

Certainty from Disruption? The workplace regulator's role in new economies
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Thank you for inviting me to speak to you today.

Before I begin, I would like to acknowledge the Gundungurra and Darug people who are the traditional custodians of the land on which we meet today. I would also like to pay respect to their Elders both past and present and extend that respect to any Aboriginal and Torres Strait Islander people here today.

The opportunities offered up by technology have changed the way we live, work and play.

Just a few decades ago, who but the most adventurous would have thought we'd all walk around with a phone in our pocket? These days it is probably more accurately described as a handheld computer that connects us to the world. We have our entire lives in these devices and they are never far from our hands.

Technology also offers up opportunities for regulators, businesses and advisers.

15 years ago, the government provided most advice about wages over the telephone. In fact, multiple governments did because many people were covered by a state industrial relations system. In the case of the Commonwealth, I'm told that 'Wageline' staff would manually look up pay rates in wage sheets stored in a large rolodex in the middle of the office.

Things are very different now. Over 15 million people came to our website last financial year for help. Our customers calculated five million rates of pay in our online pay calculator, PACT, which is available on their phones. You can now lodge a request for assistance online via our authenticated online platform called My Account, and if you suspect workplace non-compliance you can make an anonymous tip off online.

And we recently released our first app, Record My Hours, which has been downloaded over 10,000 times.

The technologies driving the platform economy in particular are bringing new opportunities to the workplace, while also challenging traditional thinking about work. By platform economy, I mean the gamut of apps and websites facilitating peer-to-peer connectivity, the gig and share economies.

These models are well and truly established. There's no turning the clock back and why would we? They offer convenient services and disrupt existing markets that may have got too comfortable. But what information is actually available for businesses or workers to make informed decisions about engaging with the platform economy?

There are obvious questions for workplace relations practitioners, like how do these models intersect with the law? Does our award system apply? Or more fundamentally, are the workers even covered by the statutory framework, which is founded on the century old principles of the common law employment contract?

Today I want to offer you my perspective on the workplace regulator's role in all of this. One sector where the answers to these questions could have broad implications is pizza delivery. It is an industry that my agency has become very familiar with.

Australia's favourite fast food

I am told that pizza is undoubtedly Australia's favourite fast food. In the year to March 2016, almost five million Australians ordered pizza at least once a month.¹ If that sounds like a lot of meat lovers that's because it is; the Australian pizza world has annual revenue of \$3.7 billion and more than 4000 businesses are vying for a slice.²

Pizza businesses employ around 14,000³ of the 580,000 café, restaurant and takeaway workers in Australia.⁴ These workers tend to be younger, less educated and lower paid than other industries.⁵ And despite café, restaurant and takeaway food workers only

¹ <http://www.roymorgan.com/findings/6907-dominos-effect-or-why-eagle-boys-stopped-soaring-201607270911>

² IBISWorld Industry Report OC4025, Pizza Restaurants and Takeaway in Australia, July 2016

³ Ibid

⁴ Based on a four quarterly average using ABS, *Labour Force, Australia, Detailed, Quarterly, Nov 2016* (cat. no. 6291.0.55.003)

⁵ Department of Employment, *Industry Outlook - Accommodation and Food services*

representing about five per cent of the workforce, they are behind 11 per cent of our dispute forms.⁶

When we ran a National Hospitality Industry Campaign between 2012 and 2015, we found contraventions in 52 per cent of the hospitality businesses we audited across the three sub-sectors targeted by the campaign. The results for take away businesses were the most concerning, with only 33 per cent of businesses fully compliant with all pay and record keeping obligations.

However, from the perspective of a customer, things have never been better. From the family-run take away shop through to fine dining, there are lots of options open to the time-poor hungry households that make up the pizza-loving Australian public. No doubt one of the competitive advantages of the pizza industry is the convenience of home delivery, traditionally carried out by drivers employed by the outlet you ordered from, driving a branded car also owned by the business.

