



Black Economy Taskforce – A sharing economy reporting regime

Unions NSW Submission

22 February 2019

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Introduction

1. Unions NSW is the peak body for trade unions and union members in NSW and has over 65 affiliated unions and Trades and Labour Councils representing approximately 600,000 workers across the State. Affiliated unions cover the spectrum of the workforce in both the public and private sector.
2. Unions NSW acknowledges the importance of compliance with the taxation system. Taxes fund government services and infrastructure and can be used as a tool to reduce inequality. It is important all workers and businesses in Australia pay their fair share of tax and that the ATO and Australian government have effective mechanisms available to ensure compliance.
3. However, the proposals outlined in the *Discussion Paper* fail to acknowledge the actions of gig-economy platforms who engage in tax minimisation, wage theft and the deliberate avoidance of Australian workplace laws. Instead the *Paper* takes aim at workers in the gig-economy, who because of a loop-hole in employment law, are earning as little as \$6.67 an hour.¹
4. Unions NSW does not support the *Discussion Paper's* recommendation to compel platform companies to provide the ATO with a record of all payments made to workers engaged on their platform.
5. The most effective and fairest way of ensuring tax compliance within the gig-economy is for industrial laws to be amended to afford gig-economy worker's rights and protections. The current industrial relations system is letting workers in the gig-economy down by allowing large multi-national companies make money off the back of a workforce with no bargaining rights, no access to minimum wages, no worker's compensation coverage and no minimum employment standards. The government should be focused on the taxation and wage theft records of gig-economy companies before aggressively pursuing low paid workers for taxation payments.

¹ Transport Workers Union, 'Snapshot: On-Deman Food Delivery Riders', 2018, available at: <http://www.twu.com.au/on-demand-workers-survey/>

The Gig-economy

6. Unions NSW acknowledges Treasury’s discussion paper is focused on a broad definition of the sharing economy. The Unions NSW submission is focused on the use of gig-economy platforms used to procure work (such as Airtasker, Uber and Deliveroo), often referred to as ‘labor platforms’ or the ‘gig-economy’, as opposed to ‘capital platforms’ used for purchases (such as Ebay and Air Bnb).²

7. Unions NSW defines the gig-economy as digitally enabled ‘marketplaces’ where companies use websites and apps to pair workers with tasks or jobs that occur both online and offline. The gig-economy can be defined by five key aspects:
 - Work is fragmented into specific individual tasks or jobs and workers are engaged on a task by task basis with no guarantees of continuous work.
 - Work is performed by individual workers, but may be commissioned by an individual or a business.
 - Labour transactions between workers and individuals/businesses are facilitated by a for-profit company who charge users for this service (eg, Airtasker, Uber). These transactions are performed through web based applications which are managed and controlled by the for-profit company.
 - Workers are treated as independent contractors by the facilitating companies and are not afforded any employment protections or minimum standards in the performance of their work.
 - The price charged for each job is set by the facilitating company or by the commissioning customer. Payment is collected through the platform, and compensation (net of the platform’s margin) is then disbursed to the worker.

8. The gig-economy is expanding across a number of traditional industries. Currently some of the major players include Uber³, GoCatch⁴, Taxify⁵, Ola⁶ (taxi and courier

² See Farrell and Grieg, 2016, *Paychecks, Paydays and the Online Platform Economy: Big Data on Income Volatility*. New York: JP Morgan Chase and Co.

³ <https://www.uber.com/>

⁴ <https://www.gocatch.com/>

⁵ <https://taxify.eu/en-au/>

⁶ <https://www.olacabs.com/au>

services), Whizz⁷ and Helping⁸ (home cleaning services), Airtasker⁹ and Freelancer¹⁰ (range of jobs and ‘tasks’), Deliveroo¹¹ and UberEats¹² (food delivery), care.com¹³(child care, aged care and household help), Mable¹⁴ (aged and disability support).

