



Labour rights in the gig economy

An Explainer

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Executive Summary

The gig economy has had a drastic impact on the nature of employment. The traditional paradigm of full-time, stable individual employment is being challenged by on-demand freelance contractor work. Consequently, certain protections and benefits that employees usually enjoy are not afforded to workers in the gig economy. This paper explains what the gig economy is, how it functions and the implications it has on labour rights. It also provides some information on the regulatory responses of other countries to the gig economy.

The gig economy essentially employs an economic model in which temporary and flexible jobs are the norm and in which companies hire contractors for on-demand work. Generally, workers in the gig economy do not receive salaries, as would employees, but are paid in return for the services or 'gigs' they perform. There are a number of features that define work in the gig economy, including:

- the division of work into particular tasks and the contracting of workers for these tasks;
- individuals undertaking the work;
- companies facilitating labour transactions; and
- workers being classified as independent contractors.

Analysis shows that workers in the gig economy tend to have lower wages than employees. They also often miss out on a number of other benefits. Further, their classification as independent contractors has implications on their tax status and superannuation. The analysis suggests that the current superannuation guarantee system may need to be reworked, as it was designed to cater to individual full-time employees, and did not envisage a gig economy labour market.

Overseas, there have been a number of different approaches to labour rights and the classification of workers in the gig economy. In general, comparable jurisdictions such as New Zealand, Canada, and states in the United States of America adopt a similar approach to Australia in categorising workers as either employees or contractors. In the United Kingdom (UK), a third category, the 'worker', exists between the employee and contractor. The 'worker' has recently been the subject of legal proceedings discussed in greater detail below, involving businesses such as Uber and Deliveroo. Overall, it appears that the legal frameworks of comparable international jurisdictions are capable of regulating the gig economy. In terms of workers' rights, some cases suggest that gig economy workers are entitled to greater rights while in other cases they have been found to have fewer rights. At the time of writing, several related matters are underway in the courts overseas.

While the debate around the gig economy can be polarising, it is certain that the gig economy is disrupting traditional methods of doing business and does not look like it is going away. Some stakeholders are in favour of it, arguing that greater flexibility and choice is a positive result of technological innovation. Others have argued against it, claiming that the gig economy is essentially about the exploitation of workers and labour laws, as opposed to being about the development of new technologies. This has led to some workers missing out on benefits like security of income, accident insurance, paid leave and superannuation contributions.

Introduction

What is the gig economy?

The term 'gig economy' refers to an economic model in which temporary and flexible jobs are prevalent, with companies hiring independent contractors instead of full-time employees. It differs from the sharing economy, which is an economic model primarily characterised by peer-to-peer acquisition and provision of goods and services, often facilitated by an online platform.¹ The sharing economy can be interpreted as an umbrella term for economic activity in which some sort of value can be unlocked and made available for use by others for payment. The gig economy, on the other hand, can be specified as the labour market, often within the sharing economy, distinguished by short-term contracts or freelance work rather than permanent work. Instead of regular salaries associated with permanent jobs, 'employees' are paid in return for the 'gigs' they perform. The gig economy therefore undercuts the traditional model of full-time employment of workers.²

There are several features that characterise work in the gig economy. These include:

- work is often divided into particular tasks and workers tend to be contracted for these tasks, rather than for ongoing work;
- work is generally undertaken by individuals;
- a for-profit company, which charges users for their service, facilitates labour transactions between workers and businesses; and
- workers fall under the classification of independent contractors and do not enjoy any employment protections or minimum standards.

In the Australian context, the issue has been polarising. Proponents of the gig economy advocate for the flexibility and freedom often associated with freelance or independent contract work. Support arises from the concept of choice, in that people may choose when and how often they undertake work. The structure of work can also be appealing; a customer needs a task to be completed, an entrepreneur has the skills to fulfil such a task. An online platform facilitates a virtual market place to bring the two together.

However, workers' rights groups have been quick to highlight the negative aspects of the gig economy.³ Many of the benefits of permanent work, including security of income, accident insurance, superannuation and paid leave, are absent. 'Entrepreneurs' with un-specialised skills must often bid down the rate of pay in order to secure work. In turn, there is no limit as to how low fees can go. Minimum wage laws do not apply as the entrepreneur is not considered an employee of the platform. As such, he/she must work as an independent contractor, meaning under industrial law minimum pay and other conditions do not apply.

The latest data from the Australian Bureau of Statistics (ABS) shows that there were around 265,000 independent contractors in Victoria in August 2017. A total of approximately 3,213,000 persons were employed in Victoria in the same period, meaning independent contractors made up just over eight per cent of the total working population.⁴ Data for all of Australia in the same period shows that, on

¹ Investopedia (2018) '[Sharing Economy](#)', Investopedia website.

² Investopedia (2018) '[Gig Economy](#)', Investopedia website.

³ Unions NSW (2016) *Innovation of Exploitation - Busting the Airtasker Myth*, Sydney, Unions NSW.

⁴ Australian Bureau of Statistics (2018) *Characteristics of Employment, Australia, August 2017*, cat. no. 6333.0, Canberra, ABS.

