

**INQUIRY INTO IMPACT OF TECHNOLOGICAL AND  
OTHER CHANGE ON THE FUTURE OF WORK AND  
WORKERS IN NEW SOUTH WALES**

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# **Select Committee on the impact of technological and other change on the future of work and workers in New South Wales**

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## **Introduction**

In this submission we draw upon our original empirical research conducted on the ‘on-demand’ or digitally enabled ‘gig’ economy in the Australian context. ‘On-demand’ or ‘gig’ work can be categorised into two distinct types, based on the nature of the work and its organisation by platform firms. One type uses mobile phone applications to organise inherently local services, delivered in real-life by workers to end-users within the same geographical location and commonly involved the repackaging and/or re-organising of ‘real world’ tasks and jobs” (Stewart & Stanford, 2017), referred to hereafter as app-based ‘gig’ work.

Crowd or cloud-based ‘gig’ work is second type. Here workers perform digital tasks for end-users, frequently from their homes. Due to its online nature, workers and end-users are not necessarily within the same locale or country. For a more detailed definition and discussion of ‘gig’ or ‘platform’ work see Stewart and Stanford (2017) or De Stefano (2016).

Over the last four years our research agenda has concentrated upon the first category – app-based ‘gig’ work. This research has explored the experiences of workers with app-based platforms as well as consumer attitudes towards the work entitlements that this particular type of ‘platform’ or ‘gig’ workers should receive. Most of our work has concentrated on food-delivery services.

App-based services in Australia, such as food-delivery and ride-share driving, are characterised by high levels of irregularity since work hours and opportunities are shaped by customer demand. Workers in these novel, digitally-intermediated, types of work organisation are required to provide some capital and/or equipment to partake in the work; the work itself is commonly remunerated on a piece rate basis; and the organisation of the work is mediated via information communication technology (ICT) with management tasks frequently delegated to self-learning algorithmic-based computer systems.

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<sup>1</sup> Please note that the expert opinions expressed in this submission do not necessarily represent the views of the institutions to which the authors are affiliated.

This technologically facilitated form of work has been designed, in many cases, to interact with existing Australian workplace regulation so that workers can be classified as independent contractors rather than employees. As discussed below, the classification approach adopted by platforms operating in Australia has broadly been upheld by regulators. It allows these organisations to engage workers without obligations to provide National Employment Standards, relevant minimum wages and other entitlements that the current regulatory system attaches to employment.

## **Changes in the earnings, job security, employment status and working patterns of people in New South Wales**

Platform-work is still a relatively new labour market phenomenon in Australia, however as a form of work organisations and source for workers to derive a primary or supplementary income it is becoming increasingly prevalent. A recent labour market survey found that 7.1% of respondents were working, or had sought to participate in platform work, in the past 12 months, with NSW being the jurisdiction with the highest level of participation (McDonald et al., 2020). Work in the gig-economy can be viewed as an extension of established trends which have seen the fissuring of work (the fragmenting of work whereby tasks are completed by third parties, contractors or employees of other organisations such as labour hire) and increasing work insecurity.

Within the ‘gig’ economy there is significant variety in terms of skill and opportunity (Kalleberg & Dunn, 2016; McDonald et al., 2019). Workers who perform relatively unskilled work via platforms that exercise relatively high levels of control over the performance of their work appears to be the most vulnerable cohort within this segment of the labour market (Kalleberg & Dunn 2016), this includes many areas of app-based work where traditional human operated management systems are replaced by the use of self-learning algorithmic management systems – frequently referred to in the academic literature as ‘algorithmic management’ (see e.g. Kellogg et al., 2020).

An additional consideration here is the demographic make-up of this workforce. Temporary migrants, for instance, have been shown to be three times more likely to participate in platform work than an Australian citizen (McDonald et al., 2019). Temporary migrants were also over-represented in our app-based food-delivery research sample, with many selecting into this work because of work restrictions of their visa, difficulty finding employment, lack of access to social security, poor experiences of low wage employment in Australia, (Goods et al., 2017; Goods et al., 2019; Barratt et al., 2020a). As such, workers took on these jobs due to the ease of entry and exit, and with knowledge of the trade-off they were making in comparison with employment. The majority of our interviewees, for instance, expressed a preference for employment and its associated minimum standards and security. While they regarded the relative flexibility around working hours as a primary benefit of ‘gig’ work, most indicated that if they were able to find employment, they would cease their delivery work (Goods et al., 2019). Hence, the emergence of ‘gig’ work needs to be understood within the context of the labour market and alternative income opportunities available to workers.

