Symposium Article

ELRR

The Economic and
Labour Relations Review
2017, Vol. 28(3) 420–437

DOI: 10.1177/1035304617722461
journals.sagepub.com/home/elrr
SAGE

Regulating work in the gig economy: What are the options?

Andrew Stewart
The University of Adelaide, Australia

Jim Stanford
Centre for Future Work at the Australia Institute, Australia; McMaster University, Canada

Abstract
Paid work associated with digital platform businesses (in taxi, delivery, maintenance and other functions) embodies features which complicate the application of traditional labour regulations and employment standards. This article reviews the extent of this type of work in Australia, and its main characteristics. It then considers the applicability of existing employment regulations to these 'gig' jobs, citing both Australian and international legislation and case law. There is considerable uncertainty regarding the scope of traditional regulations, minimum standards and remedies in the realm of irregular digitally mediated work. Regulators and policymakers should consider how to strengthen and expand the regulatory framework governing gig work. The article notes five major options in this regard: enforcement of existing laws; clarifying or expanding definitions of 'employment'; creating a new category of 'independent worker'; creating rights for 'workers', not employees; and reconsidering the concept of an 'employer'. We review the pros and cons of these approaches and urge regulators to be creative and ambitious in better protecting the minimum standards and conditions of workers in these situations.

JEL code: J88

Keywords
Digital work, gig jobs, labour regulation, precarity, risk

Corresponding author:
Andrew Stewart, Adelaide Law School, The University of Adelaide, Ligertwood Building, North Terrace, Adelaide, SA 5005, Australia.
Email: andrew.stewart@adelaide.edu.au

Introduction

The economy of tomorrow, we are informed breathlessly by journalists, will not consist of 'jobs', but rather 'gigs'. People won't go to work and they won't have an employer. Instead, they will perform tasks, coordinated through faceless online platforms and compensated through digital transfers. This gigantic marketplace might make it easier than ever for buyers and sellers to connect. But it could also facilitate a ruthless race to the bottom, as self-employed 'freelancers' compete in a larger, more competitive labour market to support themselves. How will workers' traditional rights and protections fare in this brave, digital new world?

The growth of the gig economy, typified by online platforms and isolated independent workers, poses fundamental challenges to traditional models for regulating work and setting minimum standards. It is not clear that existing regulations apply to gig workers, let alone that they can be effectively enforced in the digital economy. In fact, in some cases, evading traditional regulations (not to mention taxes[1]) appears to have been a key rationale for establishing digital businesses in the first place.

This article will consider the implications of the gig economy for labour regulation in Australia and the potential applicability of existing laws and regulations to gig work. We begin by defining such work and reviewing existing research regarding its scope and composition. We describe how the regulation of labour in the gig economy is complicated by the triangle of relations between workers, digital intermediaries and final end-users. We then discuss the applicability of existing labour regulations to gig work. In some cases, existing regulations can apply (if they are enforced ambitiously), but in others, they may not. We conclude by identifying five broad options for strengthening and extending regulations so that gig workers might achieve the same protections and minimum standards that apply to other workers. We urge regulators and policymakers to be ambitious and creative in devising instruments consistent with this goal.

Defining and measuring 'gig work'

The popular perception of digitised, irregular work, or 'gigs', applies to many different potential functions, across a range of industries, and involving many types of business. The very concept is thus rather imprecise. Many different terms are invoked to describe this type of work – often using rose-coloured euphemisms to make the phenomenon sound exciting and positive (Sundararajan, 2016). Hence, the 'sharing economy', 'crowdsourcing' or the 'collaborative economy'.

Despite the wide variety of situations and terminology, several key features typify most forms of gig work.[2] Gig workers typically face irregular work schedules, driven by fluctuations in demand for their services. In most positions, the worker provides some or all of the capital equipment used directly in their work – from a bicycle for food delivery, to more complex and expensive transportation or computing equipment in other jobs. Many gig workers also provide their own place of work: at home, in their car or elsewhere. Most jobs are compensated on a piecework basis, with payment defined according to specific tasks rather than per unit of time worked. Finally, gig jobs are usually understood to be organised around some form of digital mediation, like a web-based platform.

https://doi.org/10.1177/1035304617722461 Published online by Cambridge University Press

Digital platforms can be categorised along various dimensions. For example, the Productivity Commission (2016) defines three broad task-oriented categories: matching platforms (which connect workers and end-users, or buyers and sellers), platforms which allow analysis and sorting (e.g. by providing referrals and reviews), and platforms which allow value to be added directly to a product (by facilitating the performance of incremental online work). Another common distinction is made between 'labour platforms' (which organise the performance of productive tasks) and 'capital platforms' (which facilitate the sale or rent of assets): see Farrell and Greig (2016). Even this distinction is not perfect, however, since many 'capital' platform functions also require the application of productive labour (such as temporary room rentals through Airbnb, which involve cleaning, maintenance and other service functions).

Among labour platforms, De Stefano (2015) makes a useful distinction between two more categories:

1. '*Crowdwork*' *systems*, involving bidding for and completing work through open websites. These platforms usually involve jobs that can be completed and delivered online. The platform's role is typically limited to matching workers with the end purchasers of their services.
2. '*Work-on-demand*' *systems*, involving more traditional, physical or 'real world' tasks and jobs. These jobs are organised through online platforms managed by companies which may retain control over important aspects of the work (including setting prices and standards, and selecting and managing the workforce).

These systems have important differences. For example, the means of payment is usually decentralised in crowdwork systems, but centralised in work-on-demand systems. The implications of these different platforms for workers and labour regulation are also quite different: work-on-demand intermediaries generally take on more responsibility associated with the selection, supervision and discipline of gig workers, than is the case with crowdsourcing platforms, and hence may ultimately be found to possess more of the expected characteristics of an 'employer' than those which facilitate crowdwork.