More recently, the pizza business has fully grasped the opportunities of the online world, with the proliferation of online ordering systems. And while there has also been a proliferation of small chains and businesses, serving a range of niche pizza sub-markets, dominating the field are the two big ones – Pizza Hut and Domino’s.

“Pizza Wars”

So competitive is their rivalry that they are described as being locked in what has been dubbed the “Pizza Wars”. There is a fierce competition, intensely focused on increasing market share through a combination of ordering and delivery automation, with an ever cheaper pizza at the centre of the strategy.

There are reports that in 2014, Pizza Hut required franchisees to cut their prices by up to 50%,⁷ and on the other side, some Domino’s franchisees have reportedly asked store

⁶ Between 2013 to 2016, of the dispute forms lodged with the FWO in restaurant and takeaway food services:

- 39% involved a worker under the age of 25; and
- 22% related to a visa holder, the highest of any industry.

⁷ <http://www.smh.com.au/business/retail/pizza-hut-set-for-the-courts-over-cut-price-pizzas-20170428-gvurlt.html>

managers to keep labour costs below 27 percent of sales.⁸ In the case of Pizza Hut, the actions of head office resulted in litigation being taken by a significant number of franchisees, and those matters are currently before the Court. This competition has claimed one of the contenders, Eagle Boys, which went into receivership in July 2016, before being bought out by Pizza Hut in November.

So consider all these factors: a competitive market with predominantly low skilled workers, where we know that migrants often work,⁹ and appallingly low rates of compliance with work laws in fast food generally. What impact might these ‘pizza wars’ be having on the pay packets of these vulnerable workers? And what responsibility do established franchising systems like Domino’s and Pizza Hut have to ensure that what ends up in these workers’ pay packets satisfies their entitlement to the relevant minimum wages?

Our dealings with both of these franchises go back a number of years, and while the issues and companies’ posture has changed throughout, there are some common themes. Both these franchise systems have traditionally employed a delivery workforce, including entering into industrial arrangements to specifically cover these workers.

Between June 2010 and January 2016, the FWO completed 144 requests for assistance involving Pizza Hut franchisees. When further allegations aired in the media in late 2015 that were consistent with our concerns, we initiated a broader activity looking at the pay and conditions of their delivery drivers.

Of the 34 franchised Pizza Hut stores we audited, 32 engaged delivery drivers and we have identified non-compliance in at least 24 stores. It was our view that seven franchisees had misclassified their delivery drivers as contractors when they were in fact employees and others had underpaid as well. Only two franchisees were meeting all of their legal obligations.

⁸ <http://www.smh.com.au/business/workplace-relations/one-of-the-biggest-dominos-franchisees-investigated-20170309-guv02y.html>

⁹ For further information on how these factors impact on workplace compliance, see the FWO’s submission to the Senate Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017: <http://www.aph.gov.au/DocumentStore.ashx?id=fab88dc6-ce3d-418e-9091-05ecebfe6a4f&subId=510171>; and “Ending migrant worker exploitation” – Speech to the Migration Institute of Australia Conference 2016: <https://www.fairwork.gov.au/ArticleDocuments/764/migration-institute-of-australia-national-conference-speech-18-november-2016.docx.aspx>

As a result of this activity, three Pizza Hut franchisees have entered into Enforceable Undertakings¹⁰ with my agency and eleven were issued with Compliance Notices. We are continuing to finalise our investigations into six franchisees, and further enforcement action is not out of the question.

We are also in discussions with Pizza Hut about what it might do to address what appears to be widespread non-compliance by its franchisees. The evidence has been in front of Pizza Hut since January this year. Unfortunately the franchise is yet to make any commitment to address what appears to be a systemic problem in its network.

Our interest in the Domino's network goes back to 2010, firstly as a series of investigations in response to complaints from Domino's workers in both franchised and corporate stores. Our inquiries and investigations identified that Domino's was not applying the correct industrial instrument to its delivery drivers in some cases.¹¹

As a result of our intervention, Domino's began applying the correct instrument and adjusted rates of pay. To address the underpayments that had arisen, the Fair Work Ombudsman also suggested an arrangement under which Domino's would conduct an audit to ensure all affected workers received back pay.

