

# A Better Future for Self-Employment:

How is it changing, and how can ‘gig’ work be regulated?

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The Carmichael Centre, a project of the Centre for Future Work at The Australia Institute, is named in honour of Laurie Carmichael, the legendary manufacturing unionist who passed away in 2018 at the age of 93.

The Carmichael Centre conducts and published research on themes related to Carmichael's legacy, including:

- industrial relations;
- social policy;
- manufacturing and industry policy;
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The Centre sponsors an annual Laurie Carmichael lecture, with a prominent labour or progressive personality speaking on Carmichael's legacy.

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# Summary

This report considers and challenges two common myths about self-employment.

The first is that self-employment is inexorably growing. The second is that self-employment cannot, or should not, be regulated in order to protect self-employed workers and improve the conditions of their work. This report shows that, in reality, self-employment is *not* growing inexorably — in fact, in most countries (including Australia) it is declining. The much-trumpeted surge in self-employment and ‘freelancing’ is a myth. However, the nature of self-employment is changing: fewer self-employed people are running successful independent businesses, and more are engaged in precarious ‘solo’ activities like short-term contracting and part-time ‘gig’ work. The report also shows that some forms of self-employment *can* be regulated to protect affected workers, provided two simple and important criteria are satisfied: the workers are vulnerable and hence *need* protection, and a viable mechanism exists that *enables* their work to be efficiently regulated.

## *Terms and their meanings*

The self-employed are those who perform paid work but are not employees. A self-employed person may be either an employer, or someone who is working for themselves.

In recent years, much attention has fallen on a supposedly new form of self-employment: ‘gig workers’. A subset of gig work is ‘digital platform work’, in which workers undertake ‘work on-demand via apps’ or ‘location-based platform work’. Another group of ‘gig’ workers (separate from the digital sphere) are road transport owner-drivers. ‘Digital platform workers’ and road transport owner-drivers are collectively called ‘regulated workers’ in the federal government’s new *Closing Loopholes* bill. Much of the latter part of this report discusses these two groups of self-employed gig workers.

## *Is self-employment exploding?*

This report uses data from the Organization of Economic Cooperation and Development (OECD) and the Australian Bureau of Statistics (ABS). The OECD data show that 25 countries have experienced clear sustained long-term decline in rates of self-employment, with just four showing sustained long-term increases. Of those 25 showing declines, 15 showed continuous decline: that is a drop in self-employment in each decade throughout the period since the 1980s or 1990. The other 10 experienced general declines but with some interruptions. Another nine had either mixed patterns or insufficient data. These data refute long-standing claims that a growing share of workers in industrial countries will be independent contractors.

In Australia, self-employment fell from 19.1% of employment in 1991 to 15.7% in 2022. Broadly speaking, the rate of self-employment was moderately stable through the 1990s, but started declining from the early- to mid-2000s. This decline is confirmed by data from

the annual Household Income and Labour Dynamics in Australia (HILDA) survey. Both ABS and HILDA data series show a clear decline in self-employment for those with employees, but also (to a smaller extent) for those without employees.

Amongst full-time workers, 'solo' self-employment (self-employment by individuals with no employees) has declined. Yet amongst part-time workers, solo self-employment has grown, consistent with demand by digital platforms for mostly part-time independent contractors. This change in the composition of self-employment (with fewer people in full-time roles with their own employees, and more in part-time solo roles) increases the risks of low and insecure incomes for the self-employed, and highlights the need for regulatory measures to improve their jobs.

The decline in the self-employment rate, falling by 3.4 percentage points of total employment over three decades, was almost identical between men and women. Amongst both men and women, there was a decline in genuine small business opportunities, shown in the decline in the proportion of self-employed with employees. Amongst women, there is a decline in self-employment without employees for those working full-time, but a small increase in self-employment without employees for those working part time. Amongst men, full-time self-employment for men fell by slightly more, while part-time self-employment without employees more than doubled. These patterns reflect the recent growth of part-time employment among men generally, and male dominance in the realm of part-time solo self-employment (typical of digital platform work and other gig work).

Overall, the decline in self-employment has masked several, sometimes conflicting trends. Small business opportunities have been declining in the face of greater barriers to entry erected by larger firms. The extent of part time jobs or 'side hustles' has increased, in part to meet the needs of large digital platforms for part-time gig workers. And full-time self-employment without employees has declined, in the context of the continuing need by large firms to control the way that work is performed – since the employment relationship is the most efficient way to exercise that control.

As a result, over the past decade there were 112,000 fewer self-employed people with their own employees, 35,000 more part-time self-employed without employees, and 91,000 fewer full-time self-employed without employees than there would have been if their shares of total employment had remained unchanged. Self-employment is both shrinking and becoming more precarious.

### *Why is self-employment not growing?*

In most settings, waged employment is still the most efficient way for corporations to organise reliable production and exert direct control over labour. The employment relationship is not an invention of unions trying to maintain control over the deployment of labour. Indeed, many trade unions founded in the 19<sup>th</sup> century began by representing self-employed contractors, not employees. As capitalism developed and firms grew, it made

sense for those firms to manage workers as ‘employees’. No contract could fully foreshadow all the possible contingencies of the work that a firm wanted performed on its behalf, and hence employment offered a more reliable and clear way for firms to organise and control labour. Ultimately, the employment relationship exists, and will continue to do so, because it is in the interests of business in most situations.

