INTRODUCTION

1. The gig economy is often held out as a group of wealthy, multinational organisations that use mobile applications to skirt the edges of the law and exploit vulnerable workers. According to the General Secretary of the Independent Workers’ Union of Great Britain, no company better epitomises the gig economy than Uber.

2. There can be little doubt that Uber has gone to great extents to disguise the relationships it has with its drivers so as to avoid labour laws. So far it has been successful in doing so in Australia. But is the gig economy the creature that enables companies like Uber to exploit their labour?

3. This paper will start by defining the gig economy. It will then suggest that the current gaps in Australia’s labour laws are not a by-product of the gig economy but are instead caused by the under-regulation of dependent contracting. This paper will then look at a selection of cases from the United Kingdom, the United States of America, and Australia involving labour law claims by Uber drivers against Uber. Finally, this paper will suggest that the state and federal parliaments could better protect the working class in Australia by extending Australia’s labour laws to cover dependent contractors.

* BCom, LLB, LLM(Res). Cory Fogliani is an employment and industrial lawyer in Perth, Western Australia. This paper was prepared as a part of a seminar presentation to the Law Society of Western Australia on 15 February 2018. This paper was created and released for educational purposes only. It is not intended to be legal advice, nor to be used as legal advice. I acknowledge and thank Pearl Lim from the AMWU WA Branch for taking the time to proof read my work.


3 Kaseris v Rasier Pacific V.O.F [2017] FWC 6610.
What is the ‘gig economy’?

4. There has been a lot of academic work dedicated to talking about the gig economy. Despite that attention, it is surprisingly difficult to find any sort of consensus about what the gig economy is.

5. For example:
   a. In the Macquarie Dictionary, the term ‘gig economy’ is defined as ‘an economy in which individual workers are employed on a contract to do a particular task for a set time, with little connection to their employer, as dog walkers, people who do food shopping and deliveries, drivers in ride-sharing services, etc.’
   b. Professor Wayne Lewchuk from McMaster University in Canada has described the gig economy as an economy ‘where the dominant forms of employment are short-term contract work, freelancing and self-employment.’
   c. In 2016, the Prime Minister of the United Kingdom commissioned an independent review of ‘employment practices in the modern economy’. The authors of that review defined ‘gig economy work’ as ‘people using apps to sell their labour.’
   d. Dr Arianne Barzilay from the University of Haifa in Israel and Dr Anat Ben-David from the Open University of Israel have referred to the gig economy as ‘the disaggregation of consumption and the segmentation of production via online platforms.’

6. If you were to apply each of the above definitions to the entire workforce in Australia, then for each definition you would be left with a different group of people. This creates obvious problems for anyone advocating for better regulation of the gig economy.

7. It is difficult to define the gig economy without first considering what a gig is, and which types of workers are gig workers.

---

**What is a gig?**

8. A gig is a simple concept. It is the performance of a piece of work by a worker. All gig work is temporary. Although, there can be considerable variance in how long it may take for a worker to perform a gig. A gig may last as little as a few minutes, or it may stretch out over a couple of months or even years.

**Who are gig workers?**

9. Gig workers can come in many different forms. Some will be employees. Some will be independent contractors. And others will be caught up in dependent relationships which do not neatly fit within the more traditional employee/independent contractor construct.

10. The one thing that all gig workers have in common is that they will be engaged under either a fixed-term or fixed-task contract which is of a temporary nature. Once the term of the contract expires, or the task is completed, the gig is over.

11. Actors, musicians, barristers, babysitters, dogwalkers, and home-handymen are some examples of gig workers. They all usually work under fixed-term or fixed-task contracts. In the usual course of business, none of them ought to have any expectation of ongoing, permanent work from a single purchaser of their labour. A fundamental aspect of a gig is that it will come to an end once the work has been performed.

12. To illustrate the point, let us take the example of a musician. Our musician is contracted by a publican to play a gig for two nights at a local pub. Once the musician has completed the performances, she is paid by the publican. The work is gig work because the contract between the parties comes to an end once the work has been performed and paid for. Given the limited scope of the contract, neither party should expect that the relationship will continue beyond the two nights.

13. How a person is remunerated for their work very rarely assists in identifying whether that person is a gig worker. Not all gig workers are paid piece rates or commissions. For example, in the construction industry, gig workers are normally paid either wages or a salary for the life of their role on a construction job. Their method of remuneration does not make their work any less temporary in nature.
So what then is the gig economy?

14. The gig economy is a market in which individual workers sell their labour through fixed-term or fixed-task contracts that are of a temporary nature.

Exonerating the gig economy and shifting focus onto dependent contractor relationships

15. When we consider how the law might be reformed to better protect gig workers, it is most likely the case that we are not thinking about the legislature creating minimum work entitlements for the barristers over at Francis Burt Chambers. Those types of gig workers are big enough to look after themselves.

16. If you can accept the premise that not all gig workers need protection from exploitation, then it should become apparent that the gig economy is not the real problem.

