



Australian Government

Fair Work

OMBUDSMAN

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5 February 2019

Ms Natalie James
Chair
Inquiry into the Victorian on-demand workforce
By email: OnDemandInquiry@ecodev.vic.gov.au

Dear Chair

Thank you for the opportunity to make a submission to the Inquiry into the Victorian on-demand workforce (the **Inquiry**).

About the Fair Work Ombudsman

The Fair Work Ombudsman (the **FWO**) is Australia's national workplace relations regulator. Our jurisdiction is primarily set out in the *Fair Work Act 2009* (Cth) (**FW Act**). The FWO's role is to provide education, assistance and advice about the Commonwealth workplace relations system and to enforce compliance with workplace laws, and our services are free to the community. In fulfilling our role under the FW Act, the FWO adopts a compliance model built on a mix of risk-based regulation and strategic enforcement, which is set out in our publicly available Compliance and Enforcement Policy¹ and Litigation Policy².

FWO interface with the on-demand workforce

The FWO closely monitors developments in its jurisdiction, including the emergence of the 'on-demand' economy and workforce that is the focus of this Inquiry. The FWO's approach to resolving issues arising in the on-demand workforce is necessarily consistent with our approach to any dispute requiring our intervention, namely to apply and enforce Australian workplace law as it stands. However, as an innovative and agile regulator, the FWO is also committed to ensuring that our regulatory tools of trade evolve with the needs of the community.

At present, on the available data, the 'on-demand' workforce appears to represent only a small proportion of the Australian workforce as a whole. For example, in March 2018, the Association of

¹ See [Compliance and enforcement policy](#).

² See [Litigation Policy](#).

Superannuation Funds of Australia estimated that approximately 150,000 people, or approximately 1.2 per cent of the Australian workforce, use digital platforms to obtain work on a regular basis.³ This appears to be smaller than the on-demand workforce in some jurisdictions, such as the United Kingdom⁴, but larger than others, such as the United States⁵. Consistent with these figures, on-demand workers have similarly represented only a small proportion of total FWO requests for assistance to date.⁶

Regardless of the size of the on-demand workforce, the FWO has taken a keen interest in this issue over a number of years. The on-demand workforce intersects with a number of current priority areas for the FWO, namely:

- *Fast food, restaurants and cafés*: Several of Australia's more well-known on-demand businesses service this sector.
- *Supply chain risks*: Any business that procures labour from a third party, including via an on-demand business, is exposed to legal and reputational risk if that third party does not comply with their obligations under workplace law.
- *Sham contracting*: The FWO's interactions with on-demand workers and businesses to date have predominantly related to ensuring proper classification of workers, as either employees or contractors, depending on the circumstances of a particular engagement.
- *Vulnerable workers*: The FWO finds that certain cohorts of workers, such as young and migrant workers, can be vulnerable to exploitation. A range of factors contribute to their vulnerability, including that they are often not aware of their workplace rights and do not feel able to question their employers about their workplace rights and entitlements.

In addition to responding to requests for assistance, the FWO has undertaken a number of self-initiated inquiries into on-demand businesses, one of which led to the commencement of the Foodora litigation, as discussed below. Further, as noted above, the FWO is actively monitoring developments in this area, including the Fair Work Commission's recent decisions relating to Uber⁷ and Foodora⁸. The FWO also collects and analyses data and intelligence, and closely monitors media reporting, which then feeds into the Agency's compliance and education activities. The FWO works closely with regulators that have jurisdiction in this area including the ATO.

Misclassification and sham contracting

As noted above, the FWO's interactions with on-demand workers and businesses to date have predominantly related to ensuring proper classification of workers, as either employees or contractors. Accordingly, the FWO's activities are necessarily concerned with specific relationships

³ Andrew Craston, *Superannuation balances of the self-employed*, Association of Superannuation Funds of Australia, March 2018, p6.

⁴ Department of Jobs and Small Business, Submission No 43 to the Commonwealth Senate Inquiry into the Future of Work and Workers, January 2018, p6-7.

