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## Brand New ‘Sharing’ or Plain Old ‘Sweating’? A Proposal for Regulating the New ‘Gig Economy’

Joellen Riley<sup>1</sup>

### I. Enter the ‘Collaborative Economy’

Politicians on both sides of the political spectrum in Australia have been embracing what they are calling the ‘sharing’, or ‘collaborative’ economy, typified by new app-enabled business enterprises linking up consumers with service providers of many kinds. Examples include Uber and Lyft in the passenger transport business; Airtasker and TaskRabbit in the market for odd-job services; Deliveroo and Foodora in takeaway food delivery; and Airbnb in short-term accommodation letting. The notion that these businesses involve ‘sharing’ or ‘collaboration’ depends on seeing them as means by which those who have surplus energy or assets can make money from sharing their skills or assets with others – and the app-based intermediary takes a commission from making the introduction. In New South Wales, a November 2015 position paper stated: ‘The NSW government welcomes the positive impact of the collaborative economy

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1 Professor of Labour Law, Sydney Law School, University of Sydney. For an extended argument of this proposal, see Joellen Riley, ‘Regulating Work in the “Gig” Economy’ in Mia Ronnmar and Jenny Julen Votinius, *Festskrift Till Ann Numhauser-Henning* (Jurisforlaget I Lund, Sweden, 2017) 669–83.

for consumer choice, employment and productivity'.<sup>2</sup> This same paper stated that at the end of 2015 the collaborative economy in NSW was valued at about \$504 million a year, and approximately 45,000 people earned income from it – though this income was described as 'additional' or 'supplementary'.

Both sides of politics appear to recognise the need for some regulation of this new sector of the economy, although all are concerned that new regulation should not strangle innovation and forfeit all these coveted economic benefits. To date, most regulatory initiatives have focused on consumer protection, and the risks of unfair competition with existing services. So, for example, the *Road Transport (Public Passenger Services) (Taxi Industry Innovation) Amendment Act 2015* (ACT) introduces amendments to the *Road Transport (Public Passenger Services) Act 2001* (ACT) to ensure that the new passenger transport services provided by the likes of Uber and Lyft are regulated alongside the taxi hire car industries in the interests of passenger safety, by ensuring the registration and accreditation of drivers. With the possible exception of regulation of 'maximum driving times and minimum rest times'<sup>3</sup> (matters which may be made subject to regulations, but had not been at the time of writing<sup>4</sup>), this legislation manifests no particular concern with the labour standards observed by these new 'ridesharing' services.

There are, however, real risks to labour standards in the operation of those businesses in the so-called sharing economy that depend on the engagement of workers. These risks have become apparent in recent news stories in Australia about Uber drivers being 'blocked' (a new word for 'sacked') in apparently unfair circumstances.<sup>5</sup> And in the United States there have been stories of driver protests against Uber for cutting fares without warning by 25 per cent.<sup>6</sup> Workers in the 'gig'<sup>7</sup> economy are as

2 State of NSW Department of Finance, Services and Innovation, 'The Collaborative Economy in NSW – A Position Paper', November 2015, [www.finance.nsw.gov.au/publication-and-resources/collaborative-economy](http://www.finance.nsw.gov.au/publication-and-resources/collaborative-economy).

3 See *Road Transport (Public Passenger Services) Act 2001* (ACT) s 601(d).

4 The Regulations were consulted on 4 April 2017.

5 See Georgia Wilkins, 'Driver Sues Uber after termination', *Australian Financial Review*, 19 May 2016, 9.

6 See Adrian Chen 'An Uber Labor Movement born in a LaGuardia Parking Lot', *New Yorker*, 8 February 2016, [www.newyorker.com/business/currency/an-uber-labor-movement-born-in-a-laguardia-parking-lot](http://www.newyorker.com/business/currency/an-uber-labor-movement-born-in-a-laguardia-parking-lot) (viewed 13 May 2016).

7 The 'gig' is well-known in the music industry as the one-off performance of a job of work, with no expectation of continuing engagement.

much in need of basic labour market protections as are other kinds of workers.<sup>8</sup> The question for law reform is: What kind of regulation best accommodates this kind of work? Should these workers be treated as employees, and enjoy all the protections available in the *Fair Work Act 2009* (Cth)?<sup>9</sup> This chapter recommends that a better solution would be the introduction of a special scheme providing protections similar to those available to other small business workers in special kinds of commercial relationships.

