

The gig economy: preventing a Dickensian renaissance

Introduction

This paper seeks to answer the question of whether the law should intervene to regulate the gig-economy. In order to address this question, it is necessary to first define exactly what the gig economy is; and understand the economic context under which it has arisen. This paper will then examine the arguments both for and against the gig-economy.

Ultimately, it will be argued that there is a need for the regulation of the gig-economy. The focus of this suggested regulation will lie on areas that a legal regulatory framework might either better protect and enhance this emergent employment trend for freelancers; or at least ensure that their national workplace minimum protections are not eroded.

What is the gig economy and how has it arisen

The origins of the term the gig-economy are vague, however, it emerged 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.’¹ The term has evolved to represent the domain of ‘digitally enabled marketplaces where companies use websites and apps to pair workers with tasks that occur both online and offline.’²

The most considered definition of the gig economy is provided by Unions NSW in their Report on *The Rise of the gig-economy*, which identifies four key features that define the gig-economy:

1. *Work is fragmented into specific individual tasks and workers are engaged on a task by task basis with no guarantees of continuous work.*
2. *Work is performed by one individual worker, but may be commissioned by an individual or a business.*
3. *Labour transactions between workers and individuals/businesses are facilitated by a for-profit company who charge users for this service (e.g. Airtasker). These transactions are performed through web based applications which are managed and controlled by the for-profit company.*
4. *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.*³

Having a considered definition of what exactly constitutes the gig-economy assists in analysing how increasingly prevalent and therefore relevant it is as an emergent employment trend.

How relevant is the gig-economy

An alarming statistic estimates that by 2020 ‘contingent workers will exceed 40 per cent of the US workforce.’⁴ It has long been known that freelance work arrangements are common in consulting, writing, design and skilled trades, however freelance work arrangements have now merged into a much more expansive range of occupations and industries.⁵ This signals that workers are increasingly deciding to shape their careers by taking on work, much like a consultant, on a task-by-task basis for multiple employers concurrently, which forms the “gig economy”.⁶

The growth in the gig-economy is certainly not a geographic phenomenon that is limited to the US workforce. Current Australian statistics show that:

the largest freelance category [In Australia] is web, mobile and software development (44 per cent), followed by design and creative (14 per cent) and writing (8 per cent). [Furthermore,] data revealed that 4.1 million Australians, or 32 per cent of the workforce had freelanced between 2014-15.⁷

The driving force behind this exponential employment trend appears to be a complex range of factors, however there are some common threads, namely the world economic downturn post GFC, the desire for flexible employment and the growth in user-friendly digital platforms that connect workers with tasks.

The growth of digital platforms

The increasing emergence of digital platforms has permitted freelance workers to quickly and easily connect with employers in order to find assignments, and market their skills more easily. The range of tasks available is now almost endless. Digital platforms now cover everything from simple household chores and running errands, all the way through to high level professional projects. The scope of tasks now available on digital platforms means that freelancing is accessible to all irrespective of their level of skill, or lack thereof.

The growth of digital platforms has meant that ‘[Freelancing can also be readily utilised] for generating additional income outside regular employment.’⁸ Moreover, digital platforms have made it possible to patchwork a full-time job out of multiple freelance tasks (gigs). In support of this claim, one needs only look to an Australian platform called ‘*Freelancer.com*, which is the world’s largest freelancing and crowdsourcing marketplace, connecting over 19 million employers with contingent workers in 247 countries. Between 2009 and 2014 its number of users grew from one million to ten million.’⁹ This statistic alone demonstrates that as the digital platforms gain market traction their potential reach is enormous and therefore growth potential enormous.

What are the gig-economy’s advantages

Unions NSW found that workers are increasingly demanding more autonomous and flexible work, which traditional employment seems unable to accommodate. However, they have noticed this trend as being ‘particularly evident amongst youth, signalling a generational shift

towards greater freedom and entrepreneurship.¹⁰ As more young workers continue to realise ‘the benefits of working independently [in the gig-economy, it] will continue to influence the workforce and in turn, the economy.’¹¹ These benefits in the uptake in freelance employment towards the economy are supported by research conducted on behalf of the NSW Government, which ‘estimated the sharing economy has contributed \$504 million to the State’s economy annually, and provided 45,000 people with some form of work.’¹² This is a figure that certainly presents as a windfall for the NSW government. However, it is noted that federally the ‘gig-economy is yet to register in employment numbers but it has been a noticeable upwards trend in the US for several years.’¹³

The gig-economy is not only advantageous to the younger generation, it has advantages for ‘older workers, [who] also want to set their own schedules, choose their tasks and work in an environment that suits them.’¹⁴ The gig-economy provides an avenue that allows the flexibility for an older generation of workers that have traditionally had none.

