

**INQUIRY INTO IMPACT OF TECHNOLOGICAL AND
OTHER CHANGE ON THE FUTURE OF WORK AND
WORKERS IN NEW SOUTH WALES**

Organisation: Australian Road Transport Industrial Organisation NSW Branch
Date Received: 31 August 2020



New South Wales Branch
PO Box 277
HURSTVILLE NSW 2220
Tel: 0412 880861
Fax: 02 9579 2333
Email: hughmc@artionsw.com.au
ABN: 93149961882

31 August 2020

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

Dear Ms Ismay

Australian Road Transport Industrial Organisation NSW Branch

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

Introductory Remarks

The Australian Road Transport Industrial Organisation NSW Branch (ARTIO NSW) welcomes the opportunity provided by 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) to make a submission to the Inquiry into the Impact of Technological and Other Change on the Future of Work and Workers in New South Wales. ARTIO NSW also thanks the Committee for the invitation to lodge a submission.

ARTIO NSW notes the Committee's Terms of Reference are, understandably, wide-ranging.

This submission will:

- Provide background on ARTIO NSW.
- Describe ARTIO NSW's interests in this inquiry.
- Make general comments and observations about task-based work.
- Describe gig work in the road freight industry.
- Raise issues of concern related to gig-work in the road freight industry.
- State why defining a gig worker is necessary in order to address problems related to gig work.
- Raise issues raised in proceedings before industrial and other tribunals.
- Refer to recent reports on gig work in Australia.
- Make recommendations for the Committee's consideration.

Background on ARTIO NSW

ARTIO NSW was established in 2008 and is an association representing road transport operators conducting business in New South Wales (NSW) and the Australian Capital Territory.

ARTIO NSW's Members range from fleets with a handful of trucks to large multinational business based in Australia or elsewhere.

Collectively, ARTIO NSW's Members are involved in local, intrastate and interstate transport and operate in metropolitan, regional, rural and remote areas of NSW and in other jurisdictions.

Members of ARTIO NSW carry freight in vehicles ranging from light rigid trucks and vans to prime mover/multi trailer combinations across a diverse range of supply chains.

Members of ARTIO NSW may be engaged in employer-employee relationships, principal contractor-contract carrier relationships or both.

ARTIO NSW is not aware of any ARTIO NSW Member having an interest in the gig sector of the road freight industry.

ARTIO NSW is registered as a federal industrial association of employers under Commonwealth legislation and a registered association of employing contractors under NSW legislation.

ARTIO NSW's Interests in this Inquiry

ARTIO NSW's principal interests in relation to this inquiry arise because Members support the establishment and operation of arrangements across the road transport industry which can provide minimum and adequate remuneration and conditions to all industry participants, whether they be employers, employees, principal contractors or contract carriers as they are known under the Act (or owner drivers, or sub-contractors as they are generally called in the road freight industry in Australia) as well as gig workers.

ARTIO NSW supports Australia's federal and state industrial relations systems covering employer-employee relationships because they provide a framework whereby employers and employees, and their representative bodies, can negotiate conditions of employment at the industry and enterprise level.

Chapter 6 of the *Industrial Relations Act 1996* (the Act) provides a similar framework in relation to principal contractor-contract carrier relationships in the road freight industry and ensures legally binding remuneration and conditions exist through contract determinations (CD) along with the opportunity to for both parties earn a profit. ARTIO NSW Members who engage contract carriers under one or more of the CDs which apply in NSW agree the Act provides a commercially and industrially viable basis upon which to have a contractual relationship with contract carriers. ARTIO NSW supports policy and legislative settings which ensure minimum standards of remuneration and conditions apply in relation to principal contractor-contract carrier relationships in the road freight industry within NSW.

Legislation also exists to provide for basic conditions of engagement of contract carriers (or owner drivers, or sub-contractors as they are generally called in the industry) in Victoria and Western Australia but not in other jurisdictions. Legislation was introduced and passed in Federal Parliament by the Gillard Government (*the Road Safety Remuneration Act 2012 (C'lt)*) (the RSR Act) to provide for the opportunity to have basic conditions of engagement of owner drivers nationwide, however, the Road Safety Remuneration Tribunal which was established under the RSR Act was abolished in 2016 following the repeal of the RSR Act.

None of the above arrangements cover gig workers in road freight transport in areas such as the pick-up and delivery of meals even though the gig (or on-demand or platform) economy adds an additional and important segment to the road freight industry. This is because industrial and other tribunals have determined that current arrangements involving gig workers generally do not fall within existing industrial law.