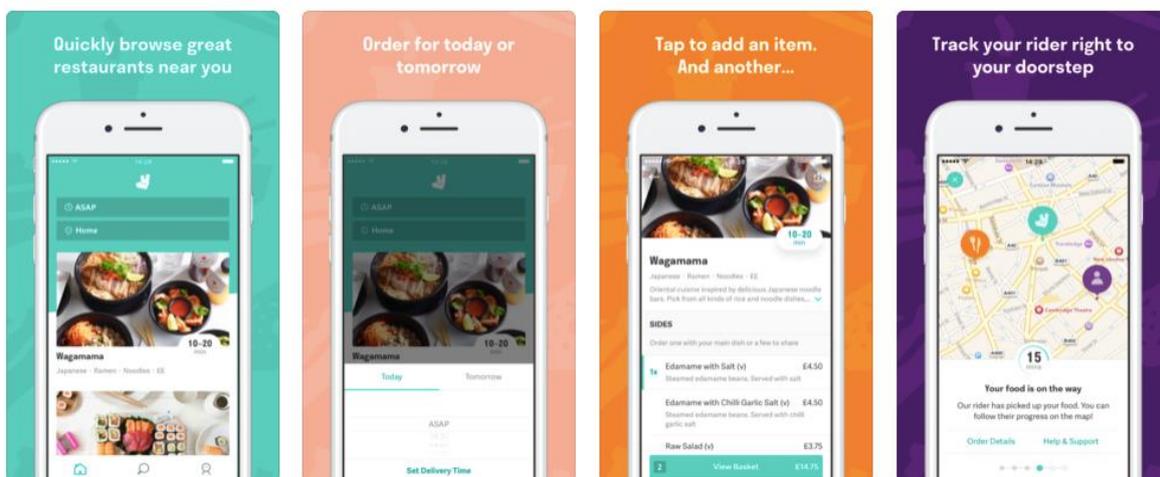
average, independent contractors made up about 8.2 per cent of total employed persons, almost identical to the Victorian figure.⁵

Deliveroo – an example

In order to illustrate how an organisation in the gig economy works in practice, this paper looks at Deliveroo. Deliveroo is a British online food delivery company that operates in over 200 cities worldwide, including Melbourne and Geelong.⁶ Deliveroo describes itself as a food delivery tech business, saying:

Our online delivery platform joins up customers who want great food, restaurants who seek additional revenue and riders who are looking for well-paid, flexible work. Customers order via our app from one of our partner restaurants, the vast majority of whom had never considered deliveries before Deliveroo. Riders then collect the prepared food and deliver it to the customer by bicycle or scooter.⁷

The image below shows the key stages of using the Deliveroo mobile application to order food.



Source: <https://www.todaytix.com/insider/london/posts/5-essential-mobile-apps-for-londoners>

Drivers and riders who deliver food for Deliveroo are considered independent contractors and are paid depending on the number of deliveries they conduct. In order to conduct deliveries, workers need to have: a scooter, motorbike or bicycle; a smartphone; a valid Australian Business Number (ABN); and a valid insurance policy for their vehicle.⁸

Deliveroo holds the view that the platform is of benefit to all parties involved. Delivery riders enjoy flexibility, customers have convenience and choice while restaurants bring in more revenue by offering delivery.⁹ However, a number of food-delivery riders—not exclusively those facilitated by Deliveroo—have outlined poor conditions and low-wages in their work. Workers have reported that three in four earn less than minimum wage, including effective pay rates as low as \$6.67 per hour.¹⁰ Further, riders have complained about the lack of guaranteed work or pay, and about company rules and pay rates changing with no consultation.¹¹

⁵ *ibid.*

⁶ Deliveroo Australia (2018) 'Home', Deliveroo website.

⁷ Education and Employment References Committee (2017) *Inquiry into Corporate Avoidance of the Fair Work Act*, final report, Canberra, The Committee, September, p. 90.

⁸ Deliveroo Australia (2018) 'Apply', Deliveroo website.

⁹ Education and Employment References Committee (2017) *op. cit.* p. 90.

¹⁰ Transport Workers Union (2018) *On-demand food delivery riders snapshot*, Melbourne, TWU.

¹¹ *ibid.*

Regulatory responses

Overall, the regulation of the gig economy sits largely within the federal jurisdiction. As yet, the federal government has not explicitly legislated with regard to the gig economy. Nor have states or territories. The Australian Tax Office (ATO) provides information on the differences between employees and contractors, which is helpful in indicating key differences between the two forms of work. This information is outlined in the Appendix below.

In 2017, the Senate established the Select Committee on the Future of Work and Workers. Of particular importance for the Select Committee is the impact of technology on the future of work—it is therefore expected that the final report will address the gig economy in Australia. The Select Committee is due to report on or before 21 June 2018.¹² The establishment of the Select Committee reflects the fact that key employment laws, such as the *Fair Work Act 2009* (Cth), were written before the advent of the gig economy. As such laws often do not define an ‘employee’,¹³ the task of doing so has instead been undertaken by the courts.

In 2016, the Victorian Department of Economic Development, Jobs, Transport and Resources handed down the final report of the *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (the Report).¹⁴ The Report runs to over 400 pages and makes 35 Recommendations for reform.

Among the key recommendations, those addressed to insecure work and independent contracting are most relevant to the gig economy. The Report flags insecure work as an issue that has become ‘entrenched’ in the Australian economy.¹⁵ Having raised insecure work, the Report also notes that most of the recommendations for reform that were heard during the Inquiry are directly within the scope of the Federal Government, not the Victorian Government. The Report therefore focuses on factors pertaining to insecure work which can be influenced by the Victorian government, especially regarding the Government’s procurement and employment practices.¹⁶

Independent contracting did generate recommendations within the Report. The Report states that:

...there remain an indeterminate but not insignificant proportion of independent contracting arrangements which are not genuine, and are designed instead to disguise an employment relationship in order to avoid the regulation associated with that relationship.¹⁷

The Report goes on to state that Victoria’s ability to regulate in this area is hampered by the Federal Government’s *Independent Contractors Act 2006* (Cth).¹⁸ In that light, it recommends that Victoria advocates for clarification in the federal legislation. Meanwhile, the Report states that the courts have so far displayed flexibility in interpreting the validity of independent contract relationships. On that basis, the Report claims that further legislative reform is unnecessary.¹⁹ The Report therefore seems to recommend that legislative reform is necessary at the Federal level, but not at the Victorian level.

