



The Hon. Damien Tudehope MLC
Minister for Finance
Minister for Employee Relations
Vice-President of the Executive Council
Leader of the Government in the Legislative Council

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4 October 2022

Mr David Blunt
Clerk of the Parliaments and Clerk of the Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email

Dear Mr Blunt

Please find attached the Government Response to Report No.1 of the Select Committee on the impact of technological and other change on the future of work and workers in New South Wales, *Impact of Technological and Other Change on the Future of Work and Workers in New South Wales – the Gig Economy*.

Yours sincerely

The Hon. Damien Tudehope MLC
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Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales

First Report

NSW Government Response

Introduction

The gig economy is a flexible evolving work environment that requires appropriately tailored government and external interventions.

The NSW Government believes that the gig economy is an innovative workforce development driven by the ongoing digital revolution affecting all aspects of our lives and that thousands of gig workers appreciate the flexibility and opportunities that the gig economy provides.

Notwithstanding this, all workers should benefit from minimum standards of remuneration and workplace safety protections.

The NSW Government particularly notes that five delivery drivers tragically lost their lives in 2020 during the course of this Inquiry, and that some of their bereaved relatives provided evidence to the Committee.

In response to these fatalities, the NSW Government initiated a dialogue with platform economy enterprises, drivers, police, and road safety experts. The result has been an enhancement of safety measures in the platform economy, and a new regulation aimed at ensuring gig workers can perform their work in a safe and healthy work environment.

SafeWork NSW has issued new guidance material targeting food delivery riders and has commenced administering the *Work Health and Safety Amendment (Food Delivery Riders) Regulation 2022*, which places new obligations on workers and platforms to enhance the safety and wellbeing of workers in the food delivery sector.

Since the beginning of the Inquiry, it is evident that industry has made conscious and incremental improvements in their approach to insurance for platform workers by proactively increasing protections through free accident and income protection insurance.

It is also worth noting that since the publication of the Inquiry's report, HungryPanda has become the fifth major platform to sign up to the '*National Safety Principles for Food Delivery Platforms*'.¹ Signatories have committed to implementing and reporting on these principles on an annual basis from July 2022.

Drivers performing work for platform enterprises who undertake passenger services in NSW (such as rideshare drivers) are already subject to the strict safety provisions under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* and the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017*. Under that law, the provider of a passenger service must ensure, so far as is reasonably practicable, the health and safety of drivers and other persons while they are engaged in providing the service and of passengers or other persons in connection with the provision of the service.

¹ These principles include commitments to implement initiatives to reduce risks associated with food delivery platform work and to provide free, automatic insurance protections in the case of accidental injuries that arise while delivering on food delivery platforms.

The application of minimum standards of remuneration are contingent on worker status – employee pay and conditions are set by awards and workplace agreements, but other workers – such as independent contractors – will have pay and conditions set by the terms of the contract negotiated between the worker and the person or enterprise for whom they perform work. Legislation relevant to the pay and conditions of the latter class of worker being the *Independent Contractors Act 2006* (Cth) and the *Competition and Consumer Act 2010* (Cth).

Since the commencement of the Inquiry, there have been some developments in the regulation of gig workers' pay and conditions. Menulog has sought to establish an employment relationship with their delivery drivers and has sought the making of a new On Demand Delivery Industry Award².

The NSW Industrial Relations Commission recently varied existing industrial instruments with the result that drivers working for AmazonFlex are now subject to the terms of a contract determination under Chapter 6 of the *Industrial Relations Act 1996*³.

In addition, the Transport Workers' Union (TWU) and Doordash have reached agreement on 'core principles' for gig economy work⁴ and more recently, the TWU has reached agreement with Uber regarding protections for drivers⁵.

Further, the Queensland Government recently introduced legislation to establish protections and enforceable minimum standards and conditions for gig workers and others⁶.

To date however, in most cases determining the status of gig workers, courts and tribunals have concluded that gig workers are not employees, but independent contractors⁷. The majority of gig workers must therefore be considered to be non-employees, or more specifically, independent contractors.

The Committee proposes the establishment of a minimum wage, paid leave and other basic workplace entitlements for gig workers via new legislation, specifically by extending the coverage of Chapter 6 of the *Industrial Relations Act 1996* to cover gig workers.

In the NSW Government's view, constitutional barriers make this proposal unviable. The *Independent Contractors Act 2006* (Cth) expressly prohibits the making of laws which would '...confer or impose rights, entitlements, obligations or liabilities on a party to a services contract in relation to matters that, in an employment relationship, would be workplace relations matters...' ⁸ The proposed amendments to Chapter 6 would clearly be of the latter kind.

