

20 February 2019

Dear Ms James,

RE: Inquiry into the Victorian on-demand workforce

The Centre for Business and Social Innovation (CBSI) welcomes the opportunity to make a submission to the Inquiry into the Victorian on-demand workforce.

CBSI operates as an interdisciplinary hub that works closely with practitioners, business and the community to shape the future of our society. It provides a unique perspective on innovation research that integrates the technological, the economic, the environmental and the social. The Centre focuses on the changing and significant role of business in transforming the economies and societies in which we live.

The Terms of Reference for the Inquiry are closely aligned to the research interests and current research projects of our members.

The growth of the on-demand economy (also referred to as the 'gig' economy) has created a variety of issues for individual workers and the labour market in Australia and across the globe. The imbalance of power between platform providers and workers combined with unregulated working conditions for gig workers increases the danger that exploitative practices will become entrenched in on-demand work. Our submission recommends that the State conducts a full audit across all policy areas to identify levers other than Federal labour law that may be used to influence labour standards and working conditions for the on-demand workforce.

Yours sincerely,



Sarah Kaine
Associate Professor
Centre for Business and Social Innovation
UTS Business School

Contents

<u>Inquiry into the Victorian on-demand workforce: Submission by the Centre for Business and Social Innovation – UTS Business School</u>	3
Terms of reference addressed in this submission:	3
Background.....	3
Federal developments and debates regarding the regulation of the ‘on-demand’ workforce	4
Overcoming jurisdictional dilemmas.....	5
Options for State based regulation.....	5
Sector specific options	6
Facilitating access to information	8
Other jurisdictions	8
Fostering alternative business models	8
Conclusion	9
Key Recommendations.....	10

Inquiry into the Victorian on-demand workforce: Submission by the Centre for Business and Social Innovation – UTS Business School

Sarah Kaine and Linda Peach

Terms of reference addressed in this submission:

- b. v.** regulation in other Australian jurisdictions and in other countries, including how other jurisdictions regulate the on-demand workforce;
- b. vii.** The limitations of Victoria's legislative powers over industrial relations and related matters and the capacity to regulate these matters
- b. viii.** The ability of any Victorian regulatory arrangements to operate effectively in the absence of a national approach.

Background

The growth of the on-demand economy (also referred to as the 'gig' economy) has created a variety of issues for individual workers and the labour market in Australia and across the globe.¹ The on-demand economy provides unparalleled opportunities for platform providers to benefit from the labour of 'gig' workers with very little risk. Conversely, taking part in the on-demand economy requires workers to take much higher risks than they would in normal employment – through the provision of their own tools, equipment and insurances, and through the insecure and short-term nature of the available employment.²

Gig workers are classified by digital platform service providers as 'independent contractors' rather than employees, and this is a key distinction that underpins the business model. If a gig worker became classified as an employee, the platform provider would become subject to Australia's labour laws, including the provision of minimum wages, satisfactory working conditions, and compulsory superannuation.³

Increasing competition among on-demand platforms in a variety of sectors such as point-to-point transport, food delivery and personal services has added to the jeopardy for workers by placing downward pressure on working conditions. As working conditions for gig workers are currently unregulated, there is a danger that exploitative practices will become entrenched in the sector. Government intervention is seen by many as the only mechanism likely to curb this "race to the bottom".⁴

Challenges regarding the employment conditions of gig workers have been seen in the Fair Work Commission with individual gig workers being used as test cases by unions and the Fair Work Ombudsman regarding 'independent contracting' status that may be obscuring 'sham contracting'. To date, the results of these cases have been mixed. Two cases brought by Uber drivers have upheld their contractor status. However, more recently, the Transport Workers Union prosecuted a case in the bicycle food delivery sector (against 'Foodora' which has withdrawn operations in Australia) in which the rider was deemed to be a casual employee and awarded backpay accordingly⁵. However, due to the nature of the federal framework these cases do not provide an automatic precedence for other gig workers. Each

¹ Minter, K. (2017). 'Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales', *The Economic and Labour Relations Review*, 28(3), pp. 438-454.

² Kaine, S., Josserand, E. (2016). *Workers are taking on more risk in the gig economy*. The Conversation, July 6, 2016.; Stewart, A. & Stanford, J. (2017). 'Regulating work in the gig economy: What are the options?', *The Economic and Labour Relations Review*, 28(3), pp 420-437;

³ Kaine, S., Josserand, E. (2016). *Workers are taking on more risk in the gig economy*. The Conversation, July 6, 2016.

