

Submission to the Inquiry into the Victorian On-Demand Workforce

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Overview of submission

This submission engages with three key terms of reference of the Inquiry:

- a. The extent and nature of the on-demand economy in Victoria, for the purposes of considering its impact on both the Victorian labour market and Victorian economy more broadly, including but not limited to
 - ii. the application of workplace laws and instruments to those persons, including accident compensation, payroll or similar taxes, superannuation and health and safety laws;
 - iv. the effectiveness of the enforcement of those laws.
- b. In making recommendations, the Inquiry should have regard to matters including:
 - i. the capacity of existing legal and regulatory frameworks to protect the rights of vulnerable workers.

In particular, this submission considers the extent to which equality and discrimination law is capable of protecting those participating in the on-demand economy.

This submission is based on research published as Alysia Blackham, “We are all Entrepreneurs Now”: Options and New Approaches for Adapting Equality Law for the “Gig Economy” (2018) 34(4) *International Journal of Comparative Labour Law and Industrial Relations* 413–434. A copy of this article is attached to this submission.

Summary of Recommendations

This submission recommends that the Victorian government:

1. Empower courts or VCAT to intervene in ‘work relationships’ (defined broadly) and amend work contracts.
2. Extend non-discrimination duties to anyone with the power to discriminate.
3. Promote collectivised approaches to individual protection for on-demand workers.
4. Impose positive duties on on-demand platforms to address discrimination or equality issues, including through the analysis and publication of data.

The challenges posed by the on-demand economy for labour law and regulation

The on-demand economy presents three fundamental challenges to established workplace regulation and labour law. First, it challenges nation-based laws and regulations, as some forms of work can be undertaken anywhere, via a platform that could be based in a different country to the parties involved. This makes national and state regulation difficult in practice, and poses a fundamental challenge to the enforcement of labour law.

Second, the on-demand economy tends to break work roles into discrete tasks or components, focusing mostly on ‘micro-tasks’ in low to medium-value transactions. By breaking jobs into

discrete tasks, the on-demand economy challenges the idea of the ‘employee’ or ‘worker’ who is offered some continuity of work. Instead, it facilitates the hiring of ‘labour on demand’¹ for small or micro-tasks. The on-demand economy therefore tends to transfer the risks of employment to workers, rather than those who engage them. While ‘truly entrepreneurial’ workers may embrace this freedom and flexibility, not all workers are able to manage these risks effectively.

Third, the on-demand economy challenges the boundaries and idea of a labor market, undermining any distinction between work and home; work and leisure; and between professional and personal relationships.

The relevance of equality law for the on-demand economy

Equality law is particularly relevant to the on-demand economy, particularly given the power that can be exercised by online platforms and the risks of discrimination in the online sphere.

For many people, work through online platforms represents their primary source of income.² This means that many on-demand workers are **financially dependent** on online platforms, giving the platforms themselves significant power and control over individual wellbeing. Platforms exercise this power in a variety of ways. In particular, platforms are able to accept or bar particular workers³ (akin to hiring or firing for traditional employees); and allocate work based on ratings⁴ (which is akin to allocating work to casual workers or independent contractors). Thus, on-demand platforms themselves have substantial control over the access and exercise of individual working arrangements, and control workers via their processes of ratings, review, feedback, and removal.⁵

This power imbalance is exacerbated by information and knowledge asymmetries. There is a lack of transparency regarding the algorithms on-demand platforms use to assess and rank workers, and how work is allocated on platforms.⁶ Discrimination may well be built into on-demand platform algorithms and rating systems,⁷ including through biased reviews left by service users.⁸ However, given the lack of transparency around how these processes are managed, it is impossible to assess whether this is the case. That said, on-demand platforms themselves hold a wealth of data and information; this data could be used to reveal and address instances of discrimination (see below).

The focus on ‘relationships’ and ‘trust’ in ‘peer-to-peer’ on-demand platforms may also serve to **replicate discrimination online**. To facilitate these trust-based relationships, platforms encourage users to post a substantial amount of personal information online, including a

¹ Productivity Commission, ‘Digital Disruption: What Do Governments Need to Do?’ (Productivity Commission Research Paper, June 2016) 76.