¹² Parliament of Australia, ‘[Select Committee on the Future of Work and Workers](#)’, Parliament of Australia website.

¹³ For example, the *Fair Work Act 2009* (Cth) does not define ‘employee’.

¹⁴ Department of Economic Development, Jobs, [Transport and Resources \(2016\) Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report](#), Melbourne, DEDJTR, 31 August.

¹⁵ *Ibid.*, p. 30.

¹⁶ *Ibid.*, pp. 34–36.

¹⁷ *Ibid.*, p. 345.

¹⁸ *Ibid.*, pp. 31–32; 346.

¹⁹ *Ibid.*, p. 345.

The findings of the Report are contrasted by a recent report published by the Australia Institute, which draws attention to what it argues is the incontrovertible problem of insecure work.²⁰ Whereas the Victorian Report refers to a series of consultations with stakeholders, the report by the Australia Institute bases its conclusions on data published by the ABS. Ultimately, the Australia Institute report argues that insecure work is a significant, multi-faceted issue, which faces Australia as a whole.²¹ According to the Australian Institute report, the gig economy is relevant to insecure work in its potential for work to be mischaracterised as independent contractor work instead of employee work. It goes on to say that it is also reflected in rates of casual work, part-time work and is relevant to issues like the protection of employee rights (for example, enterprise agreements).²²

This sentiment may be gaining traction. On 12 June 2018, the Fair Work Ombudsman commenced legal proceedings against food delivery service Foodora, alleging that the company was engaged in sham contracting which resulted in the underpayment of three workers.²³ The central issue will be whether the riders and drivers were employees or independent contractors. While that question will turn on the factual and practical relationship between Foodora and its riders and drivers, the result could have consequences for other gig economy businesses. Such consequences are envisaged by the Ombudsman, who sees the issue as being of 'significant public interest' and in need of going before a court for clarity.²⁴ Again, this desire to 'test' gig economy relationships in the courts reflects the fact that when drafted, employment laws did not envisage a gig-economy labour market.

²⁰ T. Carney and J. Stanford (2018) *The Dimensions of Insecure Work: A Factbook*, Manuka, The Australia Institute, May 29, p. 19.

²¹ *ibid.*

²² *ibid.*

²³ Fair Work Ombudsman (2018) 'Fair Work Ombudsman commences legal action against Foodora', Australian Government, press release, 12 June.

²⁴ *ibid.*

Labour rights

Labour classification

Scholars, workers' rights groups and critical commentators are uneasy about the contribution of the gig economy to a trend towards a casualised and on-demand labour market, with weak or non-existent income security.²⁵ Work conducted within the framework of the gig economy generally impedes the application of traditional labour regulations present in Australia.²⁶ Gig economy platforms and organisations have been criticised for the structure of work they provide, with work itself being 'time sensitive, algorithmically mediated, tightly controlled by platform owners, yet precarious.'²⁷ However, the majority of workers have been considered as independent contractors and not employees, and thus lose many of the rights held by employees. These rights typically include minimum wage, paid and sick leave, maximum weekly hours, notice periods, unfair dismissal protections and redundancy compensation.²⁸

The 2015 ACT Taxi Innovation Review outlined that such a system allows Uber, for example, to avoid providing service providers (drivers) with many standard working rights. As noted by UnionsACT, 'under Uber's current operating system the company [is able to deactivate] a worker without notice and entirely on the review of customers'.²⁹

A recent case by the Fair Work Commission (FWC) has confirmed that, in the case of Uber, drivers are not employees. The primary reason was the lack of a work-wages bargain agreement. While a definitive classification system and definition of sole traders working in the gig economy has not been achieved, the lack of an agreement between online platforms and service providers may currently mean that they are not employees under common law.³⁰ In order for service providers in the gig economy to become employees, a change of federal law would be required.³¹

In the FWC case, the driver in question had his service agreement with Uber terminated because of his failure to maintain a satisfactory driver rating. After bringing an unfair dismissal application he was found not to be an employee and thus had his application dismissed. The Deputy President of the FWC noted that a contract of employment is essentially a 'work-wages bargain', and 'in order to create such a contract there must be an obligation on the one side to perform the work or services under the contract and on the other side an obligation to pay for such work or services'.³² In the case of Uber drivers, the services agreement outlined that Uber provided 'lead – generation services' and other ancillary services and not a 'work-wages bargain'.

The FWC reviewed several indices of employment in order to distinguish an employee from an independent contractor.³³ These indices were control, equipment, uniform, GST and description of

²⁵ J. Kennedy et al. (2017) *Mapping the Melbourne Sharing Economy*, Melbourne Networked Society Institute, The University of Melbourne, p. 37.

²⁶ A. Stewart & J. Stanford (2017) 'Regulating work in the gig economy: What are the options?' in *The Economic and Labour Relations Review*, Vol. 28, issue 2, pp. 420 – 437.

²⁷ J. Kennedy et al. (2017) op. cit. p. 37.

²⁸ *ibid.*, p. 37.

²⁹ UnionsACT (2015) *Submission to the Treasury and Economic Development Directorate, 2015 ACT Taxi Innovation Review*, Canberra, Unions ACT, July, p. 4.

³⁰ Wolters Kluwer (2018) 'Uber, the Gig Economy and Legislative Change', WK website.

³¹ For more detail on the differences between employees and independent contractors. please see Table 1 in the Appendix.

³² Wolters Kluwer (2018) op. cit.