App-based platform-work in some respects can be viewed as a novel form of work-intermediation, a twenty-first century variant and extension of labour-hire practices. In food-delivery services, for instance, the ‘job creator’ restaurant is connected in product markets to a customer, and in labour markets to a worker, both via a platform (Barratt et al., 2020a). However, rather than established forms of labour hire or temporary agency work, most platforms do not offer employment to workers, but rather access to ‘one off’ gigs. This increases worker precarity, decreases their ability to express worker voice (depicted as ‘agency in the below figure), and increases their marginal status in the labour market.

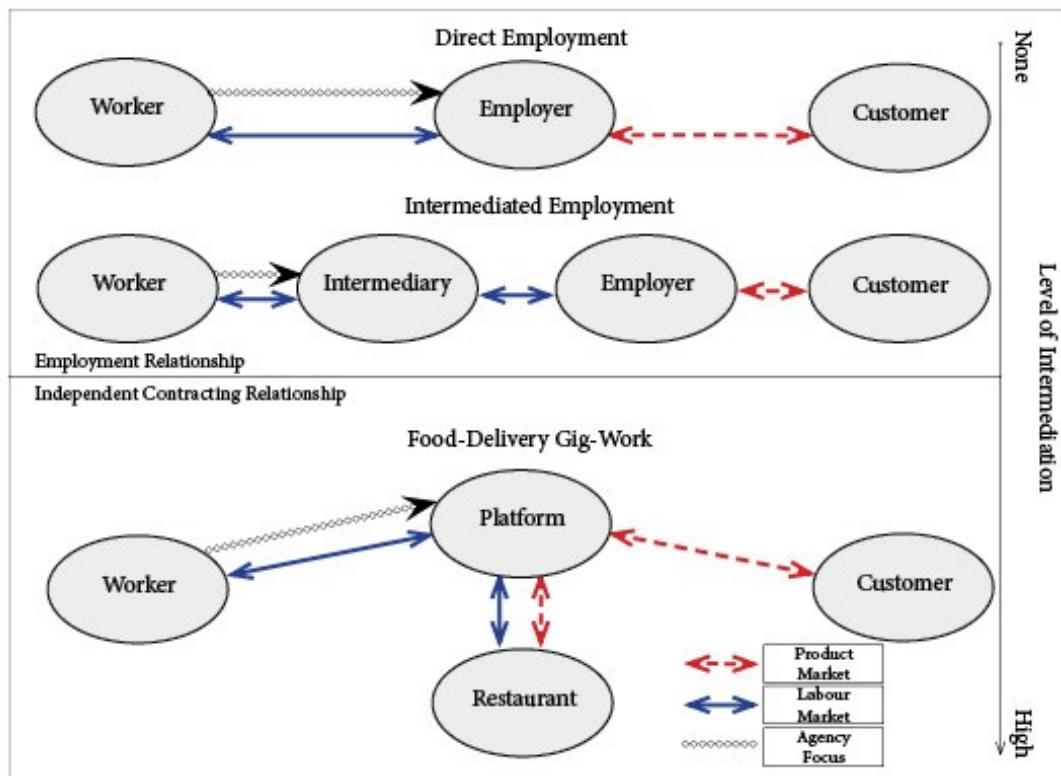


Image taken from Barratt et al (2020a).

In app-based services that rely on algorithmic management systems for the allocation, execution and performance of work workers often have constrained control over the performance of their work. This, in the Australian context, is an area, we argue, that is underrecognized within existing regulatory decisions. Perhaps the result of regulatory requirements for parties such as the Fair Work Commission to engage with legal test that have preceded the increasing digitalization not only of work but also its management. As our research on food-delivery services reveals, workers have limited ability to influence the amount of work allocated to them while through the use of different metrics their discretion to reject tasks uneconomic or unfavourable to them is curtailed (Veen et al., 2020; Barratt et al., 2020b). This, in turn, leads to both variability and uncertainty in the earnings that a worker will take home, increasing work and life precariousness.

