

# ‘We are All Entrepreneurs Now’: Options and New Approaches for Adapting Equality Law for the ‘Gig Economy’

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*As the world of work moves to increasingly precarious, temporary and insecure forms of labour, traditional forms of work regulation are becoming less relevant for the ‘gig economy’. Equality law has traditionally been framed as protecting ‘employees’ (and now ‘workers’) against acts of discrimination by ‘employers’. As these categories become increasingly remote from the lived experience of work, the relevance and potential of equality law to secure individual employment rights becomes increasingly limited. Drawing on comparative legal doctrinal analysis of the UK and Australia, this article considers options and new approaches for protecting workers from discrimination in new forms of employment, canvassing ideas such as the extension of equality law to non-traditional workers, collectivized approaches to individual protection, and the use of positive duties to regulate the gig economy. This article questions the basic relevance and structuring of equality law for new forms of work. If equality law is to remain relevant and effective, serious changes are required to how it is conceived, framed and promoted. Merely extending existing ideas of ‘equality law’ to new forms of work will not respond to fundamental shifts in the labour market: there is a need to rethink and retheorize the role and purpose of equality law.*

## 1 INTRODUCTION

Technological change is ‘having a pervasive and disruptive effect on work and labour markets’<sup>1</sup> across the global economy. New online labour market (OLM) platforms are consolidating their role in the labour market,<sup>2</sup> offering new ways of engaging labour. OLMs cover a range of different industries, ranging from transportation (Uber) to accommodation (AirBnB) to general tasks (Airtasker). In

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<sup>1</sup> Peter Gahan et al., *Technology, the Digital Economy and the Challenge for Labour Market Regulation*, in *The evolving project of labour law: foundations, development and future research directions* 276, 276 (John Howe et al. eds, 2017).

<sup>2</sup> *Ibid.*

particular, there has been a growth in ‘peer-to-peer’ marketplaces,<sup>3</sup> where the role of platforms largely centres around matching customers with services, analysing and sorting providers (including through ratings and reviews), and adding product value (including through the use of data to provide product insights),<sup>4</sup> and work is undertaken and procured by ‘peers’ or the general public.

OLMs tend to break work roles into discrete tasks or components,<sup>5</sup> and are largely confined to ‘micro-tasks’ in low to medium-value transactions.<sup>6</sup> Thus, the gig economy has been described as ‘micro-labor on a macro scale’.<sup>7</sup> The jobs on offer can be unskilled or skilled; act as core jobs or simply provide supplementary income; and often replace roles previously performed by employees or independent contractors.<sup>8</sup> OLMs compete with established players and incumbents on the basis of lower production costs,<sup>9</sup> often achieved through lower labour costs. Unsurprisingly, then, within this ‘gig economy’, work tends to be largely informal, piecemeal, and unregulated.<sup>10</sup> OLMs also offer to increase the potential for offshoring of work, allowing workers to compete for jobs regardless of their physical location.<sup>11</sup> This could potentially create a globalized competitive market for labour, at least where tasks are not locally executed.<sup>12</sup>

OLMs therefore represent a fundamental challenge to established workplace regulation and labour law in three key ways. First, they represent a challenge to nation-based laws and regulations, as some forms of work can be undertaken anywhere, via a platform that could be based in a different country to the parties involved. This makes domestic regulation fraught in practice, and enforcement highly challenging. As global platforms increasingly transcend national regulation, there is greater reliance on platforms themselves acting as regulators of their own conduct.<sup>13</sup> Second, by breaking jobs into discrete tasks, OLMs undermine the notion of the ‘employee’ or ‘worker’ who is offered some semblance of continuity of work, instead facilitating the hiring of ‘labour on demand’<sup>14</sup> for small or micro-

<sup>3</sup> *Ibid.*

<sup>4</sup> Productivity Commission, *Digital Disruption: What Do Governments Need to Do?*, Productivity Commission Research Paper 140–143 (Productivity Commission), (June 2016).

<sup>5</sup> *Ibid.*, at 76; cristiano Codagnone et al., *The Future of Work in the ‘Sharing Economy’: Market Efficiency and Equitable Opportunities or Unfair Precarization?* 11 (2016).

<sup>6</sup> Productivity Commission, *supra* n. 4, at 149.

<sup>7</sup> Arianne Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig-Economy*, 47 *Seton Hall L. Rev.* 393, 396 (2017).

<sup>8</sup> Gahan et al., *supra* n. 1, at 279.

<sup>9</sup> *Ibid.*, at 280.

<sup>10</sup> *Ibid.*, at 286.

<sup>11</sup> *Ibid.*, at 285.

<sup>12</sup> Valerio De Stefano, *Introduction: Crowdsourcing, the Gig-Economy and the Law*, 37 *Comp. Lab. L. & Policy J.* 461, 463 (2016).

<sup>13</sup> Codagnone et al., *supra* n. 5, at 11.

<sup>14</sup> Productivity Commission, *supra* n. 4, at 76.

tasks.<sup>15</sup> OLMs therefore tend to transfer the risks of employment to workers, rather than those who engage them.<sup>16</sup> ‘Truly entrepreneurial’ workers may embrace this trend, and the flexibility of work that is offered. However, not all workers have the wherewithal to manage these risks effectively.<sup>17</sup> Third, the gig economy challenges the boundaries and ‘very idea of a labor market’<sup>18</sup> by undermining any distinction between work and home, between work and leisure, and between professional and personal relationships.<sup>19</sup>

The gig economy represents a small but significant component of the modern labour market in a number of countries. In Australia, for example, it is estimated that less than 0.5% of adult Australians work on peer-to-peer platforms more than once per month.<sup>20</sup> In the US and UK, conservative estimates suggest that 1–2% of the national labour force are engaging with OLMs every week<sup>21</sup>: in the US, studies have variously estimated that the gig economy represents anywhere from 0.3% to 9% of the national labour market.<sup>22</sup> In an online survey of 2,238 UK adults aged 16–75, 21% said they had tried to find work via ‘sharing economy’ platforms during the past year. If extrapolated to the entire UK population, this is equivalent to around nine million people, or one-fifth of the adult population, engaging with the sharing economy each year. Eleven percent of respondents succeeded in finding work via a ‘sharing economy’ platform, which is equivalent to around 4.9 million people. Huws and Joyce therefore estimate that 3% of the UK labour force find work on these platforms every week, amounting to 1.3 million people<sup>23</sup>; and 4% (or around 1.8 million people) find work at least every month.

Given the potential significance of OLMs, it is important to review how platforms are regulated, and the potential for labour market regulation to intervene to secure individual worker wellbeing. The issues faced by those working in the gig economy reflect broader labour market trends towards casualization, triangulated work relationships, the demutualization of the risks of employment,<sup>24</sup> the

<sup>15</sup> *Ibid.*, at 149.

<sup>16</sup> Richard Johnstone et al., *beyond Employment: The Legal Regulation of Work Relationships* 187 (2012).

<sup>17</sup> *Ibid.* See similarly Productivity Commission, *supra* n. 4, at 69.

<sup>18</sup> Noah Zatz, *Does Work Law Have a Future If the Labour Market Does Not?*, 91 *Chi.-Kent L. Rev.* 101, 132 (2016).