³³ The indicia of employment are set out in the case of *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

relationship. The Commission found that all of the indicia weighed in favour of an independent contractor relationship, namely:

- *control*—the driver has significant control in the way he conducted services;
- *equipment*—the driver had to provide his own car, smartphone and data plan;
- *uniform*—the driver didn't display, and was not allowed to display, Uber's name, logos or colours in his vehicle and wasn't required to wear a uniform;
- *GST*—the driver needed to pay his own GST; and
- *description of relationship*—the service agreement classified the relationship typical of independent contractors.³⁴

Given the decision, the Deputy President of the Commission outlined that the 'work-wages bargain' was developed before the gig economy came into existence, explaining that:

It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.³⁵

Thus, the current paradigm in Australia is that those earning income in the gig economy are classified as independent contractors rather than employees—missing out on many of the rights held by employees.

Superannuation

Superannuation is the key element of Australia's retirement savings system. The system was designed in the early 1990s and tends to cater to individual employees who work in stable and full-time employment. The system was not designed for workers with multiple employers or those who work as contractors. The emergence of the gig economy has changed the traditional 9-to-5 job market and has consequentially affected superannuation.³⁶ Workers in the gig economy—because of their classification as independent contractors—miss out on many of the benefits of super compared to employees:

- almost one in four self-employed Australians have no superannuation, compared to 7.2 per cent of employees;
- the average superannuation balance of self-employed workers tends to be lower than that of employees; and
- an average employee aged between 55-59 is likely to have a superannuation balance of about \$217,000, compared to a self-employed worker of the same age who is likely to have only \$110,000.³⁷

³⁴ Wolters Kluwer (2018) op. cit.

³⁵ *ibid.*

³⁶ N. Dyrenfurth (2018) *Super ideas: securing Australia's retirement income system*, John Curtin Research Centre, p. 13.

³⁷ *ibid.*, p. 14.

Current trends show that with an increase in the number of workers in the gig economy, there will be an increase in the amount of labour provided with little to no superannuation contributions paid.³⁸ Lower or no contributions for workers in the gig economy will equate to lower superannuation balances at retirement, reducing the efficacy of the superannuation system as a whole. There are further considerations regarding superannuation—for example, most workers only hold life insurance cover through superannuation. If current trends continue, a larger proportion of workers will be left without life insurance cover and increasing underinsurance. This could result in a consequential burden on Australia’s social security system.³⁹

Data shows that, due to behavioural biases, workers in the gig economy tend to contribute a low proportion of money to their superannuation account.⁴⁰ For example, the Association of Superannuation Funds of Australia outlines that:

Data on superannuation contributions of the self-employed provide an indication of the behaviour of people who operate as independent contractors. Data from the Australian Taxation Office (ATO) suggest that only around one-quarter of the self-employed made tax deductible contributions to their superannuation accounts in 2014–15. Other ATO data reveal that although the self-employed account for 10 per cent of the workforce, they only accounted for 4 per cent of total superannuation contributions in 2014–15.⁴¹

The superannuation system is indeed based on the concept that, in the absence of compulsion, people would contribute less or not at all to their superannuation.

There are two further issues that limit the superannuation benefits to workers participating in the gig economy. The first is the fact that employers are not required to provide super contributions for workers earning less than \$450 a month. Regardless of the number of jobs a worker has, if each employer pays less than \$450 a month, none of the workers are required to pay superannuation. Secondly, if a worker is considered to be an independent contractor, there is no requirement for an employer to pay them super contributions.⁴²

Thus, workers in the gig economy face lower super contributions—missing out the superannuation guarantee altogether—and, as a consequence, lower income levels in retirement. This trend, however, extends beyond the individual and has put pressure on Australia’s social security system, impacting society as a whole.

³⁸ A. Craston, Association of Superannuation Funds of Australia (2017) *Superannuation and the Changing Nature of Work: Discussion Paper*, Sydney, ASFA Research and Resource Centre, September.

³⁹ *ibid.*, p. 17.

⁴⁰ *ibid.*, p. 17.

⁴¹ *ibid.*, p. 17.

⁴² Australian Taxation Office (2015) ‘[Working out if you have to pay super](#)’, ATO website.

Taxation

The ATO has outlined the tax implications applicable to those who work within the framework of the gig economy.⁴³

Workers receiving payment through work conducted in the gig economy have their payments assessed as income, and are thus subject to income tax. The ATO outlines that assessable income earned in the gig economy includes:

- income earned from performing services for a fee, such as food delivery or ride sourcing;
- income from sharing forms of property or rent from a property; and
- income received from a business arranged or facilitated through a sharing economy platform.

If turnover is below the GST threshold of \$75,000 per year, workers are not required to register for GST. Special rules, however, apply for ride-sourcing enterprises, as the ATO classifies ride-sourcing as taxi-travel for GST purposes regardless of turnover. Ride-sourcing enterprises are required to:

- hold an ABN;
- register for GST from the first day of work; and
- pay GST on the full amount of every fare.⁴⁴

For those who are already registered for GST and receive income through the provision of goods and services within the gig economy, GST needs to be accounted for in these earnings. This means that if an individual is registered for GST because he or she has a ride-sourcing enterprise, he or she must also account for GST on goods and services provided in any area of the gig or sharing economy, e.g. renting out a room or parking space.

GST can also be applicable to registered facilitators when they are provided wholly from Australia or through an Australian business operating in Australia. The ATO outlines that an individual is generally able to claim a GST credit for the GST paid on service fees or commissions. Further, GST is applicable when services are provided from outside Australia. Service providers must apply GST if they have not provided the facilitator with an ABN and thus not registered for GST.

