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Ms Laura Ismay  
Principal Council Officer  
Select Committee on the Impact of Technological and Other Change on the  
Future of Work and Workers in New South Wales  
Parliament House  
Macquarie St  
SYDNEY NSW 2000

By email: [futureofwork@parliament.nsw.gov.au](mailto:futureofwork@parliament.nsw.gov.au)

Dear Ms Ismay

## **Australian Road Transport Industrial Organisation NSW Branch**

### **Supplementary Submission: Impact of Technological and Other Change on the Future of Work and Workers in New South Wales**

#### **Introductory Remarks**

This supplementary submission from the Australian Road Transport Industrial Organisation NSW Branch (ARTIO NSW) addresses issues raised during the appearance of Hugh McMaster, Secretary/Treasurer, ARTIO NSW, (the witness), before the Legislative Council's Select Committee on the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales (the Committee) on 16 November, 2020.

These issues, which either the Committee asked for further information, or the witness took on notice are:

- To outline a possible design for a workers' compensation insurance scheme for gig workers.
- To advise the Committee whether:
  - Amazon Flex is conducting business in Australia.
  - Whether gig work is undertaken by Australia Post and/or Coles and Woolworths.
- To outline how platform companies should be accountable, especially in relation to the use of algorithms to monitor the performance of gig workers.
- To advise how training as well as leave and similar entitlements should be funded and made available to gig workers.

#### **Possible Design of a Workers' Compensation Scheme**

These comments apply to gig workers and other stakeholders in the food delivery area. It is likely, with minor adjustments, that they could also apply to passenger transport.

#### ***Underlying Principles***

The definition of a “worker” under the *Workplace Injury Management and Workers Compensation Act 1998* is sufficiently broad to cover gig workers<sup>1</sup> and should do so.

The scheme should be simple, equitable and universal.

Designing a workers’ compensation scheme suitable to gig workers should not be difficult. The scope of coverage should be consistent with what applies in terms of support and assistance to other workers, including deemed workers, that is:

- Compensation for lost wages.
- Medical, hospital and rehabilitation treatment.
- Return to work assistance; and
- In certain cases, compensation for non-economic loss.

Benefits payable should be consistent with those applicable to other workers in NSW.

### ***Scheme Design Features***

As the State Insurance Regulatory Agency notes<sup>2</sup>, there are three workers’ compensation schemes operating in NSW, icare, self-insurer schemes and specialised insurer schemes.

ARTIO NSW does not believe a self-insurance scheme, either at the platform provider or industry level is appropriate because it opens up the possibility, however unlikely, of scheme design flaws based on equity or efficiency grounds. While specialised insurers are licensed by SIRA to provide workers’ compensation insurance cover and manage associated claims and liabilities in a specific industry, something that, theoretically, could be designed for gig workers in food delivery, ARTIO NSW also believes the likelihood of scheme design flaws are greater.

Accordingly, ARTIO NSW’s preference is for a scheme administered by icare as is the case for most private sector workers and most industries. Under current arrangements, icare administers all sectors of the road freight transport and passenger industries including road freight transport – short distance, courier services and taxis. An additional advantage of an icare administered scheme is that icare and approved nominal insurers would have a sound understanding of the characteristics of workers’ compensation claims in road freight and passenger transport.

With few exceptions, in NSW workers compensation premiums are calculated on an industry by industry basis based a percentage of the dollar value of the wages, salaries and related expenses of employees, including deemed employees. This method has proven to be, in relative terms at least, the best way to ensure NSW’s workers compensation scheme can be administered in the best possible manner in terms of premiums. There are exceptions. One is for the taxi industry where the premium is set at a flat dollar amount per taxi plate.

ARTIO NSW does not believe that premiums for gig workers should be set based on wages paid because in ARTIO NSW’s opinion, this is unlikely to ensure the scheme is simple, universal and equitable.

ARTIO NSW’s concerns are that basing premiums for gig workers on wages increases the possibility of such a scheme being administratively complex, more open to the possibility of inequities and, possibly, not universal. This is because it is not clear how much of a gig worker’s remuneration can be attributed to wages as opposed to other costs of running a business. This leads to the following potential scenarios:

- Different nominal wage levels for the same work, meaning different premium rates for the same work.
- Assertions that wages are not paid or payable but instead are categorised as other costs.

Another option is to impose the insurance premium on the gig worker. This would be akin to an imposition on sub-contractors in industries like construction and road freight, not the principal contractor which engages those workers. This would increase costs faced by gig workers who already earn meagre amounts for their hard, dangerous work.

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<sup>1</sup> See [Workplace Injury Management and Workers Compensation Act 1998 No 86 - NSW Legislation](#).

<sup>2</sup> SIRA website, <https://www.icare.nsw.gov.au/practitioners-and-providers/gps-and-treating-doctors/understanding-workers-compensation/the-nsw-workers-compensation>.

However, under the NSW workers' compensation scheme it is the principal contractor, not the sub-contractor which pays the premium.

It is also administratively simpler to impose the premium on the platform providers as there are only a handful of them, compared to many thousands of gig workers many of whom use English as a second language, have in relative terms less commercial acumen and who would, in general be charged nominal premiums. On the other hand, platform providers run a sophisticated business, are commercially astute and would be charged large premiums.

