

EMPLOYEE-LIKE FORMS OF WORK – CONSULTATION PAPER

HESTA Submission – May 2023

HESTA welcomes the opportunity to make a submission to the 'Employee-like' forms of work Consultation Paper from the Department of Employment and Workplace Relations.

HESTA and our members

HESTA is a profit-to-member industry super fund investing around \$72 billion on behalf of more than 1 million members who work primarily in the health and community services sector, including in hospitals, primary healthcare, aged care, community services, disability and early childhood education and care. Gig engagements through online digital platforms are an increasing feature in health and community services, particularly in disability and aged care.

Our members are predominantly low and middle-income working women and come from every stage of working life – from those under 18 and just starting out, to retirees. Around 80% of our members are women who work in vocationally driven and often low paid roles. They earn 16% less than their male counterparts on average¹, are less likely to be able to save outside their super and are more likely to have lower account balances when they retire compared to their male counterparts.

HESTA Recommendations

Recommendation 1

That any proposed legislation expressly include the superannuation guarantee as a minimum standard available to workers in 'employee-like' arrangements.

Recommendation 2

That the Government pursue additional reforms to superannuation legislation to expressly provide gig workers an entitlement to the payment of superannuation guarantee.

Recommendation 3

That the ATO enhance its superannuation guarantee compliance activities for gig workers in 'employee-like' arrangements, including in the care economy.

¹ WGEA (2022). [WGEA Scorecard 2022: The state of gender equality in Australia](#).

Gig Work and the Care Economy

Superannuation and retirement outcomes

Existing policy settings in relation to 'employee-like' gig work mean workers are often foregoing superannuation on the income they earn while performing like for like duties as someone deemed an 'employee', but without equivalent workplace rights.

This is likely to negatively impact the retirement outcomes of workers in the care economy, whose incomes and retirement outcomes are already impacted by structural drivers including gendered occupational segregation, which sees workers in female-dominated industries earn less. Female aged care and disability workers, for example, earn less than the national average male earner.²

Modelling from Industry Super Australia (ISA) suggests that an average care worker undertaking gig economy work for three years would be \$10,800 worse off at retirement. This increases to \$17,500 when working in the gig economy for five years.³

This dynamic – where gig workers are not entitled to the superannuation guarantee – not only undermines the superannuation system, but risks forcing individuals into relying on publicly funded schemes like the Aged Pension, the NDIS or workers' compensation⁴.

For example, a worker will generally have access to insurance through their super fund (including death, permanent disability or income protection cover). A lack of super contributions and/or very low or inactive super account balances, therefore, might mean they do not hold this cover and in the event of an accident individuals may need to rely on public disability schemes.

The Care Economy

It is essential that the Department's consultation process properly consider the impact of gig work in all areas of the economy, including the care economy.

Census data shows that the healthcare and social assistance sectors employed 14.5% of the workforce, making it the largest employing industry⁵. The census also listed Registered Nurse among the top two reported occupations⁶. For aged and disability carers, the occupation has seen an increase of 72% since 2016⁷.

² Based on the latest release of [Average Weekly Earnings](#) in Australia with a reference period of November 2022. Average Weekly Ordinary Time Earnings of \$1,874.40 (private), \$1,635.80 (healthcare and social assistance). ABS.

³ Industry Super Australia (2023). [Extending the super guarantee to gig workers](#).

⁴ See [First Report – The Gig Economy](#) from the *Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales* for a more detailed discussion on superannuation.

⁵ ABS (2022). [Income and work](#). From *Census, 2021*.

⁶ [Ibid.](#)

⁷ ABS (2022). [A caring nation – 15 per cent of Australia's workforce in Health Care and Social Assistance industry](#). From *Income and work: Census, 2021* and *Education and training: Census, 2021*.

While there is no agreed measure of the number of gig engagements in the care economy, the Australian Bureau of Statistics (ABS) has commenced developing improved measurement frameworks with the intention of enhancing statistics on new and emerging forms of work, including gig workers.⁸

An inquiry in the State of Victoria into on-demand workforce highlighted that close to 14% of respondents to a national survey indicated having engaged in platform work.⁹ A 2021 Senate inquiry into job security indicates that 7.0% of gig workers are employed in the care services industry.¹⁰

These figures indicate a significant emerging gig workforce engaged in caring work.

Fair Work Commission and minimum standards

Recommendation 1

That the proposed legislation expressly include the superannuation guarantee as a minimum standard available to workers in 'employee-like' arrangements.

The Consultation Paper outlines proposals that would empower the Fair Work Commission to make orders setting enforceable minimum standards for workers such as those in the gig economy. HESTA supports proposals which would allow workers engaged in 'employee-like' arrangements to be provided with certain basic minimum standards, including the entitlement to superannuation guarantee contributions.

The Government's Guiding Principles, however, should have explicit regard to the retirement outcomes of workers. The Consultation Paper does not refer to the superannuation guarantee as a minimum standard capable of being ordered by the Fair Work Commission. We therefore recommend that the legislation expressly include the superannuation guarantee as one such minimum standard.

⁸ Australian Bureau of Statistics (2022). *Overview of ABS activity to measure digital platform work and workers.*

⁹ James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce.*

¹⁰ The Senate (2021). *First Interim report: on demand platform work in Australia.* Select Committee on Job Security.

The Superannuation Guarantee and ATO compliance

Recommendation 2

That the Government pursue additional reforms to superannuation legislation to expressly provide gig workers an entitlement to the superannuation guarantee.

Recommendation 3

That the ATO enhance its superannuation guarantee compliance activities for gig workers in 'employee-like' arrangements, including in the care economy.

In addition to HESTA's submissions concerning the proposed minimum standards for gig workers in 'employee-like' arrangements, we consider there is also a need for reform of superannuation legislation.

Existing superannuation law, specifically the *Superannuation Guarantee (Administration) Act 1992* (SGAA), has certain provisions for requiring the payment of superannuation guarantee (SG) contributions for contractors in certain limited circumstances, where for the purposes of paying the SG a contractor is deemed an employee¹¹.

However, the recent Federal Court decision in *Jamsek*¹² shows the narrow approach that is taken to these situations for contractors, and the ways in which work arrangements can be structured in such a way that workers in 'employee-like' arrangements are not entitled to the SG.

HESTA considers there is a need to revisit and reform the 'deemed employee' provisions of the SGAA so that there is an express entitlement to SG contributions for gig economy workers, including those engaged in the care economy. This would provide a legal framework that protects those working in 'employee-like' forms of work from not receiving minimum superannuation contributions.

We consider that reforms to the SGAA should be coupled with increased SG compliance activities undertaken by the ATO for gig workers in 'employee-like' arrangements, including the care economy.

¹¹ See *Superannuation Guarantee (Administration) Act 1992*, section 12(3).

¹² See *Jamsek v ZG Operations Australia Pty Ltd (No 3) [2023] FCAF 48*.