² Cristiano Codagnone, Fabienne Abadie and Federico Biagi, *The Future of Work in the ‘Sharing Economy’: Market Efficiency and Equitable Opportunities or Unfair Precarisation?* (European Commission Publications Office, 2016) 6, 33 <<http://dx.publications.europa.eu/10.2791/431485>>; Ursula Huws and Simon Joyce, ‘Size of the UK’s “Gig Economy” Revealed for the First Time’ (February 2016) 1 <<http://www.feps-europe.eu/assets/a82bcd12-fb97-43a6-9346-24242695a183/crowd-working-survey.pdf>>.

³ Peter Gahan, Joshua Healy and Daniel Nicholson, ‘Technology, the Digital Economy and the Challenge for Labour Market Regulation’ in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, 2017) 276, 286.

⁴ Ibid.

⁵ Valerio De Stefano, ‘Introduction: Crowdsourcing, the Gig-Economy and the Law’ (2016) 37 *Comparative Labor Law & Policy Journal* 461, 463–4 <<https://papers.ssrn.com/abstract=2767383>>.

⁶ Codagnone, Abadie and Biagi, above n 2, 38.

⁷ Ibid 58.

⁸ De Stefano, above n 5, 464.

personal photograph. This may encourage and facilitate discrimination,⁹ and replicate discrimination found in the general labour market (such as the gender pay gap).¹⁰

Challenges to equality law from the on-demand economy

Like most labour regulation, equality law has traditionally been framed as protecting ‘employees’ against acts of discrimination by ‘employers’. The vast majority of on-demand platforms have represented those engaged through the platforms as ‘self-employed’ or ‘independent contractors’, and therefore potentially beyond the scope of traditional labour regulation and equality law.

However, the **drafting of Australian equality law appears to include those working in the on-demand economy**. At the federal level, independent contractors are likely to fall within the adverse action provisions of the *Fair Work Act 2009* (Cth) and federal anti-discrimination law.¹¹

At the state level in Victoria, it is explicit that independent contractors are covered by the various provisions relating to ‘employment’ in discrimination law. The definition of ‘employee’ in the *Equal Opportunity Act 2010* (Vic) extends to those ‘engaged under a contract for services’, the definition of ‘employer’ includes ‘a person who engages another person under a contract for services’, and the definition of ‘employment’ includes ‘engagement under a contract for services’.¹² Thus, the prohibition of discrimination in employment in s 18 of the Act clearly extends to independent contractors, and ‘employers’ must not discriminate against ‘employees’ by denying or limiting access to promotion, transfer, training or other benefits; in dismissal or termination; or by subjecting the employee to any other detriment.

The problem, though, lies in identifying **who is the ‘duty holder’** for the purposes of equality law. In Australian equality statutes, it appears that the ‘duty holder’ for the purposes of equality law is the **principal engaging the independent contractor** under a contract for services. Indeed, this is made explicit in the definition of ‘employer’ in the *Equal Opportunity Act 2010* (Vic). However, many on-demand platforms would not see themselves as contracting with those who work on the platforms: **the contract is arguably between the service user (i.e. the client) and those performing work (i.e. the Uber driver)**. In practice, it will be difficult, if not impossible, for a driver to pursue a discrimination claim against an individual Uber user (for example).

In the United Kingdom in *Aslam v Uber*,¹³ the UK Employment Tribunal held it was impossible for Uber to argue that drivers were engaged by passengers rather than Uber itself,¹⁴ making **Uber the only practicable duty holder for the purposes of equality law**. However, other platforms are not so clear cut, particularly if terms are not dictated to those performing work, and there is more scope for negotiation between the parties. This may make it **difficult to pursue discrimination claims against on-demand platforms themselves**.

⁹ See Catherine Barnard and Alysia Blackham, ‘Discrimination and the Self-Employed: The Scope of Protection in an Interconnected Age’ in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia, 2017).

¹⁰ Arianne Barzilay and Anat Ben-David, ‘Platform Inequality: Gender in the Gig-Economy’ (2017) 47 *Seton Hall Law Review* 393, 398, 408 <https://www.academia.edu/31848284/Platform_Inequality_Gender_in_the_Gig-Economy>.

¹¹ See the discussion in the attached article.

¹² *Equal Opportunity Act 2010* (Vic) s 4.

¹³ [2017] ET 2202551/2015 (28 October 2016).

