

Workers' compensation entitlements for workers in the gig economy and the taxi and limousine industry in Queensland

J O'Dwyer / July 2019



Gig economy and workcover

Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. Our website is www.masterelectricians.com.au

In simple terms Master Electricians Australia is opposed to any change to the Queensland Workers Compensation system definition of worker to include gig taxi or Limo drivers.

Simply, MEA objection stems from the current definition of worker and the related control test which has been used successfully over many years to demine if a person is, or is not a worker and which the ATO definition heavily relies upon.

Defining the gig economy ?

In recent publications and reports such as the Victorian inquiry into the “gig economy” it is clear that the definition of the gig economy is not clear. MEA view is that the RIS does not achieve enough of a differentiation between gig and current other independent contractors to justify a change.

Supporting our contention, we draw your attention to the page 25 of the RIS (see attached over page). If we compare column 2 and 4 the results are

- they share the same traits in the Nature of the contract. Both can be “of service” and “for service” contracts.
- They share “Customers” in who they can contract with for the performance of work
- The duration in both is variable
- Both work for multiple parties
- Both have a medium to high level of control over the work they do
- Both share who must do the work, if the person is a sole trader then both are personally responsible for doing the work and with 61% of businesses in Australia being micro businesses this is often the case
- Both share the flow of payment from customer to sole trader.

The only difference that is discernible between the two groups according to the RIS is who influences the price. However, given there is a high level of control over the work and the engagement, normal contractual law takes place. An offer of work for a proposed level of remuneration, consideration of that offer and an acceptance or rejection of that offer.

This leads us to question how “gig position” can be separated from traditional and already established practices and work which in many cases are sourced via electronic platforms. Many sole traders and electricians use many different platforms, including Facebook and gumtree and paid subscription services such as trade service referral websites and group buying platforms.

Traditional worker  Independent contractor

	Worker*	Gig worker ⁴⁴ via an intermediary	Taxi / limousine driver under a bailment arrangement ⁴⁵	Other independent contractors*
Currently covered by Queensland workers' compensation scheme?	Yes	No	No	No
Within scope of RIS?	No	Yes	Yes	No
Nature of contract:				
• Contract of Service	Yes	No	No	No
• Contract for service	Yes (if deemed)	Yes	No	Yes
• Bailment	No	No	Yes	No
Who do they contract with for the performance of work?	Employer	<ul style="list-style-type: none"> • Intermediary • May also have a contract with customer 	<ul style="list-style-type: none"> • Bailor • Recipient of the work being performed 	Customer
Duration of engagement	Variable	Variable	Variable	Variable
Work for multiple parties	Yes (depending on contract)	Yes (depending on contract)	Yes (depending on contract)	Yes (depending on contract)
Who is the work sourced by?	Employer	Intermediary	<ul style="list-style-type: none"> • Bailee • Booking entity 	Independent contractor
Control ⁴⁶ over work	Medium to High	Medium to High	Medium to High	Low to High
Who must perform the work?	Worker	Gig worker	Bailee	Independent contractor and/or delegate
Who influences the rate of payment?	Employer	Intermediary	<ul style="list-style-type: none"> • Regulated • Bailee • Bailor • Booking entity 	Independent Contractor
Flow of payment	Employer to worker	<ul style="list-style-type: none"> • Intermediary to gig worker OR • Customer to gig worker 	<ul style="list-style-type: none"> • Customer to bailee • Bailee to bailor 	Customer to independent contractor

In examining the Regulatory Impact Statement (RIS) the way in which the Department has tried to characterise the relationships can and does exist in the normal subtrades and other industries already. The scope of RIS does not consider other independent contractors. MEA cannot see a simple definition that would not result in either an inappropriate classification of worker being created or unnecessarily including independent contractors at which time the viability of the fund then would become compromised.

The Control Test

As the Victorian Inquiry into the Gig economy has highlighted:

“Different formal and informal contractual arrangements may govern this ‘triangular’ relationship. The status of that relationship depends not just on the written agreements made by the parties but the substance of the relationship in reality. When the substance and the form do not align, disputes can only be finally resolved by a court when a particular case is brought before it. The onus is on the worker, or someone on their behalf, to put the particular facts of the case before a court, which will examine the relationship and determine the status of the worker.