In any event, one of the key aims of the referral of industrial relations powers in 2009⁹ was to provide a uniform national system of regulating industrial relations for the private sector. An enactment of laws regulating gig workers by individual states or territories would be contrary to this intention.

² FWC case home page: <https://www.fwc.gov.au/hearings-decisions/major-cases/proposed-demand-delivery-services-award-menulog>

³ See *Applications to vary the Transport Industry – General Carriers Contract Determination 2017 and Transport Industry – Courier and Taxi Truck Contract Determination [2022]* NSWIRComm 1003

⁴ [Doordash – Transport Workers' Union of Australia Statement of Principles to Ensure Safety and Fairness for Workers in the On-Demand Economy 9 May 2022](#)

⁵ <https://www.abc.net.au/news/2022-06-29/uber-and-twu-agreement/101192076>

⁶ See [Industrial Relations and Other Legislation Amendment Bill 2022 \(Qld\)](#)

⁷ See, for example *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Amita Gupta v Portier Pacific Pty Ltd*; *Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698. There have been two decisions in which a gig worker was found to be an employee: *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, and *Diego Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818. The latter decision has at 17 August been overturned on appeal *Deliveroo Australia Pty Ltd v Diego Franco* [2022] FWC FB 156 (17 August 2022).

⁸ IC Act s7(1)(b)

⁹ By means of the *Industrial Relations (Commonwealth Powers) Act 2009*

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Therefore, in the NSW Government's view, any regulation of gig workers should be enacted, administered and enforced by the Commonwealth.

Recommendations

The following section details the NSW Government's response to individual recommendations in the inquiry report.

Recommendation 1 - Partially Supported

That the NSW Government commit to greater protections for gig economy workers, regardless of work status.

WHS laws were developed to be flexible to accommodate new and evolving ways of working. The WHS laws use a broad definition of 'worker', which covers both employees and contractors or subcontractors who carry out work for a business or undertaking. All persons conducting a business or undertaking have a duty to ensure, so far as is reasonably practicable, the health and safety of workers they engage or workers whose activities in carrying out work are influenced or directed by the person.

In addition, the NSW Government introduced the *Work Health and Safety Amendment (Food Delivery Riders) Regulation 2022* (Food Delivery Regulation), which commenced in part on 1 July 2022 (duty to supply personal protective equipment (PPE)), with the remaining amendments (relating to training and record keeping) commencing in January 2023. These amendments will enhance protections for food delivery workers in relation to PPE, induction training and record keeping.

In applying WHS legislation to the food delivery industry, the NSW Government has demonstrated its commitment to delivering greater protections for workers in the gig economy and ensured that existing WHS legislation remains fit for purpose. Nevertheless, the value of monitoring changing conditions in the gig economy (and the various sectors within it) to ensure all workers are adequately protected is recognised.

In the NSW Government's view, protections of pay and conditions of gig workers are matters for the Commonwealth, both in terms of current legislation (the *Independent Contractors Act 2006*), and any future direct regulation.

The NSW Government notes that the Commonwealth has indicated it is appropriate that the Fair Work Commission be given the powers to make rulings for pay and conditions for gig workers which would have a national application. The NSW Government supports a tripartite approach between the Commonwealth, unions and employers to develop appropriate protections for gig economy workers whilst maintaining the benefits that flexible work arrangements can provide for employees.

Recommendation 2 – Not Supported

That the NSW Government establish a tribunal or extend the jurisdiction of the existing tribunal, with the power to set minimum pay and conditions for gig workers that provide labour to on demand platforms regardless of work status, to the extent permitted by the state's constitutional authority

A NSW tribunal with the power to set pay and conditions for gig workers would require either new legislation or the amendment of existing legislation to create such a power.

In the NSW Government's view, constitutional barriers make such a proposal unviable. The *Independent Contractors Act 2006* expressly prohibits the making of laws which would '...confer or impose rights, entitlements, obligations or liabilities on a party to a services contract in relation to matters that, in an employment relationship, would be workplace

*relations matters.*¹⁰ The proposed amendments to Chapter 6 would clearly be of the latter kind.

In any event, one of the key aims of referral of industrial relations powers in 2009¹¹ was to provide a uniform national system of regulating industrial relations for the private sector. Enactment of laws regulating gig workers by individual states or territories would be contrary to this intention.

Recommendation 3 – Not Supported

That the NSW Government introduce legislation to extend Chapter 6 of the Industrial Relations Act 1996 to include at least rideshare and food delivery workers as well as those engaged to deliver bread, milk and cream.

Please refer to the response to Recommendation 2.