While new platform business models (such as in the ride-hail and food delivery industries) have found novel ways to achieve and enforce employer control over work, productivity, supervision, and monetary flows outside of a standard employment relationship, there are limits to the use of these strategies. Hence it appears that, at any one time, only a small share of Australia’s workforce work in the platform economy; many more will have worked in it at some time over the previous year to supplement otherwise low incomes, sometimes only once.

Nominal self-employment (through contracting and gig work) is not the only way for firms to transfer risk to workers. Employers can often achieve similar goals through changes in terms and conditions for their waged employees. And the push for self-employment, to reduce costs and transfer risk, can only go so far, because firms need to exercise control. In sum, the underlying causes of growing insecurity in all its forms (including more insecure forms of waged employment) are not ultimately defined solely by the type of contracts people are on, but rather by the more general ways organisations are being structured and restructured in modern times.

The trends underpinning the changes in self-employment appear unrelated, but have a common theme: the growth of power of large firms. While the self-employment sector has long been a repository of what might be called ‘entrepreneurial spirit’, the opportunities for that spirit have been in decline; meanwhile, large firms have sought to channel the entrepreneurial desire into intermittent gigs that pay little but serve those firms’ interests.

The character of self-employment is gradually being reshaped. Some parts of the self-employment sector resemble engines of innovation and entrepreneurship, but other parts of it are increasingly populated by vulnerable workers whose interests are not so clearly being met.

### *Can and should self-employment be regulated?*

Many self-employed are in strong positions in the labour market, thanks to their specialised, in-demand skills, personal networks of customers, and other advantages. Such people with high labour market power are unlikely to want to become employees, or to have their work closely regulated. On the other hand, there is substantial evidence that many self-employed workers are, indeed, vulnerable – especially those with no employees, no corporate status, and who are highly dependent on specific companies for most of their revenue. These vulnerable self-employed workers lack most of the protections provided to employees through labour law; they can be terminated with little or no notice, and without recourse to

unfair dismissal laws; they receive low incomes, and have little say over the income they receive or the conditions under which they work; they are often underemployed; they receive few if any training opportunities; and they face worrisome health and safety risks. These workers have very low power compared to the typically large firms that use their services. The above adverse consequences often apply, with different emphases, to both digital platform workers and road transport owner-drivers. As technology has developed, the vulnerability of these and other self-employed workers has increased.

The limited available evidence suggests that many gig workers, probably a majority, do not want to become employees – though attitudes vary substantially between sectors. The views of affected workers alone are not the only relevant factor in determining whether regulation is appropriate: strong labour standards are required, regardless of the attitudes of any particular group of workers, in order to minimise any ‘race to the bottom’ that could negatively affect other workers. However, the attitudes of those involved can legitimately shape the form that regulation takes, as they can influence the implementation, effectiveness, and politics of regulation. Moreover, a seeming aversion to being assigned full employee status does not stop a majority of gig workers from wanting regulatory intervention for protection – as other survey evidence attests. While they might not wish for regulation that leads to full employee status, they do wish to see it leading to their protection from unfair practices by large corporations, and to the establishment of minimum standards for pay and conditions. This presents a regulatory challenge, as most existing interventions aimed at protecting workers’ pay and conditions have been structured around an employment relationship.

While many of the worst vulnerabilities of gig workers could well be addressed by redefining them as employees, this approach encounters three difficulties. First, as revealed by international experience, there is no certainty that attempts to define gig workers as employees would succeed. Second, even when a rule is devised to interpret the contracts that gig workers sign as employment contracts, contracting firms could (and do) amend their contracts to circumvent these criteria. Third, there is strong political resistance from gig firms to attempts to define their workers as employees, leveraging the fact that many gig workers like to conceive of themselves as independent and self-employed, as well as customers’ preference for cheap services. That said, not all attempts at regulating gig workers or the self-employed are doomed to encounter determined political opposition. In New South Wales, regulation of independent contractors involved in road freight transport (owner-drivers), through what is now Chapter 6 of the *Industrial Relations Act*, has been successfully maintained for over four decades, and survived several changes of government. This experience provides a good example of how well-designed protections for gig workers can create a stable and fairer system of self-employment.

## *What has been done?*

Various attempts have been made to regulate the work of selected self-employed people. One recent overseas example concerned the search for a means of ensuring ride-hail and taxi drivers in New York received at least that jurisdiction's minimum wage (after operating expenses). In Australia, the most relevant examples of regulation of some self-employed both centre on New South Wales, and concern road transport and apparel outworkers. These are both long-standing examples of 'gig' (but non-platform) contracting models.

In NSW, regulation enables the NSW Industrial Relations Commission to issue 'contract determinations' that specify minimum standards for self-employed owner-drivers, but without treating them as employees. The system has led to a demonstrable improvement in occupational safety for road transport drivers (and safety for other road users) in NSW. Despite some important limitations, the Chapter 6 framework also very clearly formed the model for the drafting of new legislation in Queensland to provide protection for independent courier drivers.