Another option is to integrate these workers into existing arrangements for taxis and couriers, the two industries the passenger and freight components of gig work most closely resemble.

The disadvantage of that option is taxi premiums are paid on a per plate basis, which is not suitable for gig workers picking up and delivering passengers because the extent to which a vehicle is used by gig workers to carry passengers varies considerably from one worker to another, thus making a flat per plate arrangement inequitable. Taxis are more likely to be utilised in a more consistent and dedicated manner within that industry.

As far as couriers are concerned, the disadvantage is, put simply, that premiums are based on wages which, as discussed above, is likely to generate complexities and inequities.

Instead, ARTIO NSW suggests the following design features for the Committee's consideration:

- A stand-alone scheme with its own code and Workers' Compensation Industry Classification (WIC) within icare's workers' compensation scheme.
  - This will build a discrete claims history for gig workers doing either food delivery or passenger work and assist in determining a WIC rate which collects sufficient revenue to cover the aggregate cost of claims in any year.
  - Separate codes should apply to food delivery and passenger work as the risks of injury or death are likely to be different.
- The scheme to cover all gig workers from the time they notify their platform company/ies they have commenced work until they advise that work has ceased.
  - This means that:
    - Irrespective of which platform company the gig worker does work for, he/she is covered by the scheme.
    - When a gig worker is hovering between gigs, the scheme provides the same cover as when they are performing a gig, or returning to a preferred location once a gig has been completed.
- A charge based on either a per order (or gig) basis or a nominal amount which represents a percentage of the earnings of a gig worker for the gig in question.
  - This charge can be built into the cost to deliver the order.
  - The cost can be picked up by either the platform provider or the business requesting the service (café owner, restaurateur, etc).
    - It is suggested that the platform provider pick up the cost directly which would be paid to icare and charge the business requesting the food delivery service.
    - The platform provider through which the request for a delivery is lodged and through which a worker accepts the gig would pay the charge for the gig in question.
    - This would mean a very small number of platform providers making contributions to the scheme instead of thousands of users of their service in the restaurant, café and related industries.
    - This can be expected to save costs in administration through fewer transactions.
    - Further, amongst those thousands of users, there will invariably be bankruptcies and other developments which can be expected to affect premium contributions.
    - Charges would accumulate and would be paid on a periodic basis.
  - In terms of whether the charge itself is on a per gig or a percentage amount basis, the percentage amount basis is likely to be more equitable because the cost of delivery will vary from gig to gig, however, if a flat fee arrangement assists in terms of administrative costs, its advantages over a percentage arrangement should be evaluated.
    - Another advantage of a percentage charge is that it may assist in evaluating the size of this industry.
    - A potential disadvantage is that platform providers may find a way to portray the cost of the gig as being lower than the amount paid to the gig worker, in which case:

- The aggregate amount collected would be less than predicted.
- The aggregate percentage collected would be likely to vary from one platform provider to another.
- Evasion may be more difficult if a flat charge can be automatically generated.
- Ultimately, system design will determine the risks, if any, related to the potential for evasion and how those risks can be traded off in return for a scheme which is simple and equitable to platform providers, users of the platform providers' service and gig workers.

### **Amazon Flex in Australia**

Amazon Flex is operational in Australia in Sydney, Melbourne, Brisbane and Perth.

Amazon Flex's Sydney locations are: Botany, French's Forest, Glendenning and Regents Park.<sup>3</sup>

### **Is Gig Work Undertaken by Australia Post and/or Coles and Woolworths?**

Advice from within ARTIO NSW is that Coles and Woolworths both engage workers under gig type arrangements for their home delivery work, however, to ARTIO NSW's knowledge, Australia Post does not engage gig workers.

Woolworths says on its website:

"We've partnered with on-demand delivery companies in your area to provide more delivery options to our customers. Your order will be hand picked by one of our Personal Shoppers and a Contactless Delivery will be made to your doorstep.

You'll notice that our Small Vehicle Delivery drivers don't wear a Woolworths uniform and their non-refrigerated vehicles aren't the Woolworths trucks you may be used to. That's because Small Vehicle Deliveries come directly from a local Woolworths store near you, which means it only takes minutes to deliver your order - just as if you'd gone to the shops yourself.

You can select a Small Vehicle Delivery window during Checkout."<sup>4</sup>

Coles says on its website:

"Coles utilises third party providers to deliver your groceries through the '**Small Vehicle Delivery**' window. This allows us to give customers access to more immediate home delivery windows so you can receive your groceries sooner."<sup>5</sup>

### **Work How Platform Companies Should be Accountable in Relation to the Use of Algorithms to Monitor the Performance of Gig Workers**

#### ***Understanding the Problem***

Algorithms are no more than a set of instructions which are used to complete a task.

Historically, algorithms are readily available and observable, for example:

- How to do addition or subtraction.
- How to cook a cake.
- How to change a tyre.
- How to perform surgery.