The earnings reported to us by workers were, generally, lower than the minimum wage for employees doing this form of work (though as contractors this minimum wage did not apply). However, this global average conceals the temporal and geographical variation in the amount earned (Goods et al., 2019). Workers are exposed to labour market forces of supply (other riders in competition) and demand (the number of orders placed). Workers therefore reported being able to earn more money in times of increased demand (for example a Saturday evening) or of reduced supply (for example in inclement weather). These market incentives enabled platforms to sustain their business models; by incentivising workers to create labour market equilibrium (Barratt et al., 2020a), however this also means that in reality if workers were to effectively sustain themselves they are incentivised to work

hours that have, in Australian employment, been compensated with penalty rates, and also to trade off some of the flexibility that attracted many to the work in the first place (Veen et al., 2020).

## **The extent, nature and impact on both the New South Wales labour market and New South Wales economy of the 'on-demand' or 'gig-economy'**

The current arrangement of app-based gig work, where workers are classified as independent contractors, thus exposes workers to market forces. In the food-delivery services, for example there are few barriers to entry and asymmetrical market power skewed to the platforms. This has the ability to downgrade the terms and conditions of work in the gig-economy and beyond.

Within this context, the role of the consumer becomes increasingly important. Indeed, some research has suggested that consumers are pivotal to the existence and functioning of platforms as consumer not only generate work opportunities through their demand, they also co-manage workers via evaluating and disciplining workers based on consumer-inputs such as performance ratings (e.g. five-star ratings systems).

Given the central role of consumers in this emerging form of work we conducted a survey of 737 Australians to explore the social acceptableness of this work in Australia. Our study explored the attitudes and understandings of Australians towards work conditions and entitlements in app-based food-delivery services. As a part of this we explored whether Australian citizens, as consumers, were willing to pay to ensure 'gig' workers receive improved working conditions and entitlements.

Three findings from this study (Smith et al., *forthcoming*) are particularly pertinent to this enquiry:

1. Despite the key role that consumers hold in this emerging form of work, consumers appear to have very limited, or even inaccurate, knowledge of the entitlements of food-delivery workers.
2. Regular consumers of these services appear less willing to improve app-based food-delivery worker conditions and instead prioritise price and service quality. This finding matches similar research completed by (Healy et al., 2020).
3. Overall, while approximately two third of Australian consumers were willing to pay more to improve gig workers' wages and conditions, the quantum they indicated (even if passed on in full to the worker) was insufficient to meet conditions and wages associated with employee status in Australia.

Thus, the findings raise serious questions about relying upon consumers or market forces to improve working conditions in line with remuneration or entitlements that have traditionally been guaranteed by employment. As such, this would suggest that if consumers are left to regulate this space this will have a significant impact on the NSW (and Australian) labour market. Hence, it can be concluded that there is a role to be played by Australian regulators to upholding minimum work standards and conditions.

## **The application of workplace laws and instruments to people working in the 'on-demand' or 'gig' economy**

As part of the Terms of Reference, the Committee is interested in the legal or work status of persons working for, or with, businesses using online platforms as well as whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations.

This is a question that has been keeping legal scholars, academics, and platform firms pre-occupied since the emergence of app-based delivery and ride-share services and whether the workers who undertake tasks mediated by platforms are employees, entitled to minimum standards of employment such as hourly wages, or independent contractors; engaging in an entrepreneurial activity and, effectively, capable of running their own businesses.

While in the Australian platform economy, in areas such as food-delivery services, there is a prevailing tendency of platform firms to engage workers as independent contractors rather than employees, there are notable distinctions between different platforms, whereby their specific contractual arrangements and work arrangements in practice should be considered. It also has to be noted that certain platform-based firms, such as temporary staffing platform SideKicker<sup>2</sup> engage workers as casual employees rather than independent contractors.

In Australia the Foodora platform, which went into voluntary administration in November 2018, highlights the possibility that platforms can misclassify their workers as independent contractors who they should engage as employees. The Fair Work Commission upheld, for instance, an unfair dismissal claim from one of its delivery-workers ([Klooger v Foodora Australia Pty Ltd \[2018 FWC 6836\]](#)). The relationship between the platform and this worker was atypical, for example the individual performed managerial duties for the platform for an extended period before returning to delivery duties. Hence the legal applicability of this ruling to other food-delivery platforms (and even other former Foodora riders) would remain very narrow.