17. The types of workers that are not currently protected, but probably need protection, are those who:

   a. perform work for a third party in circumstances where that third party could not accurately be described as a client or a customer; and

   b. work as an integrated part of a profession or business undertaking carried on by that third party.\(^7\)

18. One of the first concepts that a student of employment and industrial law will learn is the distinction between contracts of service and contracts for service. Under Australian law, the entire employment law universe is comprised of those two categories of relationship.

19. For the most part, employees are well protected under Australia’s labour laws. Employees receive, amongst other things, guaranteed superannuation, workers’ compensation insurance, long service leave, and protection from being unfairly dismissed. There are statutory commissions that are entirely dedicated to resolving conflicts between employers and employees. Independent contractors, on the other hand, are not guaranteed any of those entitlements.

20. Back in 1965, Professor Harry Arthurs from York University in Canada identified the merits of extending employment laws to include a new category of worker called

---

\(^7\) This is adapted from the definition of ‘worker’ in the Employment Rights Act 1996 (UK) at s 230(3)(b) and the National Minimum Wage Act 1998 (UK) at s 54(3).
‘dependent contractors’. Professor Arthurs argued that the binary employee/independent contractor distinction, combined with the lack of minimum entitlements for contractors, meant that employers had an economic incentive to classify workers as contractors rather than employees. Professor Arthurs explained that incentive as follows:

> A fluctuating demand for services is often more economically met by casual arrangements with a dependent contractor than by a burdensome continuing employment relationship. The dependent contractor may work for less. His individual bargaining power is substantially less than that of an organized group of employees. Capital and maintenance costs of equipment can be shifted to the dependent contractor, thereby further enhancing the bargaining power of the employer, while undermining the contractor’s ability to withhold his services. Not least of the attractions of dealing with a dependent contractor is his inability to claim the protection of the labour relations legislation. Finally, the dependent contractor may be used to undermine the union’s bargaining power, which stems from its control of the labour supply.

A dependent contractor is a worker that is legally a contractor but is economically dependent on the work of a single purchaser of their labour. A dependent contractor is not quite an employee and not quite an independent contractor. They instead fall somewhere between the two.

Even in more recent times, scholars from around the globe have continued to debate the merits of the law recognising a third category of employment relationship known as dependent contractors.

In support of the creation of a dependent contractor category, Professor Miriam Cherry and Antonio Aloisi have said:

> Intuitively appealing, a third category would resolve many of the ongoing disputes over misclassification plaguing the on-demand sector. Rather than litigate the issue of whether a particular worker or group of workers deserves employee status, gig workers would automatically be sorted into the hybrid “dependent contractor” category. This would eliminate the uncertainty that goes along with litigation connected to the “all or nothing” scheme and, at

---

9 Ibid at 96.
10 Ibid.
11 Ibid at 89.
12 For more information about this debate see: Miriam A. Cherry, and Antonio Aloisi, “‘Dependent Contractors” in the Gig Economy: A Comparative Approach” (2017) 66 *American University Law Review* 635.
least, offer some labor protection to workers who “present only some characteristics of
‘employees’ but not others.”

24. Professor Benjamin Sachs has questioned whether introducing a dependent contractor
category would assist in fixing the issue that exists in parts of the gig economy. This
is because some gig workers have multiple jobs or operate on multiple online platforms.
These types of workers may not be dependent on the one employer as a source of
income.

25. A complete answer to Professor Sachs’ argument can be found in the United Kingdom’s
labour laws.

The Uber problem under the United Kingdom’s labour laws

26. The legislature in the United Kingdom has taken a liberal approach with the scope of
its labour laws. It has extended them to cover ‘workers’.

27. The term ‘worker’ is defined in statute as:

... an individual who has entered into or works under (or, where the employment has ceased,
worked under)—
(a) a contract of employment, or
(b) any other contract, whether express or implied and (if it is express) whether oral or in
writing, whereby the individual undertakes to do or perform personally any work or
services for another party to the contract whose status is not by virtue of the contract
that of a client or customer of any profession or business undertaking carried on by
the individual;

and any reference to a worker’s contract shall be construed accordingly.

28. Limb (a) of that definition is straightforward. It captures employees.

29. Limb (b) casts the net much wider. It ropes in certain types of contractors.

30. In Bates van Winkelhof v Clyde & Co, Baroness Hale of Richmond said the following
about limb (b):

... the law now draws a distinction between two different kinds of self-employed people. One
kind are people who carry on a profession or a business undertaking on their own account and

---

13 Ibid at 647.
14 Benjamin Sachs, ‘A New Category of Worker for the On-Demand Economy?’ (OnLabor, 22 June 2015)
[https://onlabor.org/a-new-category-of-worker-for-the-on-demand-economy/]
15 Ibid.
16 Employment Rights Act 1996 (UK) at s 230(3)(b); National Minimum Wage Act 1998 (UK) at s 54(3).
enter into contracts with clients or customers to provide work or services for them. ... The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else.\(^\text{17}\)