<sup>19</sup> *Ibid.*, at 118.

<sup>20</sup> Productivity Commission, *supra* n. 4, at 77; Jim Minifie & Trent Wiltshire, *Peer-To-Peer Pressure: Policy for the Sharing Economy* 33 (2016).

<sup>21</sup> Codagnone et al., *supra* n. 5, at 5.

<sup>22</sup> *Ibid.* at 22.

<sup>23</sup> Ursula Huws & Simon Joyce, *Size of the UK's 'Gig Economy' Revealed for the First Time* 1 (University of Hertfordshire, Feb. 2016).

<sup>24</sup> De Stefano, *supra* n. 12, at 466–467; Valerio De Stefano, *The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowd Work and Labour Protection in the 'Gig-Economy'*, 37 *Comp. Lab. L. & Pol'y J.* 471, 480–485 (2016).

globalization of work, and the move to non-standard work.<sup>25</sup> However, as well as reflecting these trends, the gig economy is also contributing to their emergence: for example, OLMs are likely to boost the number and proportion of independent contractors in the labour market.<sup>26</sup> An examination of the gig economy therefore offers a lens with which to consider and examine broader issues as they relate to the scope and reach of labour regulation.

One area of regulation that has received limited attention in relation to its scope of coverage is that of equality and discrimination law.<sup>27</sup> However, the emergence of the gig economy is particularly relevant for discrimination law and its modern development, given the power that can be exercised by online platforms and the risks of discrimination in the online sphere. Equality law could play a substantial role in protecting the interests of gig economy workers. The question, then, is whether the current structuring and scope of equality law is fit for purpose to protect this group of workers. Like most labour regulation, equality law has traditionally been framed as protecting ‘employees’ (and, in some jurisdictions, ‘workers’) against acts of discrimination by ‘employers’. As these categories become increasingly remote from the lived experience of work, including via the growth of OLMs, the relevance and potential of equality law to secure individual employment rights becomes increasingly limited.

This article therefore questions the basic relevance and structuring of equality law for new forms of work, drawing on a comparative study of the scope of equality and discrimination law in the UK and Australia. The common legal foundations of the two countries, and similar legal models for addressing discrimination,<sup>28</sup> make the UK and Australia highly appropriate comparator countries. Both the UK and Australia largely rely on an individual rights model for addressing discrimination.<sup>29</sup> In the UK, discrimination in employment is regulated by the *Equality Act 2010* (UK), which prohibits direct and indirect discrimination, harassment and victimization in the workplace because of a range of protected characteristics. In Australia, discrimination in employment is regulated by legislation at federal, state and territory level, and as both an equality issue generally, and in relation to employment particularly.<sup>30</sup> At the

<sup>25</sup> codagnone et al., *supra* n. 5, at 5.

<sup>26</sup> Minifie & Wiltshire, *supra* n. 20, at 35.

<sup>27</sup> Though see Catherine Barnard & Alysia Blackham, *Discrimination and the Self-Employed: The Scope of Protection in an Interconnected Age*, in *European Contract Law and the Charter of Fundamental Rights* (Hugh Collins ed., 2017).

<sup>28</sup> Indeed, UK discrimination law was influential in the drafting of Australian statutes. See Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia 1* (1990).

<sup>29</sup> In the UK, see Linda Dickens, *The Road is Long: Thirty Years of Equality Legislation in Britain*, 45 *BJIR* 463 (2007).

<sup>30</sup> See the adverse action provisions in the *Fair Work Act 2009* (Cth).

federal level, different statutes regulate different protected characteristics. As in the UK, Australian discrimination statutes prohibit direct and indirect discrimination, harassment and victimization in the workplace. Both the UK and Australia have completed inquiries into the gig economy (in Australia, by the Productivity Commission<sup>31</sup>; in the UK, the Taylor Review<sup>32</sup>), revealing similar national concern with the emergence of OLMs. This comparison therefore adopts a ‘problem-solving’ or sociological approach to comparative law, which examines how different legal systems have responded to similar problems (here, the emergence of OLMs).<sup>33</sup> Options for protecting workers from discrimination in new forms of employment are explored, canvassing ideas such as the extension of equality law to non-traditional workers, collectivized approaches to individual protection, and the use of positive duties to regulate the gig economy. The article argues for a shift in how equality law is conceived, framed and promoted. Section 2 considers the relevance of equality law for the gig economy, including the potential discrimination that may occur on OLMs. Section 3 then maps the ways the gig economy might undermine or challenge equality and discrimination law. Section 4 presents a range of options for reframing equality law to meet these challenges, and Section 5 concludes.

## 2 THE RELEVANCE OF EQUALITY LAW FOR THE GIG ECONOMY

Working in the gig economy is not just a sideline source of income or ‘pin-money’<sup>34</sup>: for many people, work through online platforms represents their primary source of income.<sup>35</sup> In the ILO Survey of Crowdworkers, undertaken between November and December 2015 on the Amazon Mechanical Turk (AMT) and Crowdflower platforms, 45% of American respondents working on AMT and 26.4% of Crowdflower workers undertook crowdwork ‘as a complement to the pay from other jobs’.<sup>36</sup> However, a large group of workers relied on crowdwork as their primary source of income or main job: overall, 37% of respondents reported that crowdwork was their primary source of income; and 40% of AMT workers did not have any other paid jobs or businesses besides

<sup>31</sup> Productivity Commission, *supra* n. 4.

<sup>32</sup> Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (July 2017).

<sup>33</sup> Esin Örüçü, *Developing Comparative Law*, in *Comparative Law: A Handbook* 43, 52 (Esin Örüçü & David Nelken eds, 2007).

<sup>34</sup> Janine Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 *Comp. Lab. L. & Pol’y J.* 543, 565–566 (2016).

<sup>35</sup> Codagnone et al., *supra* n. 5, at 6, 33; Huws & Joyce, *supra* n. 23, at 1.

<sup>36</sup> Berg, *supra* n. 34, at 552.

crowdwork.<sup>37</sup> Thus, gig economy earnings may well represent the sole source of income for a large number of workers.

This means that many gig economy workers are financially dependent on online platforms, giving the platforms themselves significant power<sup>38</sup> and control over individual wellbeing. Platforms exercise this power in a variety of ways. In particular, platforms are able to accept or bar particular workers<sup>39</sup> (which is akin to hiring or firing for traditional employees); and allocate work based on ratings<sup>40</sup> (which is akin to allocating work to casual workers or independent contractors). Thus, platforms themselves have substantial control over the access and exercise of individual working arrangements, and control workers via their processes of ratings, review, feedback, and removal.<sup>41</sup>

This power imbalance is exacerbated by information and knowledge asymmetries. There is a substantial lack of transparency regarding the algorithms that platforms use to assess and rank workers, and how work is allocated on the platform.<sup>42</sup> Discrimination may well be built into OLM algorithms and rating systems,<sup>43</sup> including through biased reviews left by service users.<sup>44</sup> However, given the lack of transparency around how these processes are managed, it is impossible to assess whether this is the case. This, then, flags the potential importance of discrimination law for scrutinizing and reviewing how platforms operate.