For example, these tax provisions would apply to a Deliveroo rider-partner in the following ways. Any income one receives through work as a rider-partner is considered to be income by the ATO and must be declared on tax returns.⁴⁵ Rider-partners are also required to have an ABN, as they are classified as paid contractors. This also means rider-partners are responsible for paying their own tax and arranging their own superannuation contributions.⁴⁶ Deliveroo rider-partners are not required to register for GST if they earn less than \$75,000 a year. This differentiates them from Uber drivers, for example, who need to register for GST even if they earn less than \$75,000 a year.

⁴³ Australian Taxation Office (2018) 'The sharing economy and tax', ATO website.

⁴⁴ *ibid.*

⁴⁵ Online Tax Return (2017) 'Deliveroo Tax Guide', Online Tax Return Website.

⁴⁶ Etax Accountants (date unknown) 'Deliveroo tax help: A tax guide for Deliveroo rider-partners', Etax Accountants website.

International jurisdictional comparison

In contrast to the Australian approach where work can be carried out by employees or independent contractors, other jurisdictions have taken a different approach. This is the case for the UK, which has introduced a third category of work. Meanwhile, in those jurisdictions which retain the two categories of work, the courts have interpreted gig economy contractual relationships differently. This section briefly examines categorisations of work in the UK, New Zealand, Canada and California.

United Kingdom

The UK has taken a different approach to Australia. In classifying work, there are three overarching categories: employee, worker and independent contractor. Employees are entitled to the most rights and independent contractors the least. Workers are entitled to minimum wage, paid holidays, statutory sick leave, rest breaks and protection from unlawful discrimination.⁴⁷ They are, however, not entitled to unfair dismissal rights or statutory redundancy pay.⁴⁸ The status of gig economy workers generally is currently unclear. Two recent cases are discussed below, which led to different outcomes. At the time of writing, a recent UK Supreme Court decision has been handed down in which a plumber working in the gig economy was held to be entitled to workers' rights.⁴⁹ The cases below have been selected as the businesses involved also operate in Australia, under similar contractual relationships with workers.

The Uber case

In 2016, a group of 19 drivers working for Uber challenged their employment status in the United Kingdom Employment Tribunal.⁵⁰ The drivers claimed that they were employed by Uber as workers, and as such were entitled to workers' associated rights.⁵¹ They were successful in this claim. In its reasoning, the Tribunal closely scrutinised the written contract between Uber and the drivers working on its 'platform' and compared the contract to the working relationship in practice. The Tribunal found that Uber exercises a great deal of control over its drivers. Some instances of this include:

- an initial, though not interrogative, interview with driver applicants;⁵²
- management of the types of vehicles that Uber will accept;⁵³
- penalties for drivers who decline three trips in a row (referred to by the company as a 'Penalty Box Warning') and who cancel accepted trips;⁵⁴
- management of the routes drivers are expected to take, with the onus being on the driver to prove that a departure from a suggested route was justified if a passenger claims a refund;⁵⁵ and

⁴⁷ C. Hall and W. Fussey (2018) '[Will employees and contractors survive in the gig economy?](#)' New Zealand Law Society website, 29 March.

⁴⁸ *ibid.*

⁴⁹ C. Pistas (2018) '[UK Supreme Court rules plumber in gig economy entitled to worker rights](#)', *Reuters*, 13 June.

⁵⁰ *Aslam & Ors v Uber BV & Ors* (minimum wage : paid leave : whistle-blowing) [2016] UKET 2202551/2015. Upheld in *Uber v Aslam & Ors* UKEAT/0056/17/DA, 20 November 2017, at [7].

⁵¹ *ibid.*

⁵² *Ibid.*, at [40]

⁵³ *Ibid.*, at [43] – [46].

⁵⁴ *Ibid.*, at [51] – [53].

⁵⁵ *Ibid.*, at [54].

- using the rating system to control drivers. For example, at the time of the decision, experienced drivers with a rating of less than 4.4 out of 5 were removed from the platform and their accounts deactivated.⁵⁶

Overall, the Tribunal found that the contractual terms on which Uber relied in the hearing did not ‘correspond with the practical reality’.⁵⁷ The language used by the Tribunal was strong:

The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common ‘platform’ is to our minds faintly ridiculous...drivers do not and cannot negotiate with passengers ... They are offered and accept trips strictly on Uber’s terms.⁵⁸

The Tribunal also stated:

... it is, in our opinion, unreal to deny that Uber is in business as a supplier of transportation services. Simple common sense argues to the contrary...the Respondents’ case here is, we think, incompatible with the agreed fact that Uber markets a ‘product range’. One might ask: Whose product range is it if not Uber’s? The ‘products’ speak for themselves: they are a variety of driving services. Mr Aslam [plaintiff] does not offer such a range.⁵⁹

In evidence given to the Tribunal, one plaintiff stated that during some work he was paid GBP5 per hour, whereas the minimum wage for drivers aged over 25 was then GBP7.20 per hour. This represents payment of 70 per cent of the minimum wage for work which the Court decided should attract the minimum wage.

In 2017, Uber’s appeal of the Employment Tribunal decision was rejected.⁶⁰ At the time of writing, a further appeal had not yet been heard. Overall, the case suggests that current employment law in the UK is capable of regulating the gig economy—and that under the current laws, gig economy workers may be entitled to a wider range of rights.

The Deliveroo case

The UK Central Arbitration Committee recently heard a similar case in which the Independent Workers’ Union of Great Britain sought recognition of rights to collective bargaining with Deliveroo on behalf of Deliveroo riders.⁶¹ An integral part of the hearing concerned the employment status of riders, who claimed they were workers.⁶² Deliveroo claimed that riders it engaged were instead ‘suppliers’ and as such were entitled to rights as independent contractors.⁶³ While the case is similar to the Uber case above, it differs crucially in that the statute in question was different. The nature of the relationship was therefore subject to slightly different questions of fact and law.