31. The Employment Appeal Tribunal explained the policy behind limb (b) in this passage from *Byrne Bros (Formwork) Ltd v Baird*:

> It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu — workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.\(^\text{18}\)

32. The industrial courts and tribunals in the United Kingdom have been reluctant to develop legal tests to assist with interpreting limb (b).\(^\text{19}\) They instead prefer to stick to the words of the statute.\(^\text{20}\) This is because the language used in limb (b) is intended to be flexible.\(^\text{21}\) Notwithstanding that point, in determining whether a person is a limb (b) worker the courts and tribunals will usually consider the following factors as being relevant:

a. the nature of the obligations between the parties, bearing in mind that ‘the absence of a general obligation to work cannot be fatal to those cases where it is accepted that there are gaps between particular engagements or assignments’;

b. the degree to which the purported worker is integrated into the business of the other party to the contract (i.e. the employer); and

\(^{17}\) [2014] ICR 730 at [25].  
\(^{18}\) [2002] IRC 667 at [17].  
\(^{19}\) *Bates van Winkelhof v Clyde & Co* [2014] ICR 730 at [39].  
\(^{20}\) Ibid.  
\(^{21}\) *Uber B.V. v Mr Y Aslam* (2017) UKEAT/0056/17/DA at [101]-[102].
the degree to which the purported worker is truly independent in how they perform the services under the contract.22

33. The judiciary in the United Kingdom is aware that some organisations engage armies of lawyers to try and disguise workers as independent contractors.23 As will be illustrated below, the judiciary will push any carefully drafted contracts to one side if their terms do not accurately reflect the true nature of the relationship between the principal and the contractor.

The leading Uber case in the United Kingdom

34. The leading labour law case against Uber in the United Kingdom is Aslam v Uber BV.24

35. In 2016, a group of Uber drivers that operated around London sued three of Uber’s corporate entities in the London Central Employment Tribunal.25 Only two of those entities were relevant to the proceedings. They were:

   a. Uber BV – a Dutch corporation which was based in Amsterdam and was the parent company of the other two Uber entities involved in the proceedings; and

   b. Uber London Ltd – a UK company which held a Private Hire Vehicle Operator’s Licence for London, and which made provision for the invitation and acceptance of private hire vehicle bookings.

36. The drivers claimed that Uber failed to pay them the minimum wage pursuant to an obligation in the Employment Rights Act 1996 (UK) and the National Minimum Wage Act 1998 (UK), and failed to provide them with paid leave in accordance with the Working Time Regulations 1998 (UK).

37. The ‘core issue’ in the proceedings before the Tribunal was whether the drivers fell within limb (b) of the worker definition.26

22 Ibid at [102].
23 Consistent Group Ltd v Kalwak [2007] UKEAT 0535_06_1805 at [57]; Uber B.V. v Mr Y Aslam (2017) UKEAT/0056/17/DA at [93]-[94].
25 Ibid.
26 Ibid at [12].
How Uber operated in practice in London

38. Uber’s passengers would register an account with Uber London Limited. During the registration process, they would provide their personal information and link their Uber account to a credit card or a debit card. Registered users could then download a mobile app on their smartphones and start booking Uber rides.

39. All customer bookings were received and processed by Uber London Limited. Uber London Limited would locate the closest available Uber driver from a pool of drivers who were logged onto Uber’s driver smartphone application. It would inform the closest available driver of the passenger’s request for a ride. The Uber driver would only be told the passenger’s first name and their customer rating.

40. After receiving a job request, the Uber driver had 10 seconds to accept that job. If the driver failed to accept the job within that 10 seconds, then Uber London Limited assumed that the driver was unavailable and moved on to the next closest Uber driver. If a driver missed or rejected three consecutive job requests, then Uber would kick that driver off the mobile application for 10 minutes.

41. If the driver accepted the job, then Uber London Limited would confirm the booking with the passenger and allocate the job to the driver. Uber’s mobile applications would then connect the driver and the passenger in a voice call. This was so that the driver and the passenger could discuss a pickup location. Neither party would be able to see the mobile number of the other. Uber discouraged its drivers from asking passengers where they wanted to go during the phone hook-up.

42. The driver was not told where the booked passenger wanted to go until they picked up that passenger. Uber’s driver mobile application had built in satellite navigation. It would provide the driver with detailed instructions about the route to the passenger’s destination. The satellite navigation would also track the driver’s mobile phone movements. Generally, an Uber driver could not detour from the recommended route unless the passenger asked them to, or there was another good reason to do so. If a driver did detour from the route suggested by Uber’s phone application, and a passenger complained, then that driver could receive a please explain letter from Uber.

The facts summarised in this section are adapted from the decision in Aslam v Uber BV [2016] UKET 2202551/2015 (28 October 2016).
43. Once a driver had dropped a passenger off at their destination, the driver would confirm the drop-off with Uber London Limited using the mobile phone application. Uber London Limited would then place the driver back into the pool of available drivers looking for work.