Of course, the gig economy did not invent discrimination: as Rogers argues, discrimination has always been prevalent in the taxi industry, though this was typically *drivers* discriminating against passengers, and not the reverse.<sup>45</sup> However, the difference for OLMs relates to the sheer scale of data on a central platform: in the case of Uber, for example, ‘Uber’s data pool could also help it to root out or correct for discrimination against drivers by passengers, which, to be fair, is *not* an obvious problem in the traditional cab sector’.<sup>46</sup> Thus, the scale of transactions on OLMs, and the fact that this data is centrally held, could help to reveal and address instances of discrimination. The question, of course, is whether OLMs will use the data they hold to identify and address discrimination, particularly where their legal obligations are unclear.

<sup>37</sup> *Ibid.*, at 554–555.

<sup>38</sup> Gahan et al., *supra* n. 1, at 286.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> De Stefano, *supra* n. 12, at 463–464.

<sup>42</sup> Codagnone et al., *supra* n. 5, at 38.

<sup>43</sup> *Ibid.*, at 58.

<sup>44</sup> De Stefano, *supra* n. 12, at 464.

<sup>45</sup> Brishen Rogers, *The Social Costs of Uber*, 82 U. Chi. L. Rev. Online 85, 95 (2015). Though, of course, taxi licensing arrangements could discriminate against and limit access to potential taxi drivers. This does not originate from the customer, however.

<sup>46</sup> *Ibid.*, at 96.

Going further, the gig economy could actually help to advance equality in employment and occupation, including by helping those who have been discriminated against or left the labour market to increase their attachment to the workforce.<sup>47</sup> The gig economy offers more flexible ways of working,<sup>48</sup> which may be particularly attractive to women, those with caring responsibilities (who are often women), and those with health problems or disabilities. Indeed, in the ILO Survey of Crowdworkers, respondents included a group of workers who indicated that they could only work from home. Among US AMT workers, 15.8% of women gave this as a reason for working on the platform, compared with 4.8% of men. For Crowdfunder workers, 6.4% of women gave this as a reason for working on the platform, compared with 2.8% of men. Many of these workers had caring responsibilities: of the workers who stated that they could only work from home (94 in total), 26% had children under the age of six, and many respondents cited care obligations as a reason for why they performed crowdwork.<sup>49</sup> Others needed to work from home because of their own poor health or disability: of those who could only work from home, 36% indicated that they had a health problem that affected the kind of work they could do. These workers were also more likely to rely on crowdwork as their main source of income than other workers.<sup>50</sup>

Thus, OLMs may open up new, more flexible forms of employment that support non-traditional workers or those excluded from traditional work structures. However, there is limited evidence that online platforms are encouraging those who are unemployed or economically inactive to participate in the labour market. It is more likely that platforms are attracting those who are underemployed or self-employed,<sup>51</sup> and seeking to extend their workforce participation and increase their income.<sup>52</sup> Indeed, it is questionable whether groups that are traditionally excluded from the labour market are even able to access or are aware of the potential for working via online platforms.<sup>53</sup>

More generally, by facilitating interactions between people that involve no physical or 'real' personal contact, OLMs could increase anonymity, and

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<sup>47</sup> Gahan et al., *supra* n. 1, at 286–287; Productivity Commission, *supra* n. 4, at 69; Codagnone et al., *supra* n. 5, at 28; Minifie & Wiltshire, *supra* n. 20, at 40.

<sup>48</sup> Productivity Commission, *supra* n. 4, at 69, 95; Barzilay & Ben-David, *supra* n. 7, at 400–401.

<sup>49</sup> Berg, *supra* n. 34, at 552–553.

<sup>50</sup> *Ibid.*, at 553.

<sup>51</sup> codagnone et al., *supra* n. 5, at 6, 40.

<sup>52</sup> Though a sizeable proportion of crowdworkers report relying on OLMs as their main source of income: *see* fn. 32 and associated text. This may mean OLMs are replacing other forms of work such as self-employment.

<sup>53</sup> codagnone et al., *supra* n. 5, at 40.

potentially reduce discrimination<sup>54</sup> by transcending embodied personal characteristics. Thus, OLMs could create a new, discrimination-free marketplace, where protected characteristics become irrelevant to the transaction at hand. However, the reality of how OLMs are structured in practice is quite different to this ideal. For ‘peer-to-peer’ marketplaces in particular, a great deal of emphasis is placed on relationships and trust between those offering and using services. To facilitate these trust-based relationships, platforms encourage users to post a substantial amount of personal information online, including a personal photograph. This may actually encourage and facilitate discrimination.<sup>55</sup> Indeed, the sheer scale of information and number of individuals listed on OLMs may lead to information overload, encouraging people to rely more on cultural stereotypes to make hiring decisions<sup>56</sup> to increase simplicity and reduce uncertainty.<sup>57</sup> In the absence of face-to-face interaction, discriminatory treatment and stereotypes in hiring decisions may be particularly difficult to prove.<sup>58</sup> Thus, there is a very real risk that OLMs will simply replicate discrimination found in other areas of the labour market.<sup>59</sup> This has been borne out by empirical studies of hiring behaviour on OLMs: women have been found to be more likely to be employed in stereotypically female jobs, and less likely to be hired in stereotypically male jobs.<sup>60</sup> Further, workers who pursue jobs that are stereotypically ‘atypical’ for their gender tend to be hired by the hour, rather than being offered fixed contracts. For Silberzahn et al, this represents ‘a risk-averse practice [on the part of employers] that reflects a lack of confidence about [workers’] future performance’.<sup>61</sup>

Barzilay and Ben-David have also argued that OLMs tend to replicate discriminatory trends in the general labour market, including in relation to the gender pay gap. Drawing on analysis of over 4,600 online taskers’ requested rates, occupations, and work-hours on one OLM, Barzilay and Ben-David found that women’s average hourly requested rates were 37% lower than men’s, even after controlling for feedback score, experience, occupational category, hours of work, and

<sup>54</sup> De Stefano, *supra* n. 24, at 47; Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 Ga. L. Rev. 951 (2011); Barzilay & Ben-David, *supra* n. 7, at 400.

<sup>55</sup> See Barnard & Blackham, *supra* n. 27.

<sup>56</sup> Codagnone et al., *supra* n. 5, at 6–7, 28–29.

<sup>57</sup> Eric Luis Uhlmann & Raphael Silberzahn, *Conformity Under Uncertainty: Reliance on Gender Stereotypes in Online Hiring Decisions*, 37 *Behav. & Brain Sci.* 103, 104 (2014).

<sup>58</sup> Barzilay & Ben-David, *supra* n. 7, at 424.

<sup>59</sup> Natasha Martin, *Diversity and the Virtual Workplace: Performance Identity and Shifting Boundaries of Workplace Engagement*, 16 *Lewis & Clark L. Rev.* 605, 626–28 (2012). E.g. Travis has argued that telecommuting could serve to magnify existing gender discrimination: Michelle A. Travis, *Equality in the Virtual Workplace*, 24 *Berkeley J. Emp. & Lab. L.* 283 (2003).