The core qualitative characteristics of gig work are not especially new – even though the technology utilised to coordinate, manage and compensate the work certainly is. Many existing occupations are already characterised by irregular scheduling, piecework compensation or the requirement that workers provide capital equipment and/or a place to work. Indeed, each of these features can be traced back to the earliest days of capitalism (Finkin, 2016; Stanford, 2017; Valenduc and Vendramin, 2016). Digital techniques for organising modern gig jobs are evolving rapidly, but that does not imply that the organisation of gig work, or the associated regulatory challenges, are new.

In many ways, gig work is similar to other forms of precarious work (Lewchuk, 2017); hence, the regulatory responses may need to be similar as well. As De Stefano (2015) points out, both crowdwork and app-based work on demand exhibit many features or trends found in the wider labour market. These include casualisation, income instability and (in some instances) the disguise of what is in substance an employment arrangement. As we discuss further below, they also involve the same complications of a triangular relationship with the client and intermediary that are presented by labour hire arrangements.

Research into the size and characteristics of gig employment is still in its infancy. There are no official statistics on gig work, but varied studies using different methodologies are beginning to compile a composite portrait of gig workers, and the conditions and challenges they face. Most research suggests that the proportion of workers involved in stereotypical gig platform jobs is very small – under 1% of the workforce. For example, using banking data, Farrell and Greig (2016) estimate that 0.4% of New York residents worked on a labour platform in any given month in 2015; another 0.6% received income from a capital platform. Katz and Kruger (2016) also estimate that about 0.5% of American workers worked on or through platforms in the same year. A few estimates find a larger prevalence of gig work. For example, Huws and Joyce (2016a, 2016b, 2016c) have conducted online surveys in the UK, Sweden and Germany. They estimate that between 3% and 4% of adults perform work through online platforms in any month.[3]

In Australia, Minifie (2016) estimates that less than 80,000 Australians, or 0.5% of adults, regularly perform work on or through a digital platform (i.e. more than once per month). Deloitte Access Economics (2017) finds that 92,000 residents of New South Wales (around 1.5% of the adult population) earned money from some digital platform during 2015–2016 – although only a minority of those could be considered regularly occupied in platform work (as distinct from selling assets or other non-labour revenue-generating activities). Sectoral and occupational employment data also indicate that the sorts of jobs performed in the most common platform applications (functions such as passenger transport, courier, repair and maintenance, and personal services) account for a small share of total employment. By all of these measures, then, the importance of gig work to overall employment is likely overstated in popular commentary – at least for now.

Most gig workers are not engaged full-time in their activity (Mishel, 2015); gig work is commonly used as a supplement for other incomes. Average incomes can be low, especially for those who work only part-time. Analysis of payments data by New (2017) suggests that 55% of those earning money through digital platforms earn less than AUD100 per month, and 85% less than AUD500 per month. In Australia, Kaine et al. (2017) find that hourly incomes for part-time ride-sharing workers in Australia fall well below legal minimum wages for employees.

Ironically, the best studied platform-based business – Uber, the ride-sharing service – is not very representative of general business practices or working conditions across the broader gig economy. Uber's rapid growth, its aggressive lobbying of governments and its high equity valuations have all spurred tremendous interest from journalists, policymakers and researchers. However, Uber driving differs significantly from many other forms of gig work, with the intermediary demonstrating a higher degree of managerial control over the hiring and firing, direction, supervision and payment of workers than is true of most digital platforms. Hence, conclusions based on the experience of Uber (including precedent-setting regulatory and legal actions aimed at the firm) should be applied only very cautiously to other instances of gig work.

Uber operates in just one sector: transportation services. Other gig-type applications are more complicated, often covering a wide range of services and products (as is the case with multi-task platforms like Freelancer or Airtasker). On the other hand, the size, profile and homogeneity of Uber's business have made it a logical target for legal actions

seeking to clarify the regulatory context for gig work. In terms of its status as an 'employer', Uber claims it is not in the transportation services industry, and hence does not employ its 'driver-partners'. According to the company, its drivers are the ones who provide transportation services. Uber is simply providing them with information and payments technology. That distinction is currently being challenged, slowly and unevenly, through legal actions in numerous jurisdictions.[4]

Inevitably, efforts to clarify Uber's regulatory status will reflect cross-national differences in law and jurisprudence – as will be also true of other digital platforms. In the USA, for example, Uber has been quite lawfully requiring prospective drivers to sign away their rights to legal redress in favour of a private arbitration system (Liebman and Lyubarsky, 2017: 52–57). But in most jurisdictions, individuals cannot contract out of legal rights in this manner; it is certainly not possible in Australia (McCallum et al., 2013). In contrast, a more relevant precedent for the litigation that will likely occur in Australia is a ruling by a British Employment Tribunal in October 2016.[5] In this decision, which is under appeal, two Uber drivers were indeed found to be 'workers' and hence entitled to minimum wages, holiday pay and other benefits under British employment legislation. The tribunal delivered a scathing assessment of Uber's use of 'fictions' and 'twisted language' in characterising its operations. It was 'not real to regard Uber as working "for" the drivers … the only sensible interpretation is that the relationship is the other way round'. Uber was considered to be running a transportation business, with the drivers providing the labour through which it delivered its services (to *its* clients, not the drivers) and generated its profits.[6] This decision has important implications for regulatory strategies in various jurisdictions, which we consider further below.

The triangular relationships of gig work

One key aspect of gig work that complicates the task of labour regulation is the triangular relationship between the worker producing or performing the service, the end-user of the service (who may be an individual consumer or another business) and the digital intermediary which facilitates the whole process. This is illustrated in Figure 1.

The relationship between the worker and the intermediary is governed by a contract describing the terms and conditions of the worker's participation in the process (top left arrow of Figure 1), usually including granting the intermediary firm the right to supervise, discipline or discharge the worker or prevent their use of the platform. Typically, the worker also bears most or all of the risk associated with providing necessary equipment and tools, interruptions in service by the platform, irregularity in income flows, deactivation of the service or the relationship and more.[7] This 'demutualisation' of risk – whereby the major risks of the business are shifted to the worker – enhances the vulnerability and instability faced by gig workers (Kaine and Josserand, 2016; Slee, 2016).