9. A significant concern with gig-economy companies is their treatment of workers as independent contractors and not employees. Genuine independent contractors are governed by commercial rather than employment law, thus bypassing requirements for minimum hourly rates of pay, employment safety nets, worker’s compensation, superannuation. Workers are also left to manage their own taxation.¹⁵
10. Current employment legislation recognises the phenomenon of employers disguising employees as independent contractors, also known as sham contracting. The *Fair Work Act* provides for a contravention for misrepresenting employment as an independent contracting arrangement.¹⁶
11. The key differential between a genuine independent contractor and an employee is the level of control the worker has over the performance of their work and their reliance on another company or individual for the commissioning of that work.¹⁷ The test of employment looks at the totality of the relationship between the worker and employer and is drawn heavily from common law.
12. Despite legislative and common law provisions, the use of sham contracting remains an ongoing problem both in the ‘traditional’ and gig-economy, with employers taking advantage of the broad interpretation of the legal definition for independent contractors. For some companies, the use of independent contractors, is a deliberate

⁷ <https://whizz.com.au/>

⁸ <https://www.helping.com.au/>

⁹ <https://www.airtasker.com/>

¹⁰ <https://www.freelancer.com.au>

¹¹ <https://deliveroo.com.au>

¹² <https://www.ubereats.com/en-AU/>

¹³ <https://www.care.com/>

¹⁴ <https://mable.com.au/>

¹⁵ House of Representative Standing Committee on Employment, Workplace Relations and Workforce Participation, (2015), ‘Making it work: Inquiry into independent contracting and labour hire arrangements’, Canberra.

¹⁶ *Fair Work Act 2009*, s. 357.

¹⁷ Roles, C. Stewart A. (2012), ‘The reach of labour regulation: tackling sham contracting’, *Australian Journal of Labor Law*, issue 25, pp. 258-282

business decision, made to minimise costs and the responsibilities associated with being an employer. As a consequence, many workers in the gig-economy are left with limited control over their work and their earnings while trading off basic employment conditions like a minimum wage.

13. There are a number of common features in the gig-economy which undermine the 'independent' nature of the work. Not all gig-economy companies will meet the current threshold for employment, however, this is not necessarily an indication that workers are truly 'independent'.
14. Below is a non-exhaustive list of common gig-economy features which demonstrate the dependent nature of many workers in the gig-economy:
 - a) **Charges a work fee to workers using the site/app.** This generally takes the form of a percentage of the fee charged to the customer. For examples Airtasker takes 15 percent of earnings, Uber takes 20 percent of fares and Mable takes 10 percent of worker payments.
 - b) **Regulates the behaviour of workers.** The public image and brand of the company is regulated. This extends to controlling the public interaction of workers on the website. Workers can be blocked from work for publicly expressing dissenting views.
 - c) **Workers are dependent on ratings within the app for work.** Apps provide opportunities for customers to rate workers within the app. Workers are then dependent on the app's internal rating system in order receive work.
 - d) **Maintains the right to remove workers and thus restrict their ability to work.** Companies maintain the right to block workers from their platforms. This is particularly restrictive considering the market domination of gig-economy platforms in certain industries, making it very difficult for blocked workers to continue working in the area. Workers can be blocked for low ratings, cancelling jobs or speaking out against the company. Workers are given few rights to challenge.
 - e) **Provides (limited) insurance protection.** Some companies provide limited insurance, like Airtasker, Uber and Deliveroo. However, there are no uniform

requirements for workers to be provided insurance cover or access to worker's compensation.

- f) **Provides equipment to perform work.** Deliveroo provides branded carry bags for deliveries as well as uniforms.
 - g) **Controls who performs the work.** Gig-economy work relies on individual worker profiles and ratings. As such, companies restrict workers from further outsourcing a task or having it partially performed by another contractor. This limits the ability of workers to fully control the nature and performance of their work.
 - h) **Interviews and screens workers.** Whizz pre-screens workers before providing them with access to the platform. Deliveroo require riders to pass a riding test before they can work on the platform.
 - i) **Provides training.** Runs training which provides specific instruction on how work is to be completed. Whizz runs a training and induction session for their cleaners, providing guidance on how work is to be conducted. Deliveroo runs training for new delivery riders/drivers covering road safety, branding and use of the app.
 - j) **Arranges a roster of shifts.** Some food delivery companies have attempted to restrict the number of workers competing for jobs by requiring workers to sign up for shifts in order to access the app.
 - k) **Places limits on the completion of work.** The company may require work to be completed in a set time. Deliveroo users delivery time as a performance measure which determines continued access to the app.
 - l) **Limits transparency around the calculation of pay.** An algorithm may be used to calculate the payment for each job, with workers not provided with information on how this is calculated. For example, food delivery riders can be paid different amounts for riding the same distance without explanation. They are not shown the details on how the payment is calculated, which would allow them to make an informed decision about whether or not to accept a job.
15. The distinction between independent contractor and employee is often unclear. On the one hand workers can choose their hours of work and what jobs they want to

