

66 TH ANNUAL MEETING OF THE IAJ 2024 – CAPE TOWN (SOUTH AFRICA)

FOURTH STUDY COMMISSION: PUBLIC AND SOCIAL LAW

Response from Australia

Digital Revolution Impact on the Labor Market:

Platform or Gig Economy and Artificial Intelligence

- 1. Provide a brief description of the presence of the "gig" or "platform" economy in your country. If possible, base your answer on official public data or academic reports, although we recognize that in some cases data may not be available.**

What is the gig economy?

A range of terms describe the gig economy: on-demand, gig, sharing, collaborative, crowdsourcing, and short-term, project-based and outcome defined independent or 'freelance' work.

The Australian gig economy

The nature of work is constantly changing. How we currently work and will work in the future is being shaped by factors such as economic, technological and demographic change, as well as shifts in business practices as industries and communities adapt to climate change. The way we work also continues to evolve.

Within the Australian Context, the Productivity Commission describe the gig economy as one where workers contract to complete a task via a digital platform that facilitates labour transactions between workers and businesses seeking to have tasks completed. gig economy digital platforms collect a portion of job earnings, control the brand of the platform, the worker (via ratings mechanisms) and the worker-client relationship (for example, non-circumvention clauses). Gig work, therefore, differs from freelance work or traditional independent contracting models since workers are not building or managing their own reputation or 'business'.

In the gig economy, individuals provide services to consumers for a fee via digital platforms or marketplaces. These platforms can provide consumers with greater choice and flexibility in their daily lives.

Common gig economy services in Australia include:

- ride sharing services – for example, where consumers book an individual to drive them somewhere
- delivery services for a fee – for example, where consumers engage an individual to deliver food or other items to them

- personal services for a fee – for example, where consumers engage an individual to provide creative or professional services like graphic design and web development, or odd jobs like assembling furniture and house painting.

How many people participate in the gig economy?

While it is widely acknowledged that gig economy is rapidly expanding there is currently no 'reliable workforce data' available on gig economy workers.

Some gig workers are illegal, and some are working on the black market. It follows that the multiple jobs that gig workers hold are not captured by official statistics.

The Australian Bureau of Statistics (ABS), like most national statistical organisations, is working to expand its statistics on relatively new and emerging forms of employment, including digital platform workers. While digital platform workers and their work have always been included within existing Australian labour statistics on employment and hours, they are a relatively small group of workers who have not been separately identifiable.

Whilst it is difficult to determine the number of people engaged in the gig economy, the ABS has developed an initial framework to measure digital platform work and workers. The framework shows how the ABS has defined and scoped digital platform work and the classification of tasks undertaken by people who are paid-per-task.

The framework acknowledges that the 'gig economy' is a broad term that is generally used to describe a wide range of activities, from buying and selling goods to providing short term labour services, such as providing care. However, most of the recent and current interest, from a labour statistics perspective, has been on the supply of labour services through digital platforms.

In 2022-23, just under 1% (0.96%) of the employed population were digital platform workers. Of these:

- 66% were male, representing a higher proportion of males than in the total employed population (52%).
- 53% did not consider digital platform work to be their main job.
- over 50% had been undertaking this form of employment for less than one year.
- the most common digital platform work tasks were Food Delivery and Transport.

Source: ABS

The 2023 *Australian Youth Barometer: Understanding young people in Australia today* (3rd Edition Monash University 2023) gauges the pressures currently experienced by young Australians.

The Australian Youth Barometer, surveyed over 500 young Australians aged 18 to 24 and undertook 30 in-depth interviews to examine the interconnected dimensions of

young people's lives, including the economy, employment, education, health and wellbeing, relationships, and young people's civic participation in society, including their experiences of belonging and exclusion.

In respect of employment, some of the key findings of the 2023 Australian Youth Barometer are of interest:

- Although 90% of young Australians experienced difficulties in the past year, 52% thought that it is likely or extremely likely that they will achieve financial security in the future.
- 83% of young people are doing something extra with the goal of improving their chances of getting a job.
- 50% of young Australians reported participating in the gig economy at some point in the last 12 months. This was more common among young First Nations peoples and those with physical disabilities or other conditions than those without disabilities.

