



# **INQUIRY INTO THE VICTORIAN ON-DEMAND WORKFORCE**

Submission by  
Professionals Australia

## About Professionals Australia

Professionals Australia (formerly the Association of Professional Engineers, Scientists and Managers, Australia) is an organisation registered under the Fair Work Act 2009 representing over 23,000 professionals including professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers, transport industry professionals and translators and interpreters throughout Australia.

Professionals Australia members are employed across all sectors of the Australian economy. This includes all tiers of government and in a diverse range of industries throughout the private and public sectors including Roads, Rail, Water, Electricity, Information Technology, Telecommunications, Consulting Services, Laboratories, Research, Surveying, Construction, Retail Pharmacy, Mining, Oil, Collieries and Manufacturing.

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## Contents

FOREWORD	4
INTRODUCTION	5
FLEXIBILITY AND FREEDOM OR UNDERMINING LABOUR STANDARDS?	6
WHAT ARE THE IMPLICATIONS FOR PROFESSIONAL SERVICES?	7
1. Sham contracting	7
1(a) Erosion of workplace protections and declining income security	7
1(b) Sharing platform managers diverting risk on to workers	8
1(c) Sharing platform managers avoiding employment obligations	8
2. Threat to quality of service	8
3. Lack of investment in training and professional development	8
4. Impact on capacity of workers to negotiate fair terms	8
5. Impact on capacity of workers to report harassment, abuse or exploitation	8
CONCLUSION	9

## Foreword

Professionals Australia is committed to the need for a contemporary approach to how we represent the diverse interests of our members. We support workplace flexibility and accept the legitimacy of alternative forms of engagement. In line with this approach we provide information, legal services and insurance options to around 2,000 contractor members through our Contractors and Consultants special interest group (<http://www.professionalsaustralia.org.au/contractors-consultants/>). Members of these groups include independent contractors, professional consultants and those engaged as casuals or contractors via labour hire agencies.

Professionals Australia recognises, as acknowledged by the International Labour Organisation (ILO), that independent contractors are governed by commercial law while employees are governed by industrial law. We recognise independent contractors' freedom to operate in the manner they choose where genuine choices exist. We recognise independent contracting as a wholly legitimate form of engagement where fair contract terms are negotiated, and the right of business to engage contractors where it does not undermine the security of employment of the permanent workforce and contractors are afforded equivalent rights and protections.

While we recognise this, we also concur with the ILO which noted that while genuine commercial and independent contracting arrangements should not be interfered with, there is a need for mechanisms to ensure that persons engaged under disguised employment relationships have access to the protections they are due at the national level.<sup>1</sup>

While our understanding is that few of our members are engaged in providing professional services via the gig economy at present we believe that, over the longer-term, those industries that currently engage labour via labour hire agencies are at greatest risk of gig economy models being used to undermine pay and conditions and quality of professional services. These industries at present include Information Technology (IT) and community translating and interpreting services, though we believe some engineering, scientific and architectural services may also be at risk in the future.

We therefore thank you for the opportunity to highlight our concerns on behalf of our members.



A handwritten signature in black ink that reads "C. Walton". The signature is written in a cursive, flowing style.

Chris Walton  
Professionals Australia CEO

## Introduction

As the Inquiry background paper<sup>2</sup> points out, a significant period of time has elapsed between the emergence of the gig economy and regulatory responses leaving sharing platform managers with, at best, uncertainty around the legality of their arrangements and, at worst, enjoying an unfair competitive advantage over employers who comply with obligatory rates of pay and entitlements.

As well as creating uncertainty for platform sharing managers, the lack of regulatory response has left those engaged under gig economy models without proper workplace protections. We are opposed to labour market deregulation which allows unscrupulous employers to contrive to place segments of workers outside the framework of standard employment protections, rights and benefits.

We note that regulatory responses such as extending the definition of employee to capture gig workers, amending the superannuation system to ensure those classified as independent contractors are accommodated by the superannuation guarantee legislation and ensuring that the tax system includes a reporting regime for the sharing economy<sup>3</sup> largely sit in the Federal jurisdiction.

We have nonetheless opted to briefly outline our concerns in this forum because of the inadequacy and inconsistency of application of the current regulatory regimes in place at the Federal level and the failure to recognise the urgent need for employment law, tax and superannuation legal frameworks that are capable of fairly and consistently regulating the gig economy.

## Flexibility and freedom or undermining labour standards?

Advocates for the gig economy say it is a solution to labour market shortcomings while those against it say it is piecework for the digital age.

