

The Gig Economy: Navigating new ways to work

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It's Friday night and it has been a long week. The fridge is as depleted as you are and the mob needs feeding. But that's okay, because there are endless choices for dinner and several ways in which it can be delivered to your front door.

Home delivery is not new in Australia. But the gig economy has offered up many more opportunities for consumers, workers and businesses across a number of fronts, not just your dinner table.

New technologies and platforms offering peer-to-peer marketplaces for jobs and services have had high uptake and have quickly become established in the labour market and in our lives. In doing so, they have been variously welcomed as an opportunity for entrepreneurialism or derided as a source of exploitation.

Consumers have more options than ever before, get a wardrobe moved, fence fixed, or need a ride home. Businesses can seemingly expand their customer base without significant investment so long as they have an internet connection. If the business can get the logistics right, it can scale up.

For workers, the new tech platforms may offer flexibility and choice: to work when they want, or earn some extra cash, on top of other jobs or when they are between jobs.

But it may be unclear whether such workers are covered by the protections contained in the Fair Work Act. Many of the new models treat these workers as independent contractors rather than employees. Questions arise as to whether these workers are genuinely contractors who are running their own business, or whether they are employees who are entitled to receive protections such as minimum rates of pay, paid leave, superannuation and workers compensation.

As the Fair Work Ombudsman, it is not my intention to pass value judgments on the nature of business operations, or to stifle innovation. I am not seeking to deny anyone's opportunities. But my job is to ensure compliance with the law in an age of disruption. Where employees are incorrectly classified as independent contractors, it has the potential to not only affect the worker but also unfairly disadvantage other businesses applying award rates of pay and conditions. Disruption of existing markets is only legitimate if it is lawful.

This is particularly important given our experience that the most vulnerable workers often end up in the most exploitative scenarios. In the last five years, the Fair Work Ombudsman has taken twenty cases to court alleging sham contracting, usually with respect to low skilled workers such as cleaners, retail assistance and couriers.

Pondering the question of how these new models intersect with the law is therefore more than just an academic exercise – the answer has real world impact on real, often vulnerable, people. And while there has been much theorising, to date there hasn't been much by way of decisions in relating to gig economy businesses.

As is appropriate, the Fair Work Ombudsman similarly seeks to apply the law under the current statutory framework with respect to all businesses, irrespective of whether they are emerging or well established.

It is my role to bring public interest matters before the courts and provide certainty to the community. We have just last month seen the Court impose penalties in our first race discrimination case taken under the Fair Work Act involving visa workers treated differently from the rest of a hotel's workforce. In another first, we have also seen a court impose criminal sanctions for contempt of court against an employer who had, the court found, breached freezing orders the Fair Work Ombudsman had obtained to preserve the assets of a business that had not back paid workers in spite of court orders. The employer's appeal of this matter will be heard by a Full Bench of the Federal Court and the outcome will be closely watched.

The proceeding we have commenced this week in the Federal Court against food delivery company Foodora is based upon our allegation that three delivery workers were in fact employees, not independent contractors, and thus entitled to the benefits of the Fast Food Award.

When it comes to assessing these new work arrangements courts will assess each situation holistically, in line with the well-established test for determining whether an employment relationship exists. My inspectors do this, and will continue to do this, on a day-to-day basis, but only a court can make a final determination.

While there is a huge attraction to the services offered by the gig economy, the entities offering those services cannot ignore the longstanding law. In seeking the Court's determination of this issue, we hope to bring greater clarity to the legitimacy and sustainability of the arrangements under which those workers delivering these services are operating.

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