There is also a contract governing the relationship between the intermediary and the end-user of its services (top right arrow of Figure 1). This contract incorporates the standard terms and conditions which must be accepted by the end-user when they log into the digital service or platform. Typically, it limits the obligations and responsibilities of the intermediary for any problems that may occur in the production or delivery

https://doi.org/10.1177/1035304617722461 Published online by Cambridge University Press

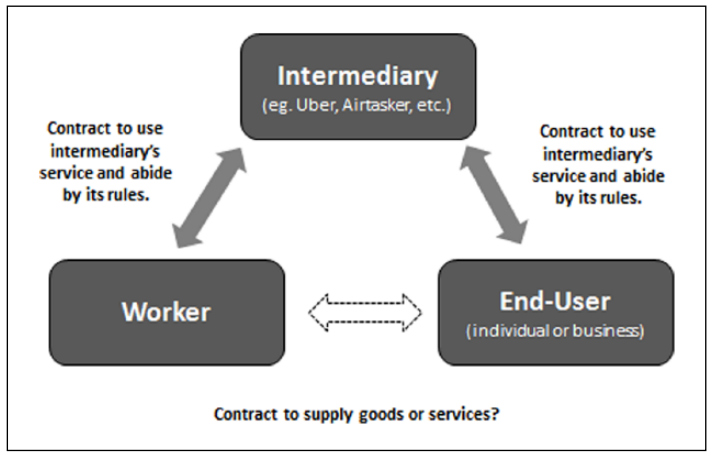

Figure 1. The triangular relationships of the gig economy.

process. In fact, end-users are rarely aware of the extent to which the intermediary's responsibilities are limited by these contracts.

The relationship between the gig worker and the ultimate user of their services (bottom arrow in Figure 1) is more ambiguous. It depends on the business model adopted by the intermediary, and how it is characterised by regulators. According to Uber, for example, the drivers to whom it provides technological support very definitely enter into contracts with their (the drivers') customers. But in the British litigation mentioned earlier, this suggestion was given short shrift. It was 'absurd' to suggest that the drivers and their passengers were entering into binding agreements despite not knowing each other's identity, and with Uber effectively dictating both the route taken and the fee paid.[8]

Of course, even if this finding survives appeal, it will not mean that a similar view will be taken of the relationship between workers and end-users connecting through other types of platform. If a platform provider is truly performing a mere matching service, then we would expect the worker and the end-user to negotiate details regarding the provision of the relevant services and the price to be paid for them. Where this actually happens, it supports the idea that there really is a contract between those parties – though whether that contract is of a commercial character, or should be regarded as one of employment, may be another matter.

The application of current Australian labour regulation to gig work

There are several existing statutes and regulations in Australia which could apply to gig workers and provide some protection in their dealings with both intermediaries and end-users. Of course, these regulations were not designed with gig work specifically in mind, so that their relevance and power are uncertain. It will require ongoing testing and clarification to better understand their scope and effectiveness.

https://doi.org/10.1177/1035304617722461 Published online by Cambridge University Press

A key legal issue in this regard is uncertainty as to the legal status of gig workers. Most of the obligations and protections set out in the main federal labour statute, the Fair Work Act 2009, apply only to employees. This includes provisions governing minimum wages, limits on hours of work, entitlements to paid leave, protections against unfair dismissal, and most collective bargaining rights.

The Fair Work Act 2009, like other statutes of its kind, does not explicitly define an 'employee'. Instead, it is left to a set of common law principles developed by the judiciary to determine whether a worker should be classified as such (Stewart et al., 2016: Ch. 8). Two requirements must be satisfied. The first is that the worker is undertaking to provide services pursuant to a contract with the person or organisation said to be their employer. If no contract exists between the parties, there can be no employment relationship. This explains why a labour hire worker sent by an agency to work for a client of the agency cannot ordinarily be an employee of that client. The only contract the worker generally has is with the agency; hence, if anyone is an employer, it will be the agency (see Stewart et al., 2016: 256–261).

Second, any contract must have the characteristics of employment, as opposed to a commercial arrangement between independent businesses. In determining whether a worker is an employee, the courts consider a range of 'indicia' or factors. These include the right to control how the work is done, the extent of the worker's integration into the other party's business, methods of payment, who is responsible for providing essential tools or equipment, the worker's freedom to work for others and their ability to delegate or sub-contract tasks. The test is an impressionistic one: there is no set number or combination of indicia that will dictate a conclusion that a worker is or is not an employee.[9]

For many years, it was relatively easy for businesses to draft contracts that carefully presented (or disguised) a worker as an 'independent contractor', no matter how little evidence there might be that the worker had a business of their own. But in recent times, Australia's federal courts have become much more inclined to look at the substance or practical reality of an arrangement, as opposed to the formal terms agreed by the parties. Coupled with a willingness by agencies such as the Fair Work Ombudsman to enforce statutory provisions prohibiting certain forms of 'sham contracting', it has become both harder and riskier for businesses to evade employment obligations in this way (Johnstone and Stewart, 2015; Roles and Stewart, 2012). Some judges (though by no means all) are now going so far as to say that a worker *cannot* be an independent contractor unless there is evidence that they are an entrepreneur who provides their labour pursuant to a business of their own. This might require evidence that they engage repetitively with clients, advertise their services, employ others, have business assets and/or use 'basic transactional systems' for invoicing, keeping records, budgeting and so on.[10]

There is an obvious potential to use this approach to challenge the common assumption that gig economy workers are 'self-employed' or operating as independent contractors. Indeed, there is a striking parallel here with the reasoning recently used by the UK Employment Tribunal to find that the Uber drivers were working for the multinational's business, not their own – regardless of what their contracts said. Technically, the case turned on the application of statutory definitions that are not replicated in legislation such as the Fair Work Act. But it seems likely that, if asked, the tribunal would also have

found the drivers to be employees at common law. It will be interesting to see whether an Australian court takes a similar view.

Even on the broadest view of what constitutes 'employment', however, it is hard to believe that all gig workers could be regarded as employees in the common law sense. The platforms less at risk of being classified as employers are those that allow a greater degree of autonomy as to how required tasks are framed and the terms on which they are performed. If anyone is to be an employer here, it is more likely to be the end-user. But even then, they would need to be sourcing labour for a business or enterprise of their own, and there would have to be a contract with the worker. It is far harder to predict how the courts might analyse such an arrangement.