<sup>60</sup> Codagnone et al., *supra* n. 5, at 45–46; Uhlmann & Silberzahn, *supra* n. 57.

<sup>61</sup> Raphael Silberzahn et al., *Pay as She Goes: For Stereotypically Male Jobs, Women Tend to Be Hired by the Hour*, 2014 *Acad. Mgmt. Proc.* 16273 (2014).



educational attainment.<sup>62</sup> While this data reflected users' requested price, and not the actual price negotiated,<sup>63</sup> it likely still reflects a substantial wage gap in online work. The authors hypothesize that women's undervaluation of their services could reflect an increased need for money, or the fact that the platform is 'operating in the shadow of the offline market in which women often earn less than men'.<sup>64</sup> Thus, OLMs may merely replicate existing gender disparities and offline discriminatory trends. This again reinforces the importance of equality law for the gig economy and OLMs.

### 3 THE POTENTIAL FOR THE GIG ECONOMY TO UNDERMINE EQUALITY LAW

Despite the importance of equality law for OLMs, the growth of the gig economy poses a number of particular and substantial challenges to the utility and efficacy of domestic equality law. The elimination of discrimination in employment and occupation is seen as a fundamental obligation of ILO Members, and is included in the ILO Declaration on Fundamental Principles and Rights at Work.<sup>65</sup> Achieving this in practice requires that protection against discrimination extend to the majority of the workforce, if not all workers. However, the vast majority of digital platforms have expended substantial effort to depict those engaged through the platforms as 'self-employed' or 'independent contractors', and therefore beyond the scope of traditional labour regulation. This was challenged successfully in the UK case of *Aslam v. Uber*<sup>66</sup> where an Employment Tribunal (ET) ruled that Uber drivers were 'workers' within the meaning of the *Employment Rights Act 1996* (UK) and for the purposes of minimum wage and working time regulations. The ET held that any contract between an Uber driver and their passenger was 'pure fiction',<sup>67</sup> meaning it was impossible for Uber to argue that drivers were engaged by passengers rather than Uber itself. The ET found that Uber ran a transportation business, not just a technology company,<sup>68</sup> and drivers provided skilled labour to allow Uber to deliver transportation services.<sup>69</sup> Further, Uber drivers undertook to complete work personally<sup>70</sup> and were engaged in a dependent

<sup>62</sup> Barzilay & Ben-David, *supra* n. 7, at 398, 408.

<sup>63</sup> *Ibid.*, at 421.

<sup>64</sup> *Ibid.*, at 420.

<sup>65</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010) Art. 2(d). [2017] ET 2202551/2015 (28 Oct. 2016).

<sup>66</sup> *Ibid.*, at 91.

<sup>67</sup> *Ibid.*, at 87–89.

<sup>68</sup> *Ibid.*, at 92.

<sup>69</sup> *Ibid.*, at 93.

work relationship.<sup>71</sup> Uber was therefore not just a grouping of small businesses: this idea was ‘faintly ridiculous’ as Uber drivers could not grow their business or negotiate the terms of their engagement with passengers<sup>72</sup>: they were offered and accepted work on Uber’s terms.<sup>73</sup> Thus, Uber’s documentation and rhetoric did not correlate with the practical reality.<sup>74</sup> Uber’s appeal to the Employment Appeal Tribunal was dismissed.<sup>75</sup>

Uber’s situation differs in a number of significant ways to other online platforms, where it is more likely that those engaged will be seen as ‘independent contractors’. In particular, Uber drivers have no capacity to negotiate terms or prices with their passengers, whereas other platforms like Airtasker allow individuals to set their own rates, and to actively negotiate with service users. Thus, the employment categorization of those who work on OLMs remains a live issue.

In some jurisdictions, being regarded as independent contractors will put gig economy workers beyond the scope of equality law. In the UK, for example, ‘employment’ is defined in the *Equality Act 2010* (UK) as ‘employment under a contract of employment, a contract of apprenticeship or a contract personally to do work’.<sup>76</sup> The prohibition of discrimination in section 39 of the *Equality Act 2010* (UK), as it relates to work, is then limited to ‘employers’ in relation to ‘employment’. This represents a narrow definition of employment, and a narrow prohibition of discrimination, which typically excludes independent contractors who are not engaged ‘personally to do work’.

This definition of employment, and the extent to which it applied to the engagement of an arbitrator, was considered by the UK Supreme Court in the case of *Jivraj v. Hashwani*.<sup>77</sup> The Court was asked to consider whether an arbitration agreement – which provided for arbitration before three arbitrators, ‘respected members of the Ismaili community’ – became void with the passage of the Employment Equality (Religion or Belief) Regulations 2003 (UK) SI 2003/1660 (the provisions of which have now been consolidated in the *Equality Act 2010* (UK)).

The leading judgment of Lord Clarke, with whom Lord Phillips, Lord Walker and Lord Dyson agreed, held that the key issue was whether the arbitration agreement ‘provides for “employment under ... a contract personally to do any work”’. Drawing on the reasoning of the CJEU in C-256/01 *Allonby v. Accrington & Rossendale College*,<sup>78</sup> the Court held that the key question was:

<sup>71</sup> *Ibid.*, at 94.

<sup>72</sup> *Ibid.*, at 90.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, at 90, 93.

<sup>75</sup> *Uber BV v. Aslam* [2017] UKEAT/0056/17 (10 Nov. 2017).

<sup>76</sup> *Equality Act 2010* (UK) s. 83; *see also* s. 212(1).

<sup>77</sup> [2011] UKSC 40.

<sup>78</sup> [2004] EUECJ (13 Jan. 2004), [2004] 1 CMLR 35, at 67–68.

whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services.<sup>79</sup>

In this case, there was no relationship of subordination, and the services were not performed ‘for and under the direction of the parties’.<sup>80</sup> Indeed, the arbitrator was expected to be independent of the parties to the agreement: ‘His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. ... He is in no sense in a position of subordination to the parties; rather the contrary’.<sup>81</sup> Thus, there was no basis for concluding that the arbitrator ‘agreed to work under the direction of the parties’,<sup>82</sup> and the Regulations were not applicable to the selection, engagement or appointment of arbitrators,<sup>83</sup> as it was not a form of ‘employment’.<sup>84</sup>

A similar result was achieved in the case of *Halawi v. WDFG UK Ltd*<sup>85</sup> on the basis that the services were not ‘personal’, and that the individual concerned was therefore not an employee or worker. In that case, Arden LJ recognized that EU equality law (which the *Equality Act 2010* (UK) implements in UK law) applies to ‘employees’ in the extended meaning of that term (that is, it extends to ‘workers’ as well as ‘employees’). The issue for that case was whether a person who provides her services through an employee-controlled company to a service company is an ‘employee’ within that extended definition. Ms Halawi sought to establish that she was an employee, not of the employee-controlled company, or of the client of the service company, but of the company that managed the workplace for the client for whom her services were engaged (WDF). These complex arrangements are depicted in Figure 1. Assuming Ms Halawi was an employee of WDF, she argued that WDF’s decision to withdraw her airside pass, which effectively prevented her from continuing with her work at WDF’s outlet, was discriminatory on the grounds of race or religion, and amounted to dismissal.

