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6 April 2021

Senator Tony Sheldon
Chair, Select Committee on Job Security

Senator the Hon Matt Canavan
Deputy Chair, Select Committee on Job Security

Department of the Senate
PO Box 6100
Canberra ACT 2600

By email: *jobsecurity.sen@aph.gov.au*

Dear Chair,

Submission to the Select Committee on Job Security

The New South Wales Society of Labor Lawyers ('the Society') welcomes the opportunity to make a submission to the Select Committee on Job Security ('the Committee').

By way of background, the Society, originally established in 1977, aims to promote changes in the substantive and procedural law, the administration of justice, the legal profession, legal services, legal aid and legal education to help bring about a more just and equitable society. The Society provides a meeting ground for people involved in the law who believe in Labor principles of fairness, social justice, equal opportunity, compassion and community. The Society's membership and supporters include barristers, solicitors and trade union industrial officers.

The Society submits in relation to term of reference (e) which asks for submissions on the effectiveness, application and enforcement of existing laws, regulations, the industrial relations system and other relevant policies in regulating insecure work. The Society's submits in relation to the effectiveness of the industrial relations system at regulating the 'gig' or 'on-demand' economy.

In summary, the Society recommends that:

1. The Committee consider conferring entitlements commensurate to other Australian workers on Gig Workers (later defined), either by introducing a statutory definition of 'employee' in the *Fair Work Act 2009* (Cth) that includes the circumstances of Gig Workers or through the enactment of *sui generis* legislation; and

2. The Committee consider amending s 12 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) ('SG Act') to include Gig Workers (later defined) as part of the statute's extended definition of 'employee', so that Gig Companies (later defined) will be obliged to pay the superannuation guarantee on their behalf.

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Background Context

The terms 'gig economy' or 'on-demand economy' generally refer to temporary, fixed term and/or freelance work that has resulted from the uptake or disruption of established industries by technology firms and platforms. Gig economy companies such as Uber, Foodora, and Deliveroo have been prominent players in the ride sharing and food delivery industries, whilst platforms such as Airtasker allow for virtually any task to be advertised and connected with a qualified individual for performance in exchange for payment.

These submissions primarily refer to ride sharing drivers and food delivery drivers (henceforth, 'Gig Workers') and the companies operating these technology platforms (henceforth, 'Gig Companies'), these being the two industries that have been dominant in the gig economy. We regularly refer to Uber as a case study, given it operates in both industries. However, the recommendations in this submission and much of the legal development to date extend to a range of Gig Workers and Companies. The extent to which legal developments apply to these is largely dependent on the services in question and the terms and conditions of any contract entered into between the worker and the company. Generally speaking, many Gig Companies allege that Gig Workers are not employees as the term is generally understood under Australian law, and can point to specifically-worded terms of engagement with Gig Workers supporting this allegation.

With the material effects of the COVID-19 pandemic on the labour market, there has been a significant upturn in both the rate of unemployment and underemployment (that is, individuals working less hours than what they would prefer). This shock to the labour market has seen large numbers of individuals enter the gig economy in search of work[1]. This has seen many individuals enter the ride sharing or food delivery industries. In particular, vulnerable workers such as international students or those in casual arrangements have been more inclined to enter the gig economy. This Committee's deliberation is therefore timely, as the issues arising from the gig economy will become more pronounced in coming years.

The Current Legal Status of Gig Workers

Before we set out our recommendations, it is useful to consider the current legal status of Gig Workers. This can be summarised by reference to the following recent Australian cases which have considered the position of Gig Workers under Australian law.

The first case is *Kaseris v Rasier Pacific V.O.F.*[2]. In that case, the applicant, Mr Michail Kaseris applied for an unfair dismissal remedy under the *Fair Work Act 2009* (Cth) ('FW Act') against Uber's technology provider, Rasier Pacific. Deputy President Gostencnik applied the multi-factorial approach undertaken in numerous preceding cases[3] to determine whether Mr Kaseris is an employee or independent contractor. Relevantly, in finding that Mr Kaseris was an independent contractor, the Deputy President said[4]:

> *"The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new*

[1] Daniel Hurst, 'Casual and part-time jobs at record levels after Australia's Covid recession, study finds', *The Guardian*, 30 December 2020.
[2] *Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610.
[3] At [46], referring to the comprehensive list of criteria in *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWAFB 8307.
[4] Kaseris v Rasier Pacific V.O.F. [2017] FWC 6610 [66].

