



Inquiry into the Victorian on- demand workforce

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Introduction

1. Unions NSW is the peak body for trade unions and union members in NSW and has over 65 affiliated unions and Trades and Labour Councils representing approximately 600,000 workers across the State. Affiliated unions cover the spectrum of the workforce in both the public and private sector.
2. Unions NSW is mindful the inquiry into the on-demand workforce is specific to Victoria. However, the on-demand workforce is growing, with national providers operating the same business models in NSW and across the country. The experiences of workers in NSW are similar to those in Victoria as many of the laws governing (or not effectively governing) the on-demand workforce are federal.
3. Loop holes in legislation have created a grey area for on-demand workers and allowed platform companies to undermine employment standards by engaging workers exclusively as independent contractors in the name of flexibility and technological innovation. The current industrial relations system is letting on-demand workers down by allowing large multi-national companies make money off the back of a workforce with no bargaining rights, no access to minimum wages, no worker's compensation coverage and no minimum employment standards. Industrial laws must be amended to provide on-demand workers with access to workplace rights and protections.

Previous submission and recommendations

4. In January 2017, Unions NSW made submissions to the Senate Inquiry into the incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009*. In February 2018, Unions NSW made submissions to the Senate Inquiry into the Future of Work and Workers. This Unions NSW Submission will reiterate key concerns with the gig-economy and use of technology to undermine labour standards raised in these submissions.

5. Unions NSW particularly supports the below recommendations made by the Senate Inquiry into the incidence of, and trends in, corporate avoidance of the *Fair Work Act 2009*¹:

Recommendation 25

The committee recommends that the *Fair Work Act* be amended to ensure that all workers have the protections of the Act and access to the labour standards, minimum wages and conditions established under the Act, so that these rights accrue to dependent and on demand contracting, preventing those arrangements from being disguised as independent contracting. These amendments should capture the dependant contractor who is dependent upon a labour hire company, a company using a work allocation platform or a major corporation using a relationship power imbalance to exercise control over the worker.

Recommendation 28

The committee recommends that the government legislate to ensure that workers in the gig economy are protected by a minimum wage by requiring platform providers to provide clear minimum labour price guidelines aligned to the relevant award for different categories of work, along with information about the relevant union for the category of work (where multiple unions would have coverage the ACTU should be provided as a point of referral).

Recommendation 29

The committee recommends that the federal government work with state and territory safety regulators to review health and safety and workers' compensation legislation to ensure that companies operating in the gig economy are responsible for the safety of workers engaged in the gig economy.

¹ Senate Standing Committee on Education and Employment, Final Report, Corporate avoidance of the Fair Work Act, 6 September, 2018

6. Unions NSW supports the recommendations made by the Senate Inquiry into the Future of Work and Workers²:

Recommendation six

The committee recommends that Australia's workplace legislation be amended, to strengthen the protections available to workers and their unions, to ensure that all Australians share the economic gains arising from technological and other change. Further, Australia's future workplace laws and legislators will need to more rapidly adapt to and anticipate the evolving nature of work and employment relationships, so as to ensure that workers, however classified, are afforded fundamental workplace rights and entitlements.

Recommendation ten

The committee recommends that the Australian Government make legislative amendments that broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system.

The gig-economy

7. The term on-demand workers and the gig-economy are often used synonymously. The gig-economy refers to digitally enabled 'marketplaces' where companies use websites and apps to pair workers with tasks or jobs that occur both online and offline.
8. The gig-economy is underpinned by five key-features:
- Work is fragmented into specific individual tasks or jobs and workers are engaged on a task by task basis with no guarantees of continuous work.
 - Work is performed by individual workers, but may be commissioned by an individual or a business.