Having noted that formal difference, the arguments made by both parties went to the same points as those raised in the Uber case. For example, the Committee found that at the time of the hearing, Deliveroo also conducted an initial interview with potential riders.⁶⁴ In contrast to the Uber case, the Committee found that while logged into the app, Deliveroo riders were free to accept and reject

⁵⁶ *ibid*, at [55].

⁵⁷ *ibid*, at [90].

⁵⁸ *ibid*, at [90].

⁵⁹ *ibid*, at [89].

⁶⁰ R. Davies (2017) ‘Uber loses appeal in UK employment rights case’, *The Guardian*, 11 November.

⁶¹ *Independent Workers’ Union of Great Britain (IGWB) and RooFoods Limited TA/ Deliveroo*, Central Arbitration Committee 14 November 2017 (TUR1/985(2016)).

⁶² *ibid*, at [18].

⁶³ *ibid*, at [11]–[13].

⁶⁴ *ibid*, at [43].

'offers' at any time.⁶⁵ Further, there were no consequences for not accepting work.⁶⁶ Riders were however expected to login to the app and work at least once every three months.⁶⁷ Deliveroo riders were also expected to provide their own clothing and equipment necessary to complete the work, and were explicitly permitted to wear 'whatever kit you want to'.⁶⁸ Persistently slow deliveries over time were a cause for termination. In its reasoning, the Committee did not provide examples of what period of time, and how slow the deliveries within that period, would justify termination.⁶⁹

In deciding on the nature of the relationship, the Committee was convinced by one key finding of fact, which it saw as outweighing all others. This was the contractual right to substitute work to another rider, once accepted by the rider through his or her account on the app—in effect, the right to subcontract driving services to almost any other person (with limited restrictions). Interestingly, the Committee did identify a potential contradiction in the evidence pertaining to this element of the relationship. This concerned the tension between the intensive on-boarding and training of new riders, against the rider's right to substitute at any time another rider in his or her place.⁷⁰ If riders were allowed to substitute their labour for any untrained rider of their choosing, then why would Deliveroo require its riders to be trained in the first place? Despite this 'substitution conundrum', the Committee decided that it was immaterial. It was not the Committee's place to evaluate the sense of the contract, but instead, whether the contractual terms lived up to the practical reality.⁷¹ In this instance, the Committee found a genuine ability by riders to substitute. The Committee stated:

Even if they did it in order to defeat this claim and in order to prevent the Riders from being classified as workers, then that too was permissible: all that mattered was the terms of the agreement, analysed in the holistic and realistic way set out in *Autoclenz* [an authority on evaluation of contracts].⁷²

This finding distinguished the case from other matters involving Uber (discussed above) and CitySprint, a courier delivery business. In the Uber and CitySprint matters, the Employment Tribunal found that a similar contradiction in the contractual right to substitute and the practical ability to do so made the contractual right untenable.⁷³

Overall, the Arbitration Committee found against the Union (and by extension the riders). The riders were not to be classified as workers under either of the two possible statutory definitions and so were not entitled to worker rights such as minimum wage, holiday pay or annual leave. A further claim is due to be heard in the Employment Tribunal in July 2018. The result of that claim will be significant, particularly given that the Tribunal recently found against Uber.

⁶⁵ *Ibid.*, at [56].

⁶⁶ *Ibid.*, at [76].

⁶⁷ *Ibid.*, at [67].

⁶⁸ *Ibid.*, at [55].

⁶⁹ *Ibid.*, at [76] and [84].

⁷⁰ *Ibid.*, at [98]–[99].

⁷¹ *Ibid.*, at [98]–[99].

⁷² *Ibid.*, at [99].

⁷³ For example, part of the reasoning in the City Sprint case centred on a lack of evidence that couriers had successfully substituted in the past, and examples were raised in which requests to substitute work were rejected by the platform. See: *Dewhurst v CitySprint UK Ltd* [2016] UKET 2202512/2016.

Taylor Review

Alongside developments in case law, the UK has recently reviewed its labour law in the context of new technology and new forms of work. Part of that context also concerns a recent downturn which has seen almost static wage growth from 2016–18.⁷⁴

In 2017, a report commissioned by the UK Government was handed down. *Good Work: The Taylor Review of Modern Working Practices* (the ‘Taylor Review’) made 53 recommendations that aim to improve the labour market in the UK so that work is decent, fair and fulfilling for workers.⁷⁵ As the report addresses recent changes in the labour market, some of the recommendations are directly relevant to the gig economy.

The Taylor Review has been strongly attacked by some academics on the basis of its methodology, execution and outcomes.⁷⁶ The criticism focuses on the lack of transparency around the process by which public consultations were held. Unlike other reviews, the proceedings have not been published, so it is not possible to read the recommendations of the Taylor Review against the views of the public who were consulted.⁷⁷ Similarly, the Taylor Review is limited in that it does not provide in-depth reasons for its analysis. These methodological concerns mean it is difficult to determine whether the Taylor Review is based on academic or expert evidence, or ‘common sense’.⁷⁸

In its response to the Taylor Review, the Government has stated its intention to adopt the recommendation that the ‘worker’ category be replaced with a new category of worker, which will give clarity to the position of platform-based workers. This new category is the ‘dependent contractor’, who will be eligible for worker rights but will not be an employee. This change was recommended on the basis that dependent contractors are the most vulnerable group of workers to suffer from one-sided flexibility in the employer-worker relationship.⁷⁹ Dependent contractors are not employees, but nor are they ‘genuinely self-employed’.⁸⁰

While the Government has stated that intention, at the time of writing the process has moved to more consultation and it is unclear as to when or how the recommendations will be implemented. From the wording of the recommendations in the Taylor Review, it is also unclear as to whether the Uber and Deliveroo cases were considered. As detailed reasons for the recommendations in the Taylor Review are not given in the report, it is unclear why the ‘dependent contractor’ category is necessary, particularly given the Uber case’s finding that the worker category was sufficiently defined to make a finding in that case.