perform which provides a large degree of individual control over their work. On the other hand, workers have limited bargaining power, are dependent on the company's app for the allocation of work and don't have control over setting their own prices.

16. Some workers are attracted to the gig-economy because of the low barriers to entry, a factor which can be used by gig-economy platforms to exploit the vulnerability of their workforce. Workers may have found it difficult to find employment in more traditional workplaces, because of language barriers, visa status, age discrimination or caring responsibilities.
17. The gig-economy has created a marginalised group of workers who have no right to collective bargaining, no access to industrial tribunals and no minimum workplace conditions or standards. A survey of over 1,000 ride share drivers by the Transport Workers Union found the average pay for workers was \$16 an hour, before fuel, insurance and other costs are deducted¹⁸.
18. Tinkering around the edges of the definitions of independent contractor and employee will not solve this problem. Employers will continue to find loopholes and arguments to opt out of employment obligations. There are some basic entitlements all workers should have access to which includes minimum wages, safety, workers' compensation, unfair dismissal and dispute resolution. The provision of these minimum standards would make it easier to engage workers through the taxation system.
19. A discussion about the tax obligations of an exploited group of workers needs to be premised with a discussion about whether they are being afforded appropriate protection under our industrial relations system. Right now, the industrial relations system is failing gig-economy workers and aggressively pursuing this group of low-paid workers for outstanding tax payments while large multi-national gig-economy platforms engage in wage theft and tax minimisation.

Compliance with taxation laws

20. The proposal for a sharing economy reporting scheme that is targeted at gig-economy workers is misdirected. The Australian Tax Office and Treasury should be

¹⁸ Transport Workers Unions, Rideshare Driver Survey, 2018, available at: <https://www.twu.com.au/home/campaigns/rideshare-drivers/>

focused on multi-national platform companies who build tax avoidance and wage theft into their business operations.

21. Gig-economy companies who choose to engage their workers as independent contractors can drive down tax revenue by:
 - a. Non-payment of payroll tax;
 - b. Shifting the responsibility of taxation onto workers, by operating outside of PAYG requirements;
 - c. Ignoring minimum and industry workplace standards and driving down workers' wages, in turn reducing the tax base;
 - d. Holding or shifting assets to overseas subsidiaries or parent companies to limit or avoid liabilities associated with the misclassification of workers (see Foodora case study below);
 - e. Using government funding to fund gig-economy companies who refuse to engage their workers as employees (see the use of NDIS case study below).

Case study - Foodora

22. The actions of Foodora in 2018 showed a clear and deliberate disregard for the Australian taxation and industrial relations system. On August 20, 2018, Foodora announced their decision to cease operations in the Australian market. The company claimed it was leaving the country to shift its focus to other growth markets. The company entered into voluntary administration later that month.
23. The classification of Foodora riders as independent contractors had come under question from the Transport Workers Union, the ATO and NSW Revenue. In November 2018, Foodora's administrators acknowledged riders on the platform should have been classified as employees. Administrators calculated Foodora owed \$8 million in unpaid wages, superannuation and taxes. Despite the admission, Foodora's parent company, Delivery Hero, committed just \$3 million to cover their debts.

