

A new definition of 'worker' could protect many from exploitation

Written by Michael Rawling, Senior Lecturer, University of Technology Sydney

If [we want](#) gig workers (such as Uber drivers, Airtasker cleaners and delivery riders) to have decent working conditions, pay and hours, it may be time to consider creating a [new legal category of "worker"](#) that covers contractors as well as employees.

Gig workers and workers in other precarious fields would be entitled to minimum pay rates and conditions even if they were not classified as employees of the platforms they work for.

A similar approach has been used in Australia's work health and safety laws, which more broadly define "worker" and "workplace" than the Fair Work Act. Under the work health and safety laws, a [worker](#) is any "person who carries out work in any capacity for a person conducting a business or undertaking".

In other words, the health and safety definition of worker includes not only direct employees, but [contractors and sub-contractors](#) as well.

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Gig work [is risky](#), [often](#) requires long hours for little pay, and could leave workers [short of superannuation](#) in retirement.

Part of the problem is that some gig workers [aren't considered employees](#) of the platforms they work for. This leaves them classified as "[independent contractors](#)"

A new category?

Another example of an expansive definition of worker can be found in the United Kingdom. There, [several parliamentary acts](#) and [government regulations](#) use a definition of “worker” that goes beyond employees.

Based on this expansive definition a [recent court case in the UK](#) found that some Uber drivers were in fact workers who may be entitled to minimum pay and limits on working hours. Uber is appealing this decision.

The UK approach still relies on courts and tribunals interpreting who is considered a worker under the legislation. But this approach could be taken in Australia and would make it more probable that gig workers such as Uber drivers would be covered by employment legislation.

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A recent [Fair Work Commission case](#) highlights the situation confronting Australian gig workers. The commission found that an Uber driver was not an employee for the purpose of [unfair dismissal protection](#) under the Fair Work Act.

The driver had brought the claim after his Uber agreement was terminated because he had allegedly failed to meet ratings standards.

One of the reasons he was not considered an employee is that he was free to work as little or as much as he liked. As a result, the Uber driver was not entitled to unfair dismissal protection because most of the employment protections established by the Fair Work Act, including unfair

dismissal rights, apply to employees only.

And if he isn't an employee, then he isn't entitled to the other protections under the Fair Work regime, including minimum wages, leave or collective bargaining rights.

The flipside

While establishing a new category of worker for gig workers may be a good option, there are a couple of pitfalls to be aware of.

A change in the category of workers who receive employment protections might be used to reduce entitlements currently extended to employees. That is, by creating a new category more people in total might be protected but at a lower minimum standard. Some companies [might even](#) misclassify employees and shift them to lower gig worker standards.□

Read more: [**How gig economy workers will be left short of super**](#)

But there are ways to draft legislation so that work rights and entitlements are extended to gig workers without undermining the current standards of employees.

This could be achieved by passing legislation so that the type of rights and entitlements established by the Fair Work Act (including minimum pay rates, leave rights, unfair dismissal and collective bargaining rights) are extended to workers who merely supply their own labour but who are currently not classified as employees – including gig workers.

The prospect of employers misclassifying employees could also be minimised by providing all workers in the new category with most or all of the rights currently available to employees. This

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would take away some of the incentives to move workers from one category to another.

Even if the law is changed it is possible that some digital businesses might continue their current arrangements in any case. Large, digital businesses such as Uber have so far [aggressively and consciously flouted labour laws](#) with which they don't agree and might continue to do so.

Also, the trajectory of digital work is, for now, unknown. Further changes to how work is performed in future could render even a “new” category of worker inadequate. Such circumstances might call for renewed efforts to enforce the law and, critically, to organise workers.

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