<sup>79</sup> *Jivraj v. Hashwani* [2011] UKSC 40, at 34.

<sup>80</sup> *Ibid.*, at 40.

<sup>81</sup> *Ibid.*, at 41.

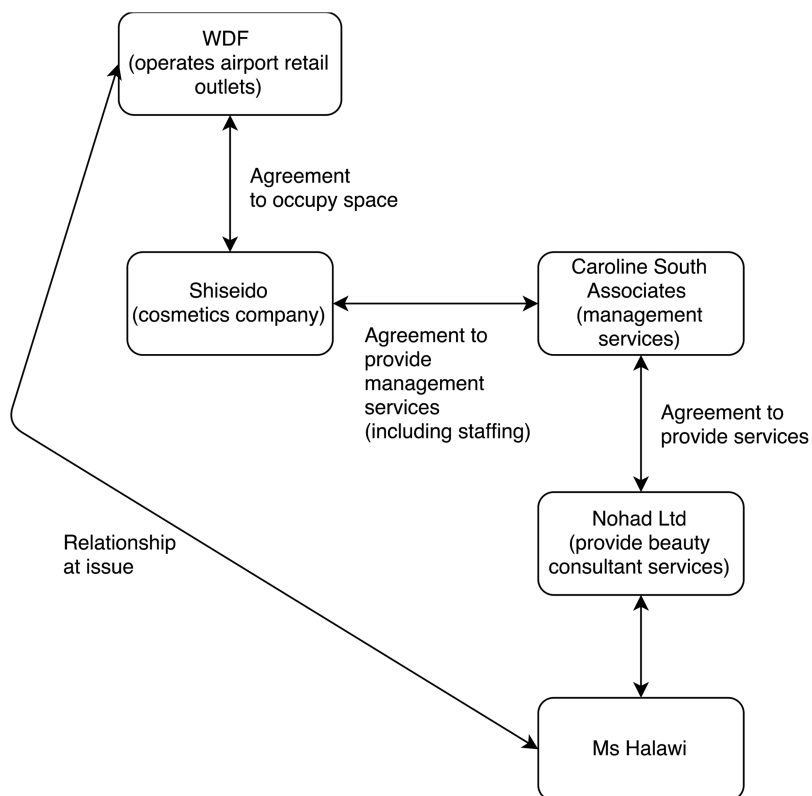
<sup>82</sup> *Ibid.*, at 45.

<sup>83</sup> *Ibid.*, at 50.

<sup>84</sup> *Ibid.*, at 34.

<sup>85</sup> [2014] EWCA Civ 1387, [2015] 1 CMLR 31.

Figure 1 Relationships Between Entities in *Halawi v. WDFG UK Ltd*



The Court held that meeting the criteria laid down by EU law for ‘employment’ required the putative employee to (1) agree personally to perform services; and (2) be subordinate to the employer (that is, generally bound to act on the employer’s instructions).<sup>86</sup> The ET in this case had previously found that Ms Halawi was not subject to WDF’s control in the way she carried out her work.<sup>87</sup> Further, Ms Halawi had a power of substitution under her contract, which was inconsistent with the personal performance of services.<sup>88</sup> This could not be disregarded, even if it was rarely used.<sup>89</sup> Arden LJ explicitly noted that:

I too have an uneasy feeling that the complex arrangements [in this case] have the effect that the appellant has no remedy for discrimination even if she has been a victim of

<sup>86</sup> *Ibid.*, at 4.

<sup>87</sup> *Ibid.*, at 44.

<sup>88</sup> *Ibid.*, at 49.

<sup>89</sup> *Ibid.*

discrimination (an issue which has not been determined at any stage of these proceedings), but am bound to hold that the legal conclusions of the ET flow from the findings it made.<sup>90</sup>

Thus, complex employment arrangements were effectively used to stymie the operation of discrimination law.<sup>91</sup>

The decision in *Aslam v. Uber*<sup>92</sup> may mean that some gig economy workers are entitled to the protection of UK discrimination law. The definition of ‘worker’ in the *Employment Rights Act 1996* (UK) section 230(3) is similar to that under the *Equality Act 2010* (UK): it defines a worker as ‘an individual who has entered into or works under ... (a) a contract of employment, or (b) any other contract ... whereby the individual undertakes to do or *perform personally any work or services* for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual’ [emphasis added]. Thus, the *Uber* decision may mean that some gig economy workers fall within the scope of discrimination law in the UK. As noted above, however, Uber may be distinguishable from other OLMs in how it operates, reducing the ability to extrapolate this decision to other gig economy workers.

Even in jurisdictions where equality law extends to the ‘self-employed’ and ‘independent contractors’, the question remains regarding who holds obligations under equality law: who is the duty holder in this context? In Australia, for example (where there is no third ‘worker’ category), independent contractors are covered by the adverse action provisions of the *Fair Work Act 2009* (Cth) section 342 and come within the scope of discrimination law. ‘Adverse action’ in relation to independent contractors includes where a principal with a contract for services with an independent contractor:

- terminates a contract with an independent contractor;
- ‘injures’ the independent contractor in relation to the terms and conditions of the contract;
- alters the position of the independent contractor to their prejudice;
- refuses to make use of, or agree to make use of, services offered by the independent contractor; or
- refuses to supply, or agree to supply, goods or services to the independent contractor.<sup>93</sup>

<sup>90</sup> *Ibid.*, at 54.

<sup>91</sup> Confusion about how to classify individuals for the purposes of discrimination law was also apparent in *Capita Translation and Interpreting Ltd v. Siauciunas* [2017] UKEAT 0181\_16\_2302 (23 Feb. 2017), which related to the engagement of interpreters for the courts.

<sup>92</sup> [2017] ET 2202551/2015 (28 Oct. 2016).

<sup>93</sup> *Fair Work Act 2009* (Cth) s. 342.

Independent contractors also receive protection under the adverse action provisions if a principal who proposes to enter into a contract for services with them: refuses to engage them; discriminates against them in the terms or conditions offered; or refuses to make use of services or supply goods or services to the independent contractor.<sup>94</sup>

For employees, the adverse action provisions prohibit discrimination by ‘an employer’ against employees or prospective employees on the basis of protected characteristics.<sup>95</sup> This protection is not explicitly extended to independent contractors. However, discrimination against independent contractors may be captured by section 340 of the *Fair Work Act 2009* (Cth), which covers workplace rights. Section 340 prohibits adverse action by a ‘person’ because ‘another person’: has a workplace right; has, or has not, exercised a workplace right; or proposes to exercise a workplace right. ‘Workplace right’ is defined broadly in section 341 to include having a benefit under a ‘workplace law, workplace instrument or order made by an industrial body’, or being able to make a complaint to a person or body which has the capacity under a workplace law to seek compliance with that law or a workplace instrument. A ‘workplace law’ is defined in section 12 as including the *Independent Contractors Act 2006* (Cth) (discussed below) and ‘any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees’. This is broad enough to include rights under equality and discrimination law. Indeed, in *Bayford v. MAXXIA Pty Ltd*,<sup>96</sup> it was held that the *Equal Opportunity Act 1995* (Vic) was a ‘workplace law’.<sup>97</sup> Thus, independent contractors likely fall within the scope of the adverse action provisions in Australia, including as they relate to workplace rights under discrimination law.