By contrast with statutes such as the Fair Work Act, the drafting of Australia's work health and safety (WHS) laws reflects a deliberate and ambitious effort to extend protection beyond the confines of the employment relationship (Johnstone and Stewart, 2015). The harmonised WHS Acts in most jurisdictions apply to any 'worker', defined broadly as anyone carrying out work in any capacity, who has been engaged by a 'person conducting a business or undertaking' (PCBU), or whose work is directed or influenced by a PCBU. This approach was motivated precisely by a desire to ensure that the vertical disintegration of production – what Weil (2014) has termed the 'fissuring' of the workplace – does not allow businesses to shed their responsibilities for health and safety. The obvious importance of maintaining high WHS standards in the face of changing work organisation and supply chain relationships motivated regulators to cast their net so widely. However, even the application of broadly defined WHS coverage to gig workers will need to be clarified, and the specific merits of these cases will vary. For example, while the WHS laws can apply to work performed in any location, including a person's home, they still require a sufficient relationship between a worker and a PCBU. It will not always be clear, for example, that a crowdworker hired through an intermediary is engaged *in*, or working *for*, that intermediary's business, while the end-user can only be a PCBU if they have a business of their own. So even WHS protections, with their deliberately inclusive applicability, may need clarification and strengthening to ensure that more gig workers are protected by their provisions. Other health and safety-related protections may also be unavailable to gig workers. For example, worker's compensation provisions typically apply narrowly to traditionally defined 'employees'. Hence, many gig workers will likely be excluded from such entitlement without specific extensions.

Another potential avenue for regulating gig work lies in laws which allow contract terms to be challenged and, if found by a court to be unfair, varied or cancelled (Riley, 2017). For workers not classified as employees, there are two main options. Part 3 of the Independent Contractors Act (2006) applies to contracts for the performance of services by a contractor, or to arrangements that are collateral to such a contract. It may or may not be possible for a gig worker to bring their contract with an intermediary within this framework. A more likely candidate is Part 2–3 of the Australian Consumer Law, in Schedule 2 of the Competition and Consumer Act (2010). Originally applicable only to consumer contracts, it has recently been amended to cover standard form contracts for the supply of services either by or to a 'small business'.[11] It is highly likely that these provisions could be used to protect gig workers from unfair terms in the contracts they sign with their respective platforms. Indeed, the Australian Competition and Consumer

https://doi.org/10.1177/1035304617722461 Published online by Cambridge University Press

Commission (ACCC, 2016) seems to have assumed as much by including Uber in a review of standard form contracts used in selected industries.

What each of these existing regulations and protections confronts is the problem of enforcement. Gig workers are likely to work in isolated, individual settings, and will typically have only limited awareness of their legal and regulatory rights. The gig workforce includes disproportionate numbers of young workers and immigrants: two groups with particularly limited knowledge about their rights, and how to defend them (Kaine et al., 2017). Recent experience has indicated that many employers in Australia, even some large ones, regularly violate labour laws (including minimum wages, loading, penalty rates and working hours provisions), and young immigrant workers are the most common victims of these abuses (see, for example, Senate Education and Employment References Committee, 2016). Better enforcement of existing regulations will require more ambitious efforts to educate workers about their rights, and stronger compliance efforts by regulators.[12] Without that, enforcement of even existing, uncertain regulatory protections for gig workers will be spotty. Any strategies to strengthen regulatory protections for gig workers must therefore take seriously the education and enforcement dimensions of the task.

One obvious way to help overcome these problems is for gig workers to organise collectively. They may, for instance, establish their own mechanisms to review potential end-users and distribute information about the pay and other conditions offered on particular platforms. An example of this is the Turkopticon website, created for workers using Amazon Mechanical Turk (Silberman and Irani, 2016). More conventionally (from a labour law perspective), they may seek to join established trade unions, or form new associations to provide some degree of voice and representation. There are signs of this starting to happen in various countries, Australia included (Stone, 2017; Wood, 2016; Workplace Express, 2017c). One problem, however, is that if gig workers are not classified as employees, they cannot access the various legal supports provided by statutes such as the Fair Work Act. This means, among other things, that any attempt to put collective demands will risk breaching the restrictive trade practices provisions in Part IV of the Competition and Consumer Act 2010.[13] The ACCC can in certain circumstances authorise a group of self-employed workers to collectively negotiate the conditions on which they are engaged. But there is no institutional support for such bargaining, and the mechanism is unlikely to be available for boycotts or other forms of concerted pressure (McCrystal, 2007). Apart from limited initiatives in particular industries, Australia has no equivalent to the laws in various Canadian provinces that permit groups of 'dependent contractors' to access the bargaining rights and processes accorded to employees (McCrystal, 2014).[14]

Another important factor complicating the application of current labour regulations to gig work is geography. Whenever work is performed across a national or sub-national border, regulation becomes more complicated. In the case of gig workers whose functions are performed electronically, this cross-border dimension becomes especially difficult. How would regulations apply to work that is performed in Australia, but delivered electronically to a customer or employer located in another country? Do existing regulations apply when the intermediary firm does not have a physical or legal presence in Australia? And even if existing regulations are deemed to be relevant, how can they be

enforced across borders? This geographical challenge will confront any effort to regulate gig work – whether on the basis of existing regulatory instruments, or utilising some of the alternative strategies which we explore in the next section.

