REGULATING GIG WORK IN AUSTRALIA: THE ROLE OF COMPETITION REGULATION AND VOLUNTARY INDUSTRY STANDARDS

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REGULATING GIG WORK IN AUSTRALIA: THE ROLE OF COMPETITION REGULATION AND VOLUNTARY INDUSTRY STANDARDS

By Tess Hardy, Anthony Forsyth & Shae McCrystal

This article surveys two recent Australian regulatory developments which highlight the critical role of competition law and voluntary industry standards in regulating gig work. In particular, the class exemption for small business collective bargaining that was recently introduced by the federal Australian Competition and Consumer Commission ("ACCC") presents important opportunities for platform workers to enhance working conditions via collectively bargaining with platform companies. Complementing this development, the state government of Victoria is planning to introduce a set of Fair Conduct and Accountability Standards for the platform economy, which include provisions to encourage platforms to engage collectively with workers. We consider how the introduction of these voluntary industry standards may interact with federal competition laws and reflect on the impact these standards may have for gig workers on the ground.

01
INTRODUCTION

In many countries, regulatory reforms directed at gig work have been focused on widening the definition of employment and clamping down on misclassification.[2] In Australia, however, regulatory initiatives directed at the gig economy have taken a somewhat unexpected turn. Earlier this year, the High Court of Australia – the apex court in this country – handed down two judgments which have contracted, rather than expanded, the common law definition of employment.[3] This approach, which gives primacy in determining work status to the formal written terms agreed by the parties at the commencement of their relationship, has buttressed the efforts of many platforms to place gig workers outside the main statutory framework governing labor relations. As a result, gig workers are largely excluded from the unfair dismissal regime, deprived of minimum wage protections, cut off from sick leave entitlements and denied access to collective bargaining under traditional channels.[4] At the same time that employment protections for platform workers have shrunk, rights and responsibilities under competition and consumer law have grown.

Gig work is a small, albeit growing, part of the Australian economy and labor market. In 2020, it was estimated that around 250,000 people nationally were providing "on-demand services" through digital platforms mediating transactions with consumers[5] (out of a total national labor force of approximately 13 million people). Mostly, on-demand work is performed for platforms operating in the transport/rideshare and food delivery sectors, along with professional and personal services, maintenance work, and increasingly the aged, disability and childcare sectors.[6] Notwithstanding its relatively modest size, gig work has prompted a wave of regulatory concern and a surge in policy experimentation.

In this article, we briefly survey two recent competition law developments which are relevant to workers in the gig economy. First, we look at the class exemption for small business collective bargaining that was recently introduced by the federal Australian Competition and Consumer Commission ("ACCC"). This exemption – which applies well beyond the gig economy – presents important opportunities for enhancing working conditions for platform workers. We then turn to examine a state-based initiative of the Victorian Government, which was prompted by an extensive inquiry into on-demand work commencing in 2018.[7] The Final Report recommended, amongst other things, that the state government in Victoria introduce a set of Fair Conduct and Accountability Standards for the platform economy. We consider how the introduction of state-based standards may interact with federal competition laws in this space. We also reflect on what impact these standards may have for gig workers on the ground.

02
CLASS EXEMPTION FOR SMALL BUSINESS COLLECTIVE BARGAINING

Historically, the right to engage in collective bargaining in Australia has been confined to those in an employment relationship. This is reinforced by a specific employment exemption under the *Competition and Consumer Act 2010* (Cth) ("CC Act"), which provides employees with the capacity to engage in collective bargaining without fear of facing legal liability under the common law or competition legislation.[8]

2 Jason Moyer-Lee and Nicola Kountouris, *The "Gig Economy": Litigating the Cause of Labour*, in TAKEN FOR A RIDE: LITIGATING THE DIGITAL PLATFORM MODEL (International Lawyers Assisting Workers Network, Issue Brief, 2021).

3 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

4 Anthony Forsyth, *Playing Catch Up But Falling Short: Regulating Work in the Gig Economy in Australia*, 31 KING'S LAW J. 287-300 (2020), at 288.

5 Institute of Actuaries of Australia, *The Rise of the Gig Economy and its Impact on the Australian Workforce* (Green Paper, 2020) 5, 9-11.

6 Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (Victorian Government, Melbourne, 2020) at 24, 34. See further The Senate, Select Committee on Job Security, *First Interim Report: On Demand Platform Work in Australia* (Commonwealth of Australia, Canberra, 2021); Fiona Macdonald, *Individualising Risk: Paid Care Work in the New Gig Economy* (Palgrave Macmillan, Cham, 2021).

