benchtv
a benchmark production

Précis Paper

Employment Law Implications of the Gig Economy

A discussion of the concept of gig work and the emerging gig economy, and its implications for employment law.

Discussion Includes

- Defining the gig economy
- Issues that arise from engaging gig workers
- Difference between employees and contractors
- Contracts in use
- Work health and safety law
- Potential legislative changes

Précis Paper

Employment Law Implications of the Gig Economy

In this edition of BenchTV, Angus Macinnis (Senior Lawyer – Stevens Vuaran Lawyers) and Dr Sarah Kaine (Associate Professor – University of Technology, Sydney) discuss the implications of the gig economy for employment in both a legal and social sense.

Defining the gig economy

1. There is a common sense view of what the economy is, but it tends to morph depending on what type of organisation or gig we are talking about. The term 'gig work' traditionally came from musicians who used to do one off jobs, opposed to a single long term job. Essentially gig work is a collection of tasks, rather than an ongoing job, for example through businesses such as Airtasker or Deliveroo.

2. Businesses such as Airbnb fall into a category outside of the gig economy, moreso into the collaborative economy. The collaborative economy or the sharing economy focuses more upon looking at resources that can be used more efficiently. Uber, on the other hand, is often used as an exemplar of the gig economy but is slightly different as it combines both capital and labour. Uber is blurrier than some other gigs such as Airtasker, which generally involves an individual going in and doing a one off job.

3. The landmark decision of *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 has been contentious with regards to companies like Deliveroo who maintain that they are just facilitating entrepreneurs, not employing bike couriers. Cases such as this are still important today in establishing what will happen into the future with regards to companies like Deliveroo and Uber.

Issues that arise from engaging gig workers

4. When deciding to become an employee or a contractor, you must consider the types of obligations that you take on yourself, for example insurance, superannuation, etc. To a certain degree these legal issues and entitlements become an individual's own responsibility when they are a contractor. This point raises a large social issue of what happens if we do end up with a large cohort of workers who have no made provision for themselves through means such as superannuation and the various types of insurance.

5. In *Hollis v Vabu*, the question was whether Crisis Couriers, who had engaged an unnamed courier who had struck Mr. Hollis, was liable for what had occurred. In his judgement, McHugh J held that there are a lot of areas in which the law distinguishes employees and contractors.

This distinction between employees and contractors affects industrial relations, leave entitlements, superannuation and issues in relation to tax.

6. Unlike the majority in *Hollis v Vabu*, McHugh J decided that there should be a new principled way of extending liability to contractors rather than doing what the majority did, which was to decide that the couriers were employees. As suggested by McHugh J, there is definitely capacity to look at new categories of worker, but enforcement of current law must also be considered, testing the creative bounds companies have extended as to how they define their workers.

7. Currently there are calls to look at testing and enforcing the existing law upon companies that have deliberately tried to obscure their arrangements in a way that circumvents existing law. The Fair Work Ombudsman (FWO) has started to take an interest in this issue. The FWO is very proactive these days with things such as vicarious liability and sham contracting, therefore moving into the gig economy seems like a natural extension of the activist view of Fair Work Ombudsman's office.

8. In terms of unions pushing for change, there is now the emergence of alt-unionism. Alt-unionism is the idea that groups of workers get together outside the bounds of a registered organisation and organize in different ways, whether it be virtually or in real time. The challenge for organizations and for workers is that these groups of workers do not fall into an ordinary, neat category that is easy to deal with. However, although these groups may be difficult to deal with, dealing with people individually would be even more difficult and work intensive for organizations and for lawyers.

9. What seems to have happened in the US and the UK is that there seems to have been a coalescence between traditional unions and newer unions because of economies of scale and economies of experience with regards to existing unions. For example, the New York Uber drivers have formed their own guild, but are associated with the machinist guild.

10. Old industrial regulations around large monolithic unions may perhaps not be appealing to the sort of people who engage in gig work, therefore creating a need to organize in different ways. However, research has shown that there is a wide variety of people engaging in gig work. Research on ride share drivers, for example, shows a mixed cohort of younger drivers, migrants, retirees, and so on. This begs to question that if existing unions do not fit, do we just let this evolve in a sort of chaotic, ad hoc way, or is there a way of accepting that worker voice is a legitimate, necessary part of the gig economy.

