



CORPORATE AVOIDANCE OF THE FAIR WORK ACT

SENATE STANDING COMMITTEE ON
EDUCATION AND EMPLOYMENT

31 JANUARY 2017

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. Avoidance of the *Fair Work Act* and employment obligations can take many forms. In recent times, we have seen the increasing use of precarious forms of employment, the classification of workers as independent contractors and the outsourcing of responsibility to labour hire firms as tools for businesses to circumvent the responsibilities of employment and shift the risk onto workers.
3. About 30 percent of the Australian workforce is employed precariously (casual, short-term contract, independent contractor) and have no access to paid sick leave, annual leave and unfair dismissal.¹ Precarious categories of employment were supposed to be reserved to address seasonal or operational requirements of business. Instead, insecure work has been used to shift risk and responsibilities from employers to workers. In more severe circumstances employers have 'opted out' of the *Fair Work Act* entirely by disguising employees as independent contractors.
4. Unions NSW acknowledges the nature of work, technology and trading hours have changed significantly since our industrial relations framework was first established. However, there are ample provisions for employers to accommodate the needs of the 'modern workforce' built into the *Fair Work Act*. Deliberate attempts by employers to avoid the *Fair Work Act* to meet the needs of their business and promote 'efficiency', are lazy and often driven by greed and profit.

5. There are multiple examples of businesses avoiding the *Fair Work Act* and their obligations as employers. Unions NSW refers the Committee to the submissions of the Australian Trade Union Council and Victorian Trades Hall Association for further examples.

6. The rise of the gig-economy and attempts by online platforms to position themselves outside of industrial regulation poses a new challenge to government and workers. Large tech companies are setting up new industries which appear to be dependent on the avoidance of the Fair Work Act. This submission will outline how key players in the gig-economy are using independent contractors to undermine the *Fair Work Act* and dodge their employment obligations.

7. Unions NSW is also interested in the strengthening of the Fair Work Act's transfer of business provisions. The transfer of business provisions play an important role in maintaining workplace standards and conditions for workers transferring from the public to private sector. However, the provisions must be strengthened to ensure all significant conditions included in industrial instruments and policies are transferred to the new employer.

Disruptive employment

7. Unions NSW recently released a report, *Busting the Airtasker Myth* which outlined the employment practices of the online platform, Airtasker. The report found 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 contained in the *Fair Work Act*.
8. In many ways, Airtasker is representative of a growing gig-economy (also known as peer-to-peer) where companies use websites and apps to create online 'marketplaces', pairing workers with jobs which occur both online and offline.
9. The use of independent contractors is a common feature of the gig-economy. By classifying workers as independent contractors, gig-economy companies absolve themselves of responsibility for providing standard employment entitlements including sick leave, minimum wages, annual leave and access to workers compensation.
10. The legitimacy of the independent contractor classification for workers in the gig-economy is questionable and represents a serious threat to the employment standards and the principles of the *Fair Work Act*.
11. Unions NSW understands technology has unlocked new, innovative and efficient ways of working and doing business. However, in embracing this, governments, workers, unions and businesses must work together to ensure new forms of work don't lead to the undermining of labour standards and exploitation of workers.

Overview of the gig-economy

12. The term gig-economy first arose in 2009 at the height of the global financial crisis, as many workers lost permanent, full time employment and turned to sporadic, casual and freelance work or 'gigs'.² Since then, the term has evolved to encapsulate the nature of digitally enabled 'marketplaces' where companies use websites and apps to pair workers with tasks or jobs that occur both online and offline.

13. The gig-economy is underpinned by four 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.

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 classified by the facilitating companies as independent contractors and are not afforded any employment protections or minimum standards in the performance of their work.

14. Gig-economy work is varied and spans a broad cross-section of industries. Some of the major companies are Uber³ (taxi and courier services), Airbnb⁴ (accommodation services), Whizz⁵ (home cleaning services), Airtasker⁶ and Freelancer⁷ (range of jobs and 'tasks'), Deliveroo⁸ and Foodora⁹ (food delivery).