24. The Australian Tax Office claimed Foodora owed \$2.1 million in unpaid taxes, Revenue NSW made a claim for \$550,000 in unpaid payroll tax and Victoria and Queensland had claims of \$400,000¹⁹.
25. The administrators estimated workers were owed \$5.54 million in unpaid wages. But made the assumption that taxpayers would foot part of the outstanding wages through the Government's Fair Entitlements Guarantee Scheme. This is despite Foodora's German based parent company, Delivery Hero forecasting revenue of \$AUD 1.2 billion.²⁰
26. The misclassification of Foodora riders was confirmed by a Fair Work Decision in November 2018, which found rider Josh Klooger was unfairly dismissed. Josh was sacked in March 2018 after speaking out about the conditions on the platform and was represented by the Transport Workers Union in the case. The Commission found that despite attempts to disguise the relationship as that of a contractor, Josh was an employee of Foodora and had been unfairly dismissed.²¹
27. Foodora has fled the country leaving behind unpaid debts to the tax office and riders, with the Australian Government likely to have to foot some of the bill. Foodora and gig-economy companies like them, who are disguising workers as independent contractors to minimise costs and tax liabilities should be the focus of tax office investigations, not the riders earning as little as \$6.76 an hour.

Case study - NDIS

28. The National Disability Insurance Scheme (NDIS) prioritises flexibility and individual choice. While this will better align with the needs of individuals with a disability, the current structure of the scheme raises a significant risk of increasing insecure employment in the disability sector. The government's approach undermines the traditional model of permanent employment with a single service provider and encourages an increase in casualisation and engagement of independent

¹⁹ A. Patty, 16 November, 2018, 'Foodora rider wins unfair dismissal case in landmark ruling', available at: <https://www.smh.com.au/business/workplace/foodora-creditors-vote-to-accept-less-than-half-of-debts-claimed-20181116-p50gic.html>

²⁰ Delivery Hero, 'Q3 Statement', 2018, available at: <https://ir.deliveryhero.com/websites/delivery/English/3100/financial-reports.html>

²¹ Klooger v Foodora Australia Pty Ltd [2018] FWX 6836

contractors. This has been further complicated by the grey-area of independent contracting and the gig-economy.

29. Already companies such as Mable are providing NDIS funded services through a model based on 'on demand' gig economy platforms. Mable provides aged care, homecare and disability support services with clients able to use the NDIS to fund services, but with workers engaged as independent contractors. On the website the company boasts lower overhead costs, with disability support workers earning \$33.30 an hour. Under the Social, Community, Home Care and Disability Services Industry Award 2010, casual workers are entitled to a minimum of \$34.90 an hour²², this rate includes the payment of superannuation, which is not included in the \$33.30 an hour quoted on the Mable website. Mable are a large multi-national corporation taking money from the Australian tax payers, but refusing to operate within Australia's industrial relations system and in turn engaging workers as employees covered by the relevant award.
30. Not only does the gig-economy approach to care undercut employment standards in the disability sector, it undervalues the work. Care and support work is complex and workers need access to ongoing development and professional supervision. This cannot be provided for through a gig-economy app. The result will be unsafe work and a lower quality of care for the most vulnerable members of the community. This is not an effective use of tax-payer resources. When services are commissioned on behalf of the government they should not be used to undermine Australian workplace conditions. Any care work provided through the NDIS should require workers be engaged as employees.
31. A NDIS Code of Conduct has been introduced for all workers providing NDIS services. The NDIS Code of Conduct applies to all NDIS providers, registered and unregistered, and all persons employed or otherwise engaged by an NDIS provider. Breaches of the Code can result in a range of penalties including civil penalties through to banning from working in the NDIS sector. Workers engaged to provide NDIS services through gig-economy platforms are required to comply with the NDIS Code of Conduct, any non-compliance with the Code of Conduct is considered a breach of the Code and is subject to penalty. All NDIS workers need training to ensure they are not at risk of breaching their obligations under the NDIS Code of

²² Social, Community, Home Care and Disability Services Industry Award 2010, Casual employee, level 2, pay point 3 as at 25 February 2019.

Conduct. A portable training scheme for all workers in the NDIS sector should be established by government to ensure all NDIS workers have a minimum qualification that is essential for the safety and quality of services and supports provided to people with disability under the NDIS.