⁴ Barratt, T., Veen, A., Goods, C., Josserand, E., Kaine, S. (2018) *As yet another ridesharing platform launches in Australia, how does this all end?* The Conversation, June 25, 2018

⁵ Decision [2018] FWC 6836 <https://www.fwc.gov.au/documents/decisionsigned/html/2018fwc6836.htm>

case is decided on its merits using a multifactor test that guides the Fair Work Commission in making determinations of employment status, but is weighted differently according to the facts of each case. The continuing appropriateness of this approach was questioned in the December 2017 decision *Kaseris v Rasier Pacific V.O.F.*⁶, when Deputy President Gostencnik noted that:

The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new “gig” or “sharing” economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied. [66]

Federal developments and debates regarding the regulation of the ‘on-demand’ workforce

The relevance of existing regulation was considered in the report from the Federal Government’s Senate Select Committee on *The Future of Work and Workers*, released in September 2018⁷. It contains 24 recommendations, several of which relate to gig work. These include changes to Australian workplace laws to better accommodate evolving work practices and employment relationships to ensure that all workers have access to the same level of workplace rights and entitlements such as superannuation and union representation. While the recommendations included the redefinition of ‘employee’ to include gig workers⁸, there is a danger that with regard to regulatory options the debate is simplified down to devising a new category of worker. However, effective government action to protect gig economy workers cannot solely rely on changing the legal definition of employee. Such a change, on its own, will potentially result in establishing another artificial boundary to be circumvented by motivated on-demand platforms.

Furthermore, implementation of the Committee’s recommendations would happen at a Federal level, and State and Territory governments are restricted in their capacities to influence such implementation because they have limited jurisdiction over labour laws. However, there are a variety of ways to influence working conditions using regulatory instruments that do not encroach on Federal labour law.⁹

⁶ Decision [2017] FWC 6610 <https://www.fwc.gov.au/documents/decisionsigned/html/2017fwc6610.htm>

⁷ Australian Government (2018). *Hope is not a strategy – our shared responsibility for the future of work and workers*. Select Committee on the Future of Work and Workers, Commonwealth of Australia.

⁸ Recommendation 10, Australian Government (2018). *Hope is not a strategy – our shared responsibility for the future of work and workers*. Select Committee on the Future of Work and Workers, Commonwealth of Australia.

⁹ Kaine, S. & Stanford, J. (2017). *The future of work is what we make it. A new vision for NSW*, Australian Fabians Pamphlet Series No.68.

Overcoming jurisdictional dilemmas

Australian governments at all levels have been creative regulators of the labour market since Federation. Following Federation, the Commonwealth government was constrained by the Labour power [Section 51 (xxxv)] of the Constitution, meaning that it could not intervene directly to set wages and conditions of work. However, it could impose taxes. The *Excise Tariff Act 1906* passed by the Deakin government included a provision for manufacturers of agricultural machinery to be exempt from the excise if the workers in that company were paid a 'fair and reasonable' wage¹⁰. The Harvester judgement that resulted is embedded in industrial relations has become synonymous with the establishment of minimum wages in Australia. What is rarely recognised is that the mechanism used to trigger this historically significant precedent was not a feature of labour law – it was enabled by the creative deployment of tax law¹¹

A century later, the Howard Government also found a way to work around what were viewed as the restrictive boundaries of labour law when it used the Corporations power [Section 51 (xx)] of the Constitution to create a national regulatory framework that downgraded collective bargaining and instituted statutory individual contracts. A legacy of that re-orientation was the continuation of the downgrading of State industrial relations jurisdictions that had previously begun in Victoria¹². This might lead to the conclusion that a State government has little capacity to influence the wages and conditions of workers beyond the public sector. However, this underestimates the extent to which creative, ambitious interventions at the state level can influence labour standards. The Victorian Government has demonstrated its willingness to influence labour standards beyond the Federal jurisdiction through the introduction of licensing laws for labour hire companies in an effort to curb exploitation of workers in industries such as horticulture. This illustrates the potential for State government action to create regulatory mechanisms to protect workers for whom Federal labour law is not providing sufficient protection.¹³

Options for State based regulation

Given jurisdictional issues, the Victorian government needs to identify regulatory options that are State or industry specific or a combination of both in order to address labour standards in the on-demand economy. Box 1 provides an example of State based regulatory activity in the United states. While the legal framework is obviously very different, the federated system in the US does mean that States wanting to supplement minimal federal labour law provision have to pursue regulatory alternatives.