## *Options and criteria for regulation*

If conditions for any group of self-employed workers are to be regulated and improved, two important criteria need to be satisfied. First, the workers must be vulnerable, such that they *need* protection, Second, a viable mechanism must exist to *enable* their work to be efficiently regulated. For a minority of the self-employed — including many in various gig-type occupations — those criteria are satisfied, and regulation is ultimately possible and appropriate.

Other principles that should guide such regulation include the following:

- Regulation should consider whether affected workers really are employees, and whether their status as independent contractors is only a pretence.
- If they genuinely are not employees, then the outcome of regulation should, financially, be indifferent between a self-employment model versus an employment relationship model.
- Any regulation needs to be tailored to the circumstances of the industry where it occurs.
- The starting point for regulation of vulnerable self-employed workers should therefore be the standards that apply for relevant employees.

## *The 'Closing Loopholes' Bill*

New legislation from the federal government (the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023*) would enable the Fair Work Commission (FWC) to establish standards on matters like payment terms, deductions, working time, record-keeping,



consultation, representation and union delegates' rights for specified groups of 'regulated workers'. Such standards can only be established where the workers have low bargaining power, are being paid less than equivalent employees, or have little authority over their work. Regulation is to be tailored to the circumstances of the workers and their industry. The FWC is told not to give preference to one business model over another (ie. employment or contracting relationships).

The Bill does *not* redefine any regulated workers as employees. Other elements of the bill do attempt to clarify the definition of 'employee' (responding to recent High Court decisions which give employers free rein to define any worker as a contractor or casual employee, based solely on the wording of the contract they sign – rather than the concrete attributes of their jobs). However, this definitional clarification may not make much difference to platform workers, as most tended to be treated as contractors anyway, even under the previous definition. The *Closing Loopholes* bill takes, as its inspiration, the reforms to road transport regulation in New South Wales, now Chapter 6 of that state's *IR Act*. Certain matters are excluded from its scope.

There are some weaknesses in the bill's approach. These include reliance on non-binding guidelines, the exclusion of some matters (like overtime pay) from the conditions which the FWC can establish for regulated workers, the limited coverage of these provisions (applying only to specified groups of contractors), and the implications for workers compensation. Still, the *Closing Loopholes* bill provides a promising and sustainable model for regulating and protecting many 'gig economy' workers.

## *Conclusions*

It is time that labour law extended beyond the employment relationship to ultimately cover all vulnerable workers, regardless of their status, provided that, in doing so, labour law recognises that there are many self-employed people for whom regulation would be unwanted, unwarranted, inappropriate or impractical. For some self-employed — mostly but not exclusively those in some gig-type occupations — the criteria for good regulation are satisfied. Regulation is ultimately possible and appropriate. When established in such circumstances, it can provide a better future for those in self-employment who satisfy those criteria. The measures affecting employee-like workers in the *Closing Loopholes* bill are consistent with this approach, and represent a clear improvement on existing arrangements.

# Introduction

This report considers two common myths about self-employment.

The first is that self-employment is inexorably growing, a result of the urge by workers or corporations to escape the supposed rigidities and inefficiencies of the employment relationship, and become ‘their own boss.’

The second is that self-employment cannot, or should not, be regulated to protect self-employed workers:

- “cannot be”, because only laws built around the employment relationship can offer such protection; or
- “should not be”, because the workers concerned don’t want, or don’t need, such protection, and/or providing it would create worse problems for society.

Both of these ideas are closely tied into recent debates about the growth of the so-called “gig economy”, typified by new platform business models for services such as passenger transportation and package or food delivery. The rise of these activities is typically described (and measured) as a form of growing self-employment. The supposed inefficiency or impossibility of regulating gig-type jobs arises from the fact that most participants are considered self-employed, and it would be deleterious to deny them that freedom.

This report critically addresses both these issues. It shows that self-employment is *not* growing inexorably — in fact, in most countries (including Australia) it is declining. It also shows that some forms of self-employment *can* be regulated to protect affected workers, provided two simple and important criteria are satisfied: the workers are vulnerable and hence *need* protection, and a viable mechanism exists that *enables* their work to be efficiently regulated. For many self-employed workers, at least one of those criteria is not satisfied, but for some — including those in some parts of the “gig economy” — those criteria are satisfied and regulation is ultimately possible and appropriate. Such regulation would promise a better future for those in self-employment who satisfy those criteria.

## BACKGROUND

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The purported rise of self-employment, freelancing, and gig jobs elicits one of two polar reactions from many observers. Some worry, and some rejoice, about the prospect that the future of work could be a world largely without waged employment. Instead, it has been imagined, workers of the future will more likely be ‘freelancers’: self-employed entrepreneurs, engaged in mostly short-term jobs or tasks performed for multiple customers or firms, or ‘portfolio workers’ who sell their talents or wares to the highest bidder. One breathless forecast in 2016 predicted: “By 2020, 40 percent of the U.S. workforce is expected

to be independent contractors.”<sup>1</sup> This could be a free market nirvana, or a dystopian hell, depending on which way it is viewed.