² Select Committee on the Future of Work and Workers, Final report, 19 September, 2018

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- Labour transactions between workers and individuals/businesses are facilitated by a for-profit company who charge users for this service (eg, Airtasker, Uber). These transactions are performed through web based applications which are managed and controlled by the for-profit company.
 - Workers are treated as independent contractors by the facilitating companies and are not afforded any employment protections or minimum standards in the performance of their work.
 - The price charged for each job is set by the facilitating company or by the commissioning customer. Payment is collected through the platform, and compensation (net of the platform's margin) is then disbursed to the worker.
9. The gig-economy is expanding across a number of traditional industries. Currently some of the major players include Uber³, GoCatch⁴, Taxify⁵, Ola⁶ (taxi and courier services), Whizz⁷ and Helping⁸ (home cleaning services), Airtasker⁹ and Freelancer¹⁰ (range of jobs and 'tasks'), Deliveroo¹¹ and UberEats¹² (food delivery), care.com¹³(child care, aged care and household help), Mable¹⁴ (aged and disability support).
10. The gig-economy currently makes up a small proportion of the overall labour market. However, its is increasing rapidly and attracts millions of users every day. Research conducted on behalf of the NSW Government estimated the sharing economy has contributed \$504 million to the State's economy annually and provided 45,000 people with some form of work.¹⁵

³ <https://www.uber.com/>

⁴ <https://www.gocatch.com/>

⁵ <https://taxify.eu/en-au/>

⁶ <https://www.olacabs.com/au>

⁷ <https://whizz.com.au/>

⁸ <https://www.helping.com.au/>

⁹ <https://www.airtasker.com/>

¹⁰ <https://www.freelancer.com.au>

¹¹ <https://deliveroo.com.au>

¹² <https://www.ubereats.com/en-AU/>

¹³ <https://www.care.com/>

¹⁴ <https://mable.com.au/>

¹⁵ Deloitte Access Economics (2015), review of the Collaborative Economy, p. 15, available at: <http://www2.deloitte.com/au/en/pages/economics/articles/review-collaborative-economy-nsw.html>

Independent Contractors in the gig-economy

1. A significant concern with gig-economy companies is their treatment of workers as independent contractors and not employees. Genuine independent contractors are governed by commercial rather than employment law thus bypassing requirements for minimum hourly rates of pay, employment safety nets, worker's compensation, superannuation.
2. Gig-economy companies have claimed they are not businesses who employ workers to perform services or produce goods. Instead companies claim to be technology platforms who provide 'lead generation' to workers.
3. Current employment legislation recognises the phenomenon of employers disguising employees as independent contractors, also known as sham contracting. The *Fair Work Act* provides for a contravention for misrepresenting employment as an independent contracting arrangement.¹⁶
4. The key differential between a genuine independent contractor and an employee is the level of control the worker has over the performance of their work, and their reliance on another company or individual for the commissioning of that work.¹⁷ The test of employment looks at the totality of the relationship between the worker and employer and is drawn heavily from common law.
5. Despite legislative and common law provisions, the use of sham contracting remains an ongoing problem both in the 'traditional' and gig-economy, with employers taking advantage of the broad interpretation of the legal definition for independent contractors.
6. There are a number of common features in the gig-economy which undermine the 'independent' nature of the work. Not all gig-economy companies will meet the current threshold for employment, however, this is not necessarily an indication workers are truly 'independent'.

¹⁶ *Fair Work Act 2009*, s. 357.

¹⁷ Roles, C. Stewart A. (2012), 'The reach of labour regulation: tackling sham contracting', *Australian Journal of Labor Law*, issue 25, pp. 258-282

7. Below is a non-exhaustive list of common gig-economy features which demonstrate the dependent nature of many workers:
- a) **Charges a work fee to workers using the site/app.** This generally takes the form of a percentage of the fee charged to the customer. For examples Airtasker takes 15 percent of earnings, Uber takes 20 percent of fares and Mable takes 10 percent of worker payments.
 - b) **Regulates the behaviour of workers.** The public image and brand of the company is regulated. This extends to controlling the public interaction of workers on the website. Workers can be blocked from work for publicly expressing dissenting views.
 - c) **Workers are dependent on ratings within the app for work.** Apps provide opportunities for customers to rate workers within the app. Workers are then dependent on the app's internal rating system in order receive work.
 - d) **Maintains the right to remove workers and thus restrict their ability to work.** Companies maintain the right to block workers from their platforms. This is particularly restrictive considering the market domination of gig-economy platforms in certain industries, making it very difficult for blocked workers to continue working in the area. Workers can be blocked for low ratings, cancelling jobs or speaking out against the company. Workers are given few rights to challenge.
 - e) **Provides (limited) insurance protection.** Some companies provide limited insurance, like Airtasker, Uber and Deliveroo. However, there are no uniform requirements for workers to be provided insurance cover or access to worker's compensation.
 - f) **Provides equipment to perform work.** Deliveroo provides branded carry bags for deliveries as well as uniforms.
 - g) **Controls who performs the work.** Gig-economy work relies on individual worker profiles and ratings. As such, companies restrict workers from further outsourcing a task or having it partially performed by another contractor. This limits the ability