¹⁰ Hamilton, R. S. (2011). *Waltzing Matilda and the Sunshine Harvester Factory: The early history of the Arbitration Court, the Australian minimum wage, working hours and paid leave* Fair Work Australia: Melbourne.

¹¹ Kaine, S. & Stanford, J. (2017). *The future of work is what we make it. A new vision for NSW*, Australian Fabians Pamphlet Series No.68.

¹² Gahan, P. (2005). 'The future of state industrial regulation: Can we learn from Victoria?', *Australian Review of Public Affairs Symposium: State Systems of Industrial Relations*, Digest 14 Nov 2005.

¹³ Kaine, S. & Stanford, J. (2017). *The future of work is what we make it. A new vision for NSW*, Australian Fabians Pamphlet Series No.68.

Box 1:

The State of the States: Portable Benefits Proposals in the US

In the US, efforts to impact labour standards for on-demand workers have largely bypassed the federal jurisdiction in favour of State-based initiatives. This has seen both worker advocates and on-demand service platforms attempting to use State legislatures to legislate conditions in their favour.

The states of Washington, California, New York and New Jersey are actively considering portable benefits schemes that would provide health, retirement or other benefits to on-demand workers (<https://www.brookings.edu/blog/the-avenue/2018/03/29/rethinking-worker-benefits-for-an-economy-in-flux/>).

While differing in detail, the general characteristics of portable benefits schemes include: benefits not being tied to a particular job or company; company contributions to worker benefit plans based on amount of work undertaken; benefits accrue to workers regardless of employment status (https://assets.aspeninstitute.org/content/uploads/files/content/upload/Portable_Benefits_final2.pdf).

Portable benefits are not unprecedented in Australia. For example, NSW has the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* that specifically regulates long service leave for cleaners regardless of changes to employer as it does in the construction industry¹⁴. There are similar examples across the States with the Victorian *Long Service Benefits Portability Act 2018* that applies to the contract cleaning, security and community services sectors coming into operation on 1 July 2019.¹⁵ **These demonstrate the capacity of State legislatures to provide an alternative path to improved entitlements for workers, particularly in those sectors characterised by non-direct employment- suggesting that similar options could be considered for the on-demand economy.**

Around Australia, various reforms aimed at regulating on demand work have already been touted at the State and Territory levels. The NSW Labor party has recommended revamping the NSW Industrial Relations Act including a new chapter to better protect on-demand workers, particularly in relation to minimum rates of pay and working conditions such as superannuation, workers' compensation and leave entitlements.¹⁶ Though not an option open to Victoria, it denotes an interest in adapting existing legislation to encompass the on-demand workforce.

Sector specific options

In addition to State based regulation, there is potential for local and industry mechanisms to be harnessed in efforts to set or improve minimum conditions in the on-demand economy. Box 2 provides the example of recently introduced ride-share regulation in New York City. In this case a sector specific regulatory body was tasked with, not only controlling the market

¹⁴ <https://legislation.nsw.gov.au/#/view/act/2010/122>; <http://www.longservice.nsw.gov.au/ci/workers/overview/long-service-leave>; <http://www.longservice.nsw.gov.au/bci/workers/your-long-service/long-service-payment>

¹⁵ <http://www.business.vic.gov.au/hiring-and-managing-staff/long-service-leave-victoria/portable-long-service-leave>

¹⁶ <https://www.smh.com.au/business/workplace/new-laws-needed-for-exploited-gig-economy-workers-20180721-p4zsuz.html>

(thereby restricting further competition that may lead to the decline in driver earnings), but also mandating minimum rates.