44. At the end of a ride, Uber’s computers calculated a recommended fare based on the satellite data collected from the driver’s mobile phone. The calculation considered the time spent in transit and the distance travelled. It also factored in a multiplier when the passenger demand for Uber drivers exceeded the number of available drivers in the waiting pool.

45. The driver and the passenger were entitled to negotiate a fare that was less than the amount that had been calculated by Uber’s computers. However, they could not agree to a higher fare. Uber discouraged its drivers from asking passengers for tips. Even if an Uber driver and passenger agreed to a lower fare than what was recommended by Uber, Uber would still take a percentage of the recommended fare for its involvement in the ride.

46. Passengers did not pay the Uber driver directly. Instead, Uber BV would make a deduction from the credit or debit card that was linked to the passenger’s Uber account. Uber BV would then draft up an invoice and a receipt for the ride. Neither document would show the full name or contact details of the passenger. It would only show the passenger’s first name. The passenger would receive a copy of the receipt, but not the invoice. The driver would receive both documents.

47. Uber BV would then make a weekly payment to its drivers. That weekly payment would account for all the relevant driver’s fares less Uber BV’s service fee for the use of its mobile application.

48. Uber had recommended to its drivers that they should not ask for a passenger’s phone number, nor should they provide their own phone number to a passenger.

49. When a passenger logged into the Uber mobile application, they had to accept Uber’s terms of service document. Those terms of service required the passenger to agree that:

---

28 The facts summarised in this section are adapted from the decision in Aslam v Uber BV [2016] UKET 2202551/2015 (28 October 2016).
a. Uber UK (which for rides in London meant Uber London Limited) was an agent for each Uber driver;

b. Uber UK was not a transportation provider and did not provide transportation services;

c. Uber UK was an intermediary between the passenger and the Uber driver;

d. any contract for a ride was between the passenger and the Uber driver;

e. Uber UK accepted passenger bookings as an agent for individual Uber drivers;

f. Uber UK was not a party to any transportation contract between the passenger and an Uber driver;

g. Uber UK was entitled to:

   i. decline any ride requests made by the passenger;

   ii. determine which Uber driver would be offered the passenger’s ride request;

   iii. keep records of each of the passenger’s bookings;

   iv. remotely monitor the progress of any ride; and

   v. manage any lost property queries relating to Uber bookings;

h. Uber UK provided its booking services ‘free of charge’ to the passenger; and

i. Uber BV was entitled to ‘facilitate’ the passenger’s payment of the fare on behalf of the Uber driver.

**The contractual documents between Uber and its drivers**

50. Before a driver could sign up with Uber, they first needed to attend an interview and induction process. The induction pack supplied by Uber to its drivers contained various instructions about what Uber expected from them.

51. To use the Uber driver mobile application, Uber drivers were required to agree to Uber’s terms of service document. Those contractual arrangements were between the driver and Uber BV. Uber could unilaterally update its terms of service. An Uber driver

---

29 The facts summarised in this section are adapted from the decision in Aslam v Uber BV [2016] UKET 2202551/2015 (28 October 2016).
would need to accept any updated terms of service before they could continue to use
the mobile application.

52. Uber’s terms of service were updated from time-to-time. In the terms of service that
were considered by the Tribunal, Uber agreed to offer information and a tool (the
mobile applications) to the driver to connect them with passengers.

53. The drivers agreed, amongst other things:

a. that Uber was not a transportation or passenger carrier, and did not provide any
   transportation services;

b. to provide their own vehicle which was:
   i. manufactured no earlier than 2006;
   ii. was in good condition; and
   iii. was within a list of acceptable makes and models released by Uber;

c. to cover all costs incidental to owning and running the vehicle;

d. that there was a direct legal relationship solely between the driver and their
   passengers;

e. that the contract was not intended to create an employment relationship between
   Uber and the driver;

f. that the driver was not an agent of Uber;

g. that Uber did not intend to exercise any control over the driver (except as
   provided for in the contract);

h. to support Uber in all communications;

i. to engage other drivers if requested to do so by Uber;

j. to refrain from speaking negatively about Uber’s business and business concept
   in public;

k. to comply with the quality standards set by Uber;

l. to constant monitoring by Uber and the storage of any data collected during that
   monitoring process;
m. to take on sole responsibility for all liability, and indemnify Uber for all damages claims, which resulted from the provision of driving or transportation services by the driver;

n. that they were not allowed to:
   i. transfer their right to use the app to another person;
   ii. share Uber accounts; or
   iii. share their Driver ID which was used to sign in to the app;

o. that if the law deemed a driver as an agent, employee or representative of Uber, then the driver would ‘indemnify, defend and hold Uber harmless from and against any claims by any person or entity based on such implied employment or agency relationship’. 30

54. Either party could terminate the contract without notice if:
   a. the driver lost their licence to operate a vehicle or transport customers; or
   b. there had been a material breach of the agreement (including the receipt of a significant number of passenger complaints about the driver).