Options for extending regulation

It is clear from the previous section that existing laws can provide some protection for gig workers, depending on their status. Clarifying and where possible extending those protections, and enforcing them more consistently on behalf of all vulnerable workers (including gig workers), should be an important priority for policymakers. But given the disruptive nature of digital technologies and platform-based business models, extending the reach of instrumental state regulation should also be considered, in order to strengthen the level of protection for gig workers. In this regard, at least five broad options might be considered.[15]

1. Confirm and enforce existing laws

The first option is to incrementally expand the reach of the existing legal framework through the use or threat of test cases. This is already occurring, with litigation being launched by or on behalf of gig workers in several countries. In Australia, Airtasker has agreed to recommend that payments for work performed through its platform meet minimum wage benchmarks, in the face of a threat by Unions NSW to take legal action over the issue (Minter, 2017; Workplace Express, 2017a). Other advocacy organisations are considering similar challenges to other platform businesses, while the Fair Work Ombudsman has announced that it is investigating the treatment of Uber's Australian drivers (Workplace Express, 2017b). In almost all cases, the litigation that has been instituted or threatened involves endeavouring to establish that gig workers are employees – but therein lies a problem. The degree of control exerted by either intermediaries or end-users over some workers, and the absence of any meaningful indicators that those workers have businesses of their own, may well make a finding of employment possible. But this is unlikely to be true of every type of crowdwork or on-demand work performed in the gig economy.

2. Clarify or expand definitions of employment

The creeping extension of regulatory protections to new forms of paid work that has been accomplished through recent case law may not be sufficient to provide acceptable levels of protection to crowdwork and on-demand workers. A faster and more direct extension of these provisions could be accomplished through the explicit expansion of the concept of employment. This could involve considering a broader set of activities as equivalent to employment, so that the category more clearly covers work that is organised, supervised and facilitated by a digital intermediary. At the very least, such workers should be given the same rights to engage in collective bargaining as employees, without falling foul of competition laws.

Alternatively or additionally, certain kinds of intermediation could be classified as 'labour hire' functions, in which case regulations governing the operation of labour hire

https://doi.org/10.1177/1035304617722461 Published online by Cambridge University Press

agencies might come into play. This approach would be more effective still if it were allied with stronger regulation of labour hire providers, as has been recently proposed in Victoria and Queensland.[16] Another method to ensure that gig workers benefit from protections for employees would be to further limit the ability of employers to artificially recategorise employees as contractors. For example, the Productivity Commission (2015), among others, has recommended strengthening the prohibitions against 'sham contracting' in the Fair Work Act.

3. Create a new category of 'independent worker'

Harris and Krueger (2015) argue that the features of gig work are so novel, and the practice so structurally different from traditional employment, that an entirely new regulatory approach is required. Independent, freelance or 'platform' workers would be defined, and basic standards of fair treatment described and enforced. These protections would presumably focus on the contractual arrangements between platform workers and their respective intermediaries (the upper left arrow in Figure 1), but might also apply to their relationships with end-users. However, other commentators (such as De Stefano, 2015 and Minifie, 2016) oppose this strategy on the grounds that it would further diversify and complicate the regulatory framework governing work. This approach would certainly seem to open further possibilities for regulatory avoidance – for example, by providing employers with another opportunity to misclassify workers (into this new category of non-standard work), in order to evade employment responsibilities. A more workable idea might be to adopt a new category that is not confined to platform workers, but covers other types of 'dependent contractor' as well (Cherry and Aloisi, 2017). But this is really taking us back to option 2.

4. Create rights for workers, not employees

The most radical option would be to abandon employment status entirely as the trigger for regulating work, and apply appropriate protections to anyone performing 'work'. This more far-reaching vision for regulatory reform would follow the example set in the Australian WHS (work health and safety) legislation. Those laws endeavour, as described earlier, to override distinctions in the specific form of the working relationship, in order to ensure that anyone who 'works' is afforded basic health and safety protections. A similar approach could be used to reconfigure other labour regulations, so that it becomes largely irrelevant whether or not a worker is an employee in the traditional sense. There is certainly no lack of academic support for the idea of recognising a 'law of work', or a legal framework for the regulation of 'personal work contracts' in some broader sense (see, for example, Freedland and Kountouris, 2011; Johnstone et al., 2012: Ch. 8). But while some rights (such as protection from discrimination) lend themselves naturally to a broad application, others would require significant adaptation or redesign to apply to every type of worker. This is especially true of those which carry a financial burden, such as paying a minimum wage, or contributing to a superannuation scheme, or providing paid leave.

5. Reconsider the concept of an employer

A further suggestion has been to focus not so much on the status of a worker, but what it means to be an 'employer'. Prassl and Risak (2016) explore the different functions that an employer may be said to have. Some platforms, such as Uber, arguably exercise all of those functions. But in other cases, they may be split between different entities – most obviously, the intermediary and the end-user. Where this is the case, the authors suggest that a gig worker should be regarded as having different employers for different legal purposes – or for some purposes, none at all. The approach is conceptually elegant. But again there are likely to be considerable difficulties in applying it, without wholesale regulatory redesign. It is notable that in the more general context of labour hire, Australia has not yet embraced the concept of 'joint employment' (Stewart et al., 2016: 259–261).

Conclusion

The Productivity Commission (2016: 69) has spoken of the benefits that gig work can bring, in terms of increased flexibility, the capacity to supplement or smooth income, and greater opportunities for some demographic groups. But it has also warned of the potential of 'a major shift in employment relations, with workers bearing more risk associated with insecure employment'. As Graham et al. (2017) point out, at the conclusion of their study of digital workers in sub-Saharan Africa and South-east Asia,

> The bargaining power of workers is undermined by the size and scope of the global market for labour; the anonymity that the digital medium affords is a double-edged sword, facilitating some types of economic inclusion, but also allowing employers to discriminate at will; disintermediation is occurring in some instances, but the combination of the existence of a large pool of people willing to work for extremely low wages and the effects of the importance of rating and ranking systems, is also encouraging enterprising individuals to create highly mediated chains; and those mediated and opaque chains are, in turn, restricting the abilities of workers to upgrade within them. (p. 158)

Others see the challenge in even starker terms. According to Unions NSW (2016),

> The increased prevalence of digitally enabled, gig-based work is actively fragmenting labour standards and disintegrating traditional jobs into short term tasks with no employment safety nets.
>
> … Such an archaic model of work is neither innovative nor is it removing traditional barriers to efficiency. Rather, the model seeks 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. (pp. 1, 11)

It is vital that policymakers recognise the challenges posed by the expansion of the gig economy to the existing regime of labour regulation – a regime which is already under pressure from the expansion of other forms of non-standard, contingent and nominally independent work. As work through digital platforms and other facets of the gig

economy becomes more widespread, it is clear that a growing number of gig workers will face working conditions, insecurity and compensation that most of Australian society would consider unacceptable. And so long as demand conditions in labour markets remain chronically inadequate, desperate workers will be pressured by economic circumstance to put up with those conditions. This is why proactive labour regulation remains essential, as the European Parliament (2017) has recently reaffirmed, to support the conditions and fairness of work across the whole spectrum of precarious, insecure work. The emergence of digital platforms requires an especially ambitious response to ensure that the regulatory regime is not left behind by these new ways of organising, directing and compensating work.