In addition, the NSW Government notes that with respect to the *Independent Contractors Act 2006 (Cth)*, there are constitutional obstacles to amending Chapter 6 of the *Industrial Relations Act 1996* to remove the exclusion for bread, milk and cream carters.

Recommendation 4 – Not Supported

That the NSW Government establish a portable entitlement scheme for gig and other precarious workers, in partnership with employers, unions and gig platforms.

The scope of the proposed recommendation to capture 'gig workers' is not sufficiently defined. Existing schemes are generally industry or sector based and contain minimum eligibility requirements.

The NSW Government notes the Commonwealth Government's plan to work with state and territory governments, employers and unions to develop portable leave entitlement schemes for Australians in insecure work. This includes portability of entitlements for workers in different industries and parts of the economy that are newer or emerging.

Recommendation 5 – Not Supported

That the NSW Government give the tribunal envisaged in recommendation 2 the power to advise on, oversee and make binding rulings on disputes between gig workers and on-demand platforms, to the extent permitted by the state's constitutional authority.

Please refer to the response to Recommendation 2.

Recommendation 6 – Support In Principle

That the NSW Government mandate improved transparency between platforms and workers concerning average earnings, most profitable times to work, real time use of the platform, data collection and utilisation, and performance management systems.

It is unclear that mandating increased transparency between platforms and workers would provide net economic benefits.

Giving relevant organisations the right to inspect the code/algorithms of platforms would have high compliance and administrative costs and could also raise concerns about intellectual property rights.

¹⁰ IC Act s7(1)(b)

¹¹ By means of the *Industrial Relations (Commonwealth Powers) Act 2009*

On the other hand, the collection, use and publishing of data could assist in the evaluation of existing policy and the development of relevant policy going forward.

Making average earnings data and data concerning the most profitable times to work could assist prospective and current gig workers in making important decisions about maximising their earnings and balancing gig work with other employment, study, family responsibilities etc.

It should also be noted that the Point to Point Transport Commissioner currently regulates the safety of passenger services in NSW (taxis, hire cars and the like). However, the Commissioner has no role in setting the terms and conditions for drivers in the sector and no power in relation to data associated with those matters.

Having regard to these considerations, the NSW Government response to this recommendation is that transparency between platforms and workers should be facilitated by voluntary disclosure of relevant data by platforms.

Recommendation 7 – Not Supported

That the NSW Government require platform companies to publish regular data on their scope and operations, and the earnings of their workers in New South Wales.

Please refer to the response to Recommendation 6 regarding voluntary disclosure.

Recommendation 8 – Supported

That the NSW Government publicly affirm the right of gig workers to freely associate by joining (or not joining) a union.

The NSW Government believes that all workers should be free to join, or not join a union, provided that individual workers suffer no detriment as a result of the choice they make.

The *Industrial Relations Act 1996* already provides for freedom of association (s209), protects individual employees or prospective employees from victimisation (s210), and prohibits giving preference to union members over non-members (s211). Section 346 of the *Fair Work Act 2009* (Cth) also provides general protections to a person for belonging or not belonging to a union or engaging or not engaging in industrial action.

Recommendation 9 – Not supported

That the NSW Government legislate to establish a system of collective bargaining for workers providing labour to on-demand platforms, to the extent permitted by the state's constitutional authority.

Please refer to the response to Recommendation 2.

Recommendation 10 – Not supported

That the NSW Government amend Chapter 6 of the Industrial Relations Act 1996 to establish a collective bargaining system that includes rideshare, food delivery and parcel delivery workers

Please refer to the response to Recommendation 2.

Recommendation 11 – Not supported

That the NSW Government give the tribunal envisaged in recommendation 2 the power to recognise an agreement reached by an on-demand platform and its workers (or their representatives) that improves the minimum conditions a worker is otherwise entitled to.

Please refer to the response to Recommendation 2.

Recommendation 12 – Not supported

That the NSW Government urgently review the grouping provisions of the Payroll Tax Act 2007 to ensure that on-demand platforms are not obtaining an advantage over other businesses who are not trading in the gig economy

Grouping provisions in the *Payroll Tax Act 2007* are detailed and designed to capture a broad range of grouping arrangements, including more complex arrangements, to counter tax avoidance practices through the splitting of business activities.

It is unclear that the grouping provisions in the Act advantage gig economy businesses, and that existing compliance activities by Revenue NSW are insufficient to address the issue of evading grouping requirements.

The Act is harmonised with payroll tax legislation in other jurisdictions, including grouping and contractor provisions, to minimise costs to businesses operating in more than one jurisdiction. As such, any reform to grouping provisions in the Act should be an interjurisdictional issue to avoid imposing additional regulatory costs.