Some worry, while others rejoice, at the prospect of an explosion of self-employment, reflecting their different respective views on the effects and desirability of self-employment. For some, it represents a liberation from the tyranny of the employment relationship. In an extreme version of this view, self-employment represents an escape from the strictures of employment regulation, which are claimed to hamper innovation, productivity, dynamism, self-reliance and growth. For others, this escape from labour regulation is precisely why self-employment is a problem: it means those workers are unprotected, and their lack of protection can undermine the employment conditions of others (since employers can threaten to replace protected employees with unprotected self-employed contractors). There are certainly instances of employers engaging in ‘sham contracting’, designed to reduce their labour costs by falsely portraying their workers as contractors rather than employees.<sup>2</sup> The frequent use of sub-contractors, rather than employees, in the building and construction sector also makes it easier and more profitable for firms to engage in illegal ‘phoenix’ strategies (closing down, without paying contractors the debts they are owed, then recreating under a different name) as accountability and control are weak, opportunities for fraud are high, and contractors’ rights (as unsecured creditors) are hard to enforce.<sup>3</sup> There are also linked questions about the ideology of self-employment, and a lack of commitment to broader solidarities, that mean unions may find it harder to organise the self-employed for the purpose of improving their conditions of work. These issues are more complex than might initially appear.<sup>4</sup> However, we do not seek to interrogate such attitudinal matters here, merely to identify them as one reason for the interest in the growth or otherwise of self-employment.

Either way, the supposed rapid expansion of self-employment is seen as a huge and important change. One American report on ‘freelancing’, a vague term<sup>5</sup> used to depict self-

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<sup>1</sup> Trakstar Hire, "Freelance vs. Full-time: The Pros and Cons of Hiring an Independent Contractor", updated 23 February, 2016, <https://hire.trakstar.com/blog/freelance-vs-fulltime-pros-cons-hiring-independent-contractor> (date at [https://hire.trakstar.com/blog?page\\_no=17](https://hire.trakstar.com/blog?page_no=17)).

<sup>2</sup> Fair Work Ombudsman, A report on the Fair Work Ombudsman’s Inquiry into the labour procurement arrangements of the Baiada Group in New South Wales, Fair Work Ombudsman (Canberra, 2015).

<sup>3</sup> Helen Anderson, "Is illegal phoenix activity rife among construction companies?", *The Conversation*, 12 June 2015, <https://theconversation.com/is-illegal-phoenix-activity-rife-among-construction-companies-43111>; Trisha Hassan, "Insolvency and Illegal Phoenix Activity in the Construction Industry: an Analysis of the Current Measures in Place and Potential for Law Reform", *University of New South Wales Law Journal Student Series* 16, no. 22 (2022), <http://classic.austlii.edu.au/au/journals/UNSWLawJlStuS/2022/16.html>.

<sup>4</sup> Giedo Jansen, "Self-employment as atypical or autonomous work: diverging effects on political orientations", *Socio-Economic Review* 17, no. 2 (2019), <https://doi.org/10.1093/ser/mww017>.

<sup>5</sup> One report defined freelancers as ‘genuine business owners without employees working in a range of creative, managerial, professional, scientific and technical occupations’ (John Kitching, *Exploring the UK Freelance Workforce in 2015*, Association of Independent Professionals and the Self-Employed (London, Exploring the UK Freelance Workforce 2016)). Another added ‘moonlighters’, multiple job-holders, temporary workers and small business owners with one to five employees who ‘consider themselves both a freelancer and a business owner’ (Freelancers Union and Elance-oDesk, *Freelancing in America: A National Survey of the New Workforce*

employment and other modes of flexible employment, proclaimed that its growth represented:

“...More than an economic change. It’s a cultural and social shift on par with the Industrial Revolution. Just as the move from an agrarian to an industrial society had dramatic effects on social structures around civil rights, workforce participation, and even democracy itself, so too will this shift to a more independent workforce have major impacts on how Americans conceive of and organize their lives, their communities, and their economic power.”<sup>6</sup>

With some innovative use of statistics, this same report estimated that 34% of the US workforce already worked as ‘freelancers’.<sup>7</sup> Meanwhile, an Australian consultancy claimed that “the widespread adoption of freelance work by businesses has made an ‘on demand’ workforce the new norm.”<sup>8</sup> The consultant explained the growth in freelancing partly through costs and benefits:

“An average full-time consultant costs \$5,000 a day. In contrast, the average daily rate of a freelance professional on Expert360 is \$1,000 [but] freelance consultants earn up to three times more than their full-time consulting counterparts.”<sup>9</sup>

The looseness of the arithmetic here is matched by the looseness of the term ‘freelancing’, so plastic and all-encompassing it is almost meaningless.<sup>10</sup> But if the core of its meaning refers to self-employment,<sup>11</sup> then the data that follow will show that this surge is but a myth.

## TERMS AND THEIR MEANINGS

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The self-employed are, in effect, those who perform paid work but are not waged employees. A self-employed person may be either an employer, or someone who is working for themselves. The ABS often refers to these people as ‘owner-managers’ (of either incorporated or unincorporated enterprises).

In recent years, attention has fallen on a subset of the self-employed, being so-called ‘gig workers’. ‘Gig work’ is characterised by the engagement of workers in a series of predominantly short-term paid tasks, as opposed to regular or long-term ongoing traditional work arrangements. It is a phrase used rather imprecisely, and often to refer to a narrower meaning (described below as ‘digital platform work’), but some of what this report describes

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(2013)), but also defined them as ‘individuals who have engaged in supplemental, temporary, or project- or contract-based work in the past 12 months’ (ibid, 3)

<sup>6</sup> Freelancers Union and Elance-oDesk, *Freelancing in America*, 2 (fn 5).