Box 2: Local Options

The NYC Council and the Taxi and Limousine Commission

In August 2018, New York City Council voted to limit operations of ride-sharing platforms such as Uber (<https://council.nyc.gov/press/2018/08/08/1631/>) placing a 12-month freeze on new vehicle licenses for ride-share services, introducing a new type of licence for companies providing over 10,000 trips per day, and making provision for a minimum pay rate per trip to be established for ride-share drivers (<https://www1.nyc.gov/site/tlc/index.page>). While these regulations were also aimed at addressing congestion issues exacerbated by the growth of ride-share, they demonstrate that the City of New York was motivated to use the powers and institutions within its own jurisdiction (in this case through the Taxi and Limousine Commission) to address concerns regarding declining earnings and increasing competition that had led to the suicide of a number of taxi and ride-share drivers (<https://www.nytimes.com/2018/10/07/nyregion/uber-driver-suicide-for-hire-taxis-new-york.html>).

Such sector specific regulations and regulatory bodies present a range of options outside of Federal labour law and are reminiscent of suggestions offered elsewhere as a means to improve and enforce labour standards in individual industries. For example, in aged care it has been argued that the aged care accreditation system may provide an alternative regulatory path to improved working conditions through the inclusion of more specific labour standards in the accreditation framework.¹⁷

Another means of regulating for better outcomes outside the confines of labour law is to support industry-specific multi-stakeholder collaboration. An example of this is the Cleaning Accountability Framework.¹⁸ CAF is an independent, multi-stakeholder initiative comprising representatives from across the cleaning supply chain – including institutional property investors, building owners, facility managers, cleaning companies, cleaners (through United Voice), industry associations and the Fair Work Ombudsman. CAF seeks to improve labour standards by encouraging transparency throughout the cleaning supply chain. CAF recognises stakeholders who adopt better practice in the cleaning industry through a building certification scheme. CAF works to improve the employment conditions of cleaners, support sustainable business models and responsible contracting practices, help building owners and investors manage risk, and assist tenants in ensuring that they are benefiting from quality cleaning services. Multi-stakeholder initiatives have been criticised for lacking enforceability, but CAF overcomes this by using the structure of the supply chain, specifically the power of building owners and managers to drive compliance.

¹⁷ See [Kaine, SJ](#) 2012, 'Collective Regulation of Wages and Conditions in Aged Care - Beyond labour law', *Journal of Industrial Relations*, vol. 54, no. 2, pp. 100-116.

¹⁸ <http://www.cleaningaccountability.org.au>

While CAF is not centred around the on-demand economy, it does deal with an historically very competitive sector characterised by sham contracting (reminiscent of FWO and union concerns regarding on-demand work). Furthermore it provides an insight into “outside the box” (and outside of Federal labour law) efforts to improve the quality and fairness of jobs.

Similar ambition and creativity could provide a better regulatory environment for the conduct of all types of work - not least in the on-demand economy. **This could begin with a comprehensive mapping of State-based regulation to identify potential opportunities to leverage existing laws, regulations, procurement policies and industry codes.** This would be an ambitious project, but given the extent of State influence in major areas of the economy (health, education, transport), it would provide a plethora of policy options.¹⁹

Facilitating access to information

A key facilitator of potentially exploitative practices in on-demand work is poor knowledge and understanding of the workers themselves. Initiatives that address this can make a material difference simply by giving workers accurate information about their rights and the responsibilities of the platforms through which they are engaged. In addition to the CAF, a multi-stakeholder platform that encourages transparency throughout the cleaning supply chain discussed above²⁰, *GigWatch*, is a developing platform that provides information for gig workers about their options for platform-driven work.²¹ These initiatives serve to change industry practices from the inside and ultimately improve working conditions. **In addition to making changes to existing laws and regulations, governments can support initiatives like these that operate outside legislative frameworks.**

Other jurisdictions

The question of how best to regulate the on-demand workforce has been a focus for governments around the globe as the gig economy has grown. Responses and suggestions for change are widely varied. The potential to create special labour laws for the on-demand economy has been mooted, based on a model used in Italy and Spain where special labour laws are applied to selected occupations.²²

The International Labour Organisation (ILO) has also begun to consider ways to regulate the digital gig economy. An ILO report on a survey conducted in 2015 and 2017 provided 18 criteria for ‘fairer microwork’. The surveys and report were focused on microtask platforms, and recommendations largely reflect those in the Australian Senate Report of 2018, including reclassification of the term ‘employee’, minimum wage standards, and access to union representation.²³