The arguments advanced by the parties about whether Uber drivers were workers

55. The Uber drivers argued that the Tribunal should look past the written contracts between them and Uber BV. 31 This was because those contracts were designed to misrepresent the relationship between them and Uber. 32 The drivers claimed that the practical reality of the relationship was that they worked for Uber, not the other way around. 33 The drivers claimed that they were employed by Uber London Limited, or alternatively Uber BV.

56. Uber responded that the contracts between the drivers and Uber BV were valid and fairly defined the relationship between the parties. 34 Uber said that it was unremarkable

31 Ibid at [83].
32 Ibid.
33 Ibid.
34 Ibid at [84].
that it made and enforced stipulations about the way which its drivers could use the mobile application.\footnote{Ibid.}

57. There were other arguments advanced by the parties relating to jurisdiction, conflict of laws, and the scope of certain entitlements if the Uber drivers were found to be workers. However, those issues are not relevant to the topic of this paper.

The Tribunal’s view about whether Uber drivers were workers

58. The Tribunal accepted that Uber drivers were under no obligation to switch on the Uber mobile application. It also accepted that Uber drivers were under no obligation to work when they were logged out of the app.

59. However, the Tribunal found that an Uber driver fell within the definition of a limb (b) worker when the following conditions were met:

a. the driver had the mobile app switched on;

b. the driver was within the territory in which they were authorised to work; and

c. the driver was willing and able to accept assignments.\footnote{Ibid at [86].}

60. The Tribunal said that while passengers may desire someone to perform a particular job (i.e. a gig), Uber’s business model required a pool of drivers to be logged into the mobile application and available to accept customer requests.\footnote{Ibid at [100].} As a result, the Uber drivers could still be said to be working for Uber while they were waiting in the pool for a job to come up.\footnote{Ibid.}

61. To a certain extent, that outcome challenges the notion that Uber drivers are gig workers.

62. The Tribunal was highly sceptical of the way in which Uber had drafted its contracts. It accused Uber of resorting to ‘\textit{fictions, twisted language and even brand new terminology}’ to mask the true state of affairs.\footnote{Ibid at [87].} The Tribunal labelled the suggestion that Uber in London was a ‘\textit{mosaic of 30,000 small businesses linked by a common}
‘platform” as ridiculous. The Tribunal refused to allow Uber to rely on its ‘carefully crafted documentation’ because it bore no relation to reality.

The Tribunal rejected the idea that Uber drivers entered into transport contracts with each of their passengers. It said that the ‘supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties’. The Tribunal added:

Uber’s case is that the driver enters into a binding agreement with a person whose identity he does not know (and will never know) and who does not know and will never know his identity, to undertake a journey to a destination not told to him until the journey begins, by a route prescribed by a stranger to the contract (UBV) from which he is not free to depart (at least not without risk), for a fee which (a) is set by the stranger, and (b) is not known by the passenger (who is only told the total to be paid), (c) is calculated by the stranger (as a percentage of the total sum) and (d) is paid to the stranger. Uber’s case has to be that if the organisation became insolvent, the drivers would have enforceable rights directly against the passengers. And if the contracts were ‘worker’ contracts, the passengers would be exposed to potential liability as the driver’s employer under numerous enactments … The absurdity of these propositions speaks for itself.

The Tribunal found that Uber’s claim that it was working for its drivers was false. The reality was that Uber was running a transportation business. Uber made its profits by recruiting and retaining drivers. The real bargain that was struck between Uber and its drivers was ‘that, for reward, the driver makes himself available to, and does, carry Uber passengers to their destinations’.

The Tribunal found that Uber London Limited was the employer of the drivers in London. This was because Uber London Limited was the point of contact between Uber and its drivers. Uber London Limited recruited, instructed, controlled, disciplined and dismissed Uber’s drivers.
Uber’s appeal of the Tribunal’s decision

66. Uber appealed the decision of the Tribunal up to the Employment Appeal Tribunal.51 Eady J reviewed the first instance decision in detail. Her Honour found no error in the Tribunal’s reasons. She dismissed Uber’s appeal.

The Uber problem under the USA’s labour laws

67. The United States of America has maintained an employee/independent contractor construct in its labour laws.52 The difficulties that arise from maintaining that construct has been highlighted by Chhabria J of the United States District Court in the following passage from Cotter v Lyft:

As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn’t very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous. Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California’s outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide. That is certainly true here.53

The ongoing case of O’Connor v Uber Technologies

68. There is ongoing litigation in the Northern District of California about whether Uber misclassified a class of up to 400,000 Uber drivers that operate in the State of California as independent contractors rather than as employees.54

69. Early on in that litigation, Uber applied to the Court for summary judgement.55 The basis of the motion was that the plaintiff drivers were not employees but were instead independent contractors.

52 S.G. Borello & Sons v Department of Industrial Relations [1989] 48 Cal.3d 341 at 350.
The legal test for employment in the State of California

70. In the State of California, the test of employment operates slightly different to that in Australia. The test involves a two-stage analysis. First, if the worker proves that they provided work and labour for the purported employer then that will give rise to a legal presumption that the worker was an employee of that employer. Second, once the presumption arises, the onus shifts to the employer to prove that the worker was an independent contractor.