> *"gig" or "sharing" economy.* ***It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances****. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy.* ***Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy****.* ***But until then, the traditional available tests of employment will continue to be applied****."*
>
> [emphasis added]

Similarly, the status of a Gig Worker was considered in *Gupta v Portier Pacific Pty Ltd and Uber Australia Pty Ltd*[5]. This case concerned an Uber Eats driver, Ms Amita Gupta, who brought a claim against Portier Pacific Pty Ltd ('Portier') and Uber for unfair dismissal under the FW Act. The proceeding was heard at first instance by Commissioner Hampton who dismissed Ms Gupta's application on the basis that she was not an employee of Portier or Uber. The Full Bench of the Fair Work Commission comprised of Justice Ross and Vice President Hatcher dismissed the appeal. While the Full Bench found that Ms Gupta was performing delivery services for Portier (at [48]), it found that Ms Gupta was providing such services as an independent contractor rather than an employee (at [70]). Before an appeal of the decision went to judgment, the matter settled[6].

Separately, the Fair Work Ombudsman has conducted its own private inquiry which found that Uber drivers are not employees[7] (which findings would likely extend to other Gig Workers).

The material effect of the above decisions, and the findings of the Fair Work Ombudsman, is that Gig Workers are not, unless and until higher findings are made, subject to an employment relationship and therefore do not have the same minimum entitlements and protections as employees enjoy. In addition, were Gig Workers to attempt to collectively bargain for better conditions, as employees commonly do through forming and joining trade unions, it could arguably be in contravention of the cartel conduct provisions in the *Competition and Consumer Act 2010* (Cth).[8]

Another recent case relevant to this Committee's deliberations is *Dental Corporation Pty Ltd v Moffet*[9]. While this case did not consider Gig Workers specifically, the findings of the Full Court are highly relevant to our recommendation to extend the superannuation guarantee to Gig Workers, which we set out later in these submissions. Mr Moffet, a dentist by trade, brought proceedings against Dental Corporation Pty Ltd, who owned and operated the premises in which Mr Moffet conducted dental services. Mr Moffet entered into a services agreement with Dental Corporation. Mr Moffet, following his resignation under the services agreement, brought proceedings against Dental Corporation seeking payment of annual leave under the FW Act, long-service leave under the relevant NSW legislation, and superannuation under the SG Act. Dental Corporation's argument was, in essence, that Mr Moffet was an independent contractor and did not meet any of the relevant definitions of 'employee' found in the respective statutes conferring entitlements. A single judge of the Federal Court of Australia found Mr Moffet was not entitled to annual leave and long-service leave, but was

[5] *Gupta v Portier Pacific Pty Ltd and Uber Australia Pty Ltd* [2020] FWCFB 1698.
[6] Nick Bonyhady, 'Staring down the barrel of a landmark judgment on its workers' status, Uber folds', *Sydney Morning Herald*, 30 December 2020.
[7] Anna Patty, 'Uber's Australian drivers are not employees, Fair Work watchdog finds', *Sydney Morning Herald*, 7 June 2019.
[8] *Competition and Consumer Act 2010* (Cth) s 45AD; see also s 310A of the *Industrial Relations Act 1996* (NSW) which creates an exception to s 45AD of the *Competition and Consumer Act 2010* (Cth), applying to taxi drivers who have entered a contract of bailment with a taxi operator.
[9] *Dental Corporation v Moffet* [2020] FCAFC 118.

entitled to the superannuation guarantee, having met the extended definition of 'employee' in s 12 of the SG Act. Both parties appealed the single judge's findings. The Full Court upheld the initial findings, which are worth considering by this Committee because of the clear delineation in the decision between rights conferred by the FW Act and the entitlement to the superannuation guarantee under the SG Act. The Full Court found that the purpose of s 12 of the SG Act (which Mr Moffet relied on as the basis that he was entitled to superannuation) was to provide an expanded definition of 'employee' beyond the term's ordinary meaning[10]. The Full Court said the following in relation to whether the multi-factorial test should be applied when considering an entitlement to superannuation[11]:

> *"we would have rejected Dental Corporation's submission in this Court that the employment-like setting test should be answered by reference to the same kinds of indicia, especially control, which govern the general issue of whether one person is employed by another. This would collapse s 12(3)…into the ordinary test of employment. It is clear that is precisely what s 12(3) does not mean."*

Four issues arise from these recent cases. *Firstly*, on balance the authority to date weighs in favour of Gig Workers being classified as independent contractors. There is no higher authority, at present, to dispute this, although there remains a possibility that higher courts may at some time in the future find that employment relationships exist as between Gig Workers and Gig Companies. This frames the approach that could be taken to the conferral of additional entitlements to Gig Workers, which we recommend below. *Secondly*, although the Fair Work Commission's authority on this issue is clear in relation to Uber specifically, the ongoing use of the multi-factorial test means that it is open for different findings to be made for other Gig Companies, accounting for differences in the work arrangements and terms of engagement in place. *Thirdly*, the legal status of Gig Workers should be clarified, either by higher authority of legislative intervention, to create certainty for Gig Workers and Gig Companies in the future. *Fourthly*, as is apparent from *Dental Corporation*, superannuation entitlements can be extended to Gig Workers independently of entitlements under the FW Act.

