rostered hours and specified location of his work
 - Worker did not advertise his own services
 - Worker did not make a substantial investment in the capital equipment used to perform the work
 - Worker used Foodora’s branded attire and equipment
- TWU support for rider against Deliveroo as a casual not contractor (*Rhind v Deliveroo Australia Pty Ltd & Anor* CAG 38/2019)

Federal Government's response to emergence of gig-economy

- Select Committee of the Future of Work and Workers
- 2018 Report (released before FWO's finding):
 - Rejected assertion that gig workers are truly contractors
 - Recommended *Fair Work Act 2009* (Cth) be amended to “*broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system.*”
- ALP and unions set to increase pressure to change *Fair Work Act 2009* (Cth), but Liberal Government unlikely to support change

Queensland Government's intervention

- June 2019 plan to amend the State's *Workers' Compensation and Rehabilitation Act 2003* announced
- Force gig economy operators to pay workers' compensation premiums
- 24 written submissions to proposal
- Proposal not finalised



Victorian Government's Response

- Amendments to the *Owner Drivers and Forestry Contractors Act 2005* were passed on 12 September 2019 extending definition of 'freight brokers' to include contractors through 3rd party platforms
- From May 2020, Victorian gig economy couriers (i.e. Uber Eats and Deliveroo) will be able to resolve disputes through the Small Business Commission
- Note: changes only apply to owner-operators using their own vehicles to deliver goods, meaning Uber is excluded

Overseas positions

- No consistency
- UK
 - 2016 finding drivers are employees – upheld in 2018 – but Uber appealing again
- US
 - Californian decision – driver an employee under State legislation
 - Philadelphian decision – drivers are contractors under Federal legislation
 - March 2019 report Uber settled class action lawsuit for \$20 million
- France
 - Court of Appeal held drivers considered employees - Uber appealing this decision in the Cour de Cassation (highest Court of Appeal)
 - Government continues to suggest it may regulate the gig-economy



Class actions alleging sham contracting arrangements

- 4 class actions on foot pursuant to the FW Act
- *Appco* (fundraising), *Aida* and *Credico* (sales & marketing led by NUW)
- Telecommunications workers against Tandem - \$400m class action

Conclusion

- Workers now looking for greater protections, in addition to the right to work when and how they want
- FWO's decision and decisions of the FWC will continue to be challenged
- Possible options for change?

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