Two current regulatory schemes spring to mind: legislation protecting owner-drivers in the transport industry, and the Franchising Code of Conduct (FCC) dealing with the rights of the small businesses who operate in franchised business networks.<sup>10</sup> A particular provision, typical in statutory schemes for protecting small business operators from exploitation, is protection from capricious termination of work contracts. A 'gig' worker who has invested heavily in a car or other equipment to perform the job is extremely vulnerable if they are working under a contract which can be terminated immediately and without sufficient justification. Another important protection is the right to form associations for the purpose of collective bargaining. Before explaining this proposal, it is worth reflecting on the realities of work for the 'gig' economy labourer.

## II. Who Profits From the 'Gig' Economy?

Businesses such as Uber (in the 'ridesharing' market), and Airtasker (in the odd-job business) have become multimillion dollar enterprises (multibillion dollar in the case of Uber), by creating and managing phone 'apps' that connect customers with services. They derive their revenue by deducting a commission from the automatic electronic payment made for every ride or gig arranged on their apps. In the case of Airtasker the

8 See the special issue on 'Crowdsourcing, the Gig-Economy and the Law' in (2016) 37(3) *Comparative Labor Law and Policy Journal*, for a number of academic studies on the need for labour protection in a proliferating world of digitally-sourced work.

9 In the United Kingdom, an Employment Tribunal has held that Uber drivers are 'workers' (but not necessarily 'employees') for the purposes of the *Employment Rights Act 1996* s 230(3)(b): see *Aslam, Farrer v Uber BV, Uber London and Uber Britannia Ltd*, Case Nos 2202551/2015, decided on 12 October 2016.

10 The FCC was made under the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* and is enforceable as a consequence of the *Competition and Consumer Act 2010* (Cth) s 51AD.

commission is 15 per cent of the agreed fee for the work.<sup>11</sup> Airtasker claims to have around 480,000 users on its platform, and turned over \$13 million in tasks in the year to April 2016.<sup>12</sup>

These organisations emphatically disavow any suggestion that they are employers of the workers. They describe what they do as ‘facilitating sharing’, in ways that unlock and exploit the unused potential in underused assets – such as cars that might otherwise be sitting in garages. In reality, there is very little ‘sharing’ involved in these relationships, notwithstanding that Uber has been successful in persuading the ACT legislature to adopt the terminology of the ‘rideshare’ service in its newly enacted provisions in the *Road Transport (Public Passenger Services) Act*.

The true nature of these relationships is that Uber and others are intermediaries profiting from the sale of labour. Some may say that they are ‘commodifying’ labour<sup>13</sup> in a way abhorrent to a fundamental principle of the International Labour Organization, that ‘labour is not a commodity’.<sup>14</sup> They do not provide any tools of trade for the worker, apart from maintaining the app that connects supply and demand in the market for the work. The workers bear the costs of maintaining their tools and equipment. In the case of Uber drivers, that may mean covering the loan or finance lease repayments on an expensive, late model motor vehicle.<sup>15</sup> The intermediary also forswears any entitlement to control the worker, and so avoids characterisation as an employer under the common law definition of employment.<sup>16</sup> Workers decide themselves how much time to spend on the job, and which tasks to accept. The intermediary does not need to monitor performance as an employer would, because

11 Ewin Hannan ‘Old School, New School’, *AFR Boss*, April 2016, Vol 17, 23.

12 Cara Waters ‘Outsourcing Jobs Frees Up Entrepreneurs’, *The Sydney Morning Herald*, 4 April 2016, 24.

13 See Antonio Aloisi, ‘Commoditized Workers: Case Study Research on Labour Law Issues Arising from a Set of “On-demand/Gig Economy” Platforms’ (2016) 37(3) *Comparative Labor Law and Policy Journal* 653.

14 See Paul O’Higgins, “Labour is not a Commodity” – an Irish Contribution to International Labour Law’ (1997) 26 *Industrial Law Journal* 225–34.

15 It is a condition of driving for Uber that the driver maintains an unblemished late model vehicle.

16 For a recent analysis of the concept of ‘employment’, see Joellen Riley, ‘The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations’ in Mark Freedland, Alan Bogg, David Cabrelli et al (eds), *The Contract of Employment* (Oxford University Press, United Kingdom, 2016) 321–40. Note that some commentators have suggested that Uber’s arrangements in Australia may constitute an employment relationship between Uber and the drivers. See, for example, Josh Bornstein’s blog: [joshbornstein.com.au/writing/the-great-uber-fairness-fallacy-as-a-driver-how-do-you-bargain-with-an-app/](http://joshbornstein.com.au/writing/the-great-uber-fairness-fallacy-as-a-driver-how-do-you-bargain-with-an-app/) (viewed 5 April 2017). See also *Aslam, Farrer v Uber BV, Uber London and Uber Britannia Ltd*, above n 9.