15. The gig-economy currently makes up a small proportion of the overall labour market. However, the size of the gig-economy 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.¹⁰

Employee or independent contractor

16. The corner stone of most gig-economy business models is the labelling of workers of workers as independent contractors and not employees. Genuine independent contractors are governed by commercial rather than employment law, thus bypassing requirements for minimum payments and employment safety nets.¹¹
17. 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, which use an application or website to connect customers and workers. Supposedly, when a customer and worker are matched they create a separate service contract with each other, which then absolves the gig-economy company of any responsibility or involvement with the work that takes place.
18. The *Fair Work Act* provides for a contravention for misrepresenting employment as an independent contracting arrangement, also known as sham contracting.¹²
19. 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.¹³ This was highlighted in the decision of *Hollis v Vabu Pty Ltd* which looked at the totality of the relationship between the worker and employer to determine employee or independent contractor status.¹⁴
20. 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.

21. The gig-economy is broad and encompasses different industries and internal processes and structures. However, there are a number of core elements common among company structures which bring into question the control and independence of their contractors. Gig-economy companies generally exhibit one or more of the below features of employment, which undermine their use of the independent contractor classification:

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 and Uber takes 20 percent of fares.

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.

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 apps internal rating system in order receive work.

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.

Provides (limited) insurance protection. Some companies provide limited insurance, like Airtasker, Uber and Foodora. However, across all platforms there is no provision for worker's compensation.

Provides equipment to perform work. Deliveroo and Foodora provide branded carry bags for deliveries as well as uniforms.

Regulates the service contract by providing mediation and arbitration. If customers are not happy with services provided, companies will act as mediators in disputes between the worker and the customer.

Controls who performs the work. Gig-economy work relies on individual worker profiles and ratings. As such, companies restricts 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.

Interviews and screens workers. Airtasker has a subset of workers called 'Airtasker Pro' which requires workers to be interviewed and screened and if they meet the standards specified by Airtasker, these workers are provided with preferential treatment for tasks. Foodora workers must submit an application for work which includes available days and number of preferred hours. Whizz pre-screens workers before providing them with access to the platform. Deliveroo and Foodora require riders to pass a fitness test before they can work on the platform.

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 and Foodora run training for new delivery riders/drivers covering road safety, branding and use of the app.

Arranges a roster of shifts. Foodora sets shifts which workers can sign up to and receive an additional hourly payment on top of their per delivery commission payments. Foodora can then suspend these shifts if there are fewer customers than expected.

Time limits placed on the completion of work. The company may require work to be completed in a set time. Foodora and Deliveroo set time frames food must be delivered within.

22. The processes and management of each gig-economy company need to be looked at in close detail to determine if the threshold for a genuine independent contractor arrangement is met. However, a broad overview of the current leaders in the gig-economy indicates there is a significant element of control being maintained by the companies facilitating work.
23. In many ways the workers engaged through the gig-economy are dependent on these 'gig' companies for the delegation of jobs. Despite this dependence, the use of the independent contractor classification means workers are not entitled to minimum wages, workers compensation, superannuation, protection against unfair dismissal, the right to collectively organise or access to the Fair Work Commission, among other workplace protections.

Personal or business use

24. The gig-economy has marketed itself as a peer to peer 'marketplace'. Companies claim to be tech businesses providing platforms to connect individual customers and workers directly. However, a number of gig-economy companies have partnerships with 'traditional' businesses, raising questions about how the gig-economy can claim technology makes them 'different' and exempt from the responsibilities of employment.
25. Foodora and Deliveroo engage workers to deliver food from restaurants to customers, as such; their business model is dependent on a business relationship with each participating restaurant.
26. The gig-economy food delivery models are providing both restaurants and companies like Foodora and Deliveroo with the windfall benefits of avoiding the costs of employment. Restaurants who in the past may have employed a worker to deliver take-away food can now shift the costs of employment onto the worker by engaging them as an independent contractor through Deliveroo or Foodora.
27. This is undermining the *Fair Work Act*. A recent Fair Work Ombudsman audit of Pizza Hut franchises found 24 restaurants had misclassified drivers as independent contractors, with a total of \$12,086 of underpayments owed to workers. The Fair Work Ombudsman issued Pizza Hut franchises with \$6,300 worth of fines and required the workplace non-compliance to be rectified. The Fair Work audit revealed 32% of the underpaid workers were under the age of 24 and were more likely to be unaware of their rights. Drivers were paid as little as \$5.70 an hour, a gross underpayment compared to the minimum wage.¹⁵

28. Similar to Pizza Hut, hundreds of restaurants across Australia are flouting their employment obligations by classifying their workers as independent contractors. The key difference appears to be using an intermediary company in the 'gig-economy' such as Foodora or Deliveroo.