71. During the second stage of the test, the court will consider a range of indicia to work out whether the worker is an independent contractor. The primary indicia – that is, the factor that holds the most weight – is the degree to which the employer retains a right to control the work. It does not matter whether the employer actually exercises that control. It only matters that the power to control rests with the employer. Secondary indicia that the court will consider include:

   a. whether the worker is engaged in a distinct occupation or business;
   b. the kind of occupation, with reference to whether that type of work is usually done under the direction of the employer or by a specialist without supervision;
   c. the skill required to perform the occupation, including whether that skill is special;
   d. whether the tools and place of work are supplied by the worker or the employer;
   e. the length of time for which the services are to be performed;
   f. the method of payment;
   g. whether the work is a part of the regular business of the employer;
   h. whether the parties believe they are creating an employer-employee relationship;
   i. the worker’s opportunity for profit or loss depending on their managerial skill;
   j. the worker’s investment in equipment or materials to perform the job (including the hiring of employees);

---

57 Ibid.
58 S.G. Borello & Sons v Department of Industrial Relations [1989] 48 Cal.3d 341 at 350.
the degree of permanence of the working relationship; and

whether the work performed by the worker is an integral part of the employer’s business.60

Stage 1: Did Uber drivers provide work and labour to Uber?

Uber’s case was that its drivers provided no work or labour to Uber.61 Uber argued that it was not a transportation company but ‘instead is a pure “technology company” that merely generates “leads” for its transportation providers through its software.’62 Uber described itself as a mere intermediary between drivers and their passengers.63 The Court rejected Uber’s characterisation of itself.

Chen J said that Uber was too focused on what its mobile applications do and that the real substance of Uber’s business was as a transportation company.64 His Honour said it was obvious that the drivers performed a service for Uber. This was because ‘Uber simply would not be a viable business entity without its drivers’.65 In addition, Uber did not generate any revenue by distributing its mobile applications. Instead, its revenue was derived from the labour of its drivers.

His Honour found that Uber exercised significant control over its drivers. This was because:

a. Uber set the price of each ride;

b. Uber prevented its drivers from soliciting future work directly from passengers;

c. Uber had substantial control over the qualification and selection of its drivers; and

d. Uber regularly terminated the accounts of drivers whose performance was not up to Uber’s standards.66

Chen J found that Uber’s drivers were presumptively employees of Uber.67

60 S.G. Borello & Sons v Department of Industrial Relations [1989] 48 Cal.3d 341 at 351, 355.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid.
66 Ibid.
67 Ibid.
**Stage 2: Were the Uber drivers independent contractors?**

76. Whether Uber’s drivers were independent contractors was a mixed question of fact and law. In California, those types of questions cannot be answered by the judge; they must be answered by a jury.  

77. The only way that Uber could obtain summary judgment on the basis that its drivers were not employees was if ‘all the facts and evidentiary inferences material to the employee/independent contractor determination [were] undisputed, and a reasonable jury viewing those undisputed facts and inferences could reach but one conclusion – that Uber’s drivers are independent contractors as a matter of law.’

78. Chen J was not satisfied that the only inference that could be drawn from the facts and inferences before him was that Uber’s drivers were independent contractors. In relation to the secondary indicia, His Honour said that there were ‘numerous factors point[ing] in opposing directions...’ and that there were disputed facts between the parties in relation to many of those factors.

79. Uber’s summary judgement application was denied by the Court. The decision was a small win for the drivers. They were found to be prima facie employees under Californian law.

**Further progress of the case**

80. As mentioned above, the litigation in *O’Connor v Uber Technologies* is ongoing.

81. In around August 2016, Uber and the drivers reached an in-principle settlement of $100,000,000 USD ($16,000,000 of which was contingent on the results of an IPO). The District Court refused to approve that settlement on the basis that it was not ‘fair, adequate, and reasonable’.

82. Chen J was concerned that the settlement sum only represented 0.1% of the potential verdict value if the drivers were to win their case against Uber. His Honour said that a 99.9% reduction did not adequately reflect the parties’ respective risks if the matter

---


Ibid.

Ibid.

Ibid.
went to trial.\textsuperscript{74} This was especially so given that the Court had already ruled that the Uber drivers were presumed by law to be employees.\textsuperscript{75}

**The Uber problem under Australia’s labour laws**

83. Australian labour law does not recognise any distinction between independent contractors and dependent contractors. It treats all self-employed workers as equals.

84. This means that industrial courts and tribunals in Australia are tasked with the difficult job of trying to work out whether a dependent contractor should be labelled as an employee or an independent contractor. To steal an analogy from Chhabria J, the legislature has essentially handed the judiciary a square peg and asked it to choose between two round holes. As will be explained below, this problem was recently highlighted in an unfair dismissal application before the Fair Work Commission.