⁵ Department of Jobs and Small Business, Submission No 43 to the Commonwealth Senate Inquiry into the Future of Work and Workers, January 2018, p6.

⁶ Between 1 July 2014 and 30 June 2018, less than half of one per cent of the disputes completed by the FWO related to on-demand businesses.

⁷ *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610.

⁸ *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

between individual workers and businesses, taken on a case-by-case basis, rather than the on-demand workforce as a whole.

Where questions arise as to whether an individual worker is genuinely an independent contractor running their own business, or an employee entitled to minimum rates of pay and other protections under workplace law, the FWO applies the common law indicia test to the relationship in question to determine the true nature of the engagement.

It is worth noting that the definition of 'employment' used by the FWO, as derived from the common law, is different from the expanded statutory definitions used by some other regulators in their jurisdictions, such as that used by the Australian Tax Office in respect of superannuation. This means that the FWO and the ATO, for example, may focus on different issues and different aspects of contracting arrangements, and may form differing views as to the proper classification of a particular worker, for a particular purpose. More information about the FWO's approach in this regard is available on fairwork.gov.au.⁹

Where the FWO finds that the law has been misapplied, and a genuine employee has been treated as a contractor, our response will vary depending on the circumstances of the matter. If the problem has arisen as the result of a genuine mistake or misunderstanding of the law, we can often best assist the parties by providing education and support to ensure any outstanding entitlements are immediately rectified and future misclassifications avoided. In addition to seeking advice and assistance from the Fair Work Infoline and MyAccount service, workers and businesses can access a broad range of information about contracting arrangements on fairwork.gov.au.¹⁰

In more serious cases of sham contracting, where the misclassification occurs deliberately or recklessly and is designed to deprive employees of their lawful entitlements, the FWO will take strong action to address that unlawful behaviour, including taking those employers to court. In the past five financial years, the FWO has recovered more than \$575,000 for over 130 individuals affected by sham contracting. In the same period, the FWO has achieved in excess of \$1,860,000 in penalties from the courts against offending businesses.¹¹

In June 2018, the FWO commenced legal proceedings against on-demand economy food-delivery company Foodora, alleging that Foodora had engaged in sham contracting that resulted in the underpayment of workers.¹² In August 2018, Foodora appointed voluntary administrators, with the effect that the FWO's proceeding is currently stayed.¹³ Contrary to some media reporting on this matter, FWO has not 'dropped the litigation' and is in regular contact with the administrators. The next hearing in the matter is listed for June 2019. The FWO has demonstrated it will take firm action where it has evidence to suggest unlawful conduct and where it is in the public interest to do so.

⁹ See [Find help for - Independent contractors](#).

¹⁰ See [Find help for - Independent contractors](#).

¹¹ See also the FWO's successful High Court appeal in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] HCA 45.

¹² See [Media release - Foodora litigation](#).

¹³ Pursuant to section 440D of the *Corporations Act 2011* (Cth).

In September 2017, the FWO welcomed the passage of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), which introduced new investigative powers for the FWO, new powers to hold ‘responsible franchisor entities’ and ‘holding companies’ responsible for franchisee entities’ conduct, higher penalties for non-compliance with workplace laws, and a reverse onus of proof with respect to record keeping. These provisions provide powerful additional tools to assist the agency to promote and enforce compliance with workplace law. For example, the FWO recently commenced the first legal action utilising the new reverse onus of proof laws.¹⁴ While the provisions do not provide the FWO with new powers relating to the on-demand workforce specifically, their enactment and use by the FWO sends a strong message about the responsibilities of all participants in the labour supply chain, and indeed anyone who profits from workers’ labour – however those workers are defined under workplace law.

I trust this information is of assistance.

Yours sincerely



Sandra Parker PSM

FAIR WORK OMBUDSMAN

5 February 2019

¹⁴ See [Media release - AK Property Services litigation](#).