29. Airtasker also has close ties to traditional businesses and has marketed itself as a platform businesses can use to hire workers. In the last year, business made up one third of the total value of tasks posted on the platform and this increased by 151 percent between February 2015 and 2016. Airtasker claims 5,318 businesses are using the site to bypass employment obligations.¹⁶ Businesses engaging workers through Airtasker are not required to pay minimum wages, provide insurance, pay superannuation or pay payroll tax for the workers they hire.

30. Airtasker states it is targeting enterprises and encouraging them to manage 'on-demand' work and temporary recruitment through Airtasker. In this case, there is strong evidence to suggest Airtasker is acting as a labour hire agency when it connects individuals with businesses for the performance of paid work.

Innovation or exploitation

31. The gig-economy has been lauded for using digital technology to reinvigorate traditional business models in sectors as diverse as transport, accommodation and labour hire.¹⁷ In many ways this is not a new business model at all. Put simply, the gig-economy uses a website to assign work and regulate and control workers. It looks a lot like employment, yet those workers are not considered to be employees.
32. Use of the term innovation is not a sufficient excuse for the bypassing the *Fair Work Act* and shifting the risk of employment onto workers.
33. Many gig-economy companies aggressively argue their business model would not survive if they were required to treat their workers as employees and provide them with basic working standards. Many believe their tech companies should not be obliged to comply with legal workplace safety nets, instead they should be governed solely by the free market within their artificial 'online marketplaces'. Such an approach flies in the face of the principles underpinning the *Fair Work Act* and a regulated industrial relations system as a whole.
34. Labour standards should not be treated as 'overregulation' or an unnecessary limitation on businesses. They are legal minima and have been designed through extensive public debate to ensure a balance between the needs of business and rights of workers to fair minimum conditions and a safe workplace.¹⁸

Legislative change

35. Legislative change is needed to bolster the safety net and employment conditions of workers engaged in the gig-economy, particularly in relation to minimum wages and workers compensation legislation. Further, legislation must ensure gig-economy businesses are not used as a mechanism for undercutting businesses who meet their legitimate tax and employment obligations.
36. Workers and their unions, businesses and government will play a crucial role in reforming legislation concerning the nature of work and the gig-economy.

Transfer of business provisions

37. Over the last 5 years the NSW Liberal Government has sort to trim the State Budget by attacking public sector workers through asset sales, outsourcing and massive job cuts. This has undermined the pay and conditions of public sector employees as they are moved into the uncertainty of sub-contracted, private sector work. The *Fair Work Act's* transfer of business provisions provide some greater certainty for public sector workers subject to provatisation, and has ensured pay and the majority of workplace conditions are able to transfer to the new employer.
38. Transfer of business provisions are crucial in upholding key working standards and outcomes: same pay for the same work, ensuring staff continuity, ensuring quality services and attracting the best and brightest into jobs that serve the community.
39. Under the current provisions however, only conditions outlined in NSW State Awards are able to be transferred to the new private employer. Consequently, conditions contained in guidelines, policy directives and determinations are not carried across. This is particularly concerning for public sector employees who have leave and pay entitlements provided for outside of the Award. In these instances, transferred employees would fall back onto the entitlements contained in the National Employment Standards.
40. For example, NSW public sector workers have access to a redundancy policy called the Managing Excess Employees Policy, which contains conditions far superior to those contained in the National Employment Standards. NSW public sector workers lose the entitlements contained in this policy when they are transferred into the private sector.

41. Transfer of business provisions should be amended to include the transfer of significant conditions included in guidelines, policy directives and determinations. Significant conditions are any category of conditions which correspond to a category of conditions of employment in the National Employment Standards.

Endnotes

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18. Industrial relations has been a feature of Australian federal and state election campaigns both currently and historically. See Muir, K. (2008), *Worth Fighting For: Inside the Your Rights at Work Campaign*, Sydney, University of NSW Press.