

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

**Matter Number:** 6740/19  
**Applicant:** Idris Dayib Kahin  
**Respondent:** Uber Australia Pty Ltd  
**Date of Determination:** 15 April 2020  
**Citation:** [2020] NSWCC 118

The Commission determines:

1. The objections to Directions for Production issued to:

- (a) Uber Australia Holdings Pty Ltd;
- (b) Portier Pacific Pty Ltd, and
- (c) Rasier Pacific Pty Ltd.

are upheld.

2. The Directions for Production issued to

- (a) Uber Australia Holdings Pty Ltd;
- (b) Portier Pacific Pty Ltd, and
- (c) Rasier Pacific Pty Ltd

are set aside in their entirety pursuant to r 13.8(9).

3. The requests for an order to issue Directions for Production to:

- (a) Rasier Pacific V.O.F;
- (b) Uber International B.V.;
- (c) Uber Portier B.V.;
- (d) Uber Technologies Inc., and
- (e) the Fair Work Ombudsman

are refused pursuant to r 13.4(1).

4. The matter is fixed for further conciliation and arbitration on 13 May 2020 at 10.00 am.

A brief statement is attached setting out the Commission's reasons for the determination.

Rachel Homan  
**Arbitrator**

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF RACHEL HOMAN, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

*A Sufian*

Abu Sufian  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Mr Idris Dayib Kahin (the applicant) was a driver for Uber Eats and was assaulted on 27 January 2019 whilst awaiting a food delivery job.
2. The applicant made a claim for compensation against Uber Australia Pty Ltd (the respondent) in respect of injuries sustained in the assault.
3. Liability to pay compensation was declined by the respondent's insurer in a dispute notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 16 April 2019. In particular, it was disputed that the applicant was a "worker" or "deemed worker".
4. The applicant commenced the present proceedings in the Commission by an Application to Resolve a Dispute filed on 20 December 2019. The applicant seeks weekly compensation on an ongoing basis from 28 January 2019.
5. At a teleconference on 31 January 2020, leave was granted to the applicant to issue Directions for Production to three corporate entities who are not named parties in these proceedings:
  - (a) Uber Australia Holdings Pty Ltd;
  - (b) Portier Pacific Pty Ltd, and
  - (c) Rasier Pacific Pty Ltd.
6. The documents in respect of which leave was granted were identified as "documents relating to the employment practices and relationships as between these entities and as between these entities and their drivers".
7. Directions for Production were filed by the applicant on 7 February 2020. The Directions were in essentially the same terms and sought production of:
  - "1. All documents, advice, records, notes, emails, correspondence, incident reports, security reports, liability reports, manager reports and/or memoranda relating to:
    - a. Contractual relationship between [the producer] and drivers of Uber and Uber Eats logoed vehicles including, but not limited to, motor vehicles and bicycles, displaying Uber logos while performing ride sharing or food delivery services in Australia;
    - b. The relationship between [the producer], drivers of Uber and Uber Eats logoed vehicles including, but not limited to motor vehicles and bicycles, displaying Uber logos while performing ride sharing or food delivery services in Australia including:

payment of drivers,  
permitted workable hours,  
allocation and significance of driver ratings,  
application and significance termination/deactivation of driver,  
the deactivation processes,  
requirements of appropriate dress of driver,  
driver's obligations and responsibilities,  
negotiation of cancellation fees,  
provisions of delivery services including instructions for pick-up and drop-off,

delivery fee calculation and adjustments,  
tax obligations and responsibilities of [the producer]  
tax obligations and responsibilities of driver/User's,  
incentives provided by [the producer],  
any service guarantees,  
indemnification,  
supplemental terms,  
performance and disciplinary management of drivers,  
disciplinary management of drivers,  
processes of dealing with complaints by drivers with respect to users,  
processes of dealing with complaints by users relating to performance by  
drivers,  
collection and use of third party's information,  
use of drivers driving record while engaged by Uber,  
use of users' history with Uber,  
Uber's requirements of drivers with respect to delivery and transportation  
method,  
details regarding legal relationship with driver/users, community guidelines,  
policies.