7 James, *supra* note 6.

8 However, secondary boycott action remains unlawful. See Shae McCrystal, *Why is it so hard to take lawful strike action in Australia?*, 61 J. OF IND. RELATIONS 129-144 (2019).

These rights and protections are largely out of the reach of most gig workers, who are commonly categorized as independent contractors by the platforms which engage them.[9] More specifically, competition laws have traditionally deemed collective bargaining activity by self-employed workers, small businesses, and franchisees to be "cartel conduct" and therefore unlawful. Practices such as price fixing, bid rigging, territorial allocation, boycotts and "concerted practices" encompassing anti-competitive information sharing are all outlawed under the CC Act. There is no requirement to show that this conduct has an anti-competitive effect in practice. A strict prohibition on "cartel conduct" under the CC Act is very much in line with the dominant narrative of modern competition law policy – that is, collusion between would-be competitors in the same market is broadly assumed to generate economic efficiencies leading to higher prices, delivering lower quality services, and producing poorer consumer outcomes.

Since the 1970s, there has been a limited capacity for collective bargaining to take place between commercial actors via the "notification" and "authorisation" procedures set out in the CC Act. However, these processes are generally perceived as cumbersome and resource intensive. They have been little used in practice.[10] Partly in response to these issues, the ACCC introduced a class exemption for small business collective bargaining in mid-2021.[11] In essence, this block exemption permits small economic players, such as franchisees, fuel retailers, and small businesses with an aggregated, annual turnover of less than $10 million,[12] to form a bargaining group and engage in collective bargaining with the relevant target (i.e. franchisors in the case of franchisees, fuel wholesalers in the case of fuel retailers and suppliers or customers in the case of small businesses). Eligible businesses that meet the statutory thresholds, and comply with a set of relevant preconditions, are provided with legal immunity from the cartel provisions and shielded from civil or criminal penalties available under the CC Act.[13]

To avail itself of this exemption, the business wishing to bargain must lodge a formal notice with the ACCC and provide this notice to any potential targets. The notice must identify a relevant class to which the bargaining group belongs (e.g. Uber drivers in Australia), but the members of the bargaining group or the targets of bargaining do not need to be specifically named. The notice may be lodged by a single member of the bargaining group, or a representative of the group, but cannot be lodged by a trade union. Under the exemption, there is no need to explicitly seek or receive permission from the ACCC in order to proceed with bargaining.

In introducing this class exemption, the ACCC appears to have accepted that horizontal coordination by small firms in the same market may generate a "net public benefit",[14] which not only neutralizes any negative anti-competitive effects, but delivers a positive outcome for the market more generally. In explaining the exemption and justifying its position, the ACCC has pointed out that small business collective bargaining can reduce information asymmetry, minimize barriers to entry and achieve enhanced contractual outcomes. The pooling of resources and the sharing of negotiation costs is also said to produce overall economic gains.[15]

"Since the 1970s, there has been a limited capacity for collective bargaining to take place between commercial actors via the "notification" and "authorisation" procedures set out in the CC Act

9 In several cases, this categorization has been upheld: see e.g. *Gupta v. Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* (2020) 296 IR 246; although compare *Franco v. Deliveroo Australia Pty Ltd* [2021] FWC 2818 (now under appeal).

10 Tess Hardy and Shae McCrystal, *Bargaining in a Vacuum: An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses*, 42 SYD. L. REV. 311-342 (2020); Shae McCrystal, *Collective Bargaining by Self-Employed Workers in Australia and the Concept of Public Benefit*, 42 COMP. LAB. L. & POL. J. 101.

11 The class exemption is given legal force by the Competition and Consumer (Class Exemption – Collective Bargaining) Determination 2020 (the "Determination"), which has been made pursuant to CC Act s 95AA and Competition Code s 95AA.

12 While there is an annual turnover cap which applies to small businesses generally, this turnover cap does not apply to franchisees or fuel retailers.

13 However, statutory prohibitions against primary and secondary boycotts still apply to eligible parties, notwithstanding the class exemption.

14 *Re Queensland Co-Op Milling Association Ltd* (1976) 25 FLR 169.

15 Australian Competition and Consumer Commission, *Collective Bargaining Class Exemption – Discussion Paper*, (2018) https://www.accc.gov.au/system/files/public-registers/documents/ACCC%20Discussion%20Paper%20-%20Collective%20Bargaining%20Class%20Exemption%20-%2023.08.18..pdf .