<sup>7</sup> Ibid, 3.

<sup>8</sup> Expert 360, *Getting Trendy 2017: How enterprises are driving the growth of the contingent workforce* (Sydney, 2017), 2.

<sup>9</sup> Ibid, 7.

<sup>10</sup> See fn 5

<sup>11</sup> Kitching, *Exploring the UK Freelance Workforce* (fn 5).

as ‘gig work’ does not require digital platforms. So the category ‘gig work’ is broader than digital platform work. In this report we use ‘gig worker’ to refer to workers who engage in a series of short-term tasks or ‘gigs’. This reflects the etymology of the term. The word ‘gig’ originally derives from the main income-earning activity of a musician or artist, and so musicians and artists are the original gig workers – whose existence long preceded that of digital platforms. Another group of gig workers who predate, by many years, digital platforms are road transport owner-drivers, whose situation is discussed later in this report (though their ‘gigs’ typically last much longer). Gig and platform work practices are spreading into many other industries and occupations, including care work (including through publicly-funded programs such as home care and disability services), building and repair services, technological and computing services, and others. The *Closing Loopholes* bill has singled out two particular categories of ‘employee-like’ work (digital platform workers and road transport owner-operators), but clearly the practice – and the insecurity and risks for workers accompanying this model – is much broader than those two categories.<sup>12</sup>

A subset, then, of gig work is ‘digital platform work’. As mentioned, ‘digital platform work’ is often referred to as ‘gig work’ or as comprising the ‘gig economy’. Increasingly gig work and platform work are merging into a single class of work, but we maintain a distinction here.

There are several ways in which platform activities can be classified,<sup>13</sup> but drawing on Valerio De Stefano, the platform economy is typically thought:

“...to include chiefly two forms of work: ‘crowdwork’ and ‘work on-demand via apps’... The first term is usually referred to working activities that imply completing a series of tasks through online platforms... ‘Work on-demand via apps’, instead, is a form of work in which the execution of traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, is channelled through apps managed by firms that also intervene in setting minimum quality standards of service and in the selection and management of the workforce.”<sup>14</sup>

The digital platform work discussed in this report is mainly of the second variety: that is, ‘work on-demand via apps’. It can also be referred to as ‘location-based platform work’.

At the recent cutting edge of expanding self-employment has been the rise of the ‘platform’ or ‘gig economy’, exemplified by the profile of brands like Uber, Lyft, Deliveroo, Doordash, Amazon Flex and Mable. These ‘disruptors’ are overturning the traditional employment model, mostly using contractors rather than employees as their source of labour, and organising their work through smart phone apps and algorithmic management strategies.

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<sup>12</sup> For a detailed review of platform work practices in care work, see Fiona Macdonald, *Unacceptable Risks: The Dangers of Gig Models of Care and Support Work*, Canberra, Centre for Future Work, 2023.

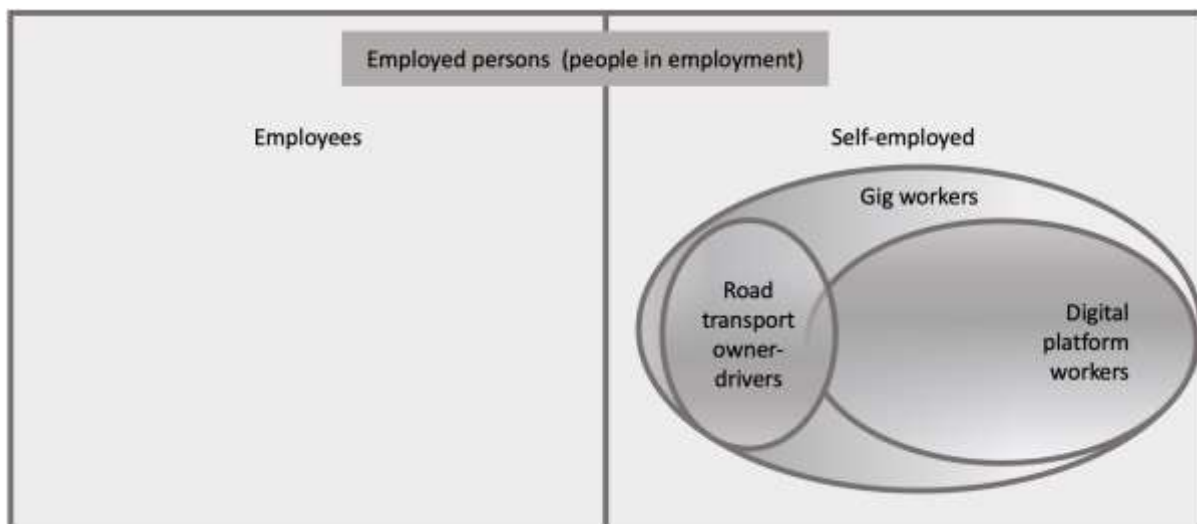
<sup>13</sup> Andrew Stewart and Jim Stanford, “Regulating work in the gig economy: What are the options?”, *Economic and Labour Relations Review* 28, no. 3 (2017).