2. All documents, service arrangements, marketing arrangements, agreements, policies, contractual documents, payment of premiums, evidencing the relationship between [the producer] and:
  - a. Uber Australia Pty Ltd;
  - b. Uber Australia Holdings Pty Ltd;
  - c. Portier Pacific Pty Ltd;
  - d. Rasier Pacific Pty Ltd.
3. All documents, notes, emails, correspondence between [the producer] and Mr Cameron Loughlin, Employment Counsel of Uber.
4. A list of all affiliates of [the producer].
5. All documents, notes, emails, correspondence, incident reports, security reports, liability reports, manager reports and/or memoranda relating to shareholders and holding companies of [the producer].”
8. On 27 February 2020, Mr Cameron Loughlin, Senior Counsel, Labour and Employment at “Uber” wrote to the Registrar raising objections to the Directions for Production served on Uber Australia Holdings Pty Ltd, Portier Pacific Pty Ltd and Rasier Pacific Pty Ltd pursuant to r.13.8(1)(a) of the Commission Rules.
9. A delegate of the Registrar wrote to the parties on 2 March 2020 inviting them to lodge any opposition the objection to the Direction for Production raised by Rasier Pacific Pty Ltd by lodging written notice, including reasons for the opposition by 5 March 2020. It appears that the objections on behalf of Uber Australia Holdings Pty Ltd and Portier Pacific Pty Ltd were inadvertently overlooked.
10. On 2 March 2020, the applicant’s solicitors requested an extension of time to file a notice of opposition. The time for the parties to lodge and serve notices of opposition and written reasons was subsequently extended to the close of business on 10 March 2020. An opposition to the Rasier objection was emailed to the Registry by the applicant at 5.13 pm on 10 March 2020.

11. In the interim, on 5 March 2020, Mr Loughlin wrote again to the Registry for and on behalf of all three entities indicating that the three objections were maintained and providing additional reasons for the objections. Mr Loughlin did, however, provide some information with regard to the applicant's relationships with the respective entities and annexed various other documents.
12. At a conciliation conference on 7 April 2020, it became apparent that the objections to the Directions for Production had not been determined. The proceedings were adjourned and directions made to enable determinations to be made. Oppositions to the objections were filed in the Commission by the applicant on 8 April 2020. The respondent wrote to the Commission on 9 April 2020 repeating the submissions made by Mr Loughlin.
13. At the conciliation conference on 7 April 2020, the applicant also made applications for orders for the issue of new Directions for Production to the following corporate entities outside Australia:
  - (a) Rasier Pacific V.O.F;
  - (b) Uber International B.V.;
  - (c) Uber Portier B.V., and
  - (d) Uber Technologies Inc.
14. An application for an order to issue a Direction for Production to the Fair Work Ombudsman was also made.
15. Oral submissions in respect of the applications were made but it was apparent that written submissions had also been lodged with the Registry. I indicated to the parties that I would issue a written determination in respect of each of the applications after reviewing the written material.
16. On 14 April 2020, further written submissions were filed by the applicant relevant to both the objections and the new requests.

## **ISSUES FOR DETERMINATION**

17. The following interlocutory issues require determination:
  - (a) the objection to the Direction for Production issued to Uber Australia Holdings Pty Ltd;
  - (b) the objection to the Direction for Production issued to Portier Pacific Pty Ltd;
  - (c) the objection to the Direction for Production issued to Rasier Pacific Pty Ltd;
  - (d) the applicant's application for leave to issue Directions for Production to:
    - (a) Rasier Pacific V.O.F;
    - (b) Uber International B.V.;
    - (c) Uber Portier B.V., and
    - (d) Uber Technologies Inc.
  - (e) the applicant's application for leave to issue a Direction for Production to the Fair Work Ombudsman.

## FINDINGS AND REASONS

### Objections to the Directions for Production issued to Uber Australia Holdings Pty Ltd, Portier Pacific Australia Pty Ltd and Rasier Pacific Pty Ltd

18. The Commission's power to issue Directions for Production is set out in s 357 of the 1998 Act which provides:

#### **"357 Power of Commission to require information**

- (1) The Commission may give a direction in writing to any person (whether or not a party to a dispute before the Commission) requiring the person:
  - (a) to produce, at a time and place specified in the direction, specified documents in the possession of the person, or
  - (b) to furnish specified information within a time specified in the direction.
- (2) The direction may require the documents to be produced or the information to be furnished:
  - (a) to the Commission or to another party to a dispute before the Commission, in the case of a direction given to a party to the dispute, or
  - (b) to the Commission in the case of a direction given to a person who is not a party to a dispute before the Commission.
- (3) A person who fails without reasonable excuse to comply with a direction given to the person under this section is guilty of an offence."