In the age of innovation, for example, the Industrial Revolution, an original algorithm increasingly attracted value. Patents rewarded the developers of original ideas which had commercial application. In manufacturing for example, workers applied algorithms to perform their role and function with their colleagues. What needed to be done in terms of generating output and maintenance was well understood and, often, widely known, for

<sup>3</sup> Further information is available from <https://flex.amazon.com.au>.

<sup>4</sup> See <https://www.woolworths.com.au/shop/discover/shopping-online/delivery>.

<sup>5</sup> See <https://shop.coles.com.au/a/national/content/home-delivery>.

example, through technical education. This gave governments a direct stake through training and skills development and enabled governments to better understand labour market needs in terms of skills and how those needs related to new ideas.

With the advent of computing, programming meant algorithms were no longer as evident, except by those responsible for their creation, namely the programmers who designed them, the companies which funded the research and development to make such innovations possible and a smaller group of workers responsible for their development and application. Everything is done in-house, notwithstanding that the workers in question may have been trained in a government run educational institution. Almost certainly, those involved are required to sign confidentiality agreements or similar to protect the commercial interests of those who pay them to create the program in question. The level of understanding within government of innovations developed in the artificial intelligence field is negligible when compared to that shown by employers in the metal trades, building trades and so on.

Companies with business interests in computer programming and the creation of artificial intelligence don't necessarily require a patent to successfully commercialise because their creation is essentially secret. This is because reverse engineering the innovation in question is likely to be more difficult.

The really successful companies in this field, including the platform companies, have, to date, not felt bound to engage genuinely with governments and other stakeholders because any discernible risks from doing so are outweighed by the commercial benefits they accrue. Risks appear only to arise when governments investigate and make recommendations related to their behaviour, e.g., payment for news content, or when it becomes clear that the algorithms fail to take proper account of human characteristics, e.g., evidence in submissions to this inquiry and the spate of recent fatalities involving gig workers. In fact, they do not appear to be concerned about ignoring existing industrial and other laws and instead have assessed that the risk of being caught, or of the law catching up to their behaviour is worth it.

It could be argued that the dependence of platform companies on entering into commercial arrangements which are found, eventually, to flout the law is the sole reason they conduct business. When the Fair Work Commission found Foodora delivery rider, Joshua Klooger was an employee, Foodora's German parent company Delivery-Hero, took the decision to cease its Australian operations, place itself into administration and leave its employees and other creditors out of pocket.<sup>6</sup>

### ***The Solution***

Given the lack of knowledge within governments of algorithms related to artificial intelligence ARTIO NSW believes all governments can do is hold platform companies to account through the implementation of legislation governing the operation of platform companies which is sufficiently broad and which has penalties which are sufficiently large so as to bring about a change in behaviour which encourages compliance.

In the case of the gig economy, ensuring that platform companies are held to account through industrial laws in the same way as employers and principal contractors can be expected to contribute towards more compliant behaviour.

### **Funding of Training and Leave**

Training can be subject to a levy collected in the same manner as the workers' compensation insurance premium referred to above. This should cover the cost of training and training scheme administration. Administration arrangements should either be tripartite or involve genuine participation by platform company and gig worker representatives.

Leave costs can be developed using a formula based on those which currently apply in industrial instruments covering principal contractors and contract carriers where cost models are developed which recognise total labour costs as well as costs related to annual leave, sick leave and other forms of leave under the National Employment Standards. For that formula to be effective, a proper cost model would need to be developed for gig workers which recognises all costs of running a gig business, including wages based on the Road Transport and Distribution Award 2020.

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<sup>6</sup> See *Klooger v Foodora Australia Pty Ltd*, U2018/2625; [Gig worker an employee, Commission hears \(workplaceexpress.com.au\)](https://www.workplaceexpress.com.au/news/gig-worker-an-employee-commission-hears); [ATO's Foodora report could be ticking bomb: Academic \(workplaceexpress.com.au\)](https://www.workplaceexpress.com.au/news/ato-foodora-report-could-be-ticking-bomb-academic).

In the absence of any legislative framework, it is difficult to conceive how leave entitlements can be provided and paid to gig workers.

### **Conclusion**

Platform companies have grown quickly in recent years to be an important part of our economy and society.

Concerns expressed by ARTIO NSW in its initial submission about the preparedness of platform providers to further broaden their reach into the industry are justified based on the evidence.

The growth and expansion of the gig economy in road transport is at the expense of the workers they engage who operate under poor working conditions.

There is an urgent need to ensure the benefits of gig work in road transport are shared between platform providers and gig workers.

This includes new and emerging business models such as Amazon Flex.

However, ARTIO NSW believes the issues raised in this supplementary submission can form the basis of reform of the gig economy in transport.

ARTIO NSW believes the workers' compensation scheme design outlined satisfies the basic tests of a simple, equitable and universal insurance scheme. This scheme model can also be applied to fund a training scheme.

It is only through legislation that remuneration and conditions, including the provision of leave for gig workers can be set at levels which ensure a reasonable rate of return to gig workers in transport for their work.

Please direct any enquiries to Hugh McMaster, ARTIO NSW Secretary/Treasurer, telephone, , email, .

Yours sincerely

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For and on behalf of  
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**President**