Professor Lucas Walsh, one of the authors of the report noted that the research findings suggest that a growing participation in insecure work such as the gig economy is connected to education, finance, and young people's perspectives about the future. Professor Walsh commented:

"The connections between a young person's participation in insecure work, such as the gig economy, and other aspects of their lives, are infused with a combination of scepticism and deep concern about the present moment, with a tempered optimism about their ability to navigate these struggles into the future".

As noted in the Senate Select Committee report on job insecurity:

- 2.122 The pandemic has accelerated a trend that has been apparent for the last decade at least, in which the most disadvantaged workers have become even more disadvantaged. Some workers who lost casual work during the pandemic were forced to turn to gig work, losing even the minimum safety net of award pay rates; some regained work in the traditional employment market; some remain in the gig economy; and some have simply given up.
- 2.123 Many discouraged workers are invisible; many women have dropped out of the labour force and are now being ignored in the numbers—underemployment is still up and underutilisation has grown slowly over time.
- 2.124 On-demand platform work has grown but there is no real way to measure its true extent at this stage. Some gig workers are illegal, and some are

working on the black market—certainly many of the multiple jobs that gig workers hold are not captured by official statistics.

Source: The Australian Senate - Select Committee on Job Security, February 2022. Commonwealth of Australia.

2. How does this development affect the traditional employee/employer relationship? What is the status of platform or gig workers in your country: employees, independent contractors or a third category? Is there any jurisprudential divergence regarding the status of these workers? Cite relevant examples.

The gig economy is characterised by workers contracting to complete short-term task-based work via digital platforms which facilitate labour transactions between workers and businesses.

The increase in the number of gig economy workers has brought into question the appropriateness of the employee/independent contractor distinction in relation to gig economy workers and whether reforms are needed to provide better job security, income, and retirement savings for gig economy workers.

In the Australian context the main drivers of the expanding gig economy include:

- digital platform enabled advances in technology that increase the scope and frequency of transactions, reduce transaction costs, increase accessibility, and enhance trust regarding payment between workers and businesses;
- changing economic behaviour and increases in the number of workers seeking supplemental income;
- workers seeking more flexible and autonomous work-life environments and businesses seeking more flexible workplace arrangements;
- demand by consumers and businesses for the convenience of on-demand services, including improved job matching; and
- the absence of (adapted/targeted) regulation and lower barriers to entry that allow consumers and providers to switch roles easily and quickly.

In the decision of *Deliveroo Australia Pty Ltd v Diego Franco* [2022] FWCFB 156, the Full Bench of the Fair Work Commission ('FWC') confirmed the key consideration in determining whether a relationship is one of employment or independent contractor is the contractual rights and obligations of the parties. In so doing, the Full Bench applied the High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 398 ALR 404; [2022] HCA 1 ('Personnel Contracting') and *ZG Operations Pty Ltd v Jamsek* (2022) 398 ALR 603; [2022] HCA 2 ('Jamsek').

In *Jamsek*, the High Court unanimously held that the respondents were not employees of the company. A majority of the Court held that, consistently with the approach adopted in *Personnel Contracting*, where parties have comprehensively committed the terms of their relationship to a written contract, the efficacy of which is not challenged on the basis that it is

a sham or is otherwise ineffective under general law or statute, the characterisation of that relationship as one of employment or otherwise must proceed by reference to the rights and obligations of the parties under that contract.

Following the High Court ruling in *Jamsek*, primacy was given to what is in each written contract of employment, regardless of the actual work arrangements prevailing in the workplace. In short, the High Court concluded that if a contract says a worker is an independent contractor, then they are one, regardless of the real nature of the work relationship.

Recently, the Australian Parliament enacted legislation aimed at providing a degree of certainty around how best to regulate the rapid expansion of the gig economy. However, the policy challenge for the Parliament is finding a balance that preserves much of the flexibility and advantages of digital platform enabled gig work for both businesses and workers in a way that also provides appropriate protections, rights and benefits for workers participating in the gig economy.