11. From a lawyer's perspective, dealing with a worker voice often depends upon what the worker is saying and whether you like what is being said. All industrial lawyers have had

experience where it has been useful to deal with the union because you get a single voice from a large workforce, however if you do not like the answer you are getting then it becomes quite different.

12. There is a variety of gigs, and a large number of people engaged in the work, all with different motivations. For example retirees who are just looking to keep engaged or supplement income, but then there is also those who may be more vulnerable, undertaking gig work in lieu of any other decent work. Research conducted by UWA and University of Sydney regarding bike/food couriers found that they were almost exclusively migrant workers who had very little understanding of our legal rules, our industrial relations system or their minimum entitlements.

13. When designing employment and workplace contracts, how you are going to motivate people who are doing the work is often really an issue of how you can assist your client in bringing their business together. Our own internal labour markets in an organisation are segmented, so each motivation may be different. Organisations will not invest the same thought and energy into gig workers that are seen as replaceable workers compared to higher end freelance workers. Gig work is the more expendable precarious work, freelance work is more traditionally known as having a higher level of skill in that you have some power to choose what it is you want to do, and some power to negotiate.

<u>Difference between employees and contractors</u>

14. The difference between employees and contractors is about the level of control, whether you wear livery, capacity to contract to other companies, and so on. *Hollis v Vabu* emphasized that the characterization used to come down mostly to control, but the judgement identified 7 different factors to consider, and recently 17 different factors were identified in a Federal Court judgement.

15. The fundamental distinction comes from working in the business of another, rather than working in your own business but this is not always a clear distinction because sometimes conducting both is possible. This was one of the points considered by the Court in *Hollis v Vabu* which suggested that if someone is genuinely conducting their own business, you will be generating good will and will have something which is capable of being transferred to some extent.

16. In *Uber B.V. and Others v Mr Y Aslam and Others*: UKEAT/0056/17/DA, the Employment Tribunal noted that all of the setting of the prices and the collection is all done by Uber, so if Uber says it is merely an agent for two other parties who are contracting themselves, then how is it that these parties who are strangers to one another are all being controlled by Uber?

17. The European Court of Justice case, *Case C-434/15 Asociación Profesional Elite Taxi v Uber Systems Spain, SL* [2017], concerned whether or not Uber was running a transport service or whether it was an information society service. The ECJ held that because there is such a high degree of control over all of the interactions between the rider and the driver, it really becomes unclear as to whether anything that is being done is being done to build a business on part of the driver. .

18. The Court in *Hollis v Vabu* also considered the extent of control and the extent to which work could be delegated as the ability to delegate suggests that you are running your own business. In the recent 2016 decision of the Central Arbitration Committee in the UK, *Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo*, it was held that although the relationship did look like one of employee-employer, Deliveroo riders are permitted to subcontract or to accept a job, and then pass it on to another rider and are therefore independent contractors. The fact that a right to delegate existed in contract was considered a decisive factor.

19. The issue of delegation came up in the CitySprint couriers case (*Dewhurst v CitySprint UK Ltd* (2016) ET/2202512/2016) which involved cycle couriers who were principally delivering high value medical specimens and so forth between doctors. Due to the regulatory scheme and the fact that riders had to have particular approval and qualifications due to the nature of the work they were doing, it was held that the ability to delegate was worthless because you were not going to be able to find someone who had that kind of approval.

20. In *Fair Work Ombudsman v Z Transport Group* [2017] FCCA 2660, a cycle courier company was prosecuted for sham contracting. Their contraventions were considered more serious because the Court had provided them with a copy of *Hollis v Vabu*, and yet they still continued to engage their riders as independent contractors.

21. More commonly we are seeing a creation of a particular discourse and a particular terminology which obscures what is going really going on between parties. However, the Fair Work Commission has said in the case of Re Porter: Ex Parte TWU (1989) 34 IR 179, it is not open to the parties to create something which has every characteristic of a rooster, but to call it a duck and insist everyone else call it a duck.