Beyond the notification procedure, the class exemption imposed very few constraints on the content of the agreement, the level of bargaining and the conduct of the parties throughout the negotiation process. Parties are effectively free to set their own rules about how to engage in bargaining and enforce any concluded agreement. In theory, this new mechanism opens up the capacity for gig workers (and their representatives) to "negotiate with platforms over pay rates, rest periods, safety standards and managerial control through algorithms."[16] However, in practice, the class exemption may fail to reach these lofty heights.

While the class exemption permits small businesses to engage in bargaining with a particular target, this can only be done on a voluntary and consensual basis. Unless parties seek to navigate the burdensome notification and authorization procedures under the CC Act, they are precluded from utilizing economic coercion to bring reluctant targets to the bargaining table or restart stalled negotiations.[17] Without any real capacity to take strike action or engage in primary or secondary boycotts in support of bargaining demands, the bargaining framework may be severely compromised.[18]

In addition, there is a notable absence of legislative supports for collective bargaining processes, including the obligation to bargain in good faith. There is no individual statutory protection afforded to the member, or representative, seeking to advance the interests of the collective. This means that key individuals remain at risk of prejudicial or retaliatory conduct on the part of an aggravated or frustrated target (for example, a Deliveroo rider who is negotiating on behalf of other riders may have their account deactivated for engaging in this activity and the platform would not be exposed to any sanction or penalty). Further, there are no statutory enforcement mechanisms for ensuring compliance with the terms of any concluded agreement, although some common law channels for the enforcement of multi-party contracts may still be available.[19]

This means that even if a final consensus is reached, either party may simply walk away from their commitments without facing any legal consequences. There also exist ambiguities about the scope and application of the exemption at the margins. For example, information-sharing is only covered by the class exemption where the parties believe that it is "reasonably necessary to share or use that information to facilitate engagement in the conduct."[20] Two of the present authors have noted elsewhere that any representative organization involved in collective bargaining for more than one group must "be careful not to share any sensitive information between different groups, to avoid potentially breaching the CC Act in the process."[21] This may prove to be a particular challenge for trade unions – such as the Transport Workers' Union – who have been very active in seeking to represent gig workers and agitating for reform in the gig economy generally.[22] The class exemption has now been in effect for just under 12 months. In this time, there have been at least 45 notices lodged with the ACCC by franchisees, doctors and medical professionals, cartage contractors and chicken growers. As yet, no notices appear to have been submitted by gig workers wishing to collectively bargain with the relevant platform. However, it would be surprising if this does not change in the near future.

"While the class exemption permits small businesses to engage in bargaining with a particular target, this can only be done on a voluntary and consensual basis

16 Anthony Forsyth, THE FUTURE OF UNIONS AND WORKER REPRESENTATION: THE DIGITAL PICKET LINE (Hart Publishing, 2022), at 223.

17 Australian Competition and Consumer Commission, *Small Business Collective Bargaining Guidelines* (2018) https://www.accc.gov.au/publications/small-business-collective-bargaining-guidelines, at 10.

18 The lack of essential structural supports for bargaining suggests that Australia has failed to comply with its international obligations in this regard. See Shae McCrystal and Tess Hardy, *Filling the Void? A Critical Analysis of Competition Regulation of Collective Bargaining Amongst Non-employees*, 37 INT. J. OF COMP. LABOUR LAW AND IR. 355-384 (2021).

19 Enforcement of multi-party contracts at common law is possible, but generally difficult. See, e.g., *Ryan v. Textile Clothing and Footwear Union of Australia* [1996] 2 VR 235. See also Shae McCrystal, *Collective Bargaining by Independent Contractors: Challenges from Labour Law* 20(1) AUST. J OF LAB. L 1, 15–17 (2007).

20 Determination, *supra* note 11, cl 13.

21 Tess Hardy and Shae McCrystal, *The Importance of Competition and Consumer Law in Regulating Gig Work and Beyond*, J.I.R. (forthcoming 2022).