We have identified five broad options for strengthening labour regulations in response to the challenge of the gig economy. In terms of the three-way relationship between the digital intermediary firm, the worker and the end-user illustrated in Figure 1, most of these regulatory options can be understood as addressing the same side of the triangle: namely, the upper left link between the intermediary business and the worker. This confirms that clarifying and regulating that relationship must be the central focus of regulatory responses to the expansion of gig work. Option 1, confirming and enforcing existing law, seeks to confirm that this relationship does indeed constitute a form of employment according to existing statute and definitions. Option 2, clarifying or expanding the definition of employment, would broaden that category to be sure of capturing the somewhat different relationship between a digital intermediary and its workers. In contrast, option 3, creating a new category of worker, would define new rights and protections tied explicitly to the particular circumstances of gig workers. Option 4 would sidestep the challenge of defining the employment status of these workers entirely, confirming that they are entitled to the protection of regulation by virtue of the productive work they perform, regardless of the precise nature of their relationship to the intermediary. Finally, option 5 would reconceive what it means to be an 'employer', making it possible for a gig worker to have different employers for different purposes.

Under any of these options, regulatory innovation is necessary to ensure that the blurring of the relationship between intermediary and worker that has been a central feature of most platform-based business models does not deny their workers of the sorts of protections that have been considered basic rights in Australian society. Some strategies seem especially promising, others less so. But each provides interesting insight into the ways in which the gig economy is currently under-regulated, and each proposes new criteria by which those regulatory gaps could be closed. In our judgement, researchers, policymakers and regulators should be eclectic and open-minded in pursuing any potential avenue for extending regulatory protections to gig work and workers.

Without adjusting and strengthening labour regulations and safety nets to reflect new practices of gig work, the prospect of building an inclusive, fair labour market – already challenged by the preponderance of insecure, precarious employment forms – will be set back all the more. Active, innovative strategies of labour regulation are essential if the positive potential embodied in new digital technologies is to be reflected in improved human welfare. The alternative is to stand by and allow working arrangements to degrade into a no-holds-barred vision of 'crowd-based capitalism' (Sundararajan, 2016), with all the hardship that model would entail.

Funding

The author(s) received no financial support for the research, authorship and/or publication of this article.

Notes

1. Concern over loss of fiscal revenues has been a key motivation for many regulatory responses to the rise of platform businesses; see, for example, UK Department for Business, Energy and Industrial Strategy (2016) and UK House of Commons Work and Pensions Committee (2017).
2. See Stanford (2017) for more discussion and references on the characteristics of digital work and its historical antecedents.
3. The online sampling methodology used for this research may result in an overrepresentation of gig workers by virtue of their greater likelihood to have participated in the survey.
4. As to the US lawsuits to date, see Liebman and Lyubarsky, 2017: 47–53; Cherry and Aloisi, 2017: 644–646.
5. *Aslam v Uber BV*, UK Employment Tribunal, Case Nos 2202551/15 and others 28 October 2016.
6. See Note 5, [87], [92].
7. A good example of this risk transfer is provided by the contract which Uber's Australian drivers have reportedly been required to sign (Wilkins, 2016). It contains some provisions (such as those giving Uber the right to change any clause at any time) which, even if taken as part of a 'commercial arrangement', would not likely survive challenge under the unfair terms provisions discussed later in the article.
8. See Note 5, [91].
9. See, for example, *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 at 229–31.
10. See, for example, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 at [178]–[186]; but compare *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [61]–[66].
11. See Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015, which took effect in November 2016. A small business is one with less than 20 employees, and the contract must have a total value of less than AUD300,000 (or AUD1m for a multi-year contract).
12. Note the proposals in the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 to lift penalties for serious breaches of the Fair Work Act, expand the Fair Work Ombudsman's investigative powers and make it easier to hold franchisors or parent companies responsible for contraventions by franchisees or subsidiaries.
13. Compare section 51(2)(a) of the 2010 Act, which exempts agreements concerning 'the remuneration, conditions of employment, hours of work or working conditions of employees'.
14. See further Cherry and Aloisi 2017, discussing whether the Canadian laws on dependent contractors, or their equivalents in Italy and Spain, might provide a model for regulating gig economy work.
15. Compare Prassl and Risak (2017) proposing a different typology of possible regulatory strategies.
16. See Forsyth, 2016; Labour Hire Licensing Bill (2017) (Qld).

References

Australian Competition and Consumer Commission (ACCC) (2016) *Unfair Terms in Small Business Contracts: A Review of Selected Industries*. Canberra, ACT, Australia: ACCC.

Available at: https://www.accc.gov.au/publications/unfair-terms-in-small-business-contracts (accessed 3 July 2017).

Cherry MA and Aloisi A (2017) 'Dependent contractors' in the gig economy: a comparative approach. *American University Law Review* 66(3): 635–689.

Competition and Consumer Act (2010) Australian Government Federal Register of Legislation. Available at: https://www.legislation.gov.au/Details/C2017C00062 (accessed 3 July 2017).

De Stefano V (2015) *The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowdwork and Labour Protection in the 'Gig-Economy' (Conditions of Work and Employment Series 71)*. Geneva: International Labour Organisation. Available at: http://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—travail/documents/publication/wcms_443267.pdf (accessed 3 July 2017).