Recommendation 13 – Not supported

That the NSW Government undertake a study of the advantages and disadvantages of replacing payroll tax with a business cash-flow tax

Payroll tax is a relatively efficient state tax (*NSW Review of Federal Financial Relations*, 2020). An alternative business cash-flow tax has, in the past, been recommended as a reform of Commonwealth business taxation, albeit with potential substitution over time with state payroll taxes (*Australia's future tax system, Report to the Treasurer*, 2009). More recent investigations of the proposal have also focused on the substitution of Commonwealth corporate income tax, in particular addressing investment disincentives, and biases towards economic rents and large overseas companies (Garnaut et al, *Replacing corporate income tax with a cashflow tax*, 2020).

As a proposal which would need to be enacted and administered by the Commonwealth Government, replacement of state payroll taxes with a business cash-flow tax would require interjurisdictional tax reform effort. This would require careful consideration of the implications for the revenue autonomy of New South Wales of making a further third of state revenues subject to the control of other jurisdictions.

Recommendation 14 – Not supported

That the NSW Government legislate to establish a requirement for all on-demand platforms to register with SafeWork NSW before they begin trading

There is limited evidence to suggest that a registration system will improve safety outcomes.

The NSW approach, as embodied in the new Food Delivery Regulation, is to require online platforms to provide training verifications to riders that will be available to SafeWork NSW inspectors to check. This is a more cost-effective way of enhancing safety outcomes.

Monitoring the impact of the new Food Delivery Regulation may provide insights into platforms' compliance and worker safety, which will enable further reform if needed.

On-demand platforms operate across Australia, not just within NSW. Except for Victoria, WHS laws are harmonised nationally, and a requirement of this kind would be seen as inconsistent with harmonisation and the model WHS laws. Such steps may also restrict the availability of Australia-wide services to NSW residents.

Recommendation 15 - Not supported

That the NSW Government introduce discrete and enforceable codes of conduct for work performed by on-demand platforms in the rideshare, food delivery, parcel delivery and disability care sectors of the gig economy

Platform companies who provide passenger services in NSW (such as rideshare companies) are subject to the strict safety provisions under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* and the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017*. Under that law the provider of a passenger service (i.e. a rideshare company) must ensure, so far as is reasonably practicable, the health and safety of drivers and other persons while they are engaged in providing the service and of passengers or other persons in connection with the provision of the service. Service providers must also ensure their drivers meet the safety standards specified in the regulation.

Drivers of passenger services must take reasonable care for their own safety and not adversely affect the health and safety of other persons and comply so far as the driver is reasonably able, with any reasonable instruction and co-operate with any reasonable policy or procedure of the service provider relating to health or safety in connection with the provision of a passenger service.

The Commission has a proactive enforcement and compliance approach, backed by strong powers and a range of measures to enforce compliance. It works with companies to educate them about their safety obligations and audits them to ensure they are complying with their obligations. This is backed up by the Commission's on-street compliance team which monitors vehicles and drivers to ensure they are operating according to the strict safety standards of point to point transport law.

SafeWork NSW has already published guidelines for the food delivery rider sector. These guidelines may be suitable for adoption by similar sectors including parcel delivery.

It should also be noted that Safe Work Australia has a role in developing national WHS guidance (where there is a national WHS issue). As a result, NSW has raised with Safe Work Australia the need for further guidance in relation to working arrangements for the disability care sector of the gig economy. In the interim, SafeWork NSW is in the process of collating, reviewing and updating relevant guidance material.

The term 'Code of Conduct' is not used within the WHS space. Under WHS legislation, model codes of practice (COP) have been developed by Safe Work Australia in consultation with WHS regulators and social partners. Once endorsed by WHS Ministers, states and territories may apply the model COPs to have effect within their jurisdictions.

Accordingly, codes of conduct as proposed by the recommendation are not considered to be warranted.

Recommendation 16 – Not supported

That the NSW Government introduce a scheme that delivers standardised workplace health and safety training to workers providing labour to on-demand platforms in high-risk industries, which can be recognised by all platforms that a worker chooses to work for.

SafeWork NSW has already developed a WHS training framework as part of the new Food Delivery Regulation. Food delivery platforms must use the framework when onboarding new food delivery riders.

It is noted that further consideration and consultation would be required in relation to developing standardised training programs for other sectors within the gig economy. Developing and administering Continued Professional Development (CPD) programs may require significant cost and resources at both the administrators' end, as well as the recipients' end (assuming a similar approach is taken to White Card or RSA training).