22 Forsyth, *supra* note 16, at 152-154, 183-185.

03

FAIR CONDUCT AND ACCOUNTABILITY STANDARDS

As noted earlier, the Final Report of the 2020 inquiry into on-demand work recommended that the state government in Victoria establish a set of principle-based "Fair Conduct and Accountability Standards" for platforms to follow in their dealings with non-employee workforces.[23] This recommendation for an industry-driven (and voluntary) approach to gig work regulation recognized that some of the inquiry's more interventionist proposals – such as the adoption of a uniform definition of work status across all employment, industrial and safety laws[24] – cannot be implemented by the state government due to limitations on its constitutional powers.[25] In late 2021, the Victorian Government released a Consultation Paper on the proposed Standards for input from stakeholders.[26] It outlined the following six areas which would be covered by the proposed Standards:[27]

> · consulting and negotiating with non-employee on-demand workers and their representatives on work status, contract terms and other work-related issues;
>
> · establishing processes for workers to raise questions about their work contracts by reference to factors such as fairness and bargaining power;
>
> · setting up clear and accessible dispute resolution systems through which workers can challenge unfair contracts and suspension/deactivation from platforms;
>
> · providing fair/decent minimum working conditions, and removing discriminatory algorithms, policies, and work practices;
>
> · implementing systems, policies, training, and consultation to reduce safety risks and improve health and safety outcomes for non-employee on-demand workers;
>
> · enabling workers to freely associate to pursue better terms and conditions, and recognizing workers/their representatives collectively.

In relation to the last of these points, the Consultation Paper observed that (as discussed earlier in this article) collective organization and negotiation by non-employee on-demand workers would ordinarily bring them in breach of the CC Act, subject to the application of the new class exemption for small business collective bargaining. The Victorian Government also notes (as we pointed out above) that the exemption only provides relief from CC Act liability. It does not compel a platform to bargain with gig workers or allow them to take industrial action in support of their demands.[28] Therefore, the purpose of the relevant proposed Standard is "to *encourage* platforms to collectively bargain with non-employee on-demand workers, when lawfully possible."[29] However, this is unlikely on its own to prompt platforms to engage in collective negotiation with workers under the ACCC class exemption process, given the proven record of gig companies in resisting new regulation globally.[30] The proposed Victorian Standards would not be legally enforceable. However, the state Government is considering options "to increase take up of [the Standards] across platforms, subject to constitutional limits," including business incentives and a public record of platforms committing to the Standards (to promote consumer awareness).[31] In our view, even within the constitutional constraints on state law-making capacity, harder-edged measures to achieve compliance with the Standards

23 James, *supra* note 6, at 199-201.

24 *Ibid*. at 191-194.

25 Regulation of employment/industrial relations is principally the preserve of the federal government in Australia, while states and territories have greater constitutional capacity to regulate workplace health and safety. See Andrew Stewart, Anthony Forsyth, Mark Irving, Shae McCrystal and Richard Johnstone, CREIGHTON AND STEWART'S LABOUR LAW (6th edition, Federation Press, 2016), chapters 5 and 6.

26 Industrial Relations Victoria, *Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce: Consultation Paper* (2021).

27 *Ibid*. at 18-38.

28 *Ibid*. at 32-33.

29 *Ibid*. at 33 (emphasis added).

30 See for example Miriam Cherry, *Proposition 22: A Vote on Gig Worker Status in California*, INT. J. OF COMP. LABOR LAW AND POLICY JNL. (DISPATCH NO. 31) (2021)

31 Industrial Relations Victoria, *supra* note 26, at 41.

could be implemented by the Victorian Government. These include procurement policies (that is, compliance with the Standards being made a condition of platforms being awarded government contracts) and business licensing (compliance being made a condition of operating as a business in the state).[32] It is unclear whether the Government would be prepared to go that far. At the very least, it should provide gig workers (and their representatives) with advice, information, and training to assist them in utilizing the ACCC class exemption process to engage in collective negotiations with platforms over pay rates, working conditions and issues unique to gig work like algorithmic management control and surveillance. Without this support, or the more definitive compliance measures we have suggested, the Standards are unlikely to make any appreciable difference to the reality of working life for those in the gig economy.[33]