Resources of the ATO

32. The *Discussion Paper* proposes a significant expansion to the work of the ATO, but is not supported by any additional funding for the agency. Under the proposals the ATO would (at the very least) be responsible for collating and cleaning data, identifying discrepancies between the lodgments of workers and platforms, collating with other income sources connected to each ABN and following up possible enforcement action with workers. The broader black economy taskforce also includes additional work for the ATO in enforcing tax compliance. The government has not provided additional resources to the ATO to be able to meet the additional work load.
33. The number of directly employed ATO employees has declined significantly over the past five years. Ongoing staffing levels in June 2018 were 15.3% lower than they were in December 2013. There are now an estimated 5,400 externally engaged staff undertaking ATO work, including approximately 700 labour hire and contractors working within ATO offices and around 2,500 in outsourced call centres. The May 2018 Budget increased staff in the ATO by only 0.2%.
34. The ATO is also one of the largest users of outsourced labour hire and other private services in the federal government. Companies contracted to do this work include Serco, Datacom and Stellar. A report commissioned by the CPSU in 2018 found that a number of private companies holding multi-million dollar contracts with the ATO, are engaged in aggressive tax minimisation strategies²³. Multi-national companies with large contracts with the ATO are paying minimal tax and provide little or no disclosure.
35. The tax practices of large ATO contractors raise serious concerns around the Australian government's commitment to integrity within the taxation system and the priorities of the government when it comes to recovering unpaid tax. As a matter of

²³ J. Ward, 'Exposing Corporate Webs', 2018, available at: <http://www.cpsu-spsf.asn.au/node/139>

priority, the Australia government must focus on corporate tax avoidance and minimisation, as well as ensuring the Australian Tax Office is appropriately resourced with public sector workers to undertake compliance activities.

36. Unions NSW is concerned the current Tax Commissioner, Chris Jordon does not see proactive compliance of corporate tax avoidance as a focus for the tax office. In a National Press Club address, the Commissioner argued that audits of tax compliance for large corporate firms was not a priority, with a preference for compliance arrangements that seek voluntary compliance.²⁴ This approach is preferred by the Commissioner as it reduces the need for intervention. It appears there is one approach for low paid gig-economy workers, who will be subjected to extreme oversight, auditing and intervention, and another for multi-national, multi-million dollar corporate entities, who the tax commissioner would like to approach through softer, more voluntary arrangements.

Concerns regarding data sharing

37. The *Discussion Paper* asks what information the ATO should share with other agencies. If the ATO were to receive information from sharing economy platform companies, Unions NSW would have serious concerns about it being shared with other departments or agencies.

38. The *Discussion Paper* does not provide any guidance on the type or details of information about workers that would be captured by the ATO, who it would be shared with and for what purpose. Unions NSW has concerns about the federal government's use of data-sharing and data-matching programs, their accuracy and the consequences of mistakes. The 'robo-debt' program proved the federal government is incapable of effectively managing automated data-matching, particularly in relation to vulnerable people²⁵.

²⁴ C. Jordon, National Press Club address, July 2017, available at: <https://www.ato.gov.au/media-centre/speeches/commissioner/commissioner-s-address-to-the-national-press-club/>

²⁵ Australian Senate, Community Affairs References Committee, 'Design, scope, cost-benefit analysis, contracts awarded and implementation associated with Better Management of the Social Welfare System initiative', June 2017.

39. Unions NSW does not support the creation of a reporting regime for sharing economy companies. However, if a scheme were to be introduced, it would be imperative that any information shared with the ATO be also provided to workers. The PAYG system requires employers to provide employees with the details of tax payments on payslips and with a group certificate at the end of the financial year. It is important workers in the gig-economy are similarly provided with details and information passed onto the tax office in order to ensure transparency.

Conclusion

40. Gig-economy companies are using loopholes in employment law to exploit gig-economy workers. Targeting these workers for non-compliance with the taxation system is the wrong focus for the government. Instead the federal government need to extend basic workplace conditions and protections to this group of workers to provide them with access to bargaining rights and a living wage. In terms of non-payment of taxation, the focus must be on the actions of large multi-national gig-economy companies who engage in tax avoidance and minimisation and who are setting up business structures to purposely avoid their industrial obligations and the taxation implications associated with employment.