<u>Contracts in use</u>

22. Some of the contracts currently being used in Australia have some extremely onerous terms, for example the Uber contract has a dispute resolution provision that calls for arbitration in the Netherlands. The question then becomes why is this being done, do people understand it and do they understand its enforceability?

23. In *Oze-Igiehon v Rasier Operations BV* [2017] WASCA 107, an Uber driver challenged wrongful termination of his contract, but it appeared he had been driving whilst mostly asleep which was regarded as a safety issue. The Court concluded that even if it had accepted the contract was terminated wrongfully, there was still a clause in the contract that provides for termination on 7 days' notice.

24. For ride share drivers, if you do not press the 'I accept the changes to contract', you cannot drive; it will not give you your rides again until you have accepted. For many this means blindly agreeing to the terms so that they are able to work. Research on ride share drivers showed there was a sense that drivers really liked their work, but did not like their interactions with the company.

25. The issue between what the contract says and what is actually happening is an issue that arises often. In the UK Uber decision (*Uber B.V and Others v Mr Y Aslam and Others*: UKEAT/0056/17/DA), the Court noted the distinction between telling drivers that they can work whenever they want, and on the other hand lowering the driver's rating if they do not pick up a ride, or deactivating their account so they cannot work.

26. Companies such as Uber want their Uber partners and driver partners to be loyal, but using terminology such as 'deactivate' does not encourage such a view. It can be said that if there is enough people coming in to do the work, you can generate language which suits the legal characteristics of saying that these people are not employees. It may not be until the amount of people available to work begins to dwindle that they will have to consider another approach.

<u>Work health and safety law</u>

27. Research done in relation to gig workers such as Delieveroo riders and ride share drivers shows that these workers have more of a sense of things such as superannuation and what a comparative minimum wage may be, but are not fully in tune with work health and safety law.

28. With the new *Work Health and Safety Act 2011* (NSW), the definition of who is a worker and what it means to perform work for someone else is quite broad. The concept of a 'worker' became the person to whom obligations are owed, and includes employees, contractors, volunteers, work experience people, and so on. With the new Act, rather than having an employer there is a new concept called a PCBU which stands for 'person conducting a business or undertaking'. It does not need to be a for-profit business or undertaking, but if you are a sole contractor performing work then you can potentially be simultaneously a PCBU and a worker.

29. If you have a premises you will have the owner of the premises who will have some measure of control over who will lease the premises, then there may be tenants and possibly sub tenants, all of whom have a certain degree of control over the workplace. Each of these parties will have a duty to keep the workplace safe, as far as reasonably practicable, not only for their own workers and workers they may engage, but also for those affected by the way work is carried out at the premises.

30. The issue of fatigue management is another key safety issue. For example with Uber drivers who are argued not to be employees, if they are trying to build goodwill and build their business, the only way to really do this is if you drive for longer hours, which inevitably leads to fatigue. Trucking companies now understand fatigue management as being a key part of their work health and safety obligations. In a Western Australian case, *Fraser v Burswood Resort (Management) Ltd* [2012] WADC 175, there was an argument by a casino employee that her employer had been negligent in failing to provide training, not only in relation to fatigue management, but not providing her with an understanding as to how fatigue operates.

31. There is a robust work health and safety framework that exists, but so far it has not been the emphasis of any commentary or complaints yet in gig work. This may come back to the idea that gig workers may not have very sound awareness of what applies to them.

32. The primary duty of the *Work Health and Safety Act 2011* (NSW) is to look after the safety of the workers you engage, but also other workers who are affected by the way in which work is performed. The Act has an express requirement that when you have multiple duty holders who all work together and they have duties in the same matter, they must consult, coordinate and cooperate their affairs. Even if there is no safety issue, you can have an independent prosecution based on the failure to do that consultation and cooperation.

33. One of the aspects of the gig economy which is not necessary but very common, is the idea of being mediated through online platforms either to find work, or to find the payment for work, or both. Some gig platforms do provide more of a market and less of a direct service, such as Airtasker. However, each platform has nuance issues that must be addressed moving forward.