In summary, the reforms contained within the legislation constitute an attempt to address many of the wide-ranging consequences arising from the unrestrained use of non-standard, contingent, insecure employment models by Australian businesses across numerous sectors of the economy.

Some of the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* ('FW Amendment Act') changes relevant to the work of the FWC include:

- changes to the definition of casual employee and changes to casual conversion
- changes to the definition of employment
- changes to intractable bargaining provisions
- changes to enterprise bargaining provisions relating to multi-enterprise agreements and franchisees
- a process for the Commission to make model terms for enterprise agreements
- powers relating to 'employee-like' workers performing digital platform work in the gig economy including:
 - the ability to make minimum standards orders
 - dealing with employee-like worker disputes about unfair deactivation from a digital platform
- powers relating to the road transport industry including:
 - the ability for new Expert Panels to make minimum standards orders
 - dealing with regulated road transport worker disputes about unfair termination of a contract
- powers to register collective agreements relating to regulated workers
- functions relating to a right to disconnect including:
 - a new dispute function

- a process for the Commission to make a model term for awards
- an 'unfair contracts' dispute resolution function for independent contractors (below a high-income threshold)
- workplace delegates' rights for regulated workers.

In the context of the gig economy, let me highlight four important amendments which have specific relevance to the gig economy. The first relates to the changes to the definition of employee and employer.

The changed definition of employee and employers under the *Fair Work Act 2009* ('FW Act') will be determined by "ascertaining the real substance, practical reality and true nature of the relationship" between parties. This means that there must be consideration of the totality and true nature of the employment relationship. This includes having regard to the terms of the contract as well as how the contract is performed in practice.

This new provision unwinds the High Court authority which gave primacy to the written terms of the contract when considering whether a person is an employee or contractor.

Secondly, the FW Amendment Act introduces a new definition of casual employee into s 15A of the FW Act. Currently, a person is a casual employee if they accept a job offer from an employer knowing that there is no firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

Under the new definition an employee is a casual employee if:

- there is no firm advance commitment to continuing and indefinite work; and
- the employee is paid a casual loading or a specific rate of pay for casual employees.

Determining no firm advance commitment to continuing and indefinite work, requires a consideration of the "real substance, practical reality and true nature of the employment relationship". The new provision will require a consideration of the totality of the employment relationship not just the terms of the contract of employment.

Thirdly, the FW Amendment Act includes a provision to assist in tackling sham contracting by amending subsection 357(1) of the FW Act. This amendment would prohibit an employer from misrepresenting an employment contract as an independent contracting arrangement.

Currently, as a defence to sham contracting, an employer needs only to argue they did not know and were not reckless as to whether the contract was an employment contract rather than a contract for service. The amendment would require that the employer reasonably believed that the contract was a contract for services rather than an employment relationship. The narrowing of the defence for sham contracting is in response to a concern that the previous provisions were not effective in deterring sham contracting.

Finally, the FW Amendment Act introduces a series of protections for regulated workers and empowers the FWC to set minimum standards for workers in the following industries:

- employee-like "gig economy" digital platform workers; and
- road transport industry.

In respect of gig economy digital platform workers, the FW Amendment Act will allow the FWC to make a minimum standards order covering matters such as:

- Payment terms
- Deductions
- Record-keeping in relation to specified matters
- Insurance
- Consultation
- Representation
- Delegates' right
- Cost recovery.

However, matters that are primarily of a commercial nature cannot be included in a minimum standards order, for example, overtime rates and rostering arrangements. Moreover, employee-like "gig economy" digital platform workers are eligible to make an unfair deactivation claim (similar to an unfair dismissal claim) in the event that their access to the digital labour platform is deactivated in circumstances where:

- they have been performing work on a regular basis through a digital labour platform for a period of at least six months; and
- they earn less than the "contractor high income threshold".

3. What is the impact of artificial intelligence on the labour market of your country? If possible, base your answer on official public data or academic reports. Outline the positive and negative impacts.