Deloitte Access Economics (2017) *Developments in the Collaborative Economy in NSW*. Sydney, NSW, Australia: Deloitte Touche Tohmatsu. Available at: https://www2.deloitte.com/au/en/pages/economics/articles/review-collaborative-economy-nsw.html (accessed 3 July 2017).

European Parliament (2017) European social rights: workers' protection needs to be extended to new jobs. Press release, 19 January. Available at: http://www.europarl.europa.eu/news/en/press-room/20170113IPR58040/european-social-rights-workers-protection-needs-to-be-extended-to-new-jobs (accessed 3 July 2017).

Fair Work Act (2009) Australian Government Federal Register of Legislation. Available at: https://www.legislation.gov.au/Details/C2014C00031 (accessed 3 July 2017).

Fair Work Amendment (Protecting Vulnerable Workers) Bill (2017) Parliament of Australia. Available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5826 (accessed 3 July 2017).

Farrell D and Greig F (2016) *Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility*. New York: JPMorgan Chase & Co. Available at: https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf (accessed 3 July 2017).

Finkin M (2016) Beclouded work in historical perspective. *Comparative Labor Law & Policy Journal* 37(3): 578–603.

Forsyth A (2016) Victorian inquiry into the labour hire industry and insecure work. Final Report, Industrial Relations Victoria, Melbourne, VIC, Australia. Available at: http://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry (accessed 3 July 2017).

Freedland MR and Kountouris N (2011) *The Legal Construction of Personal Work Relations*. Oxford: Oxford University Press.

Graham M, Hjorth I and Lehdonvirta V (2017) Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods. *European Review of Labour and Research* 23(2): 135–162.

Harris S and Krueger A (2015) *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The 'Independent Worker. The Hamilton Project (Policy Brief 2015)*. Washington, DC: Brookings Institution. Available at: https://www.brookings.edu/wp-content/uploads/2016/07/modernizing_labor_laws_for_twenty_first_century_work_policy_brief.pdf (accessed 3 July 2015).

Huws U and Joyce S (2016a) Size of Germany's 'gig economy' revealed for the first time. Crowd Working Survey, University of Hertfordshire, Hatfield and UNI Europa, Brussels, November. Available at: http://www.uni-europa.org/wp-content/uploads/2016/11/crowd_working_survey_Germany.pdf (accessed 3 July 2017).

Huws U and Joyce S (2016b) Size of Sweden's 'gig economy' revealed for the first time. Crowd Working Survey, University of Hertfordshire, Hatfield and UNI Europa, Brussels, March. Available at: http://www.uni-europa.org/wp-content/uploads/2016/03/crowd-working-survey-swedenpdf.pdf (accessed 3 July 2017).

Huws U and Joyce S (2016c) Size of the UK's 'gig economy' revealed for the first time. Crowd Working Survey, University of Hertfordshire, Hatfield and UNI Europa, Brussels, February. Available at: http://www.feps-europe.eu/en/publications/details/363 (accessed 3 July 2017).

Independent Contractors Act (2006) *Australian Government Federal Legislation*. Available at: https://www.legislation.gov.au/Details/C2016C00818 (accessed 3 July 2017).

Johnstone R, McCrystal S, Nossar I, et al. (2012) *Beyond Employment: The Legal Regulation of Work Relationships*. Sydney, NSW, Australia: The Federation Press.

Johnstone R and Stewart A (2015) Swimming against the tide? Australian labour regulation and the fissured workplace. *Comparative Labor Law & Policy Journal* 37(1): 55–90.

Kaine S and Josserand E (2016) Workers are taking on more risk in the gig economy. *The Conversation*, 6 July. Available at: https://theconversation.com/workers-are-taking-on-more-risk-in-the-gig-economy-61797 (accessed 3 July 2017).

Kaine S, Oliver D and Josserand E (2017) Precarity in the gig-economy: the experience of ride-share drivers. In: *Association of Industrial Relations Academics in Australia and New Zealand Conference*, Canberra, ACT, Australia, 8–10 February.

Katz LF and Krueger AB (2016) *The rise and nature of alternative work arrangements in the United States, 1995–2015*. NBER Working paper no. 22667, 29 March. Washington, DC: National Bureau of Economic Research. Available at: https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf (accessed 3 July 2017).

Labour Hire Licensing Bill (2017) (Queensland). Available at: www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2017/5517T798.pdf (accessed 3 July 2017).

Lewchuk W (2017) Precarious jobs: where are they, and how do they affect well-being? *Economic and Labour Relations Review* 28(3): 402–419.

Liebman WB and Lyubarsky A (2017) Crowdworkers, the law and the future of work: the US. In: Waas B, Lyubarsky A and Kezuka K (eds) *Crowdwork–A Comparative Law Perspective*. Frankfurt: Bund-Verlag, pp. 24–141.

McCallum R, Riley J and Stewart A (2013) Resolving disputes over employment rights in Australia. *Comparative Labor Law & Policy Journal* 34(4): 843–876.

McCrystal S (2014) Collective bargaining beyond the boundaries of employment: a comparative analysis. *Melbourne University Law Review* 37(3): 662–698.

McCrystal S (2007) Collective bargaining by independent contractors: challenges from labour law. *Australian Journal of Labour Law* 20(1): 1–28.

Minifie J (2016) *Peer-to-peer pressure: policy for the sharing economy*. Report no. 2016–7, 13 April. Melbourne VIC, Australia: Grattan Institute. Available at: https://grattan.edu.au/report/peer-to-peer/ (accessed 3 July 2017).

Minter K (2017) Negotiating labour standards in the gig economy: the case of airtasker and unions NSW. *Economic and Labour Relations Review* 28(3): 438–454.

Mishel L (2015) Uber is not the future of work. *The Atlantic*, 16 November. Available at: https://www.theatlantic.com/business/archive/2015/11/uber-is-not-the-future-of-work/415905/ (accessed 3 July 2017).

New C (2017) How much are people making from the sharing economy? In: *Earnest Blog*, 13 June. Available at: https://www.earnest.com/blog/sharing-economy-income-data/ (accessed 26 June 2017).