34. Labour hire is a good example of the fact that eventually when the need becomes so great and when the public understanding of the need is there, there will have to be a public policy response. Currently it is quite easy for policy makers to avoid taking definitive positions on the gig economy because there is not a great deal of understanding about it, and they also feel they do not want to jeopardize the benefits to consumers. Eventually the regulation will catch up, whether that means there will be a framework which will mean enforcing what already exists more robustly, or tweaking definitions to expand this new category of worker.

Potential legislative changes

35. Some European countries have banned organizations like Uber because they do not agree with their business model. Moving forward we could review what already exists and figure out how to extend the types of social minimums that we have come to expect in Australia. For example, superannuation is a major concern because the cost of people not having superannuation will be worn by taxpayers who will bear the social cost.

36. Looking to the future, we should be trying to extend the socially accepted fundamental minimums to whatever kind of work on whatever basis. One option is to create a new category of worker that is in between a contractor and an employee, for the purposes of superannuation or worker's compensation legislation. Although it is questioned whether this option would be creating, in a roundabout way, the type of 'opt-out' options that these organizations have been looking for.

37. There is clear capacity for policy makers to be very clear about what organisations can do generally. Intergovernmental discussion about what our position is would be incredibly useful for both lawyers and laymen, and the various agencies themselves given that there was confusion for a little while as the Tax Office had a definition up of an independent contractor and employee, which was wrong relative to the Fair Work Ombudsman.

38. One of the issues with the ACCC, on the other hand, is that they will do a lot of regulation of the interaction between these businesses and consumers, but is not so interested in the regulation between businesses and the people who work for them. The ACCC does not seem to want to look at all of the unfair contract terms, however things are changing and being deliberately challenged which may mean the ACCC will have to look at things they have not considered previously.

39. The Fair Work Ombudsman has tried to acknowledge traditional boundaries, but is attempting to address these new issues, for example vicarious liability. As with other major changes in labour law, there will probably have to be quite a bit of advocacy on behalf of those working in the gig economy in order to effect change. Traditionally this advocacy has come from unions, but it may now come from alt-unions, representations of workers or young worker centres. There are a number of actors who businesses and workers need to be aware of in terms of who might be looking after their interests and where that might be coming from.

40. In conclusion there is clearly a lot of different issues that need to be considered in a coordinated way. This means there must be a consideration of the way in which work is performed within the context of what the business does.

BIOGRAPHY

Angus Macinnis

Senior Lawyer – StevensVuaran Lawyers, Sydney

Angus is a practicing lawyer in NSW who specialises in employment and work health and safety law, and intellectual property law. He has made significant contributions to many publications including the Law Society Journal and the New Lawyer. Angus regularly speaks at conferences educating practitioners in topics including employment law and social media use.

Dr Sarah Kaine

Associate Professor – University of Technology, Sydney

Sarah lectures in Human Resource Management and Employee Relations. Prior to becoming an academic, she worked as an industrial relations practitioner and consultant to not-for-profit organisations. Sarah is currently the Research Director of Future of Work, Organising and Enterprises, Centre for Business and Social Innovation (CBSI) at UTS Business School. She has conducted extensive research into employee relations in the digital economy and the formal and informal regulation of employment relations.

BIBLIOGRAPHY

Cases

Hollis v Vabu Pty Ltd (2001) 207 CLR 21

New South Wales v Commonwealth (2006) HCA 52; 229 CLR 1

Dewhurst v CitySprint UK Ltd (2016) ET/2202512/2016

Uber B.V and Others v Mr Y Aslam and Others: UKEAT/0056/17/DA

Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo [2016]

Central Arbitration Committee TUR1/985(2016)

Fair Work Ombudsman v Z Transport Group [2017] FCCA 2660

Re Porter: Ex Parte TWU (1989) 34 IR 179

Fraser v Burswood Resort (Management) Ltd [2012] WADC 175

Case C-434/15 Asociación Profesional Elite Taxi v Uber Systems Spain, SL [2017] ECLI:EU:C:2017:981

Legislation

Work Health and Safety Act 2011 (NSW)

Competition and Consumer Act 2010 (Cth) sch 2 (*'Australian Consumer Law')*