19. Part 13 of the Commission Rules provides definitions, powers, and the process by which a Direction for Production is dealt with in proceedings.

20. Rule 13.3 provides that a party to proceedings may request the arbitrator to whom the proceedings are referred to order the issue of a Direction for Production.

21. Rule 13.4 of the Commission Rules provides that the arbitrator to whom the proceedings are referred may, at any teleconference, or otherwise in a "special case" and for the "avoidance of injustice", order or refuse to order the issue of a Direction for Production. A "special case" and "avoidance of injustice" are not defined.

22. Objections by a producer are dealt with in r. 13.8:

#### **"13.8 Objection by producer**

- (1) A producer may object to a direction for production by objecting to any of the following—
  - (a) the production of documents under the direction, or
  - (b) the terms of access to the documents produced under the direction.
- (2) A producer who objects to a direction for production under subrule (1) must notify the Arbitrator or Registrar in writing prior to the date for production.
- (3) An objection to a direction for production made in accordance with subrule (2) must clearly identify the documents that are the subject of the objection and provide reasons for the objection.

- (4) A producer who objects to a direction for production in accordance with subrule (2) is excused from complying with the direction until the objection is determined.
- (5) The Arbitrator or Registrar must notify the parties to the proceedings of an objection notified in accordance with subrule (2).
- (6) A party to the proceedings who wishes to oppose an objection to a direction for production must lodge written notice, including the reasons for the opposition, within 2 working days of being notified of the objection in accordance with subrule (5).
- (7) The Arbitrator or Registrar may determine an objection to a direction for production solely on the basis of the written objection notified in accordance with subrule (2) and the written opposition lodged in accordance with subrule (6).
- (8) Without limiting subrule (7), when considering an objection to a direction for production the Arbitrator or Registrar may do any of the following—
  - (a) determine the objection,
  - (b) seek further oral or written information from the parties to the proceedings or the producer.
- (9) The Arbitrator or Registrar may set aside or vary the terms of a direction for production following determination of an objection to the direction.”

### **Objections**

23. The objections to the Directions for Production issued to Uber Holdings Australia Pty Ltd, Portier Pacific Pty Ltd and Rasier Pacific Pty Ltd were expressed in essentially the same terms as follows:
  1. The Direction is an attempt to obtain discovery against a third party. We rely on the decisions of *National Employers’ Mutual General Assoc Ltd v Waind and Hill* (1978) 1 NSWLR 377 (*Waind*) and *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 (*Small*) which notes that a subpoena may not be issued for the purpose of obtaining discovery against a third party.
  2. The Direction is far too wide, excessively broad, not confined to time or location, and we are unable to ascertain precisely what is required.
  3. We submit that the Direction should be set aside on the grounds that it imposes an unduly onerous obligation on [the producer] to collect and produce documents which have little or no relevance to the proceedings on foot.
24. The objections requested that each Direction be set aside.
25. In the further correspondence from Mr Loughlin dated 5 March 2020 it was submitted that the Directions were:
  - “○ Far too wide, excessively broad, not confined to time or location, meaning we have been unable to ascertain precisely what is being requested; and/or
  - Not relevant to this matter; and/or
  - An attempt at a fishing expedition.”

26. Mr Loughlin indicated in that correspondence that the applicant was a former delivery partner. The delivery partners used a smartphone application known as the “Uber Eats app” to connect them with third-party restaurants and eaters looking for food delivery services.
27. Mr Loughlin submitted that delivery partners entered into a services agreement with Portier Pacific Pty Ltd who provided delivery partners with lead generation services and related services to enable them to receive on-demand requests for food delivery services from restaurants.
28. Mr Loughlin said there was no relationship, contractual or otherwise, between Uber Australia Holdings Pty Ltd or Rasier Pacific Pty Ltd and the applicant.
29. Mr Loughlin indicated that a review had been undertaken of the three entities’ records and materials had been identified in their possession and control which would likely be relevant to this matter. Those materials were enclosed and included:
  - (a) Template Services Agreement issued by Portier Pacific Pty Ltd dated 1 December 2017;
  - (b) Uber Community Guidelines (as at January 2019);
  - (c) extract of sign up and documentation requirements for delivery partners (extracted from the Uber website on 5 March 2020), and
  - (d) information about fatigue management that is also applicable to delivery partners (extracted from the Uber website on 5 March 2020).
30. Mr Loughlin’s correspondence and annexures were provided to the parties pursuant to a direction issued by the Commission on 8 April 2020.