In *The Emergence of the Gig Economy*, the AiGroup claims that the gig economy “has the potential to have real economic effects by addressing dysfunction in the labour market”.<sup>4</sup> They suggest that the gig economy facilitates “more efficient matching between the demand and supply of labour” and that the gig economy will “lead to the creation of more productive and rewarding jobs and improvements in living standards”, that it offers workers unprecedented freedom and workplace flexibility, is a solution for unemployment and underemployment and will ensure the skills needs of the economy are better aligned with the workforce. They suggest that those working in the gig economy “would work only a few hours a week, concentrating only on one task” and this would create super-efficient “hyper-specialised” teams. They also suggest that job security “can render permanent employees complacent” and that shifting the employer-employee relationship into a customer-freelancer relationship makes workers truly accountable “with performance standards dictating future security and income”.

Taking a very different view, Unions NSW says the gig economy is *creating* dysfunction by subverting established labour standards: “The increased prevalence of digitally-enabled, gig-based work is actively fragmenting labour standards and disintegrating traditional jobs into short-term tasks with no employment safety nets.”<sup>5</sup> Gig economy workers are covered by commercial rather than employment law which in turn means they do not have access to standard employment entitlements that apply to employees including minimum wages, annual leave, sick leave, penalty rates, workers’ compensation, access to unfair dismissal or collective bargaining. Professor Joseph Davis, an expert in information systems and services at the University of Sydney, says that “Many platform owners and innovation gurus have tried to dress up the gig economy as ushering in a new era of flexible, egalitarian, liberating work” but that “at its core, it has reinvented piecework for the digital age.”<sup>6</sup>

## What are the implications for professional services?

So what would the potential consequences for the professional workforce be were professional services to become widely available via platform sharing arrangements?

In particular we are concerned about:

1. the widespread use of sham contracting as a method of engagement for gig economy workers;
  - (a) the use of the on-demand workforce as a mechanism for undermining minimum employment standards;
  - (b) the use of the on-demand workforce as a way of diverting risk on to workers;
  - (c) the use of the on-demand workforce as a way of avoiding employment costs and obligations;
2. impact on quality of service;
3. lack of investment in professional development;
4. impact on the capacity of workers to negotiate fair terms; and
5. impact on the capacity of workers to report abuse or exploitation.

### 1. Sham contracting

Gig economy platform managers define their suppliers as independent contractors. Sham contracting – the misclassification of workers as contractors who, when assessed against the common law test of employee, are likely to be more appropriately classified as employees – would be a significant concern for our members in a future unregulated gig economy labour market offering professional services.

On a sharing platform, potential operators may attempt to aggressively minimise labour expenses and potentially contravene workplace laws by engaging in sham arrangements. Those who avoid obligatory rates of pay and other entitlements gain an unfair competitive advantage and compromise the level playing field created by a system of basic employment entitlements alongside effective mechanisms to provide equivalent rights and protections for contractors.

Professionals Australia recognises the changing employment landscape and supports the use of independent contractors for those who are informed about their options and choose to operate under these arrangements whether it be to disperse specialist skills, to cope with peak workloads, or to undertake work which is not of a permanent ongoing nature. We will however continue to oppose the use of contractors where genuine choices do not exist, where individuals are not informed about the consequences of changed work arrangements, where contractors are engaged under less favourable pay and terms than equivalent employees or where the pay and conditions of permanent employees are threatened or undermined.

#### **1(a) Erosion of fundamental workplace protections and declining income security**

Through its engagement of workers through sham contracting arrangements, the gig economy undermines not only fundamental workplace protections including minimum rates of pay, access to unfair dismissal, accident insurance, paid leave, redundancy entitlements, penalty rates, collective bargaining and superannuation contributions but, just as importantly, security of income. In short, these workers are effectively “locked out” of the current industrial relations system with virtually no redress. What is desperately needed is a fundamental change to the Fair Work Act 2009 to provide for a number of important reforms. Firstly, amongst other measures, to include a new definition in the Fair Work Act of a “worker” which would include both traditional employees and gig economy workers in whatever form they are engaged. This would immediately allow for the minimum National Employment Standards (NES) to apply to all workers. Further, unions should be able to bargain for and if necessary, obtain orders from the Fair Work Commission to the effect that the same minimum rate of pay shall apply to all persons performing the particular work so that the incentive to enter into sham contracting arrangements is reduced.

### ***1(b) Sharing platform managers diverting risk on to workers***

Professor Davis<sup>7</sup> says the service agreements generally utilised in the gig economy mean that “All the risks and most of the costs are borne by the workers.” In the absence of an employment arrangement, there is no professional liability cover for suppliers operating as independent contractors providing professional services so the cost and responsibility for taking out professional liability cover and the risk itself would be diverted to the contractor.

