



Senate Inquiry into the Future of Work and Workers

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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 thanks the Select Committee on the Future of Work and Workers for the opportunity to make a submission to the inquiry.
3. The future of work is filled with uncertainty. Technological advancements in artificial intelligence, robotics and machine learning will drastically change the kinds of work performed and the way that work is done. Studies have predicted these changes could see entire industries jobs and industries automated¹. Additionally, new technologies will likely create new jobs and industries that haven't even been conceived of yet.
4. The pace and scale of changes in work are impossible to accurately predict. It is the role of Government to ensure we enter the uncertainty of the future well prepared; to ensure the benefits of technological advancement can be shared fairly and safeguards are put in place to ensure technology isn't used as a tool to undermine pay and working conditions.
5. The Australian industrial relations framework is not prepared for the future of work. The system is currently built on the back of 'flexibility' for business which has resulted in increasing levels of casualisation, short-term contracts and engagement of independent contractors instead of permanent employees. Flexibility has led to a growing group of workers taking on the risk of business and forgoing the core benefits of employment like job security, paid leave and in the case of independent contractors, minimum rates of pay and workplace insurance.
6. Loop holes in legislation have allowed business, particularly in the gig-economy, to become further emboldened in undermining employment standards by engaging workers exclusively as independent contractors in the name of flexibility and

¹ Committee for Economic Development of Australia (2016), 'Australia's Future Workforce'

technological innovation.

7. In the context of increased competition in the labour market and significant upheaval and uncertainty in the future of work, a race to the bottom in working conditions is likely. Youth unemployment is sitting at 12.3% and underemployment is sitting at 8.3%². These conditions, mixed with the risk of automation associated job losses, create an environment where workers competing for work (or additional hours) could be used by employers to undermine current safeguards and see further increases in precarious work.
8. If action is not taken swiftly to update Australia's industrial relations legislation, the future of work will be bleak for workers. As new industries and jobs develop, we need to ensure they are good jobs which provide security to workers and fair working conditions. As the service sector continues to expand, these too must be good, well paid jobs and the Government, as a core funding partner in these sectors, has the ability and the responsibility to ensure this.
9. 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*. Many of the issues raised in the 2017 Inquiry are relevant to this Inquiry. This Unions NSW Submission will reiterate key concerns with the gig-economy and use of technology to undermine labour standards.

The gig-economy

10. 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.
11. The gig-economy is underpinned by five key-features:
 - a) 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.

² ABS, Labour Force, 6202.0, January 2018

- b) Work is performed by individual workers, but may be commissioned by an individual or a business.
- c) 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.
- d) 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.
- e) 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.

12. Gig-economy work is varied and spans a broad cross-section of industries. Some of the major companies are Uber³, GoCatch⁴, Taxify⁵ (taxi and courier services), Airbnb⁶ (accommodation services), Whizz⁷ and Helping⁸ (home cleaning services), Airtasker⁹ and Freelancer¹⁰ (range of jobs and 'tasks'), Deliveroo¹¹ and Foodora¹² (food delivery), care.com¹³(child care, aged care and household help).

13. 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.¹⁴

³ <https://www.uber.com/>

⁴ <https://www.gocatch.com/>

⁵ <https://taxify.eu/en-au/>

⁶ <https://www.airbnb.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.foodora.com.au/>

¹³ <https://www.care.com/>

¹⁴ 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>

14. The gig-economy is also expanding the areas it covers. For example in 2016 care.com expanded into Australia, providing an online ‘market place’ for childcare, au pairs, pet care, tutors, aged care, special needs care and housekeepers. The website boasts the average hourly rate for childcare in Australia is \$9.90¹⁵, a rate which falls significantly below the minimum Award rate.

Independent Contractors

15. 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 payments and employment safety nets.¹⁶

16. 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.

17. 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.¹⁷

18. 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.¹⁸ The test of employment looks at the totality of the relationship between the worker and employer and is drawn heavily from common law.

19. 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

¹⁵ <https://www.care.com/en-au/profiles/childcare>

¹⁶ House of Representative Standing Committee on Employment, Workplace Relations and Workforce Participation, (2015), ‘Making it work: Inquiry into independent contracting and labour hire arrangements’, Canberra.

¹⁷ *Fair Work Act 2009*, s. 357.

¹⁸ Roles, C. Stewart A. (2012), ‘The reach of labour regulation: tackling sham contracting’, *Australian Journal of Labor Law*, issue 25, pp. 258-282

advantage of the broad interpretation of the legal definition for independent contractors.

20. 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'.
21. 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 and Uber takes 20 percent of fares.
 - 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 apps 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 and Foodora provide 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 and Foodora 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 and Foodora run 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) **Time limits placed on the completion of work.** The company may require work to be completed in a set time. Foodora and Deliveroo use delivery time as a performance measure which determines continued access to the app.
22. 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.
23. 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.