***Applicant’s opposition to the objections***

31. The applicant’s oppositions to the objections are in largely identical terms.
32. The applicant argued that the objections failed to “clearly identify the documents that are the subject of the objection and provide reasons for the objection” for the purposes of r 13.8 (3) and were, as a consequence, invalid.
33. The applicant said the Directions for Production requested documents in five categories.
34. The first category of documents related to “the potential relationship” between the respective entities and drivers of Uber and Uber Eats, including documents related to permitted workable hours, the deactivation process, requirements of appropriate dress, delivery fee calculation and adjustments. The applicant said these were relevant to the central issue in dispute being “the issue of employment and worker”.
35. The second category of documents was said to relate to services agreements and policies evidencing the relationship between each entity and other Uber domestic entities. The fourth category of documents was a list of all affiliates of each entity.
36. The applicant said of these categories of document:

“The requested documents would assist the Commission and the Arbitrator in reaching a just and equitable decision in relation to the true nature of the relationship between the applicant and the identified entities including the potential removal of the corporate veil if appropriate.”



37. The applicant said that,
- “...until such time as the documents are produced no definitive analysis of the relevance or otherwise can be made.”
38. The applicant identified the third category of documents as documents passing between the respective entities and Mr Loughlin. The applicant said,
- “There is no evidence from any employee of Uber, other than Mr Loughlin at page 7 of the Reply regarding the contractual relationship with Uber...”
39. The fifth category of documents were said to include incident reports, security reports, liability reports, manager reports relating to shareholders and holding companies of the respective entities. The applicant said,
- “The documents will assist the Arbitrator to make fully informed findings as to whether the applicant is a 'worker' or the extended definition of 'deemed worker' under the Act.
- The non-production of documents, in exclusive possession of various entities, would restrict the Applicant's ability to rebut arguments, defeat inferences or make submissions with respect to issues concerning whether he is a 'worker' or 'deemed worker' under the Act.
- The absence of documents would impact the Applicant's right to procedural fairness.”
40. The applicant argued generally that the Directions for Production had a legitimate forensic purpose as the requested documents “may shed light on the main issue in these proceedings of the relationship between applicant and respondent”.
41. It was argued that:
- “Pursuant to Rule 13.4 of 2011 the proceedings can be considered a ‘special case’ and the request for directions for production should be ordered for the ‘avoidance of injustice’ due to the complex nature of the matter as it would be very relevant to future matters for what must be thousands of potential workers/drivers/deliverers being paid by Uber in NSW.”
42. It was submitted that the Directions were considered by the arbitrator at teleconference to be “reasonably necessary to resolve the issues in dispute.”
43. In the additional written submissions made on 14 April 2020, the applicant reiterated his submissions as to the forensic purpose of the Directions. It was further submitted that the Portier Pacific Pty Ltd Services Agreement was unconscionable and voidable. Additional submissions were made in support of the applicant's claim to be a worker or deemed worker in relation to the respondent.

### ***Determination of the objections***

44. I have considered first the applicant's submission that the objections are invalid as they fail to identify the documents that are the subject of the objection and provide reasons for the objection for the purposes of r 13.8(3).
45. Reading the correspondence from Mr Loughlin as a whole, it is clear that the entirety of each Direction is objected to. The documents which are objected to and the reasons for the objections are sufficiently clear for me to be able to deal with them. I do not accept that the objections are “invalid” owing to a failure to comply with r 13.8(3).