the app itself contains a rating tool to gather the views of customers. The worker is 'blocked' from using the app if ratings drop below an acceptable standard, so drivers have a big incentive to remain upbeat and cheery. (This could be why Uber users regularly report that Uber drivers love chauffeuring them around: nobody 'likes' a depressed and grumpy servant.) If the allegations in the press surrounding the 'blocking' of drivers are true, Uber drivers have no opportunity to contest poor ratings, and so are at the mercy of mean-spirited or possibly discriminatory assessments by customers.<sup>17</sup> Some apps – such as Airtasker – allow the worker to propose their own rate of pay, so workers bid competitively for tasks. As there is no minimum wage for a gig worker, rates can be low. According to a study conducted by the International Labour Organisation of online clerical workers engaged by Amazon Mechanical Turk, the mean hourly pay for a worker in the United States was \$US5.55.<sup>18</sup>

Low prices for work mean that the other beneficiaries of this kind of work are the customers who are able to source labour more cheaply than by direct employment. We know that many young people use Uber because it is cheaper than hiring a taxi, but it is not only individual domestic customers who are attracted by lower prices. At the university I work for it has been suggested that we switch from Cabcharge to Uber accounts to save on transport costs. Airtasker has reported that about a third of its turnover is driven by small businesses, not householders. According to an enthusiast for these kinds of services, 'This is a new wave of outsourcing micro tasks when you don't need to hire someone for a day, you just need them for an hour'.<sup>19</sup> This kind of micro-outsourcing by businesses may not be all that new at all. It looks very like the labour engagement practices of a hundred or more years ago, before the establishment of the standard weekly wage, when impecunious wharf labourers had to bid each day for work loading and unloading ships on the Hungry Mile at the Sydney wharves. Over the course of the past century we have regulated the engagement of labour to protect workers from the risks of highly precarious work. Past regulation has generally accepted that those who profit from the exploitation of labour ought to bear some of the cost of protective

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17 See the story of Mr Mike Oze-Iggehon in Georgia Wilkins, 'Driver Sues Uber after Termination', *Australian Financial Review*, 19 May 2016, 9. Similar stories are collected in Janine Berg, 'Income Security in the On-demand Economy: Findings and Policy Lessons for a Survey of Crowdworkers' (2016) 37(3) *Comparative Labor Law and Policy Journal* 543–76.

18 See Janine Berg, above n 17.

19 Author Rachel Botsman, cited in Waters, above n 12.

regulation. After all, how much of Uber's billion-dollar value is down to the creation of the app, and how much depends upon the availability of the drivers, with their shiny new vehicles and perpetual smiles?

### III. What Kind of Regulation?

In designing regulation for this new-old form of labour engagement it would be wise to resist squeezing these inventive app intermediaries into employment regulation – bearing in mind that employment is itself a relatively new concept, historically speaking,<sup>20</sup> and the strictures of employment regulation have sometimes created the incentives to invent new forms of labour engagement. The Uber driver agreement<sup>21</sup> is itself insistent that the company operating the Uber app is 'a technology service provider that does not provide transportation services ... nor operate as an agent for the transportation of passengers'. It also explicitly forswears the existence of any employment relationship with drivers, and devises its terms to avoid any appearance of controlling when, where or whether drivers agree to pick up passengers. The only thing the company does control (rigidly) is maximum fares, and its own commission, which is withheld before drivers are paid.

If we accept that the drivers are not employees of Uber (as seems sensible, given that the terms of the arrangement do thrust a great deal of responsibility and discretion on the drivers), how else might they access some worker rights? Are there innovative ways of regulating these kinds of labour market exchanges without stifling innovation, but also without risking a return to the Hungry Mile?

We can look to existing small business regulation in Australia to see some models for reducing the harshest effects of precarity for gig economy workers. If we focus particularly on the rideshare drivers, we may find a potential model of regulation in aspects of state-based regulation in the road transport industry.<sup>22</sup> This state legislation remains enforceable,

20 See John Howe and Richard Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *Australian Journal of Labour Law* 113.

21 The author obtained a copy of the Rasier Pacific VOF Services Agreement, last updated on 23 December 2015, under which drivers agree to provide transportation services to Uber users. Copy on file with the author.

22 Such as *Industrial Relations Act 1996* (NSW) Ch 6, which provides for regulation of work in the taxi and owner driver transport industries.

notwithstanding the enactment of the federal *Independent Contractors Act 2006* (Cth) (*IC Act*), because s 7(2) of the *IC Act* specifically preserves the operation of these statutes.