Independent contractors also fall within the scope of discrimination law in Australia. In some statutes, this is achieved by adopting a broad definition of ‘employment’ that encompasses contracts for services. For example, the *Age Discrimination Act 2004* (Cth) section 5 defines ‘employment’ as including ‘work under a contract for services’. This is consistent with the definition in the *Sex Discrimination Act 1984* (Cth) section 4. Section 18 of the *Age Discrimination Act 2004* (Cth) then makes it unlawful for an employer, or a person acting or purporting to act on behalf of an employer, to discriminate against a ‘person’ on the ground of age in determining who should be offered employment or the terms

<sup>94</sup> *Ibid.*, s. 342.

<sup>95</sup> *Ibid.*, s. 351(1). ‘Employee’ and ‘employer’ are defined in s. 335 as having ‘their ordinary meanings’.

<sup>96</sup> [2011] FMCA 202 (12 Apr. 2011).

<sup>97</sup> *Ibid.*, [140]–[141]. Though see the discussion in *Wroughton v. Catholic Education Office Diocese of Parramatta* [2015] FCA 1236 (17 Nov. 2015) [75]–[79] where it was argued (but unnecessary to decide) that the *Sex Discrimination Act 1984* (Cth) was not a ‘workplace law’. See further *Stephens v. Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) and *CFMEU v. Leighton Contractors Pty Ltd* [2012] FMCA 487 (25 July 2012), which both related to workers’ compensation statutes.

or conditions of employment; and to discriminate against an employee in the terms or conditions of employment, denying or limiting access to promotion, transfer, training or other benefits, in dismissal, or in relation to any other detriment. Similar provision is made in section 14 of the *Sex Discrimination Act 1984* (Cth).

At the state level in Victoria, it is even more explicit that independent contractors are covered by the various provisions relating to ‘employment’ in discrimination law. The definition of ‘employee’ in the *Equal Opportunity Act 2010* (Vic) extends to those ‘engaged under a contract for services’, the definition of ‘employer’ includes ‘a person who engages another person under a contract for services’, and the definition of ‘employment’ includes ‘engagement under a contract for services’.<sup>98</sup> Thus, the prohibition of discrimination in employment in section 18 of the Act clearly extends to independent contractors, and ‘employers’ must not discriminate against ‘employees’ by denying or limiting access to promotion, transfer, training or other benefits; in dismissal or termination; or by subjecting the employee to any other detriment.

In the Australian statutes, it appears that the ‘duty holder’ for the purposes of equality law is the principal engaging the independent contractor under a contract for services. Indeed, this is made explicit in the definition of ‘employer’ in the *Equal Opportunity Act 2010* (Vic). However, many OLM platforms would not see themselves as contracting with those who work on the platforms: the contract is arguably between the service user (i.e. the client) and those performing work (i.e. the Uber driver). In *Aslam v. Uber*,<sup>99</sup> the ET held it was impossible for Uber to argue that drivers were engaged by passengers rather than Uber itself,<sup>100</sup> making Uber the only practicable duty holder for the purposes of equality law. Identifying the duty holder may be more complicated on other platforms, where terms are not dictated to those performing work, and there is more scope for negotiation between parties. In this context, Barzilay and Ben-David argue that there should be less focus on *who* is discriminating, or seeking to identify the duty holder, and more emphasis on *how* the discrimination is being effected.<sup>101</sup> This is particularly important given the difficulty of proving bias or discrimination against individuals in an online setting<sup>102</sup>: ‘We should therefore increasingly be asking how inequality is being (re)produced and in which institutionalized ways ... discrimination [is being] enabled by platforms, and by society’.<sup>103</sup>

<sup>98</sup> *Equal Opportunity Act 2010* (Vic) s. 4.

<sup>99</sup> [2017] ET 2202551/2015 (28 Oct. 2016).

<sup>100</sup> *Ibid.*, at 90, 93.

<sup>101</sup> Barzilay & Ben-David, *supra* n. 7, at 428.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*

#### 4 OPTIONS FOR REFORMING EQUALITY LAW TO RESPOND TO THE GIG ECONOMY

If equality law is to remain relevant and effective in the face of the challenges posed by the gig economy, serious changes are required to how equality law is conceived and framed. The existing literature contains a range of ideas and options for how to address the general labour law implications of the gig economy: for example, scholars have suggested the introduction of portable social security accounts for all workers,<sup>104</sup> the introduction of a universal basic income<sup>105</sup> or allowing gig economy workers to have a portable rating that can be transferred from one OLM platform to another, making them less dependent on one particular platform.<sup>106</sup> However, these suggestions rarely focus on equality law, or how to address discriminatory aspects of the gig economy. It appears that there are four key options for reforming equality law to respond to the challenges posed by the gig economy.

##### 4.1 EXTENDING THE SCOPE OF EQUALITY LAW

First, equality law could be extended to include non-traditional workers within its scope. This reflects the fundamental importance of eliminating discrimination in employment and occupation,<sup>107</sup> and recognizes the significance and contentiousness of employee classification in the gig economy: indeed, the majority of litigation relating to the gig economy has related to worker classification (i.e. whether workers are independent contractors or employees) and the benefits associated with each status (such as the minimum wage).<sup>108</sup>

The extension of the scope of equality law could be achieved in five ways. First, gig economy workers could be classified as ‘employees’,<sup>109</sup> and granted the protective rights associated with that status. This reflects the approach in Australian equality law, where independent contractors are defined as employees for the

<sup>104</sup> Berg, *supra* n. 34, at 566–569; Codagnone et al., *supra* n. 5, at 7, 50–51.

<sup>105</sup> Productivity Commission, *supra* n. 4, at 69, 78–79.

<sup>106</sup> De Stefano, *supra* n. 24, at 500; Minifie & Wiltshire, *supra* n. 20, at 44.

<sup>107</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010) Art. 2(d).

<sup>108</sup> Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 *Comp. Lab. L. & Pol’y J.* 577 (2016); Codagnone et al., *supra* n. 5, at 48. In Australia, see Workplace Express, *FWO Investigating Uber’s Compliance with Workplace Laws*, Workplace Express (28 June 2017), [https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&nav=10&selkey=55792&utm\\_source=instant+email&utm\\_medium=email&utm\\_campaign=subscriber+email&utm\\_content=read+more&utm\\_term=FWO%20investigating%20Uber%27s%20compliance%20with%20workplace%20laws](https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=55792&utm_source=instant+email&utm_medium=email&utm_campaign=subscriber+email&utm_content=read+more&utm_term=FWO%20investigating%20Uber%27s%20compliance%20with%20workplace%20laws) (accessed 2 Aug. 2017).

<sup>109</sup> Guy Davidov, *The Status of Uber Drivers: A Purposive Approach*, Spanish Lab. L. & Emp. Rel. J. (2017).



purposes of equality law via a broad definition of ‘employment’, if not for other forms of labour regulation.