It may be a stretch too tenuous to suggest that the growing demand to embrace the flexibility of freelance work is demonstrated solely by the upsurge in workers turning away from traditional forms of employment. However, a number of studies have found:

that workers are at their most productive when they experience work satisfaction, and research continues to tie work satisfaction with flexibility. Flexibility is an effective way of preventing the burnout that many employees experience from the ‘always on’ work culture of today’s fast-paced business landscape.¹⁵

Moreover, the results of research conducted by the University of Chicago on 4500 workers, ‘revealed that flexibility had a bigger impact on work satisfaction than total number of hours worked or income.’¹⁶ The flexibility offered by the gig-economy is certainly a benefit that many workers would appreciate. The gig-economy has also been shown globally as good for the economy.

If we shift the focus to the advantages of the gig-economy globally, ‘McKinsey’s supply-side analysis shows that [by 2025] online talent platforms could raise global GDP by up to \$2.7 trillion and increase employment by 72 million full-time equivalent positions.’¹⁷ This is not a figure that can be trivialised in an uncertain global economy that is desperately seeking innovation to drive its future and improve efficiencies. This establishes the gig-economy as a critical part of ‘macroeconomic forces such as globalisation, outsourcing and technology.’¹⁸

Research conducted by McKinsey Global Institute established that the ‘biggest impact of the freelance economy is the boost in labour participation. For those who cannot secure employment, freelancing opens the door to countless avenues of income.’¹⁹ What is clear is that ‘independent contractor work streams are set to become a fundamental component of talent strategies, and will bring about disruption and innovation in the labour economy.’²⁰ Whilst this offers opportunity, it remains to be seen whether this is realised in unemployment statistics and a possible new realm of under-employment.

Wider access to talent

The corporate mantra that talent is a company's most valuable asset for growth and innovation is nothing new, however 'the dynamics and composition of talent have dramatically altered.'²¹ Modern business requirements demand specialist skills and expertise and exceptional talent to facilitate corporate success.²² The globalisation of freelance talent via digital platforms has heralded 'a broader pool of talented, hardworking professionals at competitive rates.'²³ The gig-economy has created talent pools for companies to dip into readily for 'hyper-specialised, exceptional talent that was previously inaccessible.'²⁴ This means that businesses that are already dominant in an area of expertise may simply tender the work out to a specialist on an ad hoc basis to remain competitive.

Freelance employment is of particular benefit to small businesses, against a backdrop of what can only be described as economic uncertainty. Accordingly, hiring freelance employees as needed for tasks is of particular benefit to start-ups and smaller businesses that typically experience fluctuating periods of activity. The concern small businesses have is that they may not be able to maintain full-time employees with so much economic uncertainty. Therein lies the advantage of 'using digital talent platforms... [to] alleviate this concern through improved access to individuals willing to undertake temporary contract work.'²⁵ In other words small businesses are able to access a wider cross section of talented freelance workers for temporary periods as the needs of the business fluctuate.

Increase in productivity

It is theoretically foreseeable that a flow on advantage of 'incorporating freelances into the workforce should yield greater productivity, prompted by two factors: hyper-specialisation and accountability.'²⁶ This trend towards freelance work goes a long way in addressing the problem that 'many employees report feeling over-worked and stretched across tasks, often working on those outside of their skillset and knowledge.'²⁷ In other words, they are being given work that is not strictly within their gambit of expertise to make them more productive, which is in and of itself perhaps counterproductive.

Perhaps unsurprisingly, organisations in favour of the gig-economy, such as AI Group, describe the comfort offered to employees by job security as:

rendering permanent employees complacent with detrimental effects for innovation and productivity. Accompanying the freelance economy is a culture where workers are truly accountable and performance standards dictate future security and income.'²⁸

It is hard to see how making employees constantly anxious about their future is an environment in which innovation can be fostered, and this leads to a discussion on the negative implications of the rise of the gig-economy.