04
CONCLUSION

In this short article, we have surveyed two important, and novel, competition law initiatives that are relevant to the regulation of gig work in Australia. The collective bargaining class exemption – introduced by the ACCC in mid-2021 – is significant in that it shows tacit acceptance of the net public benefit that may be gained through collective activity. This reform is notable in a number of respects, including the loose boundaries that have been set around the content, level, and scope of bargaining. However, it also lacks critical features and essential supports that would allow for meaningful collective bargaining on the ground. There is no obligation to bargain in good faith, no real capacity to engage in primary or secondary boycotts, no protection from victimization or retaliatory conduct and no obvious way in which to enforce a concluded agreement. Outside of the formal consultation process, the ACCC has done very little to provide information or raise awareness of this new exemption. This may be one reason for its slow uptake in the platform economy. The absence of advice and guidance on the part of the federal competition regulator uncovers opportunities for state Governments to intervene in this space. As discussed in the second part of this article, the Victorian Government has a clear appetite for more far-reaching reforms with respect to the platform economy, including the introduction of a voluntary set of Fair Conduct and Accountability Standards. While the implementation of these standards will need to navigate thorny constitutional issues, we have argued that there are multiple points of leverage available to the state Government if it is serious about promoting compliance with such standards. These include business incentives, licensing requirements and procurement guidelines. On a more basic level, the state Government could provide gig workers and their representatives with essential information and support which would enable and embolden them to utilize the collective bargaining mechanism now available at the federal level under the ACCC class exemption. Finally, following the election of a federal Labor Government in Australia on 21 May 2022, it is also possible that the national Government will take up the regulatory mantle with respect to the fair and proper regulation of platform work. This may include introducing a broader statutory definition of "employment" or "work" into the FW Act, which would bring many self-employed gig workers within the protective fold of the workplace relations regime.[34] In addition, or as an alternative, the federal Government may encourage or compel gig workers and platforms to embrace collective bargaining as a way of resolving differences and improving conditions in the gig economy.

32 This approach has been implemented in the labor hire industry: see *Labour Hire Licensing Act 2018* (Vic).

33 The Government indicated in late April 2022 that a "road map" for implementing the proposed Standards would soon be made public: "'Road map' for safer gig economy on way: Pallas," *Workplace Express* (29 April 2022).

34 While this approach is being urged by some unions and labor law academics, Labor's policy states that it will extend the powers of the federal industrial tribunal to set minimum standards for those in employee-like forms of work including gig workers: Australian Labor Party, *Labor's Secure Australian Jobs Plan* (2022).

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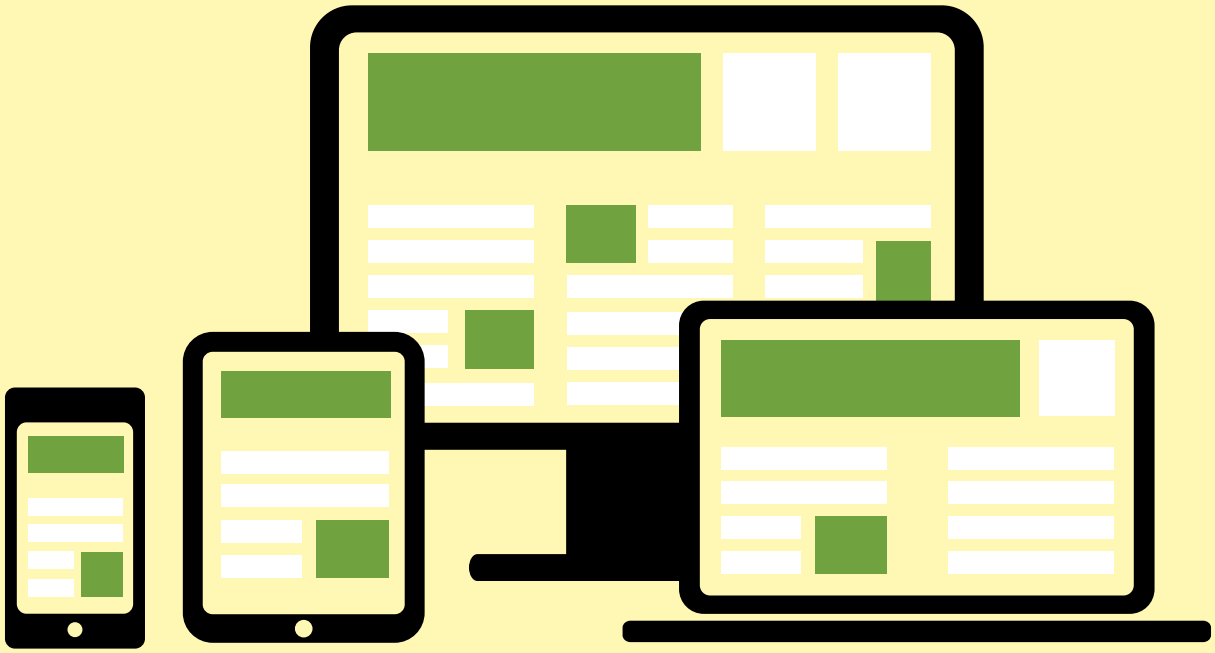

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