The Recent British Experience

Recent legal developments in the United Kingdom illustrate the need for reform in Australia and are relevant to this Committee's consideration. The Supreme Court of the United Kingdom recently found, in *Uber BV v Aslam and others*[12], that the applicant Uber drivers were 'workers' for the purpose of the *Employment Rights Act 1996* ('ERA'), *National Minimum Wage Act 1998* and *Working Time Regulations 1998*. The drivers being workers, they were entitled to, amongst other things, the national minimum wage and paid annual leave.

Unlike Australian legislation, the ERA distinguishes between a 'worker' and an 'employee', with the former defined broadly as[13]:

> *"an individual who has entered into or works under (or, where the employment has ceased, worked under) –*

[10] *Dental Corporation v Moffet* [2020] FCAFC 118 at [78] and [81]. Note that s 12(3) of the SG Act includes various specific examples of employment in the definition of 'employee' including, for example, certain persons who work in the music and film industries and, relevant to the determination in *Dental Corporation*, any person who *"works under a contract that is wholly or principally for the labour of the person"*, which definition was said to incorporate Mr Moffet who was otherwise an independent contractor.
[11] *Dental Corporation v Moffet* [2020] FCAFC 118 at [108].
[12] *Uber BV v Aslam and others* [2021] UKSC 5.
[13] *Employment Rights Act 1996* (UK), s 230(3),

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual"

Similar definitions are found in the related statutes that were the subject of the Supreme Court's consideration. Thus, while the findings in *Aslam* are certainly a positive development in the United Kingdom, they have limited application in Australia.

The result of this case is nonetheless relevant to the Committee's consideration, for two reasons. *Firstly*, it is worthwhile considering the approach Uber has taken following the judgment. Since *Aslam* Uber has extended the national living wage, holiday time and pension rights to its Uber drivers[14]. These entitlements are only applied to periods in which the Gig Workers are carrying a passenger[15]. What is clear from this approach is that the Uber business model is apparently cost effective in circumstances where the most basic of employment conditions are being extended to its workers. This informs our later recommendations, outlined below. *Secondly*, if the Committee was to propose a statutory definition of 'employee' in the FW Act, the Committee should consider the UK definition of 'worker', which has been interpreted by courts of similar common law tradition to include Gig Workers.

PROPOSALS FOR REFORM

Primary Position

The Society submits that the current entitlements of Gig Workers are insufficient. As increasing levels of the population work in the gig economy, such workers are seeing deflated entitlements which will, in the long run, be financially unsustainable for not only those workers, but also governments as a whole, which will need to respond to the deteriorating financial position of such workers. The Society's primary position is that Gig Workers should, to the extent possible through legal reform, receive entitlements commensurate to other workers in the Australian economy. The Society submits there is clearly a need for better regulation to ensure a minimum safety net for Gig Workers.

In our view, there are two approaches to ensuring minimum conditions are conferred on Gig Workers. *Firstly*, the Committee could consider introducing a statutory definition of 'employee' into the FW Act that includes Gig Workers. That definition could either be specific (by reference to the circumstances of Gig Workers) or general (by reference to independent contractors as a group). *Secondly*, the Committee could consider the enactment of *sui generis* legislation to regulation of Gig Workers and Gig Companies so as to provide a minimum safety net, in a similar vein to current NSW legislation. We consider each of these options below.

Option One: Statutory Definition of Employee

Minimum entitlements under the FW Act are conferred to 'national system employees'[16]. That term is defined by s 13 of the FW Act to include *"an individual so far as he or she is employed, or usually employed…by a national system employer, except on a vocational placement"*[17]. The term 'employee'

[14] Sarah Butler, 'Uber to pay UK drivers minimum wage, holiday pay and pension', *The Guardian*, 17 March 2021.
[15] Ibid.
[16] FW Act, ss 13, 60, and 61.
[17] FW Act, s 13.

has, to date, been defined at common law, with courts preferring a multi-factorial analysis[18] to determine whether an employment relationship exists. As the discussion of cases above reveals, Gig Workers (at least with respect to Uber, but likely in respect of other Gig Workers), have historically been considered independent contractors under the common law test. In order for this Committee to confer minimum employee entitlements on Gig Workers, the test would either need to be displaced or an exception applied specifically for Gig Workers.