What are the detractions from the gig-economy

For all the advantages the gig-economy is offering, as discussed above, it has done little to alter the stark reality, namely:

nearly one in three young Australians are currently unemployed or underemployed. Entry level rates for young people are disappearing and 70 per cent of youth are currently undertaking training for jobs which will be lost or radically affected by automation in the next 10-15 years.²⁹

The concept of underemployment is difficult to benchmark in a gig-economy, because it will be difficult to firstly define what constitutes underemployment, and secondly there arises a need to differentiate between who is underemployed by choice and who is not. Therein lies the difficulty in classification of what constitutes employment statistics and under-employment statistics in the gig-economy.

More importantly, unions are worried about the rise in this type of freelance work, of particular concern is the welfare of the freelance workers:

the loss of protections such as sick leave, insurance, superannuation and unfair dismissal. With the current system geared towards permanent employees, policies around the world must clarify how these workers will be treated under the law. The changes likely to occur in the gig economy could have a number of tax implications. Freelancers are likely to explore opportunities for offshore tax arrangements to legally minimize their tax burden.³⁰

Is the loss of hard fought for basic protections for workers, and minimised tax a desirable outcome? If the only way to be competitive is to charge less money and pay less tax to do so, then essentially we may very well run the risk of ending up in a Dickensian landscape once more.

Another casualty of the rise of the freelance worker is the erosion of specific guidelines or career ladders that can guarantee some form of career advancement. Accordingly, workers in the gig-economy 'must be savvier than their predecessors and must be highly skilled in project and time management, networking, self-marketing, communication and negotiating.'³¹ Many of these activities are unremunerated and are difficult to claim in a hyper-cost competitive environment such as this.

The Airtasker experience

Airtasker has provided a key digital platform that has been highly successful, however the reason for this success is attributed to Airtasker's business model, which exploits a legal loop hole that essentially allows Airtasker to hire workers as independent contractors and not employees. This loophole has arisen due to the fact that 'genuine independent contractors are governed by commercial rather than employment law, thus bypassing requirements for minimum payments and employment safety nets.'³² Without the responsibility of having any employees, Airtasker is able to cash in.

However, there is legislation which considers the situation whereby employers try to disguise employees as independent contractors. This situation is often referred to as sham contracting. The *Fair Work Act 2009* provides for a contravention for misrepresenting employment as an independent contracting arrangement.³³ Airtasker exploits a loop hole that allows them to class workers as independent contractors and thereby avoid the scrutiny of the Act.

By designing their digital platform to have no workers, Airtasker contractors are ‘actively encouraged to compete for work and underbid the rates that are advertised.’³⁴ By classing workers as independent contractors, there is ‘no safety net baseline for work on Airtasker jobs, allowing the minimum industry standards to be completely eroded.’³⁵ This situation fosters the exploitation of Airtasker’s freelancers.

In 2014 Airtasker released an ‘information sheet’ for Job Posters, what was of concern is that the information sheet recommended rates of pay for their most popular jobs.³⁶ However, these rates were considerably lower than the minimum award rates of pay and standards. In fact, payments made through Airtasker do not contain monetary entitlements or loadings associated with either permanent or casual work such as leave, casual loadings, superannuation or workers compensation insurance. Furthermore, the rates of pay which undercut industry award standards are still published on the Airtasker site.³⁷

Safety

Airtasker represents to Job Posters that its workers are covered by a \$20 million insurance policy.³⁸ However, of significance is that the

policy does not provide workers compensation insurance but only covers third party damage caused to the job-poster. There is no protection to the worker for personal injury or damage to any of their property either from Airtasker or the job-poster.³⁹

This leads to a dangerous situation whereby the contractor and Job poster shoulder the responsibility to check/carry this insurance. A further cost imposed on the worker.

Innovation or reinvention?

The question of whether the gig-economy is a new economy or a reinvention of bygone times simply using ‘digital technology to reinvigorate traditional business models in sectors as diverse as transport, accommodation and in Airtasker’s case, labour hire [is hotly debated].’⁴⁰ Despite Airtasker’s harnessing of new digital technology, the Airtasker business model is not new.