The Future of Work

24. 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.¹⁹ The future of work is only going to see further integration of technology into the organisation and provision of work. Technology should not be used as an excuse to bypass workplace standards or as an excuse to shift risk onto employees.
25. 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.

Case Study – Airtasker

26. 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.
27. 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.'²⁰ '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.
28. 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

¹⁹ Allen, D. Berg, C. (2014)

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

businesses to outsource jobs.

29. 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.

30. 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.

Case study – Foodora, Deliveroo, Uber Eats and other Food Delivery Services in the Gig-Economy

31. Since January 2018, Unions NSW and the Transport Workers Unions have been surveying food delivery workers in the gig-economy. To date, over 200 food delivery workers delivering food for Foodora, Deliveroo and Uber Eats have been surveyed to gauge working conditions and entitlements in the food delivery gig-economy. Preliminary results have challenged the companys' use of independent contractors and revealed significant levels of underpayment.

32. Food delivery services in the gig-economy engage workers to deliver food from restaurants to customers. Customers use the gig-economy company's app to order

food from partnering restaurants. Workers log into a phone app which allocates deliveries and workers may make deliveries on a bike, bicycle or in a care. The gig-economy companies have contractual relationships with the restaurants, customers and workers.

33. Foodora, Deliveroo and Uber Eats classify their food delivery workers as independent contractors, referring to them as ‘partners’. Workers are covered by commercial not industrial law and as such are not entitled to receive superannuation, worker’s compensation, minimum rates of pay, penalty rates or paid leave. Workers are also required to cover their own expenses, including the purchase of a thermal bag and carry pack, bike or car, petrol and insurance.
34. All three companies justify the classification of food delivery workers as independent contractors by arguing that their ‘partners’ are able to enjoy the flexibility of being an independent contractor.

Rates of pay

35. Almost all surveyed riders reported being paid per delivery. The calculations of payment vary across companies, some pay a flat rate per delivery, while others calculate the payment on distance and time travelled.
36. Surveys collected information on hours worked and payment received. The average hourly rate for gig-economy delivery workers was \$18.96. This rate does not account for work expenses, including safety gear, motorbike or bicycle expenses or other work related costs. Nor does the rate account for additional payments associated with employment including superannuation, paid leave, workers compensation or penalty rates. Once these additional items are considered, the effective rate of pay falls well below the minimum Award wage of \$24.21²¹.
37. Of the workers surveyed, the lowest reported rate of pay was \$6.67 an hour and three quarters of workers earnt less than the minimum award wage.

²¹ The Road Transport and Distribution Award Casual Transport worker grade 1 rate at 20 February 2018.

Working hours

38. Over three quarters of workers (76%) reported working 20 hours or more a week and 26.4% worked more than 40 hours a week.
39. The busiest periods for workers is in the evening and on weekends. As independent contractors, workers are not entitled to penalty rate payments for weekend or night work.

Worker's Compensation

40. Almost half of all workers (45.5%) reported injuring themselves or knowing someone who had been injured during the course of their food delivery work. None of the workers surveyed reported receiving any compensation following injury. Foodora and Uber Eats require food delivery workers to provide their own personal injury and public liability insurance. Deliveroo claims to provide cover for personal injury, however the details of the insurance are not clear and no rider interviewed had received any direct compensation following a work-related injury.

Workers

41. The majority of the workers surveyed are from culturally and linguistically diverse backgrounds and are working under student and working holiday visas. Studies have demonstrated workers with language barriers and/or on temporary work visas are subjected to higher levels of wage theft and exploitation²². When workers are engaged in the gig-economy as independent contractors they have limited bargaining power and no rights under employment law, the additional challenges of a temporary visa and a language barrier, only further exacerbates the potential for exploitation.

²² Berg, L. (2015) *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour Law*, London, UK, Taylor & Francis
S. Clibborn, (2015) *Why undocumented workers should have workplace rights*, *The Economic and Labour Relations Review*, vol 26:3, pp. 465-73

Independent contractors

42. The companies exert a considerable degree of control over the work performed on the platform. Rates of pay are set across the board and a number of platforms have introduced the allocation of shifts, compulsory training and the wearing of a branded uniform.
43. The companies themselves have referred to food delivery work as ‘entrepreneurial’ as a way of justifying the engagement of independent contractors. When the rate of pay is set, shifts are set and workers are earning as little as \$6.67 an hour, it is difficult to argue the riders have control over their earning capacity. The nature of gig-economy delivery work requires greater safeguards for workers particularly in terms of safety and minimum rates of pay.