Second, a third category of work could be established – like the ‘worker’ category in EU law, or the extended concept of ‘employee’ under UK equality law – which forms an intermediate category between ‘independent contractors’ and ‘employees’, and which is given some, limited rights to protection, including those under equality law.<sup>110</sup> As the cases of *Jivraj v. Hashwani* and *Halawi v. WDFG UK Ltd* demonstrate, however, this may not be sufficient to ensure that gig economy workers are protected from discrimination, particularly in the face of complex online structures. Indeed, this ‘third category’ approach might just generate confusion and additional complexity regarding work classifications.<sup>111</sup> While the Taylor Review of Modern Working Practices in the UK recommended keeping a third category of ‘worker’ status (relabelled as ‘dependent contractor’ status), the Review also recommended greater clarity regarding how to distinguish ‘workers’ from those who are legitimately self-employed.<sup>112</sup> This definitional difficulty strikes at the heart of a three-category classification system.

Third, some of the classification difficulties associated with the gig economy could be resolved via a presumption that those engaged in a certain number of hours of work, or earning a certain level of income, are classified as employees<sup>113</sup>; it would then be up to the employer or principal to displace this assumption. This approach would help to relieve the burden of enforcement that is often placed on individual workers, who are required to prove that they are an employee or worker to benefit from equality law. However, it does not resolve the broader issues of equality law’s lack of coverage in this context.

Fourth, legislative intervention could be used to prevent OLMs from misrepresenting those performing work as independent contractors. For example, under the Australian *Fair Work Act 2009* (Cth) section 357, an employer must not misrepresent a contract of employment as a contract for services. However, the section does not apply if the employer proves that they did not know, and were not reckless, as to whether the contract was a contract of employment rather than a contract for services.<sup>114</sup> This prohibition appears to have led to a decline in the number of Australian employers who are willing to restructure their workforce to utilize independent contractors,<sup>115</sup> and could help to stem the tide of independent

<sup>110</sup> Miriam A. Cherry & Antonio Aloisi, ‘Dependent Contractors’ In the Gig Economy: A Comparative Approach, 66 Am. U. L. Rev. 635 (2017); Codagnone et al., *supra* n. 5, at 7.

<sup>111</sup> De Stefano, *supra* n. 24, at 494–499; Cherry & Aloisi, *ibid.*, at 677–682.

<sup>112</sup> Taylor, *supra* n. 32, at 9, 35–36.

<sup>113</sup> Cherry & Aloisi, *supra* n. 110, at 682–684.

<sup>114</sup> See further *Fair Work Ombudsman v. Quest South Perth Holdings Pty Ltd* [2015] HCA 45.

<sup>115</sup> Alysia Blackham, *Sham Self-Employment in the High Court: Fair Work Ombudsman v. Quest South Perth Holdings Pty Ltd*, Opinions on High (7 Mar. 2016), <https://blogs.unimelb.edu.au/opinionsonhigh/2016/03/07/blackham-quest/> (accessed 8 Aug. 2017).

contracting in the gig economy, bringing more workers within the scope of equality law.

Fifth, gig economy workers could receive protection from specific legislation, such as that afforded to independent contractors by existing legislative regimes in Australia. The *Independent Contractors Act 2006* (Cth) section 12, for example, provides that an application may be made for a court to review a services contract on the grounds that it is unfair or harsh. This applies to services contracts that do not relate to work for the ‘private and domestic purposes of another party to the contract’, and to contracts that do not involve independent contractors that are body corporates (unless the work is performed by a director or their family member).<sup>116</sup> The court may consider the relative bargaining positions of the parties, any undue influence or unfair tactics, and ‘whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work’.<sup>117</sup> To address the limited scope of equality law, this protection could be extended to also consider whether the terms of the contract are likely to be discriminatory.

While these proposals offer potential means to extend equality regulation to OLMs and the gig economy, they are beset by similar issues of enforcement. Even if gig economy workers are granted legal protection from discrimination, it is unclear whether they will have the capacity or willingness to enforce their legal rights.<sup>118</sup> Further, gig economy workers may struggle to establish discrimination claims, particularly if discrimination legislation is grounded in a comparator requirement. Where workers are employed remotely, with little contact with other individuals, identifying a real or hypothetical comparator may be problematic. Thus, it is necessary to consider alternatives or complementary strategies to an individual rights approach of this nature.

#### 4.2 REGULATING WORK NOT EMPLOYMENT

Going further, consideration should be given to whether it is possible to regulate work rather than employment. As with the *Independent Contractors Act 2006* (Cth), this could be achieved via a provision allowing the courts to intervene in work relationships and amend contracts<sup>119</sup>: however, this would not be restricted to independent contractors of certain types or performing certain functions, and would instead focus on work contracts generally. Johnstone et al argue that grounds of intervention could include fair dealing (including the provision of

<sup>116</sup> *Independent Contractors Act 2006* (Cth) s. 11.

<sup>117</sup> *Ibid.*, s. 15.

<sup>118</sup> In relation to work rights generally, see Andrew Stewart & Jim Stanford, *Regulating Work in the Gig Economy: What Are the Options?*, 28 *Econ. & Lab. Rel. Rev.* 420, 428 (2017).

<sup>119</sup> Johnstone et al., *supra* n. 16, at 196.

clear information); income security; collective negotiation; and accessible dispute resolution.<sup>120</sup> Fair dealing in this context could be extended to include discrimination and equality issues.

A related proposal would be to extend fundamental work rights – including rights to non-discrimination – to all workers,<sup>121</sup> regardless of their work classification. Fredman has argued that non-discrimination duties should not be limited to ‘relationships of subordination’, as in employment, but should instead ‘fall on anyone with the power to discriminate’.<sup>122</sup> Thus, equality law could be seen as an independent human right, rather than being limited to the scope of labour law,<sup>123</sup> and could adhere to all who have the power to impact upon another’s capacity or ability to work. This would help to resolve issues of identifying the ‘duty holder’ for the purposes of equality law. These proposals challenge the fundamental structure of equality law and labour regulation, but offer substantial potential to respond to the future world of work.

#### 4.3 COLLECTIVIZED APPROACHES TO INDIVIDUAL PROTECTION

Third, rather than focusing on individual rights, there could be a renewed focus on collectivized approaches to individual protection for gig economy workers. This may help to address the limitations of individual enforcement noted above.<sup>124</sup> For example, the Freelancers Union in the US provides a number of services for its members; while it does not bargain on its members’ behalf, it is involved in advocacy for policy change.<sup>125</sup> In some contexts, collective action by independent contractors may raise concerns of anti-competitive behaviour, and enliven the operation of antitrust law. However, there are obvious examples where collective representation is not anti-competitive, particularly where the collective action does not extend to bargaining. Thus, some scholars have recommended removing legal barriers to collective action among gig economy workers, including those from antitrust laws,<sup>126</sup> or extending rights to freedom of association to those who are not presently classified as employees or workers.<sup>127</sup> This is recognized in Australia in the laws relating to collective action by independent contractors: independent

<sup>120</sup> *Ibid.*, at 196–200.

<sup>121</sup> De Stefano, *supra* n. 24, at 500–501.