of workers to fully control the nature and performance of their work.

- h) **Interviews and screens workers.** Whizz pre-screens workers before providing them with access to the platform. Deliveroo require riders to pass a riding test before they can work on the platform.
 - i) **Provides training.** Runs training which provides specific instruction on how work is to be completed. Whizz runs a training and induction session for their cleaners, providing guidance on how work is to be conducted. Deliveroo runs training for new delivery riders/drivers covering road safety, branding and use of the app.
 - j) **Arranges a roster of shifts.** Some food delivery companies have attempted to restrict the number of workers competing for jobs by requiring workers to sign up for shifts in order to access the app.
 - k) **Places limits on the completion of work.** The company may require work to be completed in a set time. Deliveroo uses delivery time as a performance measure which determines continued access to the app.
 - l) **Limits transparency around the calculation of pay.** An algorithm may be used to calculate the payment for each job, with workers not provided with information on how this is calculated. For example, food delivery riders can be paid different amounts for riding the same distance without explanation. They are not shown the details on how the payment is calculated, which would allow them to make an informed decision about whether or not to accept a job.
8. The distinction between independent contractor and employee is often unclear. On the one hand workers can choose their hours of work and what jobs they want to perform which provides a large degree of individual control over their work. On the other hand, workers have limited bargaining power, are dependent on the company's app for the allocation of work and don't have control over setting their own prices.
9. Some workers are attracted to the gig-economy because of the low barriers to entry, a factor which can be used by gig-economy platforms to exploit the vulnerability of their workforce. Workers may have found it difficult to find employment in more traditional workplaces, because of language barriers, visa status, age discrimination or caring responsibilities.

10. The gig-economy has created a marginalised group of workers who have no right to collective bargaining, no access to industrial tribunals and no minimum workplace conditions or standards. A survey of over 1,000 ride share drivers by the Transport Workers Union found the average pay for workers was \$16 an hour, before fuel, insurance and other costs are deducted¹⁸.
11. Tinkering around the edges of the definitions of independent contractor and employee will not solve this problem. Employers, will continue to find loopholes and arguments to opt out of employment obligations. There are some basic entitlements all workers should have access to which includes minimum wages, safety, workers' compensation, unfair dismissal and dispute resolution.

Case Study – Airtasker

12. In 2016 Unions NSW produced the report *Busting the Airtasker Myth* which outlined the employment practices of the online platform, Airtasker. The report argued Airtasker took advantage of a grey area of industrial law and classified their workers as independent contractors, circumventing minimum wage rates and removing employee safety nets.
13. Airtasker is an online gig-economy platform and leading provider of task-based services. The company was established in 2012 and describes itself as 'the best place for people and businesses to outsource tasks.'¹⁹ 'Job-posters' nominate specific tasks and rates of pay. Workers subsequently price a job-poster's task through a competitive and blind bidding process. The nominated worker carries out the work at the tendered price, from which Airtasker deducts a 15% commission.
14. The Unions NSW report challenged Airtasker's use of independent contractors arguing the platform was purposefully avoiding its employment responsibilities and encouraged a 'race to the bottom' for working standards. Central to these concerns were the lack of minimum rates of pay, safety and the use of the application by

¹⁸ Transport Workers Unions, Rideshare Driver Survey, 2018, available at: <https://www.twu.com.au/home/campaigns/rideshare-drivers/>

¹⁹ Airtasker, (2018), Airtasker Home Page, accessed 20 February 2018, <https://www.airtasker.com/how-it-works/>

businesses to outsource jobs.