46. It has been argued by the producers that the Directions are excessively wide. In *Marsden v Amalgamated Television Services Pty Limited* [1999] NSWSC 619 it was held that a subpoena can be set aside if its terms are too wide:

“A subpoena can be set aside if its terms are too wide. This may occur where the subpoena does not refer to specific documents: *Lee v Argas* (1866) LR 2 Eq. However, if a person to whom a subpoena is directed admits to having in his possession documents covered by the terms of the subpoena he must produce them: *Lee v Argas*.”

47. The Directions filed in the Commission, sought access to documents including:

- (a) all documents, advice, records, notes, emails, correspondence, incident reports, security reports, liability reports, manager reports and/or memoranda in relation to the relationships between the producers and Uber and Uber Eats drivers;
- (b) all documents, service arrangements, marketing arrangements, agreements, policies, contractual documents, payment of premiums, evidencing the relationship between each producer and the other identified producers and the respondent;
- (c) all documents, notes, emails, correspondence between the producer and Mr Loughlin, and
- (d) all documents, notes, emails, correspondence, incident reports, security reports, liability reports, manager reports and/or memoranda relating to shareholders and holding companies of the producer.

48. I accept that the range of documents potentially caught by these descriptors would be extremely voluminous. I also accept that it would be unduly burdensome or onerous for the producers to be expected to comply with a Direction in these terms.

49. The producers have also submitted that the Directions constituted a “fishing expedition”. A party asserting that a Direction is a fishing expedition is in effect asserting that the documents sought have no apparent relevance to the proceedings. As noted in *Automotive Dealer Administration Services Pty Ltd v Kulik & Ors* [2010] VSC 293:

“That term is so frequently used that it tends to be forgotten that it means making enquiries of something not pleaded in the hope that it can then be alleged.” (at [21])

50. In *Small* the following was said about fishing:

“A party is no more entitled to use a subpoena duces tecum than he is a summons for interrogatories, for the purpose of ‘fishing’, i.e., endeavouring, not to obtain evidence to support his case, but to discover whether he has a case at all.”

51. In, *Trade Practices Commission v Arnotts Ltd* [1989] FCA 248 Beaumont J posed the following questions:

“Without restricting this inquiry, it is convenient to address the present application in the first instance by reference to two questions: (1) Does the material sought have an apparent relevance to the issues in the principal proceedings, i.e., is adjectival, as distinct from substantive, relevance established? Does the subpoena have a legitimate forensic purpose to this extent? This involves a consideration of the matter from the standpoint of Arnotts [the issuer]. (2) Is the subpoena seriously and unfairly burdensome or prejudicial?” (at [44]).

52. In *Waind*, Moffitt P (Hutley and Glass JJA agreeing) said:

“The only legitimate purpose of requiring the production, and permitting the inspection, of a stranger’s documents can be to add, in the end, to the relevant evidence in the case.” (at 384)

53. The Full Federal Court in Federal Court in *Wong v Sklavos* [2014] FCAFC 120 at [12] said:

“Although the parties referred to several authorities concerning the requirement for subpoenaed documents to have apparent relevance to an issue in a proceeding, in our opinion, the applicable principles are well established. The party issuing a subpoena bears the onus of demonstrating that the subpoena has a legitimate forensic purpose in relation to the issues in the proceedings: .... A subpoena may be set aside if it requires the production of documents which do not have apparent relevance to the issues arising on the pleadings: .... Other cases have used different terminology, but with essentially the same effect, for example, by requiring that, viewed realistically, the documents sought have a bearing on an issue which is not unreal, fanciful or speculative ... or that the material sought is reasonably likely to add in some way to the relevant evidence in the case ... or that it be “on the cards” that the documents sought will materially assist the party at whose request the subpoena has been issued: ...”

54. The documents sought have been described by the applicant as relevant to the present proceedings in that they may reveal “the potential relationship” between the respective producers and drivers of Uber Eats.

55. It was said that the documents would assist the Commission to identify the true nature of the relationship between the applicant and the producers including the potential removal of the corporate veil if appropriate.

56. The applicant said the documents would assist the Commission to make fully informed findings as to whether the applicant is a 'worker' or 'deemed worker'.

57. The documents were also said to be capable of assisting the applicant to rebut arguments, defeat inferences or make submissions with respect to issues concerning whether he is a 'worker' or 'deemed worker'.