The audit found that approximately 7 per cent of delivery drivers were underpaid. Ultimately \$588,000 in back-pay was secured for underpaid pizza delivery drivers around Australia. The self-audit and back payments were carried out under a formal arrangement – one of our very early Proactive Compliance Deeds, underpinning our first Compliance Partnership with Domino's.

Compliance Partnerships

A Compliance Partnership is an arrangement that my agency offers to businesses or brands that are looking to address compliance in their business, networks or supply chains. They

¹⁰ For more information see FWO's media release *Enforceable Undertakings resulting from the Fair Work Ombudsman's Activity Report on Pizza Hut outlets*, <https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/pizza-hut-eus>

¹¹ These issues arose during the modern award transition, due to the interaction of transitional rates and the Domino's enterprise instruments. For further information see the FWO's Domino's Proactive Compliance Deed Final Report, <https://www.fairwork.gov.au/ArticleDocuments/762/Dominos-Pro-active-Compliance-Deed-Final-Report.docx.aspx>

offer the signatories a structured and transparent way to influence behaviour down the line and ensure all workers, regardless of whether they are their direct employees, are paid correctly.

In this sense, the partnerships extend beyond the legal obligations with which a business must comply, and provide an accountable and transparent way for a business to take moral and ethical responsibility for its supply chain or network. This is something we have been encouraging for some time, often seeing the encouragement bear fruit after allegations of worker exploitation result in a brand experiencing negative publicity.

A common feature is to include sustainable monitoring and compliance arrangements, including self-audits, so business have oversight of what is occurring throughout their network. We generally require that the results are reported back to us so we can work with the company on appropriate further action. These arrangements are, as I say, transparent; you can find the documents on our website, along with accompanying reports about the implementation of the arrangements.

However, Compliance Partnerships are not a statutory enforcement tool. They do not exist under the Fair Work Act. Each is a tailored and voluntary response to the particular compliance issues that the partners are seeking to address and they have evolved over time. Compliance Partnerships fill a gap. Because in cases where we have already formed a view that a breach of the law has occurred, we can accept an Enforceable Undertaking from the employer.

But increasingly when we find concerns in networks and supply chains, the entity that is the cause of the problem is not the direct employer. It is the one controlling the settings.

And so our Compliance Partnerships are a solution developed over time, designed to address a broader range of conduct. These instruments incentivise a brand to not only take remedial action but build a compliance infrastructure within its labour supply chain or service network.

We had reasonable confidence that after their first Compliance Partnership with us, Domino's understood the importance for its brand of getting ahead of compliance issues.

We thought this was promising and entered into a second Compliance Partnership with Domino's in 2014.

While the partnership with Domino's has since lapsed, toward the end of 2015 we became aware of the potential for systemic issues in the Domino's network due to a request for assistance concerning a particular franchisee in South Australia. We discussed our concerns with Domino's at the time and were confident they understood the risks, as head office took agreed action to address the non-compliance in question for all affected employees.

During the course of 2016, our concern grew that all was not well. Particularly in the latter half of 2016 when we began receiving intelligence of a confidential nature alleging that Domino's franchisees were exploiting vulnerable workers. The nature of what we were hearing was more serious than what had arisen back between 2010 and 2015, recalling we had been in regular and frequent dialogue during this period with Domino's head office.

The new allegations of exploitation of workers were being amplified via the media. Domino's assured us that they were both mindful of, and were addressing, these concerns. Indeed, we were aware they had exited at least two rogue franchisees in 2016, and then earlier this year we learned that their audits had recovered \$4.5 million for franchisee workers in unpaid wages and superannuation. They also told us they would continue to audit stores.

Be that as it may, as the regulator, we need to form our own views about compliance in their network. That is why we are conducting our own independent compliance activity that began in late 2016, which will inform an assessment of any breaches of the law by Domino's or its franchisees and appropriate consequences.