If the test were to be displaced, the Committee could consider replacement of the definition with the statutory definition of 'worker' used in the equivalent UK legislation considered by the Supreme Court in *Aslam* (see above). If an exception to the test were to be applied, the Society suggests an additional subsection be added to s 13 of the FW Act providing that Gig Workers meet the definition of 'national system employee'. This latter change is not without precedent. As the discussion of *Dental Corporation* above reveals, s 12 of the SG Act already expands the existing definition by clarifying that an 'employee' (for the purpose of superannuation entitlements) includes a range of circumstances that would not otherwise meet the common law test.

In a practical sense, rendering Gig Workers 'employees' by displacing the common law test or creating an exception is fraught with difficulty. This is because, in narrowing the definition to include general or specific independent contractor arrangements, this Committee risks intruding on arrangements outside of the gig economy that are otherwise uncontroversial.

Option Two: Sui Generis Legislation

A less intrusive method of conferring entitlements on Gig Workers would be to enact *sui generis* legislation akin to Chapter 6 of the *Industrial Relations Act 1996* (NSW) ('IR Act') which would regulate the ride sharing and food delivery industries in which Gig Workers operate and confer minimum entitlements on those workers.

Overview of Chapter 6, IR Act

By way of background, Chapter 6 of the IR Act regulates contracts of carriage between principal contractors and carriers (that is, the transportation of goods by vehicle), and contracts of bailment between the owner of a public vehicle and an individual (generally, taxi operators and taxi drivers for use of a taxi vehicle). Chapter 6 of the IR Act does not apply to Gig Workers operating in the ride sharing industry or in the food delivery industry, as the IR Act expressly excludes from its application contracts of carriage for the transportation of food[19] and the contract of bailment provisions do not apply to Gig Workers by reason of Gig Workers owning the vehicle in which they operate, there being no bailment to regulate[20].

Nonetheless, Chapter 6 of the IR Act is an important case study for the Committee to consider, given the Chapter confers a range of important rights on persons who have entered a contract of carriage or bailment. We discuss these rights below.

Firstly, the IR Act grants rights to form and join associations of contract drivers or contract carriers[21]. In effect this allows drivers and carriers to form and join trade unions to collectively bargain and further their interests through the NSW Industrial Relations Commission's ('NSWIRC') contract determination

[18] By reference to, amongst other things, the level of control a person has over the manner in which the worker performs the work, whether the worker provides their own equipment, and whether there was scope for the worker to bargain for their remuneration: see *Hollis v Vabu Pty Ltd* [2001] HCA 44.
[19] IR Act, s 309(4).
[20] IR Act, s 307.
[21] IR Act, s 335.

and agreement making powers. Section 310A of the IR Act also exempts these arrangements from the cartel conduct provisions in the *Competition and Consumer Act 2010* (Cth).

Secondly, the IR Act allows the NSWIRC to make a 'contract determination' in relation to the remuneration (including minimum rates), leave entitlements, hours, and other conditions that the NSWIRC considers appropriate for a bailee[22]. In effect, a contract determination is similar to industrial awards and provides minimum terms and conditions upon which a contract of bailment can be made between a principal contractor and a carrier. For example, the NSWIRC has approved the *Taxi Industry (Contract Drivers) Contract Determination 1984* which regulates the bailment of taxis, and confers, amongst other things, entitlements to annual leave, sick leave and long service leave for permanent bailees[23] and minimum rates[24].

Thirdly, the IR Act permits an association or group of contract drivers or carriers to enter into a contract agreement with a bailor or a principal contractor[25]. Contract agreements are similar to enterprise agreements made under the FW Act between an employer and a group of employees who bargain for higher rates of pay and better terms and conditions than those under a modern award. The terms and conditions contained in a contract agreement prevail over those contained in a contract determination that covers the same principal contractor or bailor[26].

Fourthly, the IR Act provides a mechanism to resolve disputes in a fair and efficient manner. Section 332 provides for compulsory conferences to be facilitated by the NSWIRC in certain circumstances, for example where the bailor is in breach of a contract of bailment[27]. This mechanism provides a proactive way of resolving or attempting to resolve disputes before a dispute proceeds to costly litigation.