<sup>122</sup> Sandra Fredman, *Equality Law: Labour Law or an Autonomous Field?*, in *The Autonomy of Labour Law* 257, 258, 273 (Alan Bogg et al. eds, 2015).

<sup>123</sup> *Ibid.*, at 262, 266.

<sup>124</sup> Stewart & Stanford, *supra* n. 118, at 428.

<sup>125</sup> Gahan et al., *supra* n. 1, at 289.

<sup>126</sup> De Stefano, *supra* n. 24, at 502.

<sup>127</sup> This could be achieved by adopting a broader definition of ‘worker’ in this context: see Tonia Novitz, *Changes in Employment Status Under Austerity and Beyond – Implications for Freedom of Association*, 39 *Dublin U. L. J.* 27 (2016).

contractors can form or join a union, but can only collectively bargain with the authorization of the Australian Competition and Consumer Commission where it is in the public interest.<sup>128</sup> Another possible approach is through a focus on ‘platform cooperatism’, or the establishment of more worker-friendly OLM platforms that are not-for-profit and owned by members.<sup>129</sup>

While collective action and collectivized platforms may help gig economy workers more generally, it is questionable whether they will address issues relating to discrimination and equality, which are unlikely to be a priority for collective action in the face of the other issues confronting gig economy workers. At the same time, Harcourt et al argue that the presence of unions can help to promote employers’ compliance with anti-discrimination law, and strengthen individual protection from discrimination.<sup>130</sup> Thus, collectivized action could be encouraged in conjunction with other options for strengthening equality law.

#### 4.4 POSITIVE DUTIES TO ACHIEVE EQUALITY

Fourth, it may be possible to regulate online platforms to impose positive duties to address discrimination or equality issues, including through the analysis and publication of data. As noted above, OLMs are collecting substantial quantities of data, which could be used to monitor, assess, and address discriminatory practices. The question, then, is whether OLMs will use the data they hold to identify and address discrimination, particularly where their legal obligations under equality law are unclear. Rogers argues that OLMs could be encouraged to use their data in this way, even without legal obligations to that effect.<sup>131</sup> While this may be true, it is unlikely that all platforms will adopt this path voluntarily: some legal or policy intervention will probably be required. This could take a variety of forms, ranging from financial incentives or exhortations to comply, to legal or financial penalties for non-compliance.

To this end, Barnard and Blackham have suggested that the UK public sector equality duty (PSED) be adapted and extended to parts of the private sector.<sup>132</sup> As part of this duty, OLMs could be required to collect, analyse and publicize data on the protected characteristics of those using the platform; remove photos or personal descriptions about workers, unless there are objectively justified reasons to retain them; and have policies demonstrating what they are doing to

<sup>128</sup> *Competition and Consumer Act 2010* (Cth) pt IV.

<sup>129</sup> Gahan et al., *supra* n. 1, at 289–90.

<sup>130</sup> Mark Harcourt et al., *Do Unions Affect Employer Compliance with the Law? New Zealand Evidence for Age Discrimination*, 42 *Brit. J. Indus. Rel.* 527 (2004).

<sup>131</sup> Rogers, *supra* n. 45, at 96.

<sup>132</sup> Barnard & Blackham, *supra* n. 27, at 217.

address and eliminate discrimination.<sup>133</sup> This would go some way to addressing the lack of transparency inherent in the operations of many OLMs. However, it would not necessarily address inherent bias or discrimination that is present in wage rates, algorithms and ratings. Thus, platforms could also be required to adopt greater transparency in their ratings, algorithms, and deactivation processes.<sup>134</sup> Platforms could also be encouraged (or, indeed, required) to improve the reliability of feedback gained from users, and to initiate a right of reply for those undertaking work on the platform.<sup>135</sup> Where platforms identify particular trends or potential discrimination in these areas, it is important that they take action to address emerging issues. A general obligation to eliminate discrimination and achieve equality in the platform's operations may go some way to achieving this end.

These proposals are consistent with Barzilay and Ben-David's emphasis on the use of 'Equality-by-Design' for online platforms. This systemic approach, which addresses the way platforms are structured and function and how this affects human behaviour, reflects a broader focus on not *who* is discriminating, but *how* discrimination is occurring via OLMs.<sup>136</sup> An 'Equality-by-Design' approach considers how discrimination is potentially embedded in algorithms (including through the unwitting use and aggregation of biased and unbiased data), platform design, and customer interaction, and how platforms can be structured 'in ways that extend beyond merely omitting gender as a formal element of platforms' template for profiles or not portraying women in a biased manner'.<sup>137</sup> Actions that could be taken by platforms include informing the market (and workers) of average hourly rates for certain tasks, publishing reasonable hourly rates, suggesting hourly rates to users, or fixing levels of pay; reviewing how user profiles are displayed, and their content; providing users with transparent guidelines for assessing work and performance<sup>138</sup>; and reviewing the information used by platform algorithms. These initiatives could then be monitored and evaluated by platforms to ensure their efficacy.<sup>139</sup> In Australia, some of these suggestions relating to pay have been taken up by the Airtasker platform. Pursuant to an agreement with Unions NSW, Airtasker has agreed to publish recommended rates of pay that are above award rates for specific tasks.<sup>140</sup>

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<sup>133</sup> *Ibid.*

<sup>134</sup> De Stefano, *supra* n. 24, at 500.

<sup>135</sup> Productivity Commission, *supra* n. 4, at 10.

<sup>136</sup> Barzilay & Ben-David, *supra* n. 7, at 428.

<sup>137</sup> *Ibid.*, at 430.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> Workplace Express, *FWC Gets Airtasker Disputes Gig*, Workplace Express (1 May 2017), [https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?selkey=55591](https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=55591) (accessed 2 Aug. 2017).

## 5 CONCLUSION

The emergence of the gig economy both reflects and extends contemporary labour market trends towards casualization, insecure work and complex work arrangements. While some workers may embrace the freedom offered by OLMs, others may find they are exposed to new or less regulated forms of discrimination. Indeed, OLMs may merely replicate and extend existing discrimination in the labour market, in a forum that is typified by a lack of transparency and difficulties of enforcement.

In the face of this changing labour market, reform is required to how equality law is conceived and framed to ensure its contemporary relevance and effectiveness. While much scholarship on the gig economy has focused on worker classification, and whether gig economy participants are employees, workers or independent contractors, this is only the beginning of the conversation. Merely extending existing ideas of 'equality law' to new forms of work will not necessarily respond to fundamental shifts in the labour market. Instead, there is a need to rethink and re-theorize the role and purpose of equality law.

This article offers four key suggestions for reforming equality law to respond to the gig economy, ranging from extending the scope of equality law, to regulating work not employment, to collective action, to the use of positive duties to achieve equality and transparency. While these suggestions have normative merit taken on their own, they are likely to be most successful if adopted together as an integrated approach to reform. While this article has focused on equality law as it applies to the gig economy, it offers a broader lens with which to consider and examine issues as they relate to the scope and reach of labour regulation more generally. As the gig economy continues to expand and embeds its challenge to labour regulation, this is an issue with which all labour lawyers must engage.



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