### ***1(c) Sharing platform managers avoiding employment obligations***

As well as avoiding minimum employment standards and diverting risk on to workers, the use of independent contractor arrangements in the gig economy allows platform sharing managers to avoid paying PAYG tax and payroll tax.

## **2. Threat to quality of service**

The gig economy operates on competitive arrangements based largely or solely on price. In any transfer of professional services to platform sharing, there is likely to be a lack of clarity around qualifications, compliance with codes of practice, licensing and accreditation.

Competent practice, ethical conduct and the safety of the community all rely on high standards of professionalism and the gig economy is a direct threat to these standards. Ultimately the community will carry the risk and the cost of legal recourse in the case of sub-standard work with any shift away from accountability and professional standards.

Where providers compete solely on price, a “race to the bottom” ensues and serious compromises to service quality inevitably result.

## ***3. Lack of investment in training and professional development***

In spite of the Ai Group’s claim that the gig economy will ensure the skills needs of the economy are better aligned with the workforce, the gig economy - like the labour hire industry before it - is more likely to simply opt out of investing in workforce skill development allowing clients to simply buy in the specific skills they need. Depending on the reach of the gig economy, this lack of investment could potentially have a significant impact on growing our skills base and building professional capacity for the longer-term.

## ***4. Impact on capacity of workers to negotiate fair terms***

It is common for gig workers to be offered jobs on a “take it or leave it basis” without the opportunity to negotiate fair terms which suit both parties. This largely reflects the differential bargaining power of the platform sharing manager and gig worker.

## ***5. Impact on capacity of workers to report harassment, abuse or exploitation***

Professionals Australia members have reported that they are unable to report harassment, abuse, exploitation, safety concerns or injuries for fear that doing so would lead to loss of shifts or the loss of work when they operate through labour hire agencies. Evidence suggests that this experience is exacerbated in the case of gig economy arrangements.

## Conclusion

So overall, is the gig economy piecework for the digital age as suggested by Davis, a solution to a dysfunctional labour market as the AiGroup claims, or as Unions NSW put it, more of the same with digital platforms operating much like real-world labour hire agencies that attempt to avoid their employment obligations?

Professionals Australia's view is that while digital disruption offers new challenges and opportunities, workers must be protected from employers trying to undermine minimum employment standards, avoid their employment obligations and divert risk on to workers by misclassifying them as independent contractors.

If we fail to do this, we destroy any chance of a level playing field for those who do comply with their employment obligations.

We recognise independent contractors' freedom to operate in the manner they choose where genuine choices exist. We recognise independent contracting as a wholly legitimate form of engagement where the opportunity to negotiate fair contract terms is in place, and we acknowledge the right of business to engage contractors to meet workflow peaks, overcome skills gaps and provide a level of flexibility in their labour force.

Professionals Australia sees the gig economy as it currently stands however as a regressive loophole in labour regulation rather than a legitimate part of contemporary workplace relations arrangements. Never before, in our view, has there so clearly been a need to provide mechanisms to ensure that workers being denied their rights and entitlements under the guise of, in Davis's terms, innovation, egalitarianism and liberation, have access to the protections they are due.

We believe that a comprehensive regulatory response is required to provide certainty around the obligations of sharing platform managers and to ensure that persons engaged under disguised employment relationships have access to the protections at the national level.

## Endnotes

- <sup>1</sup> International Labour Organisation, The Scope of the Employment Relationship, Report V, 2003
- <sup>2</sup> Victorian State Government (2018). Inquiry into the Victorian On-Demand Workforce.
- <sup>3</sup> As recommended by the 2017 Black Economy Taskforce Report. Available at [https://static.treasury.gov.au/uploads/sites/1/2018/05/Black-Economy-Taskforce\\_Final-Report.pdf](https://static.treasury.gov.au/uploads/sites/1/2018/05/Black-Economy-Taskforce_Final-Report.pdf).
- <sup>4</sup> Australian Industry Group (2016). The Emergence of the Gig Economy. Available at [http://cdn.aigroup.com.au/Reports/2016/Gig\\_Economy\\_August\\_2016.pdf](http://cdn.aigroup.com.au/Reports/2016/Gig_Economy_August_2016.pdf).
- <sup>5</sup> Unions NSW (2016). Innovation or Exploitation: Busting the Airtasker Myth. Available at <http://www.unionsnsw.org.au/gigeconomy>.
- <sup>6</sup> Davis, J. (2015).
- <sup>7</sup> Davis, J. (2015).