The Victorian *Owner Drivers and Forestry Contractors Act 2005* (Vic) (*ODFC Act*), provides a useful illustration of the kinds of provisions that might also be enacted to protect rideshare drivers. As outlined below, these include provisions seeking to promote decent levels of remuneration, protection from capricious termination of working arrangements, and access to affordable and fair dispute resolution mechanisms to enable drivers to secure these entitlements. The legislation also accommodates a pragmatic application of the right to freedom of association, so that drivers can join together to agitate for fair treatment.

The standard Uber driver contract permits Uber to determine maximum fares, and to vary fares without consultation with drivers.<sup>23</sup> There is no provision for fares to be set taking into account any of the drivers' costs for motor vehicle expenses, or for a telecommunications provider's charges to a driver for accessing the large amounts of data required to operate the app. Under the *ODFC Act*, rates and cost schedules for truck drivers can be reviewed by the minister, in consultation with the Transport Industry Council and Forestry Industry Council, with a view to ensuring that owner drivers can earn similar remuneration to employees engaged to do the same work.<sup>24</sup> Hirers must include these rates schedules in written information provided to drivers.<sup>25</sup> A hirer who fails to provide this information takes the risk that the Victorian Civil and Administrative Tribunal (VCAT) will exercise a power to order that the contractor be paid what VCAT determines is a 'fair and reasonable rate', notwithstanding the terms of the contract.<sup>26</sup> The establishment of an administrative body to provide similar review of fares and costs for rideshare drivers would help them to secure fair remuneration for their work.

Truck drivers can also complain to VCAT if they believe they have been subjected to 'unconscionable conduct',<sup>27</sup> the definition of which includes 'whether or not the regulated contract allows for the payment of any increases in fixed and variable overhead costs on a regular and

23 Clause 4 of the contract, see n 21.

24 *ODFC Act* s 14(2)(b).

25 *ODFC Act* s 16.

26 *ODFC Act* s 45.

27 Defined in *ODFC Act* s 31.

systematic basis'.<sup>28</sup> The available remedies include a 'contract variation order'.<sup>29</sup> The special danger of a 'contract variation order' is that it may be extended generally, to other contracts of a specified class. A trade union has standing to apply for a contract variation order made in one case to be extended to cover other contracts.

Rights to collective negotiation should also be supported for rideshare drivers. Uber drivers with grievances about things like Uber's sudden reduction of fares have already demonstrated a propensity to protest collectively, and to form associations.<sup>30</sup> Under the *ODFC Act*, drivers are permitted to bargain collectively through 'negotiating agents',<sup>31</sup> and such conduct is expressly exempted from any sanction under the *Competition and Consumer Act 2010* (Cth).<sup>32</sup>

Protection from capricious loss of one's job is also a key entitlement for workers, whether they are employees or contractors. According to the Uber driver contract, drivers can be given seven days' notice of termination for any reason or no reason at all,<sup>33</sup> and they can lose access to the app without notice if their ratings drop below an acceptable level.<sup>34</sup> By way of contrast, under the *ODFC Act* heavy vehicle drivers must be given a minimum of three months' notice,<sup>35</sup> recognising that these drivers have invested in job-specific, expensive rigs. Although a shorter period may be warranted for Uber drivers who have invested in ordinary passenger vehicles which are more readily sold, there ought to be some recognition of drivers' sunk costs in acquiring a vehicle when determining a fair and appropriate notice period for terminating driving contracts.

28 *ODFC Act* s 31(2)(k).

29 *ODFC Act* s 44(1)(g) and 47(2).

30 See Adrian Chen, 'An Uber Labor Movement born in a LaGuardia Parking Lot', *New Yorker*, 8 February 2016, [www.newyorker.com/business/currency/an-uber-labor-movement-born-in-a-laguardia-parking-lot](http://www.newyorker.com/business/currency/an-uber-labor-movement-born-in-a-laguardia-parking-lot) (viewed 13 May 2016).

31 *ODFC Act* ss 25–26.

32 *ODFC Act* s 64(1)(c)–(e). In Australia, the anti-trust provisions in the *Competition and Consumer Act 2010* (Cth) operate to limit, if not curtail entirely, the scope for independent contractors to engage in collective industrial action. See Shae McCrystal, 'Organising Independent Contractors: The Impact of Competition Law' in Judy Fudge, Shae McCrystal and Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation* (Hart, Oxford, 2012) 139.

33 Clause 12.2.

34 Clause 2.5.2.

35 *ODFC Act* s 21.