Prassl J and Risak M (2016) Uber, Taskrabbit, & Co: platforms as employers? Rethinking the legal analysis of crowdwork. *Comparative Labor Law & Policy Journal* 37(3): 619–651.

Prassl J and Risak M (2017) The legal protection of crowdworkers: four avenues for workers' rights in the virtual realm. In: Meil P and Kirov V (eds) *Policy Implications of Virtual Work*. Cham: Springer, pp. 273–295.

Productivity Commission (2016) *Digital disruption: what do Governments need to do?* Research paper, 15 June. Canberra, ACT, Australia: Productivity Commission. Available at: http://www.pc.gov.au/research/completed/digital-disruption/digital-disruption-research-paper.pdf (accessed 3 July 2017).

Productivity Commission (2015) *Workplace relations framework*. Inquiry Report no 76, 21 December. Canberra, ACT, Australia: Productivity Commission. Available at: http://www.pc.gov.au/inquiries/completed/workplace-relations/report (accessed 3 July 2017).

Riley J (2017) Regulating work in the 'gig economy'. In: Rönnmar M and Julén Votinius J (eds) *Festskrift Till Ann Numhauser-Henning*. Lund: Juristförlaget, pp. 669–683.

Roles C and Stewart A (2012) The reach of labour regulation: tackling sham contracting. *Australian Journal of Labour Law* 25(3): 258–283.

Senate Education and Employment References Committee (2016) *A national disgrace: the exploitation of temporary work visa holders*. Report, 17 March. Canberra, ACT, Australia: Parliament of Australia. Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Report (accessed 3 July 2017).

Silberman MS and Irani L (2016) Operating an employer reputation system: lessons from Turkopticon, 2008–2015. *Comparative Labor Law & Policy Journal* 37(3): 505–541.

Slee T (2016) *What's Yours Is Mine: Against the Sharing Economy*. New York: OR Books.

Stanford J (2017) The resurgence of gig work: Historical and theoretical perspectives. *Economic and Labour Relations Review* 28(3): 382–401.

Stewart A, Forsyth A, Irving M, et al. (2016) *Creighton and Stewart's Labour Law*. 6th ed. Sydney, NSW, Australia: The Federation Press.

Stone KVW (2017) Unions in the precarious economy: how collective bargaining can help gig and on-demand workers. *The American Prospect*, 21 February. Available at: http://prospect.org/article/unions-precarious-economy (accessed 3 July 2017).

Sundararajan A (2016) *The Sharing Economy: The End of Employment and the Rise of Crowd-based Capitalism*. Cambridge, MA: MIT Press.

Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act (2015) *Australian Government Federal Register of Legislation*. Available at: https://www.legislation.gov.au/Details/C2015A00147 (accessed 3 July 2017).

UK Department for Business Energy and Industrial Strategy (2016) Taylor review on modern employment practices launches. Press Release, 30 November. Available at: https://www.gov.uk/government/news/taylor-review-on-modern-employment-practices-launches (accessed 28 June 2017).

UK House of Commons Work and Pensions Committee (2017) *Self-employment and the Gig Economy*. Thirteenth Report of Session 2016–2017, 1 May. London: House of Commons. Available at: https://www.publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/847.pdf (accessed 3 July 2017).

Unions NSW (2016) *Innovation or Exploitation: Busting the Airtasker Myth*. Sydney, NSW, Australia: Unions NSW. Available at: https://d3n8a8pro7vhmx.cloudfront.net/unionsnsw/pages/3135/attachments/original/1474529110/Unions_NSW_Report_into_Airtasker.pdf?1474529110 (accessed 3 July 2017).

Valenduc G and Vendramin P (2016) *Work in the Digital Economy: Sorting the Old from the New*. European Trade Union Institute Working paper 2016.03, 5 April. Brussels: European Trade Union Institute. Available at: https://www.etui.org/Publications2/Working-Papers/Work-in-the-digital-economy-sorting-the-old-from-the-new (accessed 3 July 2017).

Weil D (2014) *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*. Cambridge, MA: Harvard University Press.

Wilkins G (2016) The Uber contract explained: 'I would be loath to sign it'. *Sydney Morning Herald*, 26 May. Available at: http://www.smh.com.au/business/workplace-relations/the-uber-contract-explained-i-would-be-loathe-to-sign-it-20160523-gp25vc.html (accessed 3 July 2017).

Wood A (2016) It's a matter of time: can Deliveroo deliver collective bargaining for the gig economy? Oxford Internet Institute, University of Oxford, 16 August. Available at: https://www.oii.ox.ac.uk/blog/its-a-matter-of-time-can-deliveroo-deliver-collective-bargaining-for-the-gig-economy/ (accessed 3 July 2017).

Workplace Express (2017a) FWC gets Airtasker disputes gig. *Workplace Express*, 1 May. Available at: https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=55591

Workplace Express (2017b) FWO investigating Uber's compliance with workplace laws. *Workplace Express*, 28 June. Available at: https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55792

Workplace Express (2017c) Promise of more Uber strikes. *Workplace Express*, 12 April. Available at: https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=55543

Author biographies

Andrew Stewart is the John Bray Professor of Law at the University of Adelaide. His main interests lie in employment law and workplace relations, contract law and intellectual property. He is the author of reference texts on employment law and intellectual property law. He is part of three teams awarded Australian Research Council funding: a Discovery Grant to examine the regulation of post-secondary work experience, a Linkage Grant to study the Fair Work Commission's role in facilitating workplace cooperation and a Linkage Infrastructure, Equipment and Facilities Grant to help develop a new online database of employment and industrial law materials.

Jim Stanford is the founding Director for The Australia Institute's Centre for Future Work. He served for over 20 years as Director of Policy with Unifor, Canada's largest private-sector trade union (formerly the Canadian Auto Workers) and continues to advise the union, as well as continuing in a fractional appointment as Harold Innis Industry Professor in Economics at McMaster University in Hamilton, Canada. He is also an Honorary Professor of Political Economy at the Department of Political Economy at the University of Sydney.

https://doi.org/10.1177/1035304617722461 Published online by Cambridge University Press