New Zealand

New Zealand operates under the Australian approach in that there are two classifications of work: employee work and independent contractor work. Employees and contractors are defined according to the *Employment Relations Act 2000* (NZ).⁸¹ However, the definition is subject to ‘a considerable

⁷⁴ Office for National Statistics (2018) ‘[Analysis of real earnings and contributions to nominal earnings growth, Great Britain: May 2018](#)’, ONS website.

⁷⁵ M. Taylor, G. Marsh, D. Nicol and P. Broadbent (2017) ‘[Good Work: The Taylor Review of Modern Working Practices](#)’, UK Government Department for Business, Energy & Industrial Strategy, July.

⁷⁶ K. Bales, A. Bogg and T. Novitz (2018) ‘Voice’ and ‘Choice’ in Modern Working Practices: Problems With the Taylor Review’, *Industrial Law Journal* 47(1), 46–75.

⁷⁷ *ibid.*, p. 54.

⁷⁸ *ibid.*

⁷⁹ M. Taylor, G. Marsh, D. Nicol and P. Broadbent (2017) *op. cit.*, p. 9.

⁸⁰ *Ibid.*, p. 36.

⁸¹ *Employment Relations Act 2000* (NZ), ss 6, 69B.

overlay of Judge-made law'.⁸² Prior to the 2017 election, the Minimum Wage (Contractor Remuneration) Amendment Bill 2017 was defeated. The Bill sought to introduce a minimum wage for contractors. Meanwhile, the government has stated an intention to introduce statutory support and legal rights for "dependent contractors" who are effectively workers under the control of an employer, but who do not receive the legal protections that are currently provided to employees under the law'.⁸³ At the time of writing, draft legislation outlining how this change might take effect has not been released.

A recent case

In New Zealand, the courts have adopted a sympathetic approach to the status of gig economy workers who have claimed employee rights. A recent decision held that despite signing contracts as independent contractors, workers were employees.⁸⁴ In a case involving LSG Sky Chefs New Zealand, the plaintiffs were workers seeking a declaration that they were not contractors, but employees. In its reasoning, the Court noted that the plaintiffs were supervised by the employer, wore company uniforms and attended meetings as company employees.⁸⁵ Similarly, the 'contractors' were not registered for GST, did not market their services to other businesses and did not employ others—factors which would normally indicate independent contractor status. The Court also used strong language in making its 'fundamental' finding:

It is fanciful to suggest that either plaintiff was in business on their own account. They did not advertise their services, employ others, hold business assets, issue invoices or keep records. They could not delegate their work to anyone else, they enjoyed no scope for other business activities and they were exposed to no risk (and conversely no potential benefit) in terms of loss and profit.⁸⁶

Again, the Court was interested in the ability of the workers to substitute their labour, which was clearly not part of the contractual relationship; instead, it was accepted that the workers were expected to conduct the work personally.⁸⁷

The Court also stated that the traditional binary relationship between employer and employee has recently been challenged, due to innovation in both work and working relationships.⁸⁸ In the face of these changes, the Court also stated that each case should be assessed on its facts.⁸⁹ In this sense the Court adopted a similar approach to that of the Employment Tribunal in the Uber case referenced in the United Kingdom, above. Namely, that despite a seemingly independent contractual relationship being agreed by the parties in both cases, the practical reality of the working relationship gave rise to greater worker rights than those of independent contractors.

⁸² *McDonald v OnTrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223, at [51], cited in: *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 48 (11 May 2017), at [19].

⁸³ Labour (undated) 'Workplace Relations Policy', Labour website (accessed 24 May 2018).

⁸⁴ *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150; see also *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721, [2005] ERNZ 372.

⁸⁵ *Ibid.*, at [61]–[85].

⁸⁶ *Ibid.*, at [85].

⁸⁷ *Ibid.*, at [87].

⁸⁸ *Ibid.*, at [91].

⁸⁹ *Ibid.*, at [31]–[39].

Canada

Canada also utilises two categories of work: employee and self-employed individual.⁹⁰ In determining which category is applicable, 'the facts of the working relationship as a whole decide the employment status'.⁹¹

Canada is a federal jurisdiction. In Quebec, the rules are slightly different to other Canadian jurisdictions. The federal government does outline general rules around classification of employment, particularly regarding taxation.⁹² However, the factors which go to determining the nature of the working relationship will usually be decided by the jurisdiction within which the matter is heard.⁹³ In determining the nature of the relationship, the key question is 'whether the person is engaged to carry out services as a person in business on his or her own account, or as an employee'.⁹⁴ A two-step approach is used to answer this question. Firstly, the parties' intentions in entering the contract are established. Secondly, the practical nature of the working relationship is established. Matters which are relevant to this question are:

- the level of control the payer has over the worker's activities;
- whether the worker or payer provides the tools and equipment;
- whether the worker can subcontract the work or hire assistants ;
- the degree of financial risk the worker takes;
- the degree of responsibility for investment and management the worker holds;
- the worker's opportunity for profit; and
- any other relevant factors, such as written contracts.⁹⁵

In January 2018, a matter was brought before the Superior Court of Justice, Ontario. The plaintiff there sought to bring a class action against Uber, seeking a ruling that drivers of Uber are employees and as such are entitled to relevant employment law rights. The case was primarily concerned with how the dispute should be handled in arbitration. The case is relevant in that the Court stated that the working relationship between Uber and its drivers *could* be an employment relationship. Similarly it could be an independent contractor relationship. Here, the Court confirmed that a finding on that issue should be conducted by a 'fact-based determination' of the actual working relationship, as opposed to the terms of the written agreement between the parties.⁹⁶ The Court held that the matter should go to arbitration in the Netherlands (wherein the Uber entity with the power to arbitrate the dispute resides), and as such no finding was made on the nature of the working relationship.