¹⁴ *Ibid* [90], [93].

Recommendations

Thus, we need to focus on *how discrimination is occurring*, rather than who is discriminating.¹⁵ This requires a focus on institutional and platform structures that may lead to discrimination.

Further, even though on-demand workers are granted legal protection from discrimination in Australia, they are unlikely to have the capacity or willingness to enforce their legal rights.¹⁶

This submission therefore puts forward four recommendations to make equality law more relevant and effective for the on-demand economy:

1. **Empower courts or VCAT to intervene** in ‘work relationships’ (defined broadly) and amend contracts,¹⁷ including on the grounds of fair dealing (including the provision of clear information, equality or discrimination); income security; collective negotiation; and accessible dispute resolution.¹⁸
2. **Extend non-discrimination duties** to anyone with the power to discriminate.¹⁹ This would protect equality as an independent human right. It would help to resolve issues of identifying the ‘duty holder’ for the purposes of equality law, as duties would be held by all who have the power to impact upon another’s capacity or ability to work, including on-demand platforms.
3. Promote **collectivised approaches** to individual protection for on-demand workers. This could take the form of on-demand ‘unions’, the integration of on-demand workers into existing unions, or moving towards ‘platform cooperatism’, via the establishment of more worker-friendly on-demand platforms that are not-for-profit and owned by members.²⁰ The presence of unions can help to promote employers’ compliance with anti-discrimination law, and strengthen individual protection from discrimination.²¹
4. **Impose positive duties on on-demand platforms** to address discrimination or equality issues, including through the analysis and publication of data.²² Platforms are already collecting substantial quantities of data, which could be used to monitor, assess, and address discriminatory practices. However, platforms are unlikely to use their data in this way without legal intervention, particularly where their legal obligations under equality law are unclear.²³ A positive duty could include obligations on platforms to:
 - a. collect, analyse and publicise data on the protected characteristics of those using the platform;
 - b. remove photos or personal descriptions about workers, unless there are objectively justified reasons to retain them;

¹⁵ Barzilay and Ben-David, above n 10, 428.

¹⁶ In relation to work rights generally, see Andrew Stewart and Jim Stanford, ‘Regulating Work in the Gig Economy: What Are the Options?’ (2017) 28 *The Economic and Labour Relations Review* 420, 428 <<http://journals.sagepub.com/doi/10.1177/1035304617722461>>.

¹⁷ Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (The Federation Press, 2012) 196. This is similar to the powers in the *Independent Contractors Act 2006* (Cth), but would not be restricted to independent contractors of certain types or performing certain functions.

¹⁸ *Ibid* 196–200.

¹⁹ Sandra Fredman, ‘Equality Law: Labour Law or an Autonomous Field?’ in Alan Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing, 2015) 257, 258, 273 <<http://www.bloomsburycollections.com/book/the-autonomy-of-labour-law>>.

²⁰ Gahan, Healy and Nicholson, above n 3, 289–90.

²¹ Mark Harcourt, Geoffrey Wood and Sondra Harcourt, ‘Do Unions Affect Employer Compliance with the Law? New Zealand Evidence for Age Discrimination’ (2004) 42 *British Journal of Industrial Relations* 527 <<http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8543.2004.00328.x/abstract>>.

²² In the UK, see Barnard and Blackham, above n 9, 217.

²³ *cf* Brishen Rogers, ‘The Social Costs of Uber’ (2015) 82 *The University of Chicago Law Review Online* 85, 96 <<https://lawreview.uchicago.edu/page/social-costs-uber>>. Rogers argues that platforms could be encouraged to use their data in this way, without legal intervention.

- c. have policies demonstrating what they are doing to address and eliminate discrimination;²⁴
- d. adopt greater transparency in their ratings, algorithms, and deactivation processes;
- e. improve the reliability of feedback gained from users,²⁵ and initiate a right of reply for those undertaking work on the platform; and
- f. eliminate discrimination and achieve equality in the platform's operations.

This represents an extension and adaption of the public sector equality duty already in place in the UK.

²⁴ This could be done by informing the market (and workers) of average hourly rates for certain tasks, publishing reasonable hourly rates, suggesting hourly rates to users, or fixing levels of pay.

²⁵ This could be done by providing users with transparent guidelines for assessing work and performance.