In a similar vein, as emerged from Foodora's administrator's report to creditors, the Australian Taxation Office formed the view that the platform should have been collecting PAYG income tax and making superannuation contributions. As we have explained elsewhere (Veen et al., 2018) in more detail, it was on the basis of the ATO's findings that the administrator agreed Foodora had probably wrongly classified its workers as independent contractors.

In addition, the Fair Work Ombudsman also alleged that Foodora had underpaid workers who should have been engaged as employees rather than contractors. As we have detailed in an analysis, there were distinct differences between platforms such as Foodora, Uber Eats, and Deliveroo at the time. With those providing most benefits and certainty to workers, most at risk of running afoul of misclassification (Barratt et al., 2018). This is also an issue recognised by platforms, who have described how the regulatory apparatus provides disincentives for increasing support for workers, as this may threaten workers' contractor classification.

There have also been a number of decisions by the Fair Work Commission where it found that platform-workers were not employees and that their engagement as independent contractors was appropriate. This includes:

- [Hinde v Rasier Pacific Pty Ltd \[2018\] FWC 1764](#)
- [Kaseris v Rasier Pacific v.o.f-Kaseris \[2017\] FWC 6610](#)
- [Pallage v Rasier Pacific Pty Ltd \[2018\] FWC 2579](#)
- [Gupta v Portier Pacific Pty Ltd & Uber Australia Pty Ltd \[2019\] FWC 5008](#)
- [Gupta v Portier Pacific Pty Ltd & Uber Australia Pty Ltd \[2020\] FWCFB 1698](#)

Critical to these determinations about the status of these workers are questions of 'control'; guided by the multi-factor common law test which concentrates on 'who controls the way the work is performed'. Crucial in the determinations thus far appear 'where' and 'when' the work is performed.

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<sup>2</sup> <https://sidekicker.com/au/>

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We are of the view, however, that flexibility in this segment of the platform economy is much more constrained than currently recognised within the aforementioned decisions by the Fair Work Commission – which one of our peer-reviewed papers explores in-detail (Veen et al., 2020).

One of the most recent, and perhaps notable, of these decisions has been the Fair Work Commission's Full bench decision in *Gupta v Portier Pacific Pty Ltd & Uber Australia Pty Ltd*. It found that a worker on the Uber EATS platform, Adelaide-based driver Ms Amita Gupta, was an independent contractor and not an employee. In its decision the Bench conjectured “that Ms Gupta had the capacity to develop her own independent delivery business as a result of her legal and practical right to seek and accept other types of work while performing work for Uber Eats, but chose not to”.

The Bench's decision did not scrutinize the plausibility that she could establish such a business, instead it focused on three critical factors to highlight how app-based delivery work is markedly different from more traditional courier services, namely: (1) non-exclusivity of the relationship; (2) the relative flexibility of the work; and (3) the lack of any visible branding. Leading to the conclusion that, therefore, the work did not bear the hallmarks of an employment relationship.

As non-legal experts we do not wish to comment on the appropriateness of the findings, we do want to share some insights in relation to the first two points and our broader points about the need for regulators and policymakers to more fully engage with the novel, technological aspects of app-based platform-work.

First, as a food-delivery courier on the Uber Eats platform, Ms Gupta was free to work for other platforms, like EASI or Deliveroo. Indeed, our research also found that app-based food-delivery couriers do not exclusively deliver for one restaurant or venue, nor is their relationship with the platform necessarily exclusive – a practice called ‘multi-apping’.

Second, the Bench found that Ms Gupta enjoyed relative flexibility about ‘when’ and for ‘how long’ she worked. However, the reality of this ‘*market*’ means if workers are indeed to act as businesses, it pays more to work on a Friday evening than a Tuesday mid-morning. Moreover, in this decisions and others (e.g. *Kaseris v Rasier Pacific V.O.C.*) there is a notable lack of engagement with the nature and impact of algorithmic management on the level of control that workers experience and the amount of choice in the performance of their work that they can exercise.

As we have pointed out (Barratt et al., 2020b), algorithmic management systems are becoming increasingly prevalent across workplaces in Australia, with the ‘gig’ economy at the forefront at this technological disruption of management. Here it has been instrumental in enabling platform firms to create novel forms of work organisation.