I take this opportunity to note that when we are dealing with a franchise, the employer obligations rest with the employing entity, often the franchisee. What we have become especially interested in, is the role of the franchisor in any non-compliance – or their 'involvement' – to use the language of accessory liability.

There are some big cheeses in the pizza business, established franchise systems with well-known brands, international business interests and reputations; our view is they have some

work to do. The allegations of non-compliance with workplace laws reflects in many ways an increasingly fierce competition in the business of getting food to households.

Creating certainty from disruption

Because while the Pizza War between the traditional players rages on, emerging players are creating new opportunities to deliver hot food to our dinner tables. Gone are the days when your only option for home delivered take away was a family sized pizza from your local pizza shop. Third-party delivery services are expanding our Friday night menu options, providing choices for customers and workers alike.

Restaurants that may not have sufficient take away business to support their own delivery staff no longer need to employ their own drivers or provide any infrastructure other than an internet connection. In this regard, the competitive advantage that pizza had is disintegrating.

But is this disruption occurring on a level playing field? Are the arrangements that underpin the disruptive conduct lawful? And if they may not be, what implications might this have for those who are utilising long standing and traditional arrangements to achieve the same ends. Whether the workers picking up delivery jobs through their mobile phone should be entitled to minimum wages under the Fair Work Act is an obvious question to ask and indeed many have.

And while it's easy to ask these questions from a distance, it is not a regulator's role to speculate, but to investigate appropriate cases that are brought to our attention. Despite the public debate, sweeping assertions and excitement about overseas legal developments, my agency has not been inundated by complaints from workers in these sectors. Much of the noise comes from the established competitors. But this is not to say we have not had any complaints, or that there isn't public interest in examining the question.

The Fair Work Ombudsman does not approach these issues by making value judgements and nor do we want to stand in the way as these technologies evolve. Our role is to apply the law to the question. And the law in question here is the long standing basis for

workplace regulation in Australia and the trigger for coverage by the Fair Work Act and its minimum pay and conditions – the employment contract.

Applying the long-standing legal tests to these emerging models is novel and not without its challenges. It involves a forensic examination of the arrangements, data, activities and expectations of the parties connecting across these platforms. And it is probably optimistic to think the question in these sorts of matters can be resolved by simply applying a check list.

The Fair Work Ombudsman does not determine the law itself. Questions of law can only be truly resolved if they are posed with specific facts and pleadings before a court. Where this can be brought about, it is usually the best way to convert an academic inquiry into certainty for business, workers and consumers alike.

This has not yet come to pass, but we are all watching this space.

And that includes businesses engaging their own delivery workforce in a traditional model. We have already cast the contractor-vs-employee lens over the delivery arrangements at Domino's and Pizza Hut and found them wanting in some cases. We can't leave question marks hanging over other services that enter into the same market.

Future-proofing our toolkit

And while technology continues to evolve at rates that make my new phone outdated in two years, the Government has also seen a need to evolve aspects of the Fair Work Ombudsman's enforcement toolkit to ensure we remain effective. As I'm sure you are aware, the Government's Fair Work Amendment (Protecting Vulnerable Workers) Bill is before the Parliament. It proposes new powers for the Fair Work Ombudsman, and it proposes greater penalties for non-compliance.

It's important to have an enforcement toolkit that is "future-proofed" and if this bill passes, it would give the Fair Work Ombudsman powers to secure the evidence we need to answer these complex questions. We would of course continue to ensure that our interventions are proportionate and appropriate, taking into account the full range of circumstances.

The Bill would also expand liability of franchises and holding companies, requiring them to take responsibility for workplace compliance where they have control of the necessary levers. It will not be lost on you that I've just spent some time talking about compliance issues within two long-established Australian franchise brands.

So it is more important than ever that businesses stay ahead of the pack and make compliance with workplace laws a priority. This will be crucial for emerging businesses using platform technology. Just recently we've released education and guidance material to support those who want to step up and take moral and ethical responsibility for workers in their supply chains.

I look forward to working with industry and with unions, with employers, the legal profession and academics to answer these questions, as the regulatory environment adapts to the future of work.

Thank you.