It follows that ARTIO NSW believes the absence of a regulatory framework governing gig workers engaged in freight transport in NSW and elsewhere in Australia puts at risk existing legislative arrangements and associated systems which govern relationships between those who hire and those who are hired.

The on-demand business model in which gig workers are engaged also has the potential to pose a threat to the viability of those parts of the industry where gig work may be commercially viable.

This is clear from the impact of gig work on the long established and accepted business model in the taxi industry.

ARTIO NSW does not want that to occur for the hard-working participants in the industry.

ARTIO NSW believes the structure of gig work means it has the potential to diversify into other important areas of the road freight market in Australia. This includes other high-volume areas of the market where a centralised organisational and operation structure provides scale advantages due to the number of consignments and the consignments themselves are small. Such areas of the industry include courier and taxi truck work because in a management and operational sense they are similar to the ride sharing industry.

It is unlikely that gig work will extend to those parts of the road freight market where there is greater emphasis on the quality of the work performed, the skill level required or where greater levels of judgement are required to ensure successful execution of a transport task. However, in ARTIO NSW's view, the threat posed the digital platform company business model to significant industry sectors including courier and taxi truck work is real even though these sectors are characterised by widespread competition by well-run companies who can compete successfully while doing the right thing in terms employee and contract carrier remuneration and conditions.

Therefore, ARTIO NSW's interest is to ensure that relationships between digital platform companies, gig workers and any users of gig worker services are governed by a set of policy arrangements and accompanying legislation which ensure minimum standards of remuneration and conditions apply to gig workers and that gig workers in the road freight industry have the opportunity to be rewarded for their risk and enterprise through a reasonable rate of return just like any other business.

ARTIO NSW stresses that it wants to ensure the concept of gig work has the potential to grow and develop as an important part of road freight industry, provided gig workers enjoy agreed minimum standards of remuneration and conditions.

It should be possible to structure the gig sector of the industry in such a way to ensure the rewards the flow from innovation, enterprise and risk do so to both digital platform companies and gig workers while also benefiting users.

General Comments about the Labour Market in Australia, Task Based Work and the Gig Economy

Task based work is not new, not confined to transport and can be rewarding commercially and in other ways to participants.

Task based work, which involves any one-off or discrete task undertaken by a worker is common in the arts and entertainment sector. Some artists and entertainers such as Tim Winton, Nicole Kidman or Jimmy Barnes can command a high price for their work or their performance. They have unique talents and abilities for which the market is prepared to pay a price. More importantly, they have power in that part of the labour market in which they operate. The same applies to many practitioners in medicine, the law, engineering, accounting and other professions.

Rates of remuneration for such workers, whether they be based on earnings per event or tour, per hour, per consultation or any other basis take into account the nature of their work, the value of their performance or advice as well as the overheads associated with running a business or event as well as other entitlements.

These arrangements show the manner in which task-based work is remunerated is not necessarily a problem which requires a role for government. In the above situations, the worker has the power in the market place to command a rate or remuneration which may or may not be accepted.

Casual work, piece work, seasonal work, itinerant work and labour hire work are also prevalent. Australia's workplace relations system recognises that casuals are entitled to a higher hourly rate in return for other trade-offs such as the absence of leave entitlements. The *Fair Work Act 2009 (Cth)* also imposes minimum obligations on employers and companies involved in labour hire sector to ensure workers engaged in piece work, seasonal work or itinerant work in sectors such as agriculture, horticulture, live performing arts and travelling shows are entitled to legally minimum remuneration and conditions which are determined through the Fair Work Commission (FWC).

The gig economy involves an innovative application of new electronic technologies developed globally by digital platform companies that have caused disruption to the industries in which they have entered while also enjoying widespread use. Disruption has extended to the way in which gig workers are engaged in the gig economy.

Each digital platform company has developed their own app which is available to users to request a gig service to be provided by a service provider, being a gig worker. Thus, the app acts as the link between parties in the gig economy.