Two other provisions in the *ODFC Act* might be included in a specific scheme to protect rideshare drivers. One is similar to the general protection provisions in the *Fair Work Act* Pt 3-1, which prohibits threatening a person with detriment if they claim any of their rights under the Act.<sup>36</sup> Another is access to a Small Business Commissioner for mediation or other dispute resolution processes, before resorting to VCAT with a complaint;<sup>37</sup> any regulatory scheme designed to assist small business people needs to provide access to quick and inexpensive dispute resolution services.

## IV. General 'Fair Trading' Protections

A special scheme for rideshare drivers, designed to provide similar protections to those enjoyed by owner truck drivers, is one solution to providing satisfactory worker protection for one part of the 'gig' economy. More general protections may be needed for the freelancers working on other platforms, such as Airtasker. The *Competition and Consumer Act 2010* (Cth) already includes protections for small businesses against predatory practices of larger ones in its provisions prohibiting unconscionable dealing.<sup>38</sup> Perhaps these provisions need to be supplemented by a special industry code of conduct, similar to the Franchising Code of Conduct (FCC), which also deals with matters such as adequate disclosure of contract terms, and protections from capricious termination of contracts.<sup>39</sup>

The policymakers who framed the original FCC were responding to a number of reports and enquiries that had uncovered widespread exploitative practices in the franchising industry.<sup>40</sup> The typical franchise

36 *ODFC Act* s 61.

37 *ODFC Act* s 35.

38 See *Competition and Consumer Act 2010* (Cth) ss 51AA–51AC.

39 See *Competition and Consumer (Industry Codes – Franchising) Regulation* 2014, and the *Competition and Consumer Act 2010* (Cth) s 51AD.

40 See the Swanson Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs* (Commonwealth of Australia, Canberra, 1976); Trade Practices Consultative Committee, *Small Business and the Trade Practices Act Vol 1* (Commonwealth of Australia, Canberra, 1979) (Blunt Committee); House of Representatives Standing Committee on Industry Science and Technology, *Small Business in Australia: Challenges, Problems and Opportunities* (Commonwealth of Australia, Canberra, 1990) (Beddall Committee); R Gardini, *Review of the Franchising Code of Practice: Report to the Minister for Small Business, Customs and Construction* (Commonwealth of Australia, Canberra, 1994); Reid Committee Report, *Finding a Balance towards Fair Trading in Australia. Report by the House of Representatives Standing Committee on Industry, Science and Technology* (Commonwealth of Australia, Canberra, 1997).

agreement requires considerable investment by the franchisee in a business heavily controlled by someone else. Franchisees are especially vulnerable to the risk of losing their investment if the franchise is terminated, much in the same way as a gig economy worker is at considerable financial risk if she or he sets up a business in reliance on a clientele sourced through the app, but is subsequently 'blocked' from using the app. The FCC deals with this risk by including provisions protecting franchisees from capricious termination of the franchise. Even if a franchisee has committed some breach of the franchise agreement, a franchisor may not summarily terminate the franchise, but must notify the franchisee of the alleged breach and the proposal to terminate, and give the franchisee a reasonable time (not exceeding 30 days) to remedy the breach. If the franchisee remedies the breach, the franchisor is not permitted to terminate on account of that breach.<sup>41</sup> If gig economy workers had this kind of right, it would go some way to protecting any investment they have made in their 'micro enterprises' by ensuring they could not have their capacity to earn withdrawn without warning.

Like owner truck drivers, franchisees also enjoy a freedom to form associations, and they are protected from any conduct of the franchisor to restrict or impair that right by a 300 penalty unit fine.<sup>42</sup> The FCC does not, however, clarify whether this freedom extends to engaging in collective negotiations or boycotts.

Like the *ODFC Act*, the FCC also encourages parties to use mediation to resolve disputes (though parties retain their rights to litigate), and the *Competition and Consumer Act 2010* (Cth) empowers a third party watchdog – the Australian Competition and Consumer Commission – to take action on behalf of franchisees, and seek a range of flexible remedies, including orders for the variation of contracts.<sup>43</sup>

## V. Conclusion

Workers in the 'gig' economy, like all others who rely on their own labour for a livelihood, need the security of decent incomes and protection from capricious termination of jobs. We have laws protecting these kinds

41 FCC cl 27(4).

42 FCC cl 33.

43 See *Competition and Consumer Act 2010* (Cth) s 87.

of interests for other workers outside the boundaries of employment legislation, in all manner of special schemes designed to promote fair dealing for small enterprise operators. Politicians across the spectrum in Australia ought to be looking at these models with a view to designing suitable regulation to protect the growing armies of workers in the 'gig' economy. Key elements of new regulation need to be a suitably empowered watchdog (similar to the ACCC, or the Fair Work Ombudsman), and an easily accessible dispute resolution forum.

