



Editorial Introduction

In the gig economy, there is generally a client who requires the service, a worker willing to perform the service, and a digital platform connecting the two parties. To be connected, both workers and clients must accept and adhere to the platform's terms and conditions. This briefing paper presents findings from a detailed review of the terms and conditions of digital platforms. We show how and when, compared against examples provided in the Australian Consumer Law, some digital platform terms are potentially unfair. We also examine how contractual terms are used as a means to attract, manage, and control workers on platforms.

About the Authors

Associate Professor Penny Williams, Senior Research Fellow (DECRA) Faculty of Business & Law, Program Lead (Human-Robot Workforce Program) Australian Robotics Centre, and CI Centre for Decent Work & Industry, QUT.

Professor Paula McDonald, Pro Vice Chancellor Research, and CI Centre for Decent Work & Industry, QUT.

Professor Andrew Stewart, John Bray Professor of Law University of Adelaide, and Adjunct Professor Centre for Decent Work & Industry, QUT.

Professor Robyn Mayes, Associate Dean Research Faculty of Business & Law, and Director Centre for Decent Work & Industry, QUT.

Terms and conditions of digital labour platforms: Unfair contractual control?

Penny Williams, Paula McDonald, Andrew Stewart, & Robyn Mayes

Introduction

Clients and workers, in what is commonly called the gig economy, interact with digital platforms via their websites or app, and they are subject to the terms and conditions of the platforms on which they register. The terms and conditions of platforms, supported by website content, serve as a contractual agreement that defines and governs the organisation of platform work and the relationship between platforms and their users. Contractual terms and conditions offer an important window into the strategies adopted by digital platforms to attract, manage, control, and profit from labour, yet are underexamined despite their role in shaping worker-platform-client relations.

This briefing paper presents findings from three studies of the contractual terms and conditions of digital platforms. The first study tested the fairness of digital platform terms by analysing the terms of popular platforms to identify potentially problematic terms, as defined by s 25 of the Australian Consumer Law (ACL) and the regulator that administers the ACL, the Australian Competition and Consumer Commission (ACCC) (Stewart & Williams, 2023). The second study explained how platform terms govern the matching processes in online creative work when compared with in-person care work (Williams et al., 2021). The final study identified how platform terms act as a means of control in digital platform care work (McDonald et al., 2021). Together, these studies demonstrate that beyond governing platform access and protocols, terms and conditions articulate powerful methods of control over workers and labour conditions.

Potentially Unfair Terms and Conditions

We conducted a study to assess whether platform workers, as independent contractors, might be able to challenge the inclusion of harsh or one-sided provisions in platform terms and conditions, exploring the fairness of these contracts under Part 2-3 of the ACL (Stewart & Williams, 2023).

For a term to be treated as unfair, three requirements must be satisfied (s 24(1)). The term must (a) cause a 'significant imbalance' in the parties' contractual rights and obligations, (b) not be reasonably necessary to protect the legitimate

interests of the party advantaged by the term, and (c) have the potential to cause financial or other detriment if applied or relied upon. Section 25 of the ACL provides a list of the kinds of terms that *may* be treated as unfair. In 2016, the ACCC reviewed independent contracting arrangements, noting concerns with four types of terms:

- unilateral powers to vary the terms of the contract;
- provisions unreasonably limiting one party's liability, and/or requiring one party to indemnify the other, such as for loss or damage caused by the other party;
- clauses conferring 'inappropriate' powers of termination; and
- misleading statements about legal rights.

We analysed the terms and conditions of 15 digital platforms operating in Australia, and found that all 15 contained provisions that were likely to fall within the potentially unfair categories of s 25 of the ACL. Platforms contained terms that:

- provided the platform with the power to terminate (or suspend) a worker's use of the platform;
- permitted only one party to avoid or limit performance and clauses which penalised one party for breach or termination, either capping liability in various ways (7 platforms) or imposing requirements on workers to indemnify the platform against certain types of loss or damage (12 platforms); and
- enabled the platform to unilaterally vary the terms and conditions of use, although some stipulated they would provide notice of any change.

As the law currently stands, there is no prohibition on the use of such terms, and we do not suggest that the terms in question would necessarily be found by a court to be unfair if challenged. The findings however suggest the possible

value of the ACL as a means of protecting platform workers (Stewart & Williams, 2023), and demonstrate the unequal rights and power of platforms formalised within their terms and conditions. In two further studies of care and graphic design platforms, we illustrate the resultant imbalance of power, both when seeking and performing work via a platform.

Platform Websites, Terms and Conditions and Recruitment of Workers

Platform workers have a high degree of agency in choosing the platforms on which they work, and when and how much they work. Hence, attracting workers to register and engage in work via the platform is crucial to platform profitability (Choudary, 2018; van Doorn & Badger, 2020). In this second study, we compared the terms and conditions and website content of platforms intermediating care and graphic design services to reveal similarities and differences in the way platform terms govern the matching processes of in-person work (care work) and online work (graphic design) (Williams et al., 2021).