For example, the Fair Work Commission (FWC) made a decision that a Foodora delivery rider’s engagement was to be properly construed as that of an ‘employee’, as opposed to that of an ‘independent contractor’.²⁹ The Australian Taxation Office (ATO) also determined in 2018 that Foodora workers were incorrectly classified as independent contractors instead of employees. However, these decisions cannot be applied beyond the circumstances of that organisation and those workers.³⁰ This is because any decision as to the employment status of a worker or group of workers, whether by a court, tribunal or the ATO, will depend on the particular facts of the case being considered.

However, we also see that in the same type of situation as reported on by the Fairwork Ombudsman media release has shown the following

Uber Australia investigation finalised

7 June 2019

The Fair Work Ombudsman has completed its investigation relating to Uber Australia Pty Ltd (Uber Australia) and its engagement of drivers.

Fair Work Ombudsman Sandra Parker said that inspectors examined a wide range of evidence, including drivers’ contracts, log on and log off records, interviews with drivers and Uber Australia, ABN documents, payment statements, banking records and pricing schedules.

“The weight of evidence from our investigation establishes that the relationship between Uber Australia and the drivers is not an employment relationship,” Ms Parker said.

“For such a relationship to exist, the courts have determined that there must be, at a minimum, an obligation for an employee to perform work when it is demanded by the employer.”

“Our investigation found that Uber Australia drivers are not subject to any formal or operational obligation to perform work,” Ms Parker said.

“Uber Australia drivers have control over whether, when, and for how long they perform work, on any given day or on any given week.”

“Uber Australia does not require drivers to perform work at particular times and this was a key factor in our assessment that the commercial arrangement between the company and the drivers does not amount to an employment relationship,” Ms Parker said.

“As a consequence, the Fair Work Ombudsman will not take compliance action in relation to this matter.”

“This investigation related solely to Uber Australia and was not an investigation of the gig economy more generally,” Ms Parker said.

Companies in the gig economy use a range of business models and the Fair Work Ombudsman will continue to assess allegations of non-compliance on a case-by-case basis. Anyone with concerns about their employment arrangements should contact the FWO.

Employers and employees can visit www.fairwork.gov.au or call the Fair Work Infoline on **13 13 94** for free advice and assistance about their rights and obligations in the workplace. A free interpreter service is available on **13 14 50**.

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MEA states importantly that these two examples clearly show that the proposed changes that are considered by the RIS are simply not suitable. Any change must consider all industries and the effect of “work on demand” definitions may have on other industries. It is impossible to predict with any certainty the unintended consequences will have on the Workcover fund.

The RIS is suggesting that the Queensland Workcover Act abandon Australian common law and the control test which currently has commonalities with most other jurisdictions. The RIS tries to indicate that there is gap in who is considered a worker however as shown above

between Uber and Foodora there are 2 legitimate classifications and that the current rules should be enforced rather than trying to over regulate and confuse industry with unclear and uncertain definitions of what is perceived as a new type of worker but are not exhibiting any different type of trait that has not been experienced in the past.

Enforcement and Compliance

It is not new that legitimate independent contractors/ “work on demand” enterprises can be confused with what is sham contracting and therefore companies avoid their obligations. It is surprising that the RIS makes no attempt to define, measure or highlight the success or otherwise of Workcover Qld enforcement and compliance measures to demonstrate what has happened in other industries. The RIS is suggesting that GIG economy workers are workers then enforcement of current regulation should be the first action, not rushed legislative change.

The gig economy should, and is subject, to the same scrutiny as other venerable workers and industries such as those in transport, labour hire, security and contract cleaning, which over the years have been addressed through the common law test and enforcement by the regulator.

Insurance

The RIS, also, tries to address insurance arrangements including the relationship between motor vehicle, health and personal insurance. It suggests a gap may be present between these insurance products. The RIS does not give exact examples of how the comparison has been conducted. Independent contractors purchase a range of insurances to ensure businesses continue to operate. It is clear in all industries and even through natural disasters people make decisions not to insure or self-insure or only partly insure based on numerous factors including cost risk industry and coverage however this is a decision made by the person. If they are an employee then the common law test will determine that they are covered by Workcover, if not it is a private insurance matter for the independent contractor.

MEA is against any change in this area due to the unintended consequences and lack of clarity that any definition of gig worker may impact on the current status and viability of the Workcover Qld fund.



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