

A GIG DEAL - 'GIG ECONOMY' REGULATION INITIATIVES AT THE FEDERAL LEVEL

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Legal Briefings - By **Natassia Smith and Henry Kerstens**

The Australian Labor Party (ALP) has a broad industrial relations platform that it is promoting in the lead up to the federal election. However, one key policy that has been set since early 2018 is a 'crackdown' on what is described as the 'casualisation of Australia's workforce and insecure work'. This 'crackdown' will likely involve increased regulation of the 'gig economy', which, if implemented, may recast the rights afforded to workers engaged in this sector.

Broadly speaking, the ALP would likely expressly include 'gig' workers within the coverage of the National Employment Standards, possibly as deemed 'employees', and perhaps aim to provide them with greater rights to collective bargaining avenues and broader union representation.

The Coalition, in contrast, has proposed no changes in this area, but has warned against over-regulating sectors reliant on flexible arrangements.

As a result, the outcome of the election may carry (potentially significant) implications for 'gig economy' companies, providing a timely reminder for business to carefully watch and consider ALP policy announcements and adapt operations accordingly.

CLASSIFYING WORKERS IN THE 'GIG ECONOMY'

The 'gig economy', or 'on-demand economy', broadly describes a sector in which digital platforms facilitate transactions between buyers and sellers, with some form of fee, consideration or return to the platform provider. Its operation depends on digital platforms, which act as intermediaries using 'algorithmic management' to connect individual service providers with end-users (enterprises or consumers) seeking specific services. Sometimes of course, the service providers are individuals. It is these situations where the ALP policy looks to treat them as employees.

Almost a million self-employed Australians work flexibly in the 'gig economy',¹ often for large, well-known companies like Uber, Airtasker and Deliveroo. Some say that the varied, non-permanent nature of these engagements has made the traditional approach to characterising workers as either 'employee' or 'contractor' a difficult one. Others contend that employment can never be an appropriate label for such workers, who choose to log into and out of the platform at their discretion, what work, if any, they accept, and the very terms on which they agree to do it.

The task has been further complicated by conflicting characterisations in the Fair Work Commission (**FWC**) of 'gig economy' workers as both employees² and contractors,³ putting added pressure on regulators from some quarters to respond to what is perceived to be a need for clarity for those engaged in this rapidly growing marketplace.

A [recent decision](#) determining that a Foodora delivery driver was actually an employee, even though he was engaged under an 'Independent Contractor Agreement', prompted Commissioner Cambridge of the FWC to describe what he clearly perceived as public interest in further regulation, as follows: *"there may be a need to expand or modify the orthodox contemplation for the determination of the characterisation of contracts of employment vis-à-vis, independent contractor, as the changing nature of work is impacted by new technologies"*.

THE POLICY LANDSCAPE

The ALP's federal policy platform highlights what might be described as opposing concern from the major parties on ensuring creative, innovative working opportunities, on the one side, and the implications this is perceived to have on workers' rights, on the other.

It has been a debate mirrored at the state level, with the Victorian Government undertaking an Inquiry into the Victorian On-Demand Workforce (report due late 2019) and NSW Labor proposing what it describes as bold, fresh measures to better protect 'gig economy' workers.

If elected, we can expect a number of initiatives from the ALP aimed at 'tighter regulation of the gig economy'. These may include:

- the legal definition of 'employee' to be expanded within existing legislation to cover all

workers in the 'gig economy' (in keeping with the proposals suggested by various ALP-led Senate Committees);

- modern award coverage to be extended to 'gig economy' workers; and
- independent contractors to be allowed to bargain collectively and access union representation.

The NSW Labor Party has also proposed the introduction of discrete legislation that it says regulates 'future work' and comprehensively addresses 'gig' workers, and the 'platforms' or 'networks' through which work is provided. Additionally, various unions have been active in advocating for the regulation of the 'gig economy' sector, with the ACTU arguing that "*the under-regulated gig economy is allowing businesses to deny basic rights and entitlements to Australian workers*". Further, the TWU has suggested contractors be granted rights based on a test of 'dependency', in which the FWC would look at work patterns and the extent that contractors are dependent on a particular business model.

These more significant changes would have support from the Greens, who have made 'gig economy' regulation a key agenda topic, last year introducing a bill to give these workers minimum pay and expanded workers' rights.

In contrast, the Coalition have a seemingly clear policy position against any significant or unconventional regulation of the 'gig economy'. It is therefore unlikely that we will see significant change in this space if the Coalition retain government, however minor tweaks to tax reporting obligations for platform providers have been flagged.

THE FUTURE

The real policy change in this space appears tied to an ALP election win, with the proposed regulation of 'gig economy' workers symptomatic of what could be a robust and broad post-election targeting of apparently 'insecure work' generally.

For companies active in the 'gig economy', carefully monitoring policies as they are developed, including after the election, will be critical. This will not only allow businesses to prepare for and understand their impact, but also ensure they are able to engage in consultation processes which are likely to accompany any significant reform on this issue.

For a broad summary of the proposed industrial relations reforms publicly announced by the Liberal Party and the ALP please contact the below 'key contacts'.

ENDNOTES

1. [Where is the gig economy taking us?](#) SMH, September 6, 2018
2. *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836
3. *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**ANTHONY
LONGLAND**
PARTNER, PERTH

+61 8 9211 7273
Anthony.Longland@hsf.com



KIRSTY FAICHEN
PARTNER, BRISBANE

+61 7 3258 6492
Kirsty.Faichen@hsf.com



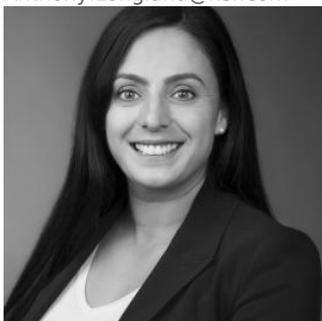
ROHAN DOYLE
PARTNER,
MELBOURNE

+61 3 9288 1099
Rohan.Doyle@hsf.com



ANTHONY WOOD
PARTNER,
MELBOURNE

+61 3 9288 1544
Anthony.Wood@hsf.com



NATALIE GASPAR
PARTNER,
MELBOURNE

+61 3 9288 1091
Natalie.Gaspar@hsf.com



SHIVCHAND JHINKU
PARTNER, SYDNEY

+61 2 9225 5228
Shivchand.Jhinku@hsf.com



WENDY FAUVEL
EXECUTIVE COUNSEL,
BRISBANE

+61 3 9288 1732
wendy.fauvel@hsf.com



CATHERINE PASE
SPECIAL COUNSEL,
MELBOURNE

+61 3 9288 1668
catherine.pase@hsf.com

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