15. Following the publication of the report, Unions NSW and Airtasker engaged in productive dialogue concerning how workers rights on the site could be improved. In April 2017 Airtasker and Unions NSW agreed:
 - a. All recommended rates of pay on Airtasker will be above comparative award rates;
 - b. Workers using Airtasker will be offered an affordable and flexible insurance product similar to workers compensation to protect against workplace injury and illness;
 - c. Both Airtasker and Unions NSW will work with the Fair Work Commission to develop an appropriate dispute resolution mechanism;
 - d. Airtasker will continue to work with Unions NSW to ensure best practice workplace health and safety standards are in place to protect workers and consumers using the platform.

16. The agreement with Airtasker was an important step in acknowledging the importance of minimum wages and safety protections in the gig-economy. However, the agreement is not an enforceable instrument nor does it provide any safety net for workers in other areas of the gig-economy. The agreement highlights the risks currently facing workers in the gig-economy and the failure of legislative tools to provide adequate protections. Unions NSW has an ongoing dialogue with Airtasker in relation to the 2017 agreement and the treatment of workers through the site.

17. Airtasker workers do not have workers compensation coverage. Since April 2018, Airtasker has offered Personal Accident Cover to workers who are injured in the course of a task (if it is covered by the policy). The insurance provides a lump sum payment to lessen the financial burden of injuries, but does not cover the costs of specific medical costs or provide income protections.

18. The lack of insurance to cover injury or damages to Airtasker workers, however, does not absolve job-posters or Airtasker of their safety obligations — nor does it absolve them of potential liability in the case of a worker being injured. As a general rule, independent contractors are not entitled to workers compensation insurance. However, under the Work Health and Safety Act (Cwth) 2011 (WHS Act), a service-hirer is obligated to provide a safe and hazard-free workplace. The WHS Act also

provides that more than one duty holder may be held responsible for the safety of workers — specifically including both the labour hire company, and the host of the independent contractor. The duty of care must be fulfilled by both parties to the extent they have the ability to control and influence the matter.

19. In the case of Airtasker, this would require Airtasker to ensure job-posters are aware of their safety obligations and risks associated with certain tasks, and workers are also made aware of the job-poster's responsibilities (so they can enter their arrangement with a certain expectation those responsibilities will be met). Since the Unions NSW agreement, Airtasker has developed information on safety obligations or potential hazards for their users. Airtasker has also since introduced badges onto the platform to identify workers qualifications and licenses. This is an area where state government can play a more pro-active role in ensuring gig-economy companies are meeting their safety obligations.

Case study - Foodora

20. Gig-economy companies are exploiting workers through sham-contracting and they are also ripping off tax payers by dodging the taxation obligations associated with being an employer.
21. The actions of Foodora in 2018 represent a clear and deliberate disregard for the Australian taxation and industrial relations system. On August 20, 2018, Foodora announced their decision to cease operations in the Australian market. The company claimed it was leaving the country to shift its focus to other growth markets. The company entered into voluntary administration later that month.
22. The classification of Foodora riders as independent contractors had come under question from the Transport Workers Union, the ATO and NSW Revenue. In November 2018, Foodora's administrators acknowledged riders on the platform should have been classified as employees. Administrators calculated Foodora owed \$7.2 million in unpaid wages, superannuation and taxes. Despite the admission, Foodora's parent company, Delivery Hero, committed just \$3 million to cover their debts.