<sup>14</sup> Valerio De Stefano, The rise of the «just-in-time workforce»: On-demand work, crowdwork and labour protection in the «gig-economy», International Labour Office (Geneva, 2016), 1.

The emergence of digital platform work has reignited debates about the regulation of certain types of self-employment. Another subset of ‘gig’ workers (separate from the digital sphere) are road transport owner-drivers. These two groups of gig workers (digital platform workers and owner-drivers) are called ‘regulated workers’ in the *Closing Loopholes* bill.

The different coverage of these terms is shown graphically in Figure 1, which depicts the status of people in employment. Paid workers who are not self-employed are in an employment relationship — whereby a worker is an ‘employee’ of a firm (i.e. of an ‘employer’). Gig workers as a subset of the self-employed. Figure 1 shows both digital platform workers and road transport owner-drivers as subsets of gig workers. These groups overlap slightly, as the rise of Amazon Flex has turned some owner-drivers of small trucks into digital platform workers who deliver parcels.

**Figure 1: Key terms used in this report**



For completeness, it needs to be noted that there is another group of vulnerable self-employed people on which attention has also fallen, termed ‘dependent contractors’. (This is a descriptive term, not one with any legal distinction.) A contractor is a self-employed person who performs work for a client (another person or organisation), usually on a piece-rate basis (that is, paid for the completion of the work, not the number of hours spent doing it). A ‘dependent contractor’ is someone who performs most of their work for one client, so they are dependent on that client for most of their income, and often perform that work according to strict directives specified by the client. Often they are ironically given the title ‘independent contractor’, the term ‘independent’ referring not to their relationship with clients but to a distinction between themselves and waged employees, who are also ‘dependent’ on their employer. The Productivity Commission estimated in 2001 that a

quarter of the self-employed were dependent contractors.<sup>15</sup> Some gig workers are also dependent contractors, in that they only work for one client, but some work for more than one client (in digital platform work, this is referred to as multi-apping). If dependent contractors were separately shown in Figure 1, they would overlap with other groups there – including, in some cases, overlapping with employees (since some allegedly dependent contractors are, at law, employees, and their contracting arrangement is a sham). This report does not include separate discussion of dependent contractors, but they are part of the broader composite of self-employed and are included (but not separately identified) in the statistics that follow in the next section.

## OVERVIEW

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The next section in this report addresses the question: *is self-employment increasing?* It uses data from the Organization for Economic Cooperation and Development (OECD) to examine international trends since the 1980s, then looks in more detail at Australian data, making use of Australian Bureau of Statistics labour force survey data since 1991. The latter enables distinctions to be made between self-employed people with and without employees (the latter coinciding more closely with common understandings of ‘freelancers’ and ‘gig’ workers), between full-time and part-time workers, and between males and females. That section also seeks to understand the decline in self-employment, including these factors:

- the benefits of the employment relationship for business;
- the constraints on the growth of gig work;
- the existence of alternative ways that risks and costs can be shifted from firms to employees (as that is often seen as a reason for the growth of self-employment).

The section that follows then addresses the question: *can and should self-employment be regulated?* It first considers whether the self-employed are vulnerable, and shows that, while some are clearly not, others lack labour market power and can be quite vulnerable — especially ‘gig workers’. It then investigates whether the self-employed want to be employees, and whether they want to be protected. For many self-employed workers, the answer to the first question is ‘no’; nevertheless, many vulnerable self-employed workers do desire regulatory protections. This presents a policy challenge, as most regulatory interventions protecting workers’ pay and conditions have been built around the employment relationship. Next there is a discussion of the class politics of gig work regulation, which notes mixed outcomes from attempts to convert gig workers to employees, the ability of gig firms to rewrite contracts to avoid employee status, and their ability to mobilise political opposition to reforms. This discussion also notes, however, that some attempts at regulation of specified groups of self-employed workers have been

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<sup>15</sup> Matthew Waite and Lou Will, *Self-employed contractors in Australia: Incidence and characteristics*, Productivity Commission (Canberra, 2001), <https://www.pc.gov.au/research/supporting/self-employed/secia.pdf>.

successful, even attracting bipartisan support. This includes reforms affecting textile, clothing and footwear outworkers and road transport drivers in New South Wales. Drawing on this, we consider options for regulation and the criteria for successful regulation.

The final substantive part of the paper discusses the provisions of the current *Closing Loopholes* bill with reference to those considerations. The conclusion argues that the specific groups of self-employed workers targeted by that bill are both vulnerable and desire regulatory protection, and that the protections proposed in the bill are workable and likely effective.<sup>16</sup>

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<sup>16</sup> Many of the ideas in the latter part of this report are rehearsed and elaborated upon in David Peetz, “Can and how should the gig worker loophole be closed?”, *Economic and Labour Relations Review*, vol 34 no 3 forthcoming (2023).



# Is self-employment growing?

The first part of this section explains the methodology used in the analysis. After that, it considers international data on trends in self-employment, followed by data specific to Australia.