Unpaid labour: We found that where work is remote and the labour supply is global, selection processes require significant unpaid worker investment, such as a willingness to undertake work trials and participate in competitions where there is a risk of completing work that will never be paid. Where labour is local and 'in-person', workers are subject to more traditional methods of recruitment and selection, such as interviews and reference checking by clients, which also require an investment in unpaid time (Williams et al., 2021).

Promise of abundant work: Both types of platforms attracted workers by promoting easy access to abundant work, flexibility, freedom, choice, and being part of a community on their

websites. Both types of platforms also emphasised choice over hours of work and cited the number of registered users as a method of attraction, even though registered users do not reflect actual available workers (or clients). Terms and conditions, however, limited the obligations of platforms to provide any work.

Algorithmic preferencing: In both cases the work opportunities presented to workers are controlled by algorithmic processes that match clients with potential workers, but also determine the visibility of worker profiles. The position of a worker's profile on the web page was determined by algorithms that prioritised workers with good client ratings or reviews, or who had paid for 'premium' positioning. Both care and graphic design platforms provided search filters to assist clients to shortlist from the potential pool of available workers. Clients could select on work-related, as well as personal characteristics, potentially enabling bias in client selection decisions. Terms and conditions placed responsibility for fair, equitable, or quality selection decisions on the client, avoiding questions of the impact of algorithms on discrimination (Chua, 2022; Vaccaro et al., 2015).

These findings revealed how the 'matching' processes applied by digital platforms pose risks to fair work opportunities, and that terms and conditions limit platform responsibility.

Terms and Conditions as a Means of Control in Care Work

To understand how contractual terms govern work arrangements, our final study used labour process theory to analyse the terms and conditions of nine digital platforms offering care services in Australia in 2018. Labour process theory draws attention to the

ways economic value is created and then apportioned among parties through control mechanisms (McDonald et al., 2021; Thompson & Smith, 2009). The findings demonstrated that terms utilised in intermediated care work in Australia offer digital platforms a significant source of control in four ways (McDonald et al., 2021):

Shifting the risks and responsibilities of doing business from the platform to workers and clients: The terms and conditions disclaimed any employment relationship, instead defining the platform as a marketplace or search facility, and workers as independent contractors, responsible for all client negotiations. The terms denied all responsibility for delays or non-payments to carers. They also stipulated that worker-client disputes were to be independently resolved, providing little or no support to carers or clients when a dispute arose.

Apportioning direct and indirect costs to workers and clients: Platform terms allowed for workers and/or clients to be charged for various services, which could include access to job postings or worker profiles. However, users were required to first register with the platform before these charges became obvious. Any additional costs of seeking or doing work via the platform, such as equipment or transport expenses, were also the responsibility of the carer. Some platforms required workers to show proof of insurance or charged the worker an insurance premium within their 'service fee'.

Dictating contractual arrangements between the platform, worker, and client: Carers were subject to non-negotiable, take-it-or-leave-it terms which limited how carers and clients could engage with the platform. Some platforms prohibited workers from working on more than one platform or directly caring for a client without engaging them via the platform. Some platforms required carers to pre-emptively inspect the clients' premises to ensure compliance with health and safety regulations. At the time of the study, a universal feature of care platforms was the right to add, delete, or change terms and

and conditions at any time. All platforms reserved the right to extract, publish, or otherwise re-purpose photos, images, text, and other user content and data.

Monitoring performance and quality standards of service work: Care platform websites stated that they screened and verified worker credentials. Terms and conditions, however, included several liability disclaimers distancing the platform from any responsibility for inaccurate information and denying accountability for the quality of in-person care organised through the platform. Rather, clients were encouraged to verify worker credentials themselves. Platforms could suspend, modify, or terminate a carer's membership at any time.

These findings demonstrate how power relations embedded in platform terms and conditions which govern the organisation of work direct an on-demand workforce in ways which embed precarity and inequality and, as demonstrated in prior research, may negatively impact on the income, safety, and wellbeing of platform workers (Choudary, 2018; Ropponen et al., 2019).

Conclusion

The Fairwork Foundation calls for platform terms to be "transparent, concise, and provided to workers in an accessible form" (Graham et al., 2020, p. 3). Terms should also clearly identify the party contracting with the worker, and be free of "clauses which unreasonably exclude liability on the part of the platform" (Fairwork, 2019, p. 13) (Berg et al., 2018; ILO, 2021). In Australia, ACL unfair contract terms provisions may provide an avenue for platform workers to make legal challenges to the fairness of digital platform terms. The studies summarised in this brief also suggest the need for other reforms such as:

- imposing a positive obligation on platforms to make all terms transparent, easily accessible and understandable for workers;
- ensuring an appropriate regulator (e.g., ACCC) is empowered and resourced to scrutinise platform work contracts; and
- accessible, low-cost and effective dispute resolution services for platform workers to challenge the fairness of platform terms.

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