Partly with the support of consumers, platforms collect a range of data on worker performance. However, only limited information is provided to workers regarding how performance ratings are used for the allocation of ensuing orders or continued ability to operate on the platforms, creating a critical information asymmetry. Our research suggests that while workers are acutely aware that their performance is constantly monitored, they often have imperfect understandings about the inner workings of such performance management systems.

It is important to note here that the ‘on-demand’ platforms need to quickly, reliably and simultaneously intermediate product and labour markets. To do this they need sufficient workers in the right place at the right time, yet when their business model relies on the use of a contractor classifications, they are limited in their ability to control workers directly.

As workers are aware that performance metrics are measured, and that the platform retains the right to de-activate their accounts, worker behaviours are indirectly controlled by the platform should they wish to continue to earn an income from this type of work. In addition to algorithmic management, the design of some of the mobile phone applications – which form the main interface that workers interact with – purposely omit key information from workers, such as the delivery-address. Such features encumber workers' ability to act in a discerning, business-like and entrepreneurial fashion. On most platforms, workers also have no ability to set prices or develop ongoing client bases, meaning that the app effectively (though indirectly) controls workers.

### **Whether, and what, legislative or other measures should be taken**

While the emergence of new forms of 'gig' work, offer important opportunities, it is also clear that in their current form there are important drawbacks which negatively impact workers and the broader community. Our research (Barratt et al., 2020; Smith et al., *forthcoming*) suggests that relying upon market forces or on the behaviour of consumers of these services to ameliorate these drawbacks is insufficient. Further, as we argue, many of the workers who engage in food-delivery platform work have little labour market power, and as such are vulnerable to the 'higgling' of the market (Goods et al., 2019). This creates a circumstance where regulatory intervention and state measures should be considered.

A guiding framework for responding to the issues our research has raised is the International Labour Organisation's (2020) 'Decent work' principles. These principles describe decent work as being productive, delivering a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives, and equality of opportunity and treatment for all women and men.

As we recently noted (Barratt et al., 2020b), efforts to develop fair standards to ensure improved transparency and accountability between platforms and workers are emerging in other jurisdictions. For example, the Fair Work initiative, led by the Oxford Internet Institute in partnership with the ILO is bringing together platforms, workers, unions and regulators to develop principles for work in the platform economy. There is precedent outside of the gig-economy in Australia for such collaborations, and the creation of such a quadripartite institution could help mitigate some of the identified problems around 'gig' work.

Despite contention over whether workers work on a contractor or employee basis, in Australia the notion of work has been embedded in principles of fairness and justice. These principles have driven policy for well over a century, as set out in the Harvester case.

....The provision for fair and reasonable remuneration is obviously designed for the benefit of the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers. If Parliament meant that the conditions shall be such as they can get by individual bargaining – if it meant that those conditions are to be fair and reasonable, which employees will accept and employers will give, in contracts of service – there would have been no need for this provision. The remuneration could safely have been left to the usual, but unequal, contest, the "higgling of the market" for labour, with the pressure for bread on one side, and the pressure for profits on the other. The standard of "fair and reasonable" must, therefore, be something else; and I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilized community... (Higgins, 1907)



Significantly, this decision was set out in the first decade of the 20<sup>th</sup> Century, and the contemporary tests that are applied to determine whether workers should be categorised as employees or independent contractors were created in an era where these ‘gig’ economy arrangements could not have been conceived. There is thus, in our view, a need to fundamentally revisit the way which work is considered by these regulatory instruments. If this doesn’t occur, there is the potential for increasing artificiality and decreasing utility of such instruments.

More specifically, our research (Goods et al., 2019) suggests three possible ways forward to better reflect this long-term commitment to decent work in Australia.

First, addressing the limited opportunities for worker voice and recourse against unilateral platform decisions. If these workers retain their contractor classification, this may take the form, as in Victoria, of mediation processes for disputes between food-delivery contractors and hirers, covered by that state’s Small Business Commission.

Second, in order to improve safety and provide workers with adequate protection, sector-wide worker compensation requirements could be imposed on platforms, as well as minimum expectations around training. There is also scope to include gig economy workers under state Occupational Health and Safety regulation, as was recently recommended by a Western Australian Parliamentary Inquiry (Standing Committee on Public Administration (WA), 2020).

Third, mandating improved transparency between platform and workers concerning average earnings across the sector and in specific geographical and temporal contexts, the most profitable times to work, data collection and utilisation and performance management systems. This may also include arrangements for inter-platform data portability.

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