*Fair Work Commission: Kaseris v Rasier Pacific V.O.F*\textsuperscript{76}

85. Mr Kaseris was an Uber driver. He had entered into a services contract with Rasier Pacific V.O.F ("Raiser Pacific").

86. Rasier Pacific was an unlimited partnership. There were two partners in the partnership: Uber Pacific Holdings B.V., and Uber Pacific Holdings Pty Ltd. Raiser Pacific and Uber Pacific Holdings B.V. were registered in the Netherlands. Uber Pacific Holdings Pty Ltd was registered in Australia. Raiser Pacific ran the Uber brand in Australia.

87. On 11 August 2017, Raiser Pacific permanently disabled Mr Kaseris’ access to Uber’s driver mobile app.\textsuperscript{77} According to Raiser Pacific, this was because Mr Kaseris had failed to maintain an adequate overall rating.\textsuperscript{78}

88. In response, Mr Kaseris made an unfair dismissal application against Raiser Pacific in the Fair Work Commission.

89. Only employees are entitled to make unfair dismissal applications under the *Fair Work Act 2009* (Cth).\textsuperscript{79} Predictably, Raiser Pacific objected to the Commission hearing the

\textsuperscript{74} Ibid.
\textsuperscript{75} Ibid.
\textsuperscript{76} [2017] FWC 6610.
\textsuperscript{77} Ibid at [42].
\textsuperscript{78} Ibid.
\textsuperscript{79} *Fair Work Act 2009* (Cth) at s 382.
matter on the basis that Mr Kaseris was not its employee and was therefore not entitled to make an unfair dismissal application.\(^{80}\)

90. Just like its alter-egos in other countries, Rasier Pacific told the Commission that it was not a transportation company but was instead a technology business that supplied lead-generation software.\(^ {81}\) The Commission rejected that argument.\(^ {82}\) It found that Rasier Pacific was operating a transportation business.\(^ {83}\)

*Kaseris v Rasier Pacific: The work-wage bargain*

91. The Commission said that there were certain fundamental conditions that must be present to establish that a work contract was a contract of service. One of those fundamental conditions was the work-wages bargain.\(^ {84}\) The work-wages bargain requires:

   a. an obligation on the worker to perform the work or services that the employer may reasonably demand under the employment contract; and

   b. an obligation on the employer to pay the employee for that work or those services.\(^ {85}\)

92. Rasier Pacific argued that there was no work-wages bargain between it and Mr Kaseris.\(^ {86}\) Mr Kaseris, who was unrepresented in the proceedings, did not seriously challenge that argument nor did he contest important aspects of Rasier Pacific’s evidence relating to that issue.\(^ {87}\)

93. The Commission agreed with Rasier Pacific.\(^ {88}\) It found that there was no work-wages bargain between the parties. This was because:

   a. the contract between the parties did not require Mr Kaseris to perform any work or services for Rasier Pacific; and

\(^{80}\) *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610 at [2].

\(^{81}\) Ibid at [5].

\(^{82}\) Ibid.

\(^{83}\) Ibid.

\(^{84}\) Ibid at [48].

\(^{85}\) Ibid.

\(^{86}\) Ibid at [51].

\(^{87}\) Ibid.

\(^{88}\) Ibid.
b. Rasier Pacific did not pay Mr Kaseris for any work or services.\textsuperscript{89}

94. The Commission found that the uncontested evidence before it was that Rasier Pacific charged Mr Kaseris a service fee.\textsuperscript{90} That fee was calculated as a percentage of the fare that Mr Kaseris charged his passengers.\textsuperscript{91} The service fee was consideration for the services that Rasier Pacific provided to Mr Kaseris.\textsuperscript{92}

95. The Commission’s finding that there was no work-wages bargain between Mr Kaseris and Rasier Pacific meant that there was no employment relationship between those parties.\textsuperscript{93} For this reason, Mr Kaseris’ unfair dismissal application wholly failed.\textsuperscript{94}

\textit{Kaseris v Rasier Pacific: The multi-factorial test}

96. Despite having found that Mr Kaseris was not an employee, the Commission went on to apply the multi-factorial test to further supplement its decision.

97. Control: In relation to the degree of control that each party to the relationship had, the Commission found that:

a. Rasier Pacific had some control over Mr Kaseris.\textsuperscript{95} This is because Rasier Pacific could multiply the fares to be charged by Uber drivers at peak times, and it required its drivers to meet certain vehicle maintenance and safety requirements.\textsuperscript{96}

b. Mr Kaseris had a complete control over how and when he did work. He could pick his own hours, pick which passengers he picked up, and decide whether he wanted to work at all.\textsuperscript{97} The high degree of control that Mr Kaseris had over his activities as an Uber driver indicated that he was an independent contractor.\textsuperscript{98}

\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid.
\textsuperscript{91} Ibid.
\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
\textsuperscript{95} Ibid at [55].
\textsuperscript{96} Ibid.
\textsuperscript{97} Ibid at [54].
\textsuperscript{98} Ibid.
98. **Provision of equipment:** Mr Kaseris supplied his own vehicle, mobile phone, and internet connection.\(^99\) These factors indicated that Mr Kaseris was an independent contractor.\(^{100}\)