The proof of this is found on the company’s website in its business model, which has been described as ‘offer[ing] a model of employment no different to a combination of unregulated Taylorism within a Dickensian marketplace where workers compete for bite-sized fragments of labour.’⁴¹ In which case, not only is this moribund form of work not innovative, nor can it be said to really remove traditional barriers to efficiency. Instead, it can be described as a ‘model seek[ing] to reintroduce competitive Taylorism in a laissez faire environment

disrupting over 150 years of agitation by workers and unions who struggled to eradicate this form of labour exploitation and replace it with civilized employment relationships.⁴²

I doubt anyone wishes to return to Dickensian flexibility. If it is indeed innovative, then the ‘flexibility shouldn’t have to be intrinsically paired with a wage discount or reduction of key workplace insurance, superannuation and access to the Fair Work Commission to resolve disputes to ensure its viability.’⁴³ If it is, then sadly it is a backward practice in reinvention seeking to reintroduce a form of detestable labour.

Policy Proposals

The Unions NSW report made the most definitive findings on Airtasker’s workers. They found that Airtasker:

workers [do not] meet the definition of an independent contractor. Airtasker retains a significant level of control over workers’ access to work and how that work is performed. The current distinction between employee and independent contractor does not accurately capture the dependent nature of gig-economy work exemplified by Airtasker.⁴⁴

Having made the finding that Airtasker’s workers were not truly independent contractors and could then be award covered employees, they then suggested that the ‘rates of pay will vary for different tasks, however these rates could be easily inbuilt into the backend of Airtaskers’ website.’⁴⁵

More generally speaking Unions NSW stated that:

current legislation does not adequately acknowledge or protect the employment conditions of workers engaged in the gig-economy. As this report has illustrated gig-economy businesses, such as Airtasker have used this loop-hole to their advantage, undermining safety standards and well-established workplace entitlements to drive their business models.⁴⁶

Ultimately, this led to their call for legislative change to ensure that the gig-economy provides a safety net and basic employment conditions for workers, such as minimum wages and workers compensation legislation. Most poignantly, they were concerned that any such ‘legislation must ensure gig-economy businesses like Airtasker are not used as a mechanism for undercutting businesses who meet their legitimate tax and employment obligations.’⁴⁷ This seems like a logical solution to solving a potential return to Dickensian employment. This concern for workers being exploited in the gig-economy without some form of legislative change is widely shared.

The evidence is already there that supports the Unions NSW’s findings on the gig-economy, for example currently ‘many young workers exhaust themselves doing on-demand jobs for very little money.’⁴⁸ Basically the consensus is that the gig-economy is exploitative and increasingly gaining momentum from people who either make the choice to earn their income from lots of small gigs or are forced to.

It is hard to see a utopian outcome, as the gig-economy has more likelihood of creating:

an anxious, disenfranchised workforce glued to their smartphones or laptops, waiting for the next gig to materialise. Many platform owners and innovation gurus have tried to dress up the gig economy as ushering in a new era of flexible, egalitarian, liberating work. But it's hard to disagree with the observation made by the American employment and civil rights attorney Moshe Marvit, writing in the Nation magazine, that at its core, it has reinvented piecework for the digital age.⁴⁹

It is a bleak outlook for employees and as the gig-economy expands, the competition and risks for the workers will be increased exponentially. In order to secure employment in the gig economy, workers often have to give their time, labour and in some instances their capital. This situation means workers are burdened with insecure employment, and additionally assuming the risks associated with investing their own money into a business that they have very minimal control over.

The Productivity Commission agree that the gig-economy poses some serious concerns in its present form. They described gig work as a model of hiring labour on demand.⁵⁰ The report cautions that “gigging” ‘might increase flexibility of work, but it also means workers bear more risk because of fragmented, insecure employment.’⁵¹

The report concludes by finding that:

Australia's industrial relations system seems ill-equipped to regulate for emerging forms of work, given that it continues to struggle to define long-established forms of contingent employment (such as casual work). In terms of determining if a worker is an “independent contractor” Australian courts consider whether the hirer controls the work performed; whether the worker is integrated into the hirer's organisation or is in business on their own; whether the worker is paid according to tasks completed or time spent working and whether the worker can subcontract out work, or is free to work for other hirers.⁵²

Not only is Australia's industrial relations system unable to address this legal loop hole with current legislation, but the common law tests long deliberated over to classify independent contractors has provided for a mutated form of employment to develop. The only way to assess each employment relationship currently is on an individual case basis, which is described as ‘a piecemeal and time consuming approach.’⁵³ Perhaps, we should instead focus legislative change on creating a new category of worker to address the issue. Maybe the solution lies in creating a new hybrid category of worker, such as a dependent contractor, or an independent employee.