Work commissioned by the Victorian Department of Premier and Cabinet provides insight into the labour market in the gig economy in Australia¹. Findings include:

- Younger people, especially males, and those living in urban areas have worked in the gig economy.
- A higher proportion who have done gig work in NSW compared to other states.
- A higher proportion who have done gig work are students, are unemployed, identify as having a disability, speak a language other than English at home or are not Australian citizens.
- Transport and food delivery accounts for over 18 per cent of all gig work.
- Transport and food delivery workers are more likely to be younger, have temporary residency status, speak a language other than English at home and work across multiple platforms.
- Those most likely to say gig work is essential to meeting basic needs are doing care or transport and delivery work.
- Transport and food delivery workers are more frequent workers within the gig economy.
- Compared to professional service workers and those doing odd jobs and maintenance work, transport and delivery workers are considerably less satisfied with the ability to set a price for their services and with either gaining new skills or improving existing skills.

Gig Work in the Road Freight Industry

Digital platform companies operate in a manner not dissimilar to loading agents who provide long distance drivers, usually owner drivers, with a load on either a regular or irregular basis for a return leg of a journey.

Gig work contrasts with courier work, including bicycle courier work, where a task may be one-off but a tied, more structured contractual relationship exists between the principal contractor and the contract carrier.

In road freight other parties (users) include restaurant and café owners who as consignors increasingly rely on digital platform companies to generate business and their customers who act as consignees.

Issues of Concern Related to Gig-Work in the Road Freight Industry

Gig workers in the road freight industry do not have access to the FWC or the NSW Industrial Relations Commission or the right to collective bargain. Gig workers are not paid a minimum wage, have no paid leave, minimum or maximum hours, or superannuation, no protection from unfair dismissal and in all likelihood have no workers' compensation insurance cover or protection through other insurances such as public liability. Gig workers have no recourse to a dispute settlements mechanism.

Collective bargaining also does not appear to be available through Australia's competition and consumer regulatory arrangements regulated by the Australian Competition and Consumer Commission.

This contrasts with protections which have been available to employees through the conciliation and arbitration system in Australia since the early last century to ensure they have minimum standards of remuneration and conditions.

In NSW, there also has long been acceptance of the need for minimum standards of remuneration and conditions for contract carriers in the road freight industry to address problems where a contractual relationship exists.

¹ *Digital Platform Work in Australia (2019)*, Prof. Paula McDonald, Queensland University of Technology, https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7315/9254/1260/Digital_Platform_Work_in_Australia_-_Prevalence_Nature_and_Impact_-_November_2019.pdf

In 1967, the then Minister for Labour and Industry, the Hon Eric Willis MLA commissioned a report under the *Industrial Arbitration Act 1940* (IA Act) into, amongst other things, the regulation of lorry owner drivers through the NSW industrial relations system (the “Beattie Report”)².

In response to recommendation in the Beattie Report, in 1979, the NSW Parliament passed legislation which amended the IA Act (now Chapter 6 of the Act) which led to decisions made in the then Industrial Commission of NSW to develop CDs in the road freight industry in NSW.

These CDs take into account the costs of owning and maintaining a truck, labour costs based on wage rates payable in the relevant award and entitlements such as sick leave, annual leave and long service leave. In determining a remuneration structure, account is also taken of other costs such as workwear, personal protective equipment, registration, heavy vehicle accreditation, insurances and accounting costs. Contract carriers have the right to collectively bargain and have union representation through union delegates as well as access to a dispute resolution mechanism. Rates of remuneration are determined according to an agreed cost structure and calculation methodology.

The New South Wales Industrial Relations Commission has the power to vary a CD pursuant to s.320 of the Act. Registered organisations, including ARTIO NSW and the Transport Workers’ Union New South Wales Branch may apply to vary a CD. This ensures rates and conditions in a CD are subject to periodic review.

ARTIO NSW believes these rights should be available to gig workers in the road freight industry. Policy settings developed should also continue to ensure digital platform companies are rewarded reasonably but not excessively for their skills as innovators and for their commercial risks. Their interests should not be cast aside just as the interests of employers were not cast aside when the conciliation and arbitration system was developed early last century or those of principal contractors in NSW following the passage of legislation which amended the IA Act.

It is important to stress that there is not necessarily a problem with the gig economy’s business model, or with the manner in which the gig economy is structured. The problem is that the balance between risk and reward is clearly distorted in favour of the digital platform company to the detriment of the gig worker. The problem arises because market power resides overwhelmingly with the digital platform companies who built the business model and developed the infrastructure to support the operation of the gig economy.

This power is evident because they have been able to set a percentage return from each gig-based transaction. This provides a secure income stream. Users in the gig economy who pay that price do so on a take it or leave it basis. The manner in which gig workers are rewarded by digital platform companies for their work is also determined on a take it or leave it basis in favour of the digital platform company.