## HOW THE ANALYSIS WAS UNDERTAKEN

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Data for the charts and tables that follow are from two sources. The first is the employment database of the Organization for Economic Cooperation and Development (OECD). This contains standardised data (to the extent permitted by national data collection systems), including information on the number of self-employed persons in each country, and the total number of employed persons (that is, employees plus the self-employed). From this we calculate the rate of self-employment (the number of self-employed persons as a proportion of all employed persons).

For the OECD, self-employment is defined as “the employment of employers, workers who work for themselves, members of producers’ co-operatives, and unpaid family workers.”<sup>17</sup> As national systems of data collection vary, the OECD often makes adjustments to national data to make them consistent with the OECD definition, a task made easier by various agreements between national statisticians on definitions and collection methods.

Accordingly, the measured changes that occur *within* countries tend to be more reliable indicators of reality than measured differences *between* countries. For data availability reasons, the start dates (and, to a lesser extent, the end dates) of data differ between countries. The term ‘decade’, as used in the text, just refers to the average of whatever data were available for each decade in that country. In the 2020s, this is inherently restricted to two years (2020 and 2021), so for that reason (and others discussed later) the data for the 2020s need to be treated especially cautiously (all the more so due to the COVID pandemic). While 2020-2021 provides the most recent information on the present state of self-employment, the analysis also evaluates the sensitivity of conclusions to the experience of those years (due to their special nature).

The second source of data is the household labour force survey conducted by the Australian Bureau of Statistics. On ‘self-employment’, the ABS does not directly measure that variable, but instead collects data on the numbers of ‘owner-managers of incorporated and unincorporated enterprises’. Helpfully, the ABS distinguishes between such people with and without employees. Independent contractors, and the subset of them constituting gig

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<sup>17</sup> Organisation for Economic Cooperation and Development, “OECD Employment Database: Self-employment rate”, <https://data.oecd.org/emp/self-employment-rate.htm>. It is not self-evident that all of these people are indeed ‘self-employed’, but the categories ‘members of producer co-operatives,’ and ‘unpaid family workers’ are both very small in Australia’s case, so their inclusion does not matter a great deal.

economy workers, are for this purpose ‘owner-managers’ of enterprises without employees (as are other own-account or ‘solo self-employed’ workers).

In recent decades, incorporation has been encouraged by various legal considerations, including taxation laws, the greater financial security associated with incorporation, and the change in the constitutional basis of federal industrial law.<sup>18</sup> So the proportion of owner-managers whose enterprises were incorporated grew from 27% to 44% over the last three decades. A majority (59%) of incorporated enterprises in 2022 had employees. The great majority (83%) of unincorporated enterprises were self-employed individuals with no employees — up from 70% in 1991. Those unincorporated businesses without employees likely encompass the group of self-employed most closely corresponding to the gig and platform workers considered below.

## INTERNATIONAL SELF-EMPLOYMENT TRENDS

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One of the defining elements of the apparent growth of the ‘gig economy’ is the use of allegedly independent contractors by digital ‘gig’ or ‘platform’ firms. Platforms do not hire these workers as employees, but rather provide supposedly entrepreneurial independent workers with an opportunity to conduct an income-generating activity through the firm’s network. If the future of work is one in which the ‘gig’ or ‘platform’ economy is dominant, then we should expect to see rapid growth in self-employed independent contractors. Indeed, the growth of self-employment should already be a trend that we can observe, since ‘gig’ firms have been in operation for a considerable time now. Uber, for example, was established in 2009 and presently operates in over 10,000 cities.<sup>19</sup>

Figure 2 tracks the level of self-employment in 38 (mostly OECD-member) countries included in the OECD database, grouped by the pattern of change. Panel A shows 15 countries (Australia, Austria, Denmark, Spain, Greece, Ireland, Israel, Italy, Japan, Korea, Norway, Poland, Portugal, Russia, USA) with a continuous decline in self-employment – that is, countries that showed a drop in self-employment in each decade throughout the period covered by their data (dating back to the 1980s or 1990s). Panel B includes a further six countries (Belgium, Canada, Finland, Germany, Hungary, Slovenia) with at least four decades of data, and showing a general, but interrupted, decline; and another four countries (Latvia, Lithuania, Turkey, Mexico) showing decline over at least three decades of data. Panel C shows the remainder of countries. Of them, only two (Netherlands, Czechia) show continuous growth in self-employment over four decades, and two more (France,

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<sup>18</sup> Federal industrial relations law had previously been based on that part of the constitution dealing with interstate industrial disputes. Since 2006, it has been based on that part dealing with corporations, so any ‘constitutional’ corporation is now covered by federal, not state, industrial law.

<sup>19</sup> Uber, “Use Uber in cities around the world”, Uber, 2022, accessed 20/9/22, <https://www.uber.com/global/en/cities/>.

Luxembourg) show growth over three decades. The remaining nine indicate mixed patterns<sup>20</sup> or have insufficient data. In total, then, of the 38 countries covered in this data, 25 show sustained long-term declines in rates of self-employment, and just four show sustained long-term increases.

Unfortunately, this OECD database does not include the United Kingdom. There, self-employment (measured as the proportion of employed people describing themselves as self-employed) fell from 14.0% in 1995 to 12.0% in 2001, rising to 15.2% in 2019 but falling to 13.2% in 2021 in the pandemic<sup>21</sup> (where the government's emergency furlough scheme may have affected how some people described their work status<sup>22</sup>). If it had been included in the OECD database, the UK would have been located in Panel C (with a mixed trend).