58. The applicant also asserted that he would be denied procedural fairness in the absence of the documents.

59. The submissions made by the applicant assume the Commission has a much broader jurisdiction to determine issues than is in fact the case.

60. The Commission only has jurisdiction to determine those matters previously notified as disputed between the parties to the proceedings. Section 289 of the 1998 Act states that a dispute about a claim for weekly payments cannot be referred for determination by the Commission unless the person on whom the claim is made disputes liability for the claim or fails to determine the claim as and when required by the Act. Section 289A of the 1998 Act provides that a dispute cannot be referred for determination by the Commission unless it concerns only matters previously notified as disputed, although the Commission may hear or otherwise deal with a matter subsequently arising out of such a dispute.

61. The only matters previously notified as disputed in these proceedings are whether the applicant is a “worker” or “deemed worker” of the respondent, Uber Australia Pty Ltd. The Commission has no jurisdiction to determine generally whether the applicant is a worker or deemed worker of any other entity. Nor does the Commission have jurisdiction to determine whether any other driver is a worker or deemed worker of any of the relevant entities.

62. The applicant has not made a claim for compensation against any of the three producers or claimed that any of those entities were his employer. None of the producers has disputed liability for a claim for compensation. Nor are any of the producers named in the proceedings. To the extent that any of the documents may be capable of establishing a relationship between one or more of the producers and the applicant it is difficult to see how this would be relevant to the issues before the Commission of whether the applicant is an employee or deemed worker in relation to *the respondent*.
63. The applicant has made submissions by reference to decisions made in overseas jurisdictions in relation to other Uber entities not party to these proceedings as well as the grouping provisions of the *Workers Compensation Act 1987*, in particular, s 175H. The grouping provisions do not, however, have application until it is accepted or there is a determination that there is an employer. The application of the grouping provisions is not an issue requiring determination in the current proceedings.
64. Notwithstanding that leave was granted to the applicant to issue Directions for Production at teleconference, upon consideration of the Directions for Production actually filed, the objections raised by the producers and the further submissions of the applicant, I have formed the view that the apparent relevance of the documents sought has not been established.
65. For the reasons set out above, I am satisfied that the Directions for Production issued to Uber Holdings Australia Pty Ltd, Portier Pacific Pty Ltd and Rasier Pacific Pty Ltd should be set aside pursuant to r 13.8(9).

#### **Applications for orders to issue Directions for Production to overseas entities**

66. The applicant has made a request pursuant to r 13.3(1) for orders to issue four new Directions for Production on the following overseas entities:
  - (a) Rasier Pacific V.O.F;
  - (b) Uber International B.V.;
  - (c) Uber Portier B.V., and
  - (d) Uber Technologies Inc.
67. In considering these applications I have taken into account the submissions made orally at the conciliation conference on 7 April 2020 as well as the correspondence forwarded by the applicant to the Registry by email on 28 February 2020, including the applicant's written submissions and draft Directions. The Directions the applicant proposes to file are almost identical to those previously filed and dealt with above, with the omission of the documents relating to Mr Loughlin. The potential relevance of the documents has been identified in broadly the same way.
68. The party seeking a Direction for Production has the onus to show, expressly and precisely, the apparent relevance of the documents sought to the issues in dispute. If a Direction for Production is required to be served outside the State of New South Wales, the requirements of the *Service and Execution of Process Act 1992* (SEPA) must also be complied with. This involves a statutory component and the test is higher. An arbitrator must be satisfied that the documents or things sought under the Direction for Production are deemed "necessary in the interests of justice".
69. For the reasons given above in relation to the objections from Uber Australia Holdings Pty Ltd, Portier Pacific Pty Ltd and Rasier Pacific Pty Ltd, I am not satisfied that the documents sought by the applicant under these Directions are relevant to the issues presently before the Commission. In addition, the scope of the Directions are so wide as to be unduly onerous and burdensome upon the proposed producers. It follows that I am not satisfied that the proposed Directions are necessary in the interests of justice.

70. I refuse to order the issue of these Directions for Production pursuant to r 13.4(1).

### **Application for an order to issue a Direction for Production to the Fair Work Ombudsman**

71. A further request pursuant to r 13.3(1) for an order to issue a Direction for Production on the Fair Work Ombudsman was also made at the conciliation conference on 7 April 2020. A request for the same was previously made in writing on 10 March 2020.

