# Inquiry into the Victorian On-Demand Workforce

Submission by

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This submission is made in our capacity as academic experts on labour regulation, and the views expressed are ours alone.

The submission addresses a number of issues concerning the application and design of labour regulation in relation to work in the so-called 'gig economy'. The points that we make below are dealt with in more detail in an article entitled 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?', which has been accepted for publication in the Australian Journal of Labour Law in 2019. A draft version of that article (referred to below as the 'AJLL article') has been provided separately to the Inquiry on a confidential basis, on the understanding that we will supply the final version as soon as it is published in the Journal.

**Status of gig workers under the existing law**

As the Background Paper notes, the application of statutes such as the *Fair Work Act 2009* (Cth) or the *Long Service Leave Act 2018* (Vic) primarily hinges on whether it is possible to identify an *employment* relationship, as determined by established common law principles.

In our review of that issue in the AJLL article, we point out that in analysing the status of arrangements intermediated by a digital platform, much may depend on how the platform's business is characterised.[1]

Many platforms operate simply as an *intermediary* or *matching service* to connect workers and end-users through a digital marketplace. Provided that the platform does not seek to exert more than incidental control over how the relevant work is defined or performed, it is difficult to imagine it being considered an employer, even on the broadest view of the common law. Its role is effectively analogous to a newspaper or website publishing classified advertisements. It is possible, depending on the circumstances, that the contract brokered by the platform might be one of employment by the *end-user* – though that would be less

[1] As to the dichotomy suggested below, see C Codagnone, F Abadie and F Biagi, 'The Future of Work in the "Sharing Economy": Market Efficiency and Equitable Opportunities or Unfair Precarisation?', Institute for Prospective Technological Studies, JRC Science for Policy Report, 2016, pp 47–8.

likely where the relevant job was performed for an individual consumer, or where the job in question was just one of many performed by the same worker for multiple clients.

The second possibility is that the platform operates as a *vertically-integrated firm*, offering what are in effect *its* clients a service and supplying the labour necessary to achieve that. It is far easier for platforms in this category to be regarded as employers, given the extent to which they tend to stipulate and enforce standards of performance, not to mention setting pay. Firms such as Uber and Deliveroo can readily be seen to fit this model, even though they dispute that. It was the finding that Uber was operating a transport business, not (as it claimed) a technology business,[2] and that its drivers had no effective businesses of their own, that was the key to the British ruling in *Uber BV v Aslam*.[3] The determination that Uber drivers were entitled to the UK minimum wage and other employment benefits was made under an extended statutory definition of 'worker'.[4] But the reasoning used could just as easily have supported a finding that they were employees in the common law sense, a point that (no doubt for strategic reasons) was not argued in the case.

As matters stand, there have simply not been enough test cases yet in Australia to be sure of how to characterise gig workers. We put little store on the two unsuccessful claims against Uber,[5] because in neither of those cases was the applicant legally represented. Equally the successful proceeding against Foodora[6] involved arrangements that, as we understand it, are not representative of how other platforms operate. Indeed, even if cases do ultimately get to the higher courts, uncertainty is likely to remain, given the very different approaches that (as we explain in the AJLL article) courts can take when applying the common law in this area.

**How *should* gig work be regulated?**

There is no simple answer to this question, not least because of the great variety of arrangements that exist in the gig economy. Some of the context and options are canvassed in an earlier article, to which reference is made in the Background Paper.[7] In our AJLL article, however, we make three key points.

The first is that there are many forms of labour regulation that can and should apply to all forms of personal labour, regardless of whether they involve employment in the common law sense. We identify work health and safety, redress for discrimination or harassment, privacy, access to cheap and effective dispute resolution, whistleblower protection and

[2] The characterisation of Uber as operating a transport business has also been accepted in other regulatory contexts by the European Court of Justice: see *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, European Court of Justice, Case C-434/15, 20 December 2017; *Uber France SAS v Bensalem*, European Court of Justice, Case C-320/16, 10 April 2018.

[3] [2018] EWCA Civ 2748.

[4] See eg *National Minimum Wage Act 1998* (UK) s 54(3)(b); *Employment Rights Act 1996* (UK) s 230(3)(b).

[5] *Kaseris v Rasier Pacific VOF* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579.

[6] *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.

[7] A Stewart and J Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28 *Economics & Labour Relations Review* 420.

general obligations of fair dealing as appropriate subjects for broadly framed standards that apply to all forms of work, including gig work.