99. **Uniform:** Under the service contract, Mr Kaseris was not allowed to display Uber’s logo.\(^{101}\) The service contract did not require Mr Kaseris to wear a uniform.\(^{102}\) These factors indicated that he was an independent contractor.\(^{103}\)

100. **GST:** Mr Kaseris was responsible for registering for GST and passing that GST on to the Commissioner of Taxation.\(^{104}\) This indicated that Mr Kaseris was an independent contractor.\(^{105}\)

101. **The terms of the contract:** The terms of the contract between Mr Kaseris and Rasier Pacific set out that Mr Kaseris was a contractor and not an employee.\(^{106}\)

102. **Other factors:** The Commission found that the following other facts also indicated that Mr Kaseris was an independent contractor:

   a. Mr Kaseris did not receive a wage from Rasier Pacific;

   b. Mr Kaseris was responsible for managing his own tax affairs;

   c. Rasier Pacific did not provide Mr Kaseris with annual leave, sick leave or long service leave;

   d. Rasier Pacific did not make any superannuation contributions to Mr Kaseris’ superannuation fund.\(^{107}\)

103. Unusually, the Commission also found that Mr Kaseris was not an integrated part of Rasier Pacific business.\(^{108}\) The Commission treated this as a neutral factor.\(^{109}\)

104. The Commission concluded that the overwhelming weight of the relevant indicia pointed at Mr Kaseris being an independent contractor rather than an employee.\(^{110}\)

---

\(^99\) Ibid at [56].
\(^{100}\) Ibid.
\(^{101}\) Ibid at [57].
\(^{102}\) Ibid.
\(^{103}\) Ibid.
\(^{104}\) Ibid at [58]-[59].
\(^{105}\) Ibid.
\(^{106}\) Ibid at [60].
\(^{107}\) Ibid at [61].
\(^{108}\) Ibid at [62].
\(^{109}\) Ibid.
\(^{110}\) Ibid at [67].
Closing remarks of the Commission

105. At the end of its decision in *Kaseris v Rasier Pacific V.O.F*, the Commission remarked:

The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new “gig” or “sharing” economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.\(^{111}\)

An argument for extending Australia’s labour laws to cover dependent contracting

106. The above passage from *Kaseris v Rasier Pacific V.O.F* is quite powerful. Arguably, it is recognition from Australia’s peak industrial tribunal that the scope of Australia’s labour law is inadequate.

107. The social problems that arise from dependant contracting are not new. Professor Arthurs was writing about them over 50 years ago. The United Kingdom extended its employment laws to cover dependent contractors more than 20 years ago. Unfortunately, in Australia, the problem has flown under the radar until relatively recently.

108. The expansion of companies like Uber into Australia has increased the number of people in Australia that are working in dependent contractor relationships. The rapid expansion of those companies into the market has probably helped shine a light on the inadequacy of Australia’s labour laws when it comes to dependent contracting.

*What can currently be done by dependent contractors in the gig economy?*

109. At present, it is possible for a dependent contractor (such as an Uber driver) to challenge their work contract on the basis that the contract is harsh or unfair. This can be done through the *Independent Contractors Act 2006* (Cth).

\(^{111}\) Ibid at [66].
110. In assessing whether a contract is harsh or unfair, the court can consider whether the dependent contractor is being paid less than what an employee would be paid to do a similar task.\textsuperscript{112}

111. As has been suggested by Professor Joellen Riley from the University of Sydney, there is no reason why an Uber driver could not challenge the fairness of the termination provision in Uber’s work contracts with its drivers.\textsuperscript{113} Of course, one can only hope that when the time comes where an Uber driver does make such an application, they do not go into the proceedings unrepresented.

112. The problem with the Independent Contractors Act 2006 (Cth) is that it does not provide any minimum, guaranteed entitlements to dependent contractors. The ability of a court to cure unfairness or harshness in a contract, in practicality, does not adequately protect dependent contractors.

\textit{Extending workplace laws in a similar fashion as has been done in the United Kingdom}

113. If employees and dependent contractors are equally vulnerable to exploitation if not protected by statute, then it makes little sense that Australia’s labour laws would only enshrine the protection of employees.

114. A common-sense fix would be for the state and federal parliaments to amend their respective employment and industrial laws so that all the protections and entitlements that are afforded to employees are also afforded to dependent contractors (including workers compensation and superannuation).

115. Achieving such an outcome would be as simple as adopting the extended worker definition that is used in the United Kingdom. It appears from the Uber litigation that that wording is effective at capturing dependent contractors.

-END

\textsuperscript{112} Independent Contractors Act 2006 (Cth) at s 15(1)(c).

\textsuperscript{113} Joellen Riley, ‘Sacked Uber driver case shows driver vulnerability under law’ (The Conversation, 20 May 2016) [https://theconversation.com/sacked-uber-driver-case-shows-driver-vulnerability-under-law-59677].