These data show a more consistent pattern across countries than is seen, for example, in comparative data on temporary employment.<sup>23</sup> The stability or decline of self-employment in most industrial countries suggests constraints on firms' ability to make use of contractors as a source of reliable labour input, for reasons explored later in this report. The broad decline in the share of self-employment is remarkable in the context of the rapid growth of new platform businesses, which might be expected to have led to increased self-employment.

None of the data support the prediction of a recruitment agency that predicted in 2016 that within four years 40% of American workers would be independent contractors.<sup>24</sup> Figure 2 shows self-employment averaging well below 10% in every decade in the US, and in continuous decline.

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<sup>20</sup> For example, employment in New Zealand was lower in the 2010s, but higher in the 2020s, than in the 1980s, and lower in both recent decades than in the 1990s; Sweden rose in the 1990s, but was flat thereafter; Brazil fell in the 2000s but rose in the 2010s; Columbia did the opposite.

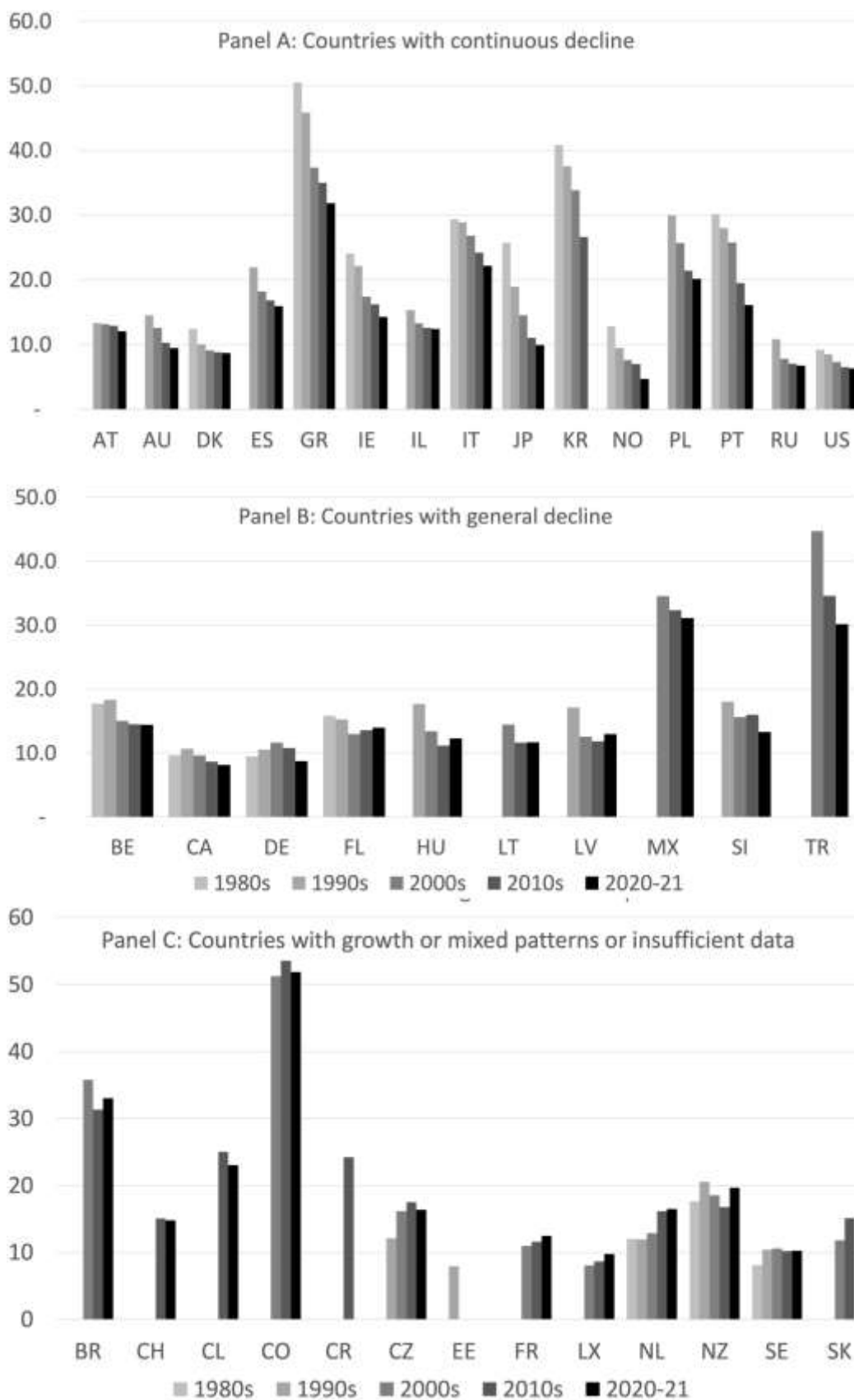
<sup>21</sup> Office for National Statistics (UK), "Dataset EMP14: Employees and self-employed by industry", updated 15 August, 2023, <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/dataset/s/employeesandselfemployedbyindustryemp14>

<sup>22</sup> Office for National Statistics