It is recognised that digitisation, automation and generative AI are having a profound impact on labour markets across developed economies, with low-skilled jobs or those involving repetitive tasks at greater risk of being replaced by AI. However, Australia faces a lower risk of losing jobs to automation than many other OECD countries given the nation's greater levels of education, robust export services sector and high rates of urbanisation.

As discussed above, many of the benefits and risks relate, at least in part, to the characterisation of workers as independent contractors of the digital platform rather than as employees. Therefore, the gig economy poses challenges to existing models of regulating employment and work- not all of which are new. A worker's entitlements and protections vary depending on whether they are an employee or independent contractor.

According to the OECD's latest estimates, in Australia 10 per cent of jobs have been estimated to be at a high risk of automation compared to an OECD average of 14 per cent. Jobs at risk of

significant change are estimated at 24.6 per cent, compared to 31.6 per cent for the OECD average.

The OECD report, *Preparing for the Future of Work Across Australia* identifies that Rural and Regional areas of Australia are at most risk of AI and automation tend to be those with high employment shares in manufacturing, agriculture, or the mining sector.

The OECD estimates pre-pandemic show that 36% of jobs in Australia are at risk of being automated, compared to the OECD average of 46%. About 11% of jobs face a high risk (i.e. high probability) of being automated, while another 25% are likely to face significant change. Automation will impact places differently. Across Australian states and territories, the share of jobs at risk of automation varies from 29.3% in the Australian Capital Territory to 36.9% in Tasmania. In addition, there are large differences in the risk of automation at the regional level across Australia, depending on the occupational profile and the characteristics of the local economy.

There is a potential risk that automation within the Australian workforce could exacerbate wage polarization, income inequality, and the lack of income advancement that has characterised the past decade across advanced economies, stoking social, and political tensions.¹

4. Do you have any laws regulating and/or relevant judicial decisions about artificial intelligence on the labour market? What are the challenges for employers, such as privacy, transparency, secrecy, plagiarism, and the claim that artificial intelligence will be replacing workers? What are the concerns of employees?

Many of the issues raised by the gig economy, including the nature of the employment relationships are not new. While digital platforms have altered the way in which gig economy workers are engaged to complete tasks, relevant legislation has not provided guidance as to how gig economy workers are to be classified.

Artificial Intelligence ('AI') is regulated in Australia, but not with AI-specific legislation. Instead, it is governed by existing legislation.

In November 2023, the Australian Government, alongside the EU and 27 countries signed the Bletchley Declaration, an international commitment to ensuring that AI should be designed, developed, deployed, and used in a manner that is safe, human-centric, trustworthy and responsible.'

Australia is at an early stage when it comes to deciding on a way forward in relation to AI. Australian legislators are in the process of considering the benefits and harms which AI poses with an eye to developing further regulation.

The Australia Government has acknowledged that AI is insufficiently regulated in Australia, and that it would seek to regulate AI in a risk-based, technology-neutral way.

¹ Poorer than their parents? Flat or falling incomes in advanced economies, July 2016.

On 26 March 2024, the Australian Senate resolved that the Select Committee on Adopting AI, be established to inquire into and report on the opportunities and impacts for Australia arising out of the uptake of AI technologies in Australia.

The establishment of the Select Committee comes alongside several other inquiries into AI in Australia:

- Australian Government's Safe and Responsible AI in Australia consultation (the Consultation);
- Australian House of Representatives Standing Committee on Employment, Education and Training Inquiry into the use of generative AI in the Australian education system, culminating in a national Framework; and
- New South Wales Parliament's Inquiry into AI in New South Wales.

The Senate Select Committee is tasked with the responsibility to inquire into and report on the opportunities and impacts for Australia arising out of the uptake of AI technologies in Australia, including consideration of:

- recent trends and opportunities in the development and adoption of AI technologies in Australia and overseas, in particular regarding generative AI;
- risks and harms arising from the adoption of AI technologies, including bias, discrimination and error;
- emerging international approaches to mitigating AI risks;
- opportunities to adopt AI in ways that benefit citizens, the environment and/or economic growth, for example in health and climate management; and
- opportunities to foster a responsible AI industry in Australia.

The Select Committee will present its final report on or before 19 September 2024.