⁹⁰ Canada Revenue Agency (undated) '[Employee or Self-employed?](#)', Government of Canada, RC4110(E) Rev. 17, p. 4. Note: while one case refers to a 'dependent contractor' as a standalone classification, there is no other mention of a dependent contractor in the case law or in the [Employment Standards Act 2000](#) (Can). See: *Heller v. Uber Technologies Inc.*, [2018 ONSC 718 \(CanLII\)](#), at [47].

⁹¹ Canada Revenue Agency (undated) '[Employee or Self-employed?](#)', op. cit., p. 5.

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ *Heller v. Uber Technologies Inc.*, op. cit. See also: *Braiden v. La-Z-Boy Canada Ltd.*, [2008 ONCA 464 \(CanLII\)](#); *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001 SCC 59 \(CanLII\)](#); *Belton v. Liberty Insurance Co. of Canada* (2004), [2004 CanLII 6668 \(ON CA\)](#), 72 O.R. (3d) 81 (C.A.); *Montreal v. Montreal Locomotive Works Ltd.*, [1946 CanLII 353 \(UK JCPC\)](#), [1947] 1 D.L.R. 161 (P.C.).

California

In April 2018, the Supreme Court of California handed down an unpublished decision that lays out three criteria which an employer must meet in order to justify classifying a worker as an independent contractor instead of an employee. These conditions are:

- (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
- (B) that the worker performs work that is outside the usual course of the hiring entity's business; and
- (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.⁹⁷

If those conditions are not met, then workers must be classified as employees.⁹⁸ This decision has the potential to significantly impact the viability of Californian gig economy businesses, which could be forced to increase pay and provide workers with the rights to which they are entitled—rights such as annual leave, sick leave and holiday pay. The decision also goes to a key tension in the gig economy as an economic model, by indicating that the gig economy may be driven not by technological innovation but by the exploitation of labour and labour laws.⁹⁹

The District Attorney of San Francisco has recently subpoenaed the employment records of Uber and another rideshare service, Lyft. The subpoenas have been issued in order to determine the accuracy of how the businesses classify their workers, and to confirm that workers are being provided the rights guaranteed under that classification.¹⁰⁰ At the time of writing, the case is ongoing.

⁹⁷ *Dynamex Operations West, Inc. v. Superior Court*, S222732 available at: (<http://www.courts.ca.gov/opinions/documents/S222732.PDF>) (last visited Monday June 4, 2018), p. 7.

⁹⁸ *ibid.*

⁹⁹ M. Rawling and E. Schofield-Georgson (2018) 'Industrial legislation in Australia', *Journal of Industrial Relations* 60(3) p. 393; C. F. Wright (2018) 'Austrian industrial relations in 2017', *Journal of Industrial Relations* 60(3), p. 293; J. Fudge (2017) 'The future of the standard employment relationship: Labour law, new institutional economics and old power resource theory', *Journal of Industrial Relations* 59(3), p. 387; P. Findlay and P. Thompson (2017) 'Contemporary work: Its meanings and demands', *Journal of Industrial Relations*, 59(2), p. 132.

¹⁰⁰ J. White (2018) 'Uber and Lyft subpoenaed for employment records after landmark gig economy ruling', *Independent*, 29 May; H. Somerville (2018) 'San Francisco subpoenas Uber, Lyft on driver classification', *Reuters*, 30 May.

Appendix

Table 1. Classifying employees and contractors

Employee	Contractor
<p>Ability to subcontract/delegate: the worker can't subcontract/delegate the work – they can't pay someone else to do the work.</p>	<p>Ability to subcontract/delegate: the worker can subcontract/delegate the work – they can pay someone else to do the work.</p>
<p>Basis of payment – the workers is paid either:</p> <ul style="list-style-type: none"> • for the time they worked • a price per item or activity • a commission. 	<p>Basis of payment: the worker is paid for a result achieved based on the quote they provided. A quote can be calculated using hourly rates or price per item to work out the total cost of the work.</p>
<p>Equipment, tools and other assets:</p> <ul style="list-style-type: none"> • the business provides all or most of the equipment, tools and other assets required to complete the work, or • the worker provides all or most of the equipment, tools and other assets required to complete the work, but the business provides them with an allowance or reimburses them for the cost of the equipment, tools and other assets. 	<p>Equipment, tools and other assets:</p> <ul style="list-style-type: none"> • the worker provides all or most of the equipment, tools and other assets required to complete the work • the worker does not receive an allowance or reimbursement for the cost of this equipment, tools and other assets.
<p>Commercial risks: the worker takes no commercial risks. The business is legally responsible for the work done by the worker and liable for the cost of rectifying any defect in the work.</p>	<p>Commercial risks: the worker takes commercial risks, with the worker being legally responsible for their work and liable for the cost of rectifying any defect in their work.</p>
<p>Control over the work: the business has the right to direct the way in which the worker does their work.</p>	<p>Control over the work: the worker has freedom in the way the work is done, subject to the specific terms in any contract or agreement.</p>
<p>Independence: the worker is not operating independently of the business. They work within and are considered part of the business.</p>	<p>Independence: the worker is operating their own business independently of the business. The worker performs services as specified in their contract or agreement and is free to accept or refuse additional work.</p>

Source: Australian Taxation Office (2017) 'Difference between employees and contractors', ATO website.

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