72. The documents the applicant seeks have been described as the documents relied upon by the Fair Work Ombudsman in relation to an investigation into the relationship between Uber drivers and Uber. The applicant has noted that the result of that investigation is available on the Fair Work Ombudsman's website but the report itself and any documents relied upon are not.

73. A media release issued by the Fair Work Ombudsman on 17 June 2019 states:

“The Fair Work Ombudsman has completed its investigation relating to Uber Australia Pty Ltd (Uber Australia) and its engagement of drivers.

Fair Work Ombudsman Sandra Parker said that inspectors examined a wide range of evidence, including drivers' contracts, log on and log off records, interviews with drivers and Uber Australia, ABN documents, payment statements, banking records and pricing schedules.

‘The weight of evidence from our investigation establishes that the relationship between Uber Australia and the drivers is not an employment relationship,’ Ms Parker said.

‘For such a relationship to exist, the courts have determined that there must be, at a minimum, an obligation for an employee to perform work when it is demanded by the employer.’

‘Our investigation found that Uber Australia drivers are not subject to any formal or operational obligation to perform work,’ Ms Parker said.

‘Uber Australia drivers have control over whether, when, and for how long they perform work, on any given day or on any given week.’

‘Uber Australia does not require drivers to perform work at particular times and this was a key factor in our assessment that the commercial arrangement between the company and the drivers does not amount to an employment relationship,’ Ms Parker said.

“As a consequence, the Fair Work Ombudsman will not take compliance action in relation to this matter.”

74. The applicant alleges that the Direction for Production has a legitimate forensic purpose as the requested documents may shed light on the main issue in these proceedings, namely the relationship between the applicant and respondent. The applicant has submitted that the documents are sought to:

“ensure the employment relationship negated by FWO is elicited before WCC, so as to narrow down the focus on whether the applicant worker was an employee, and if not then parties can focus on extended definition of worker or deemed worker.”

75. No application for a Direction for Production on this producer was made at the initial teleconference. It is necessary for the applicant to establish therefore that the request involves a special case and is necessary for the avoidance of injustice. The use of a

Direction for Production must also be balanced with the Commission's obligation to resolve disputes in a timely and cost efficient manner.

76. An order for the issue of a Direction for Production at this stage of the proceedings would necessitate further-significant delay and interfere with the Commission's obligation to resolve disputes in a timely and cost efficient manner.
77. There is no evidence that the applicant requested these documents informally or under Freedom of Information laws prior to the commencement of these proceedings although the investigation concluded in June 2019. The applicant has subsequently filed evidence under an Application to Admit Late Documents indicating that a Freedom of Information request was made and responded to after the initial teleconference in these proceedings. It is not possible to tell, however, what documents were requested and most of the documents produced are heavily redacted on the basis of being "irrelevant".
78. It appears that much of the material relied on by the Fair Work Ombudsman in its investigation is of a nature that would either be already within the applicant's possession, publicly available or could have been requested through a Notice to Produce to the respondent.
79. In particular, the materials before me indicate that the Fair Work Ombudsman relied on materials produced by the respondent in response to Notices to Produce Records; drivers' contracts; logon/log off records; payment statements/banking records; and communications logs and messaging pertaining to driver guides, assistance, advice, offers, promotions, rewards and resources information, pricing schedules, vehicle inspection cards and incident reports. The Fair Work Ombudsman also relied on publicly available communications on the Uber website and interviews with drivers.
80. The applicant has lodged some of this type of material already and some has been lodged by the respondent. Any records relating to or kept by other drivers would not necessarily assist in a determination of whether this applicant was a worker or deemed worker in relation to the respondent.
81. Given the outcome of the Fair Work Ombudsman's investigation was a conclusion that there was no employment relationship I am also not satisfied that it is reasonably "on the cards" that any documents produced by the Fair Work Ombudsman would materially assist or advance the applicant's case.
82. Weighing these considerations I am not satisfied that it is necessary to order the Direction for Production to the Fair Work Ombudsman for the avoidance of injustice or that this request involves a special case. I refuse to order the issue of a Direction for Production to the Fair Work Ombudsman pursuant to r 13.4(1).