Secondly, where there is a case for creating rights or processes for the self-employed that are analogous but not identical to those enjoyed by employees, the extension should be framed by reference to the purposes and practical operation of each regime, rather than making a blanket assumption that it is only for 'dependent contractors', or other 'employee-like' workers.

For example, in relation to collective bargaining rights, the Canadian experience is instructive. The collective bargaining statutes in the various Canadian jurisdictions were extended to 'dependent contractors' (workers who are economically dependent on one labour engager, but legally considered to be self-employed) in the late 1960s. While this extension has made collective bargaining rights available to this category of workers, it has also given rise to extensive case law on who is a 'dependent contractor' and where the dividing line should fall. In addition, workers within this category are not extended any minimum labour standards, leaving them to bargain without any safety net or benchmark of appropriate standards. A better approach, we suggest, is to have either general or sector-specific regimes that are accessible by self-employed workers, not just those dependent on a single client.

Thirdly, the issue of sham contracting or misclassification of workers can best be tackled by clarifying and expanding the category of employment, in particular by presuming workers to be employees unless they can be shown to running their own business.[8] This, we suggest, is the best way to deal with the grey area created by the inconsistent and unpredictable application of judicially-developed tests of employment status. It will never be possible to avoid boundary problems in relation to the scope of labour standards. But a broader and legislatively enshrined definition of employment should be sufficient to deal with situations where businesses concoct arrangements, whether in the gig economy or otherwise, that seek to conceal what is in substance and practical reality an employment relationship behind the façade of a commercial arrangement. This would have particular significance for digital platforms that are operating as vertically -integrated firms, rather than as mere intermediaries.

We argue in particular against the idea of creating an intermediate category of 'independent worker', on whom something less than the full range of employment rights and protections would be conferred. We review examples of this approach in Australia, Canada, Italy, Spain and the UK. In practice, such categories rarely manage to expand the classes of workers who are protected by labour standards. On the contrary, they can encourage the reclassification of workers who should really be regarded as employees into the new category, with a consequent loss of rights and protections.

It is also sometimes suggested that labour standards should be applied to *all* workers, regardless of their status. But while, as we have already noted, this can readily be done for

[8] See eg the proposal in C Roles and A Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *Australian Journal of Labour Law* 258 at 279–80.

some standards, it is much harder for others. Some existing regimes would clearly require substantial redesign to apply to every type of worker. This is especially true of those which carry a financial burden, such as contributing to a superannuation scheme, or providing paid leave. It is not impossible to imagine how the relevant regimes might be adapted. But aside from the practicality of convincing a government to take this step, we are concerned about the risk of a net reduction in entitlements if employee rights and protections were converted to more universally applicable norms. For example, while a single minimum wage might be set for all kinds of work, it is hard to imagine the elaborate system of base wage rates, pay loadings and controls on working hours established by the award system being extended to the genuinely self-employed.

In summary, we have no doubt that *some* gig workers should be regarded as employees, and qualify for the protection of statutes such as the *Fair Work Act 2009*. Indeed on a broad application of the common law, they quite possibly *are* employees already. This could and should be confirmed by a broad statutory definition of employment, though one that would operate generally rather than by specific reference to the gig economy.

But there also many other platform workers, especially those who undertake micro-tasks for multiple end-users, who are unlikely to qualify as employees, even on the broadest possible view. Nor would it be easy to try and bring them within the scope of laws that impose financial burdens, such as in relation to wages, superannuation contributions, paid leave or workers compensation.

Where platforms are operating as genuine intermediaries, it is hard to see how they could legitimately be made responsible for the financial aspects of work arrangements that they are merely brokering – though they might be required to provide relevant and accurate information about pay and conditions. The fairness of the terms on which they allow access to their technology would also quite legitimately be subject to review under regimes such as that in Part 2-3 of the *Australian Consumer Law* or (if it applies) Part 3 of the *Independent Contractors Act 2006* (Cth). Indeed there is a case for more accessible and effective mechanisms for challenging the fairness of terms in work-related contracts than those regimes allow.

It might also, at least in theory, be possible to require end-users to observe certain minimum standards on pay for work obtained through digital platforms, or to contribute to insurance or superannuation funds. But aside from the practicalities involved in regulating what may be a multitude of minor engagements, involving clients located in all corners of the world, it is far from clear why this should be done for work brokered through platforms, though not for direct engagements.

That concludes our submissions. We are happy to answer queries or provide further information or input on request.