23. The Australian Tax Office claimed Foodora owed \$2.1 million in unpaid taxes, Revenue NSW made a claim for \$550,000 in unpaid payroll tax and Victoria and Queensland had claims of \$400,000²⁰.
24. The administrators estimated workers were owed \$5.54 million in unpaid wages. But made the assumption that taxpayers would foot part of the outstanding wages through the Government's Fair Entitlements Guarantee Scheme. This is despite Foodora's German based parent company, Delivery Hero forecasting revenue of \$AUD 1.2 billion.²¹
25. The misclassification of Foodora riders was confirmed by a Fair Work Decision in November 2018, which found rider Josh Klooger was unfairly dismissed. Josh was sacked in March 2018 after speaking out about the conditions on the platform and was represented by the Transport Workers Union in the case. The Commission found that despite attempts to disguise the relationship as that of a contractor, Josh was an employee of Foodora and had been unfairly dismissed.²²
26. Foodora has fled the country leaving behind unpaid debts to the tax office and riders, with the Australian Government likely to have to foot some of the bill.
27. The findings that Foodora riders had been misclassified as independent contractors raises serious questions about the operation of other on-demand food delivery providers and other gig-economy companies. However, our current legislative framework provides too much grey areas around the definitions of employees and independent contractors. Employers will continue to find loop holes that argue their workers are 'genuinely' independent. The law needs to acknowledge that there are some standard workplace conditions which all workers must have access too. This includes bargaining rights, minimum wages, safety, workers compensation and dispute resolution.

Case study - NDIS

²⁰ A. Patty, 16 November, 2018, 'Foodora rider wins unfair dismissal case in landmark ruling', available at: <https://www.smh.com.au/business/workplace/foodora-creditors-vote-to-accept-less-than-half-of-debts-claimed-20181116-p50gic.html>

²¹ Delivery Hero, 'Q3 Statement', 2018, available at: <https://ir.deliveryhero.com/websites/delivery/English/3100/financial-reports.htm>

²² Klooger v Foodora Australia Pty Ltd [2018] FWX 6836

28. The National Disability Insurance Scheme (NDIS) prioritises flexibility and individual choice. While this will better align with the needs of individuals with a disability, the current structure of the scheme raises a significant risk of increasing insecure employment in the disability sector. The government's approach undermines the traditional model of permanent employment with a single service provider and encourages an increase in casualisation and engagement of independent contractors. This has been further complicated by the grey-area of independent contracting and the gig-economy.
29. Already companies such as Mable are providing NDIS funded services through a model based on 'on demand' gig economy platforms. Mable provides aged care, homecare and disability support services with clients able to use the NDIS to fund services, but with workers engaged as independent contractors. On the website the company boasts lower overhead costs, with disability support workers earning \$33.30 an hour. Under the Social, Community, Home Care and Disability Services Industry Award 2010, casual workers are entitled to a minimum of \$34.90 an hour²³, workers paid under the award are paid superannuation on top of this hourly rate. Superannuation is not paid to workers engaged through Mable. [Text redacted].
30. Not only does the gig-economy approach to care undercut employment standards in the disability sector, it undervalues the work. Care and support work is complex and workers need access to ongoing development and professional supervision. This cannot be provided for through a gig-economy app. [Text redacted]. This is not an effective use of tax-payer resources. When services are commissioned on behalf of the government they should not be used to undermine Australian workplace conditions. Any care work provided through the NDIS should require workers be engaged as employees.

²³ Social, Community, Home Care and Disability Services Industry Award 2010, Casual employee, level 2, pay point 3 as at 25 February 2019.

31. A NDIS Code of Conduct has been introduced for all workers providing NDIS services. The NDIS Code of Conduct applies to all NDIS providers, registered and unregistered, and all persons employed or otherwise engaged by an NDIS provider. Breaches of the Code can result in a range of penalties including civil penalties through to banning from working in the NDIS sector. Workers engaged to provide NDIS services through gig-economy platforms are required to comply with the NDIS Code of Conduct, any non-compliance with the Code of Conduct is considered a breach of the Code and is subject to penalty. All NDIS workers need training to ensure they are not at risk of breaching their obligations under the NDIS Code of Conduct. A portable training scheme for all workers in the NDIS sector should be established by government to ensure all NDIS workers have a minimum qualification that is essential for the safety and quality of services and supports provided to people with disability under the NDIS.

Conclusion

32. The use of independent contractors in the gig-economy is a pressing issue. Extending basic working conditions to all workers is crucial to ensure further technological developments aren't used as a tool to undermine employment.