Introduction of Sui Generis Legislation for Gig Workers

Introducing similar legislation to regulate the conditions of Gig Workers would bypass the difficulty in amending the current definition in s 13 of the FW Act. If a new scheme were to be introduced, we submit that it should confer at least the following entitlements on Gig Workers:

1. Minimum rates;
2. Leave entitlements for workers deemed permanent;
3. Freedom of association rights; and
4. Dispute resolution pathways, and conciliation and arbitration rights in the event of breach.

Further Recommendation: Expansion of Superannuation Entitlements

Separately to the options identified above, the Committee should recommend that superannuation entitlements be extended to Gig Workers.

As noted earlier, s 12 of the SG Act contains an expanded definition of 'employee' to the common law definition in the FW Act. The SG Act extends the definition to include, amongst other things, "*a person work*[ing] *under a contract that is wholly or principally for the labour of the person*". Section 12(8) also extends the definition of employee to certain categories of workers who operate in the music and film industry. The purpose of the provision is, in effect, to expand the common law test to include certain

[22] IR Act, s 312.
[23] *Taxi Industry (Contract Drivers) Contract Determination 1984,* cl 19, 20 and 22.
[24] *Taxi Industry (Contract Drivers) Contract Determination 1984,* cl 3, Sch 1 and Part B.
[25] IR Act, s 322.
[26] IR Act, s 327.
[27] IR Act, s 332.

categories of workers who the legislature has deemed entitled to superannuation payments. By reason of the operation of Part 3 of the SG Act, an employer is then obliged to pay an employee's superannuation guarantee to a complying superannuation fund[28] and pay a super guarantee charge in the event they fail to do so[29].

It is useful at this juncture to consider the decision in *Dental Corporation v Moffet*, described earlier in these submissions. In that decision, the Full Court of the Federal Court determined that a person found to be an independent contractor could nonetheless be entitled to superannuation payments by reason of s 12(3), providing that they are subject to a contract, which contract is wholly or principally 'for' the labour of a person, and the person is 'working' under the contract[30]. That is, on the Full Court's reasoning, a person can not meet the definition of 'national system employee' in the FW Act (meaning they are not entitled to FW Act minimum conditions, such as the National Employment Standards)[31], but at the same time meet the employee definition in s 12 of the SG Act and become entitled to superannuation payments.

At least in relation to Uber, the company does not make superannuation contributions for its drivers[32]. Arguably, the current, broad interpretation of s 12(3) in *Dental Corporation* by the Full Court of the Federal Court of Australia may create an obligation for Uber to pay the superannuation guarantee to its drivers. This is not a proposition that has been tested[33]. Nonetheless, despite this untested proposition, we recommend that the Committee consider expanding s 12 of the SG Act to include specific reference to Gig Workers such that Gig Companies become liable to pay the superannuation guarantee. This would require amendment to include an additional subsection covering the circumstances of Gig Workers.

Our Society has one reservation in extending such entitlements under the SG Act. In the absence of minimum fares or service charges for Gig Workers, the introduction of superannuation entitlements may lead to downward pressure on the rates Gig Workers are receiving from Gig Companies. The overarching goal of these reforms should be a net increase in the entitlements of Gig Workers. Thus, while it is open to the Committee to recommend the expansion of the superannuation guarantee to Gig Workers alone, the preferred approach should be simultaneously creating a regulatory framework for the gig economy (see Options 1 and 2 above) and expanding the reach of the SG Act.

We thank you for your consideration of this submission. Please contact the undersigned at info@nswlaborlawyers.com if you require any further information.

Yours faithfully,

NSW Labor Lawyers

NSW Society of Labor Lawyers

President: Lewis Hamilton **Vice President:** Blake Osmond **Treasurer:** Claire Pullen **Secretary:** David Pink **Ordinary Committee Members:** Kirk McKenzie, Tom Kelly, Jamila Gherjestani, Penelope Parker, Nikhil Mishra, and Connor Wherrett.

The Society is not affiliated to the Australian Labor Party. The views expressed in this submission are not those of the Australian Labor Party, its members or the Federal Parliamentary Labor Party.

[28] SG Act, ss 32C and 32D.
[29] SG Act, ss 16-19.
[30] *Dental Corporation v Moffet* [2020] FCAFC 118 at [82].
[31] Which the Full Court found Mr Moffet had not met: at [74].
[32] Kaseris v Rasier Pacific V.O.F. [2017] FWC 6610 at [61]; *Gupta v Portier Pacific Pty Ltd & Uber Australia Pty Ltd* [2019] FWC 5008 at [82] – see consideration of cl 13.2 of the relevant Services Agreement.
[33] We note the judgment in *Dental Corporation* was delivered in 2020 and is a recent interpretation of s 12 of the SG Act.

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