Fostering alternative business models

A key factor exerting downward pressure on labour standards in the on-demand economy is a business model largely based on suppressing labour costs.²⁴ To mitigate this, an option available to State governments is to encourage the development of on-demand businesses whose model incorporates the needs of those performing the work. An example which is

¹⁹ Previous two paragraphs adapted from pp.32 Kaine, S. & Stanford, J. (2017). *The future of work is what we make it. A new vision for NSW*, Australian Fabians Pamphlet Series No.68. pp 27-33

²⁰ <https://www.cleaningaccountability.org.au/>

²¹ Kaine, S. et al (2018). *GigWatch* platform under development

²² Todolí-Signes, A. (2017). *The ‘gig economy’: Employee, self-employed or the need for a special employment regulation?* *Transfer*, 23(2), pp 193-205.

²³ ILO (2018). *Digital labour platforms and the future of work. Towards decent work in the online world.*

²⁴ Johnston, H & Land-Kazlauskas, C. (2018) *Organizing on-demand: Representation, voice, and collective bargaining in the gig economy.* ILO, Geneva.

gaining greater attention is platform cooperativism.²⁵ One reason for this is the recent success of cooperatives in improving the working lives of low-wage workers. Box 3 gives the example of the Worker Cooperative Business Development Initiative (WCBDI) that has assisted low-wage workers establish and join cooperatives in New York more than doubling their hourly rates.²⁶

Box 3: Improving low paid work through cooperatives: The Worker Cooperative Business Development Initiative (WCBDI)

WCBDI is an initiative of New York City in which the City (<https://www1.nyc.gov/nycbusiness/article/worker-cooperatives>) has committed to 'an innovative business model' that assists with overcoming income inequality by promoting entrepreneurship among low-income workers to 'create meaningful and stable jobs, and improve New York City's economic landscape'. (https://www1.nyc.gov/assets/sbs/downloads/pdf/about/reports/worker_coop_report_fy17.pdf)

In 2017, \$US 2.2 million was dedicated to the program with the WCBDI focusing on both the incubation of worker cooperatives and the conversion of traditional businesses into co-ops. It supported the development of co-ops through the provision of specialised services including 'bookkeeping, business launch, business plan development, financial planning, governance and internal manuals, legal issues, marketing and market research, strategic planning, succession planning, and translation' (https://www1.nyc.gov/assets/sbs/downloads/pdf/about/reports/worker_coop_report_fy17.pdf p7).

Co-operatively developed on-demand platforms could help to address some of the challenges faced by workers in the on-demand economy. Co-operatives are businesses that are owned and controlled by their members. As owners of the platform, workers have more power in setting their working conditions, while still allowing them to benefit from the autonomy and flexibility of work provided by on-demand platforms. While this does not replace regulation, it addresses some of the misalignment and imbalances of power typically experienced between workers and owners of on-demand platforms.

Conclusion

To date, options for remedying poor conditions in the on-demand economy based on Federal labour law, have been ad hoc and reliant on individual complaints. However, despite the 'limitations of Victoria's legislative powers over industrial relations and related matters', our submission has argued that there is still capacity for the Victorian government to take a proactive stance on the regulation of labour standards in the on-demand economy. Our suggestions for the pursuit of this follow.

²⁵ Scholz, T. (2017). *Uberworked and underpaid: How workers are disrupting the digital economy*. John Wiley & Sons.

²⁶ Scholz, T. (2017). *Uberworked and underpaid: How workers are disrupting the digital economy*. John Wiley & Sons., p171

Key Recommendations

1. Consider possibilities for the extension of portable entitlements scheme to on-demand workers and to a broader range of entitlements
2. Conduct full audit of State-based (Victorian) and local council regulatory controls across all policy areas to identify levers other than Federal labour law that may be used to influence labour standards and working conditions. This may include, licensing laws that relate to sectors that employ gig workers in large numbers, work health and safety laws that reside at State and Territory levels, road safety laws, local council rules, urban planning laws, consumer protection laws and sector specific regulation that may relate to such issues as quality of service in sectors such as health and disability services.
3. The Victorian government is encouraged to support the development of information platforms that can assist on-demand workers to understand their rights and options around gig work and digital platforms such as Gigwatch.
4. That the Victorian government consider the development of a scheme to encourage the establishment of on-demand (platform) cooperatives, providing both financial and administrative support to groups of on-demand workers seeking to create worker-controlled enterprises to compete in on-demand markets.