The profitability and security of cash flow in the digital platform company’s business model, combined with the benefits of scale, is reflected in the value of the securities of those companies on securities exchange markets. That value reflects how traders in those securities value the digital platform companies having regard to the inherent risks in their business model when compared to the returns generated.

Market power also rests to some degree with the consumer. Consumers have the ability to rate the service provided by the gig worker. No doubt, that will be driven by the quality of what is delivered as well as timeliness and any other consumer expectation. It will not take into account events beyond the control of the gig worker such a hold up at the point of pick up, provision of an incorrect address or any other issue. Ratings will be subjective because consumer expectations may or may not be realistic or reasonable, or made in a considered way. In that regard, the gig worker’s rating is also at the mercy of the consumer and has no comeback. That rating may be important because it may affect the standing of the gig worker with the digital platform company.

Why a Definition of a Gig Worker is Necessary

² *Report to The Hon Eric Willis, Minister for Labour and Industry on Section 88E of the Industrial Arbitration Act, 1940-1968 in so far as it concerns Drivers of Taxi-cabs, Private Hire Cars, Motor Omnibuses, Private Motor Vehicles and Lorry Owner-Drivers, 23 February 1970.*

As the Victorian Transport Association said in its submission to the Victorian Government's Inquiry into the Victorian On-Demand Workforce, defining gig workers is essential³. This is because unless gig workers are defined then the scope and extent of problems associated with gig work cannot be clearly described, nor can policy settings and accompanying legislation be properly developed.

Some thought has been given to this. For example, characteristics of gig work have been proposed in submissions to the inquiry conducted by the Senate Select Committee on the Future of Work and Workers (the Senate inquiry). The report of the Senate inquiry cited a submission by Dr Tom Barratt, Dr Caleb Goods and Dr Alex Veen which said work in the gig economy is characterised by:

- High levels of irregularity shaped customer demand;
- Part of the capital is provided by workers;
- The work is frequently paid on a piece rate basis; and
- It is arranged and/or facilitated via online and/or mobile digital platforms⁴.

ARTIO NSW suggests that gig work should be distinguished from other types of work based on task, degree of casualisation, piece, season or its itinerant nature through consideration of the following tests:

- The definition should exclude:
 - Any worker covered by an industrial instrument such as an award, enterprise agreement or contract determination.
 - Any worker who determines either unilaterally or by agreement the time when the service is performed and the rate at which is charged. This would eliminate workers in areas such as the professional services sector.

The definition of gig work should include:

- Workers not covered by any of the arrangements outlined above.
- Workers performing work where a rate per task or job is set for them through a platform or similar technologically based intermediary, irrespective of the capacity in which they act, and where work is generated through a service, facility or any other means provided by that intermediary. This includes an app which generates provision of a service to a consumer by a gig worker through use of an app developed by the provider of the platform app in question.

Issues Raised in Proceedings before Industrial and Other Tribunals

The following issues amongst others have been raised in industrial tribunals and higher courts which highlight the challenges in categorising gig workers in the road freight industry as workers covered by the industrial relations system and the rights and protections it offers within Australia's industrial law framework⁵:

- Are digital platform companies merely platform providers or are they also transport companies?
- Are gig workers employees or some form of independent contractor?
- What tests should be applied to gig workers to determine their status within the industrial relations system having regard to such factors as:
 - What is the relationship between the parties in the gig economy?
 - Which party provides the capital, systems, and operating infrastructure and procedures under which the gig worker undertakes work?
 - Does this amount to control and, if so, to what extent?
 - Who does the gig worker purport to represent when conducting work?

³ Victorian Transport Association (2019) Submission on behalf of the Victorian Transport Association to the Victorian Government Inquiry into the Victorian On-Demand Workforce, p6. A copy of this submission is available at: <https://engage.vic.gov.au/inquiry-on-demand-workforce>.

⁴ Senate Select Committee on the Future of Work and Workers (2018) *Hope is not a strategy – our shared responsibility for the future of work and workers*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork/Report, p. 73.

⁵ See for example *Michael Kaseris v Rasier Pacific V.O.F.* [2017] FWC 6610, <https://www.fwc.gov.au/documents/decisionssigned/html/2017fwc6610.htm>; *Janaka Namal Pallage v Rasier Pacific V.O.F.* [2018] FWC 2579, <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwc2579.htm>; *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwc2579.htm>.