Right to strike

A key feature of independent contractors is that they seemingly have no right to strike, or even the ability to collectively organise themselves to take industrial action. The gig-economy is really an exercise in individualism; however the recent Deliveroo strike suggests collectivism can still work even in this isolated model of work.⁵⁴

Unions are finding it difficult to adapt to changes in models of employment. The much publicised reports of union decline in Australia are concerning. In fact, the statistics show that fewer than 15% of workers are members of unions, with that dropping to 11% in the private sector.⁵⁵

The first issue is that very few unions have recent experience in effectively organising and representing contingent workers. Their main focus has been traditionally on full time and part time employees. The second issue is that ‘unions have generally inflexible membership structures that have been slow to adjust to the changing composition of the labour market.’⁵⁶

Unions need to adapt to the changes in the economy to again become relevant. They need to take note of the collective action undertaken by Non-union workers in the gig-economy, such as Deliveroo and Uber workers who campaigned for fair pay. They need to adapt to understand how ‘workers in non-union companies are... using the internet to self-organise.’⁵⁷

The proposed solution

Senator Elizabeth Warren has unveiled a comprehensive suite of proposals aimed at providing basic employment policy protections and income security benefits to those working in the gig-economy as well as others in subcontracted or franchised arrangements.⁵⁸

In looking for a solution Warren posed a fundamental question: Why should these workers be excluded from the protections and benefits and minimum standards afforded to traditional employees? Her response emphasised the need for protection:

I believe we start with one simple principle: all workers – no matter when they work, where they work, who they work for, whether they pick tomatoes or build rocket ships – all workers should have some basic protections and be able to build some economic security for themselves and their families. No worker should fall through the cracks.⁵⁹

Senator Warren proposed three fundamental principles that were required for achieving this outcome, namely:

1. Provide portable basic benefits – Social Security, insurance against catastrophic loss, and sick and family leave – for all workers.
2. Extend the right to organize a union or other form of collective voice and protect everyone from retaliation or discrimination for exercising those rights.
3. Ease the paperwork burden and responsibility for administering these benefits from employers by allowing unions or other groups to provide retirement savings plans and other benefits to workers at a fair price.⁶⁰

Moreover, Senator Warren proposed that other laws need to be streamlined and made easier for employers to enforce, such as the multiple definitions of who is an employee. She found there were too many definitions between different agencies.⁶¹

This paper agrees with the approach adopted by Senator Warren. In that she recommends an encompassing approach, namely: ‘all who work should be protected by our basic worker

rights and covered by the benefits society deems essential for workers and their families to thrive.’⁶² The language of the legislature should reflect this intention.

Conclusion

What is made clear in this paper is that legislation is required to provide protections of basic employment conditions and wages for gig-economy workers. This essay recommends that a singular definition of a new category of employee be inserted into the *Fair Work Act 2009*. It would define the new employee category as a dependant contractor, rather than an independent employee as the latter could also be true of a casual employee.

All acts that have definitions referring to workers would need to be refereed back in the relevant section of the *Fair Work Act*. A comprehensive review of existing laws, such as workers compensation, would need to be conducted. Ultimately, there would be three distinct types of employment, namely an employee; an independent contractor; and a dependant contractor.

The dependant contractor should be afforded all minimum employment standards, such as being subject to the NES and not be permitted to contract below the minimum wage. In order to achieve this aim, all entitlements should be pro rata accumulated and paid into a government fund by the digital platform provider. There should also be a penalty provision ensuring the dependant contractor cannot contract below these minimum standards, nor can a digital platform facilitate or encourage contracting below them.

The tasks can still be pitched at an overall task dollar level. However, the worker must simply stop the job if a time period is reached that would not permit the job to continue without offending the minimum entitlements.

Also recommended would be a provision permitting dependent contractors to organise, and form a representative group. A requirement that the digital platform must provide an opt in feature for facilitating a collective group of dependant contractors to liaise. A penalty provision for any retaliation or discrimination associated with being part of the collective group should be introduced.

The dependent contractor should also be permitted easy access to the Fair Work Commission for conciliation and possible arbitration on payments, and/or unfair dismissal protections for tasks.

If these simple insertions into the *Fair Work Act* were made and minimal further impediment to the gig-economy were entertained by government, then it is foreseeable that more people would switch to this type of employment without the associated fear of worrying about basic hard fought for protections being abandoned. This legislation would ultimately be for everybody’s benefit and most importantly prevent a complete erosion of Australia’s industrial landscape into a Dickensian wasteland.

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