The Growth of the Service Sector

44. Demographic and technological change will likely result in significant growth in the service sector, particularly in health and social services and education.
45. Health, social and community services and education are three stand-out areas considered to be made up of non-routine and cognitive jobs, placing these industries in a low risk of complete automation. Further, these areas have also seen significant employment growth over the last decade.
46. The future of work will see further increases in the proportion of workers employed in the service sector. To this end, governments at all levels will play an important role as either direct employers or funding bodies of employers in the service sector.
47. In recent years the health, education and social services have seen increasing levels of casualisation and short-term contracts. In a number of cases this has been aided by Government decisions.
48. A recent example, is the current Government’s action in relation to workers at Rape and Domestic Violence Services Australia (RDVSA), which represented a significant attack on workers employed by government funded organisations.

49. Since 2010 the RDVSA provided telephone counselling as part of the Federal Government funded service 1800 RESPECT. In 2015 the RDVSA sought additional funding from the Federal Government to deliver the service. Instead of funding the RDVSA, the Liberal-National Government awarded the contract to the multinational private health insurance fund, Medibank Health Solutions (MHS) to provide the service.
50. After winning the Government contract, MHS put the 1800 RESPECT counselling service out for tender in February 2017. In August 2017, MHS informed RDVSA the tender process had been 'cancelled without award' and MHS would be developing their own model of service delivery. Under the new model 70% of the workforce of RDVSA would be made redundant.
51. Under the RDVSA's funding arrangements with the Federal Government, the organisation did not retain funds for redundancies. Under these circumstances the Australian Services Union wrote to MHS and to the Minister seeking advice on what arrangements have been made by MHS to fund redundancy payments to the women who will no longer be employed to deliver the MHS contract at RDVSA.
52. The Minister for Social Services, Christian Porter wrote to the Australian Services Union criticising RDVSA for hiring staff in permanent positions when they received funding through a government contract.
53. Additionally, Dr Roslyn Baxter, the Group manager for Families in the Department of Social Services provided evidence to the Senate Inquiry supporting Minister Porter's position:
- 'Clearly, governments would be very reluctant to offer any funding agreements if it created obligations to employees beyond the length of time of that funding'²³.*
54. The effect of this position is to say employees working on programs linked to Government funding contracts are not entitled to employment security. This covers all workers in the social community sector and extends to a range of other non-market

²³ Dr Roslyn Baxter, 8 November, 2017, Finance and Public Administration References Committee, Hansard, p 42.

services provided through government funding.

55. When services are commissioned on behalf of a government, there should be an expectation certain standards of employment will be upheld. Funding contracts may have an end date, but services will continue. The work provided through government contracts is ongoing and the government has the ability and responsibility to ensure job security is upheld.
56. Another key example is the roll out of the National Disability Insurance Scheme (NDIS). The model prioritises flexibility and individual choice, which is anticipated to increase insecure employment in the disability sector. The Government's approach will undermine the traditional model of permanent employment with a single service provider and will encourage an increase in casualisation and engagement of independent contractors²⁴.
57. There are significant concerns the NDIS model will encourage gig-economy style platforms with independent contractors. Already companies such as Ubercare are providing NDIS funded services through a model based on 'on demand' gig economy platforms. On the Ubercare platform carers are engaged as independent contractors, to receive work they log into a GPS based app which allocates requests from nearby clients. Requests for carers are sent to workers in real time, the worker has 60 seconds to respond to a client before the request is sent to another carer. Prices paid by clients are at a fixed hourly rate and Ubercare takes a \$10 commission for every hour worked.²⁵
58. 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. The result will be unsafe work and a lower quality of care for the most vulnerable members of the community.
59. When services are commissioned on behalf of the Government they should not be used to undermine Australian workplace conditions.

²⁴ Australian Services Union (2017) Submission to Inquiry into transitional arrangements for the NDIS

²⁵ <http://uber care.com/becomeuberarer/>

60. Job security is a crucial pillar of Australia's employment system with permanent employees provided with access to unfair and unlawful dismissal rights and redundancy payments. Additionally, labour standards associated with employment, have been developed through extensive public debate to ensure a balance between the needs of business and the rights of workers to fair minimum conditions and a safe workplace. When the Government commissions services, they have a responsibility to ensure these standards are upheld.

61. The future of work must prioritise job security and access to basic workplace entitlements. The Government must set an appropriate example. This is particularly important in sectors which will make up a growing proportion of the overall workforce.

Conclusion

62. What the long-term future of work will look like is unclear. But right now, new patterns and organisation of work are emerging which seriously threaten the working conditions and living standards of workers.

63. It is the responsibility of the Government to ensure our industrial relations framework is well equipped to allow the benefits of technological advancement to be shared fairly and not used to undermine employment.