- Who offers gig work accepted by the gig worker?
 - What is the significance and relevance of a gig worker accepting or declining work to the relationship that worker has with other parties in the gig economy?
 - Who pays the gig worker for work performed?
 - Who determines the rate of remuneration of the gig worker?
 - Should remuneration paid be linked in any way to an award and, if so, which award?
 - Does the gig worker undertake work for or through more than one platform provider?
- How relevant is the industrial law framework in NSW and nationally to gig work?
 - Given that the structure of the relationships between the parties in the gig economy appear to be similar in Australia to other countries, are there lessons that can be learnt from elsewhere?
 - If there are labour market problems that arise from the relationship between digital platform companies, gig workers and other parties in the gig economy, what remedies should be made available to resolve those problems?

Recent Reports on Gig Work in Australia

There have been two recent reports on gig work in Australia. They are:

- The Senate inquiry's 2018 report *Hope is not a strategy – our shared responsibility for the future of work and workers*⁶ (the Senate report); and
- The Victorian inquiry's 2020 *Report of the Inquiry into the Victorian On-Demand Workforce*⁷ (the Victorian report).

The Senate report made the following recommendation: Recommendation 10 4.129 The committee recommends that the Australian Government make legislative amendments that broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system.⁸

The Victorian report recommended the following in relation to what the report described as “platform workers”:

- Establish fair conduct and accountability standards for non-employee platform workers.
- Remove barriers to collective bargaining for non-employee platform workers.
- Consider revised awards for platform workers.⁹

The Victorian report also recommended that the Commonwealth Government take the lead in the implementation of the recommendations in this report but, should the Commonwealth not act, Victoria, in collaboration with other jurisdictions, should pursue administrative and legislative collaboration.¹⁰

It is noteworthy that both reports recommended regulatory intervention to protect gig workers.

ARTIO NSW submits each of these recommendations are relevant to the proceedings of the Committee's inquiry.

Recommendations

ARTIO NSW recommends the following for the Committee's consideration:

1. That a definition of gig work be established which distinguishes such workers from permanent, part-time and casual employees and workers whose skills and qualifications provides them with a reasonable opportunity to be adequately rewarded for their labour without recourse to the industrial relations system.

⁶ A copy of the report *Hope is not a strategy – our shared responsibility for the future of work and workers*, is available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork/Report.

⁷ A copy of this report is available at: <https://engage.vic.gov.au/inquiry-on-demand-workforce>.

⁸ Senate Select Committee on the Future of Work and Workers (2018) *Hope is not a strategy – our shared responsibility for the future of work and workers*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Work_and_Workers/FutureofWork/Report, p. 92.

⁹ Report of the Inquiry into the Victorian On-Demand Workforce (2020) p. 184. A copy of this report is available at: <https://engage.vic.gov.au/inquiry-on-demand-workforce>.

¹⁰ Report of the Inquiry into the Victorian On-Demand Workforce *op. cit* p. 189.

2. That the status of gig workers either as employees or as independent contractors be determined having regard to amongst other things:
 - a. The manner in which the gig economy works.
 - b. The rights of individuals to work in the gig economy.
 - c. The role and relationship of gig workers to other parties in the gig economy.
 - d. The extent to which capital and labour are provided by gig workers in order for the gig economy to function in the road freight industry.
 - e. The right of gig workers to determine their hours of work and whether or not to accept work offered to them.
3. That gig workers be afforded the same rights and protections as other transport workers within the industrial relations system given market power of digital platform companies when compared to gig workers.
4. That NSW advocate for reform to industrial laws in order to ensure the rights and protections available to other transport workers within the industrial relations system are provided to gig workers.

Conclusion

Successful commercialisation of new innovations and new ideas without market intervention are worthy of support because they underpin economic growth, employment growth and improved living standards.

However, the structure of the gig economy and the manner in which it operates does not ensure an equitable distribution of benefits to its participants. Benefits overwhelmingly flow to digital platform companies at the expense of gig economy workers.

It follows that the policy debate should not be about relationships or the absence thereof in the gig economy.

Instead the policy debate should be about how best to ensure the rights and obligations of gig workers are protected through legally binding minimum standards.

Australia has a long record of offering protection to vulnerable workers through the industrial relations system, including employees and owner-drivers.

ARTIO NSW's view is that gig workers deserve a similar form of protection to ensure the benefits of the gig economy are shared on a more equitable basis.

Accordingly, the task at hand should be to determine how to achieve this policy outcome.

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

Yours sincerely

Hugh McMaster
For and on behalf of
Laurie D'Apice
President