This may make it harder for new workers to enter the market, especially those of low income or wealth.

Measures currently in place already provide the substance of this recommendation.

Recommendation 17 – Not supported

That the NSW Government partner with on-demand platforms, employers and unions to develop an enforcement regime which provides for the inspection, auditing and reporting of an on-demand platform's compliance with workplace health and safety laws by organisations independent of that platform.

Platform companies which provide passenger services in NSW (such as rideshare companies) are subject to the strict safety provisions under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* and the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* (see also response to Recommendation 15 above).

Also, audits of service providers are undertaken to check that they have arrangements in place to identify and manage the risks to the safety of their passenger services and that they are complying with regulated safety standards.

Existing legislation enables SafeWork NSW inspectors to inspect, audit, enforce, sanction and report on the performance of on-demand platforms and the industry as a whole. The Food Delivery Regulation will further enable SafeWork NSW to verify that food delivery workers have undertaken training for each platform they work with.

Collaboration on these matters is already underway - an industry action plan (IAP) was developed as part of the NSW Government's Taskforce on Food Delivery Rider Safety. This report was a collaboration between government, on-demand platforms, and other key stakeholders. The IAP includes a commitment by the NSW Government to support the industry through compliance and enforcement operations, and safety messaging. This work has since resulted in Deliveroo, Doordash, Menulog and Uber Eats agreeing to a set of National Food Delivery Platform Safety Principles that focus on enhancing training, PPE and incident reporting/investigation.

Recommendation 18 - Noted

That the NSW Government review health and safety legislation to ensure workers in the gig economy are protected by health and safety laws, including reviewing the definitions of 'person conducting a business or undertaking' and 'worker' in the Work Health and Safety Act 2011.

Model WHS laws were independently reviewed in 2018. The review found that for the most part, the laws were working as intended. However, recommendation 3 of the review suggested that Safe Work Australia continuously assess new and emerging business models, industries and work hazards to help identify when there is a need for legislative reform or new model regulation. In response to this recommendation, Safe Work Australia is

developing a set of principles to assist with effectively identifying emerging issues. NSW has been contributing to discussions at the national level.

The definitions of 'person conducting a business or undertaking' (PCBU) and 'worker' are core concepts underpinning the model WHS laws. However, SafeWork NSW is working on clarifying WHS definitions and obligations for stakeholders by developing guidance material for emerging sectors within the gig economy.

Recommendation 19 - Noted

That SafeWork NSW urgently review the Work Health and Safety Act 2011's provisions for health and safety representatives, to ensure that they are able to operate effectively for gig economy workers

Guidance material recently developed by SafeWork NSW for the food delivery industry provides information on health and safety representatives (HSRs) and obligations that PCBUs must adhere to.

DCS notes that there has been a recent review and amendment to the *Work Health and Safety Act 2011* in relation to HSR training. Additional work in this space will be explored.

Recommendation 20 - Noted

That the NSW Government provide full workers compensation benefits to on-demand platform workers that are equivalent to the level of benefits currently provided to employees injured in New South Wales workplaces

The rapid growth of the gig economy in NSW is changing the way the workforce operates. The State Insurance Regulatory Authority (SIRA) will continue to monitor developments in the on-demand and gig economy industry.

As part of its ongoing strategic and broad-scale efforts to modernise the NSW workers compensation system, SIRA continues to examine options for reforming the scheme.

Recommendation 21 – Support in principle

That the NSW Government take greater leadership in the gig economy by actively anticipating the changes taking place, monitoring those changes and their effects, engaging with both business and workers, and establishing the best regulatory measures to ensure optimal outcomes for workers, business and the broader community

The NSW Government already monitors workforce changes and their effects, has enacted laws for the safety of drivers of rideshare and other point to point passenger services and has initiated new regulatory measures to ensure that gig workers operate in a safe and healthy work environment.

SafeWork NSW has already demonstrated effective leadership by delivering safety initiatives and improvements for the food delivery sector, including through the implementation of the Food Delivery Regulation. SafeWork NSW will continue to progress and deliver this work for other sectors within the gig economy, as well as for the broader community

Recommendation 22 - Supported

That the NSW Government support ongoing data collection on and research into on-demand work, specific to New South Wales, including longitudinal research that tracks changes in participation in digital platform work, the experience of workers and businesses, and the outcomes for the economy and broader community.

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The NSW Government's Centre for Work Health and Safety continues to invest in work into the future world of work including on-demand, digital platform work.

The NSW Department of Customer Service currently plays a role in data collection and analytics and operates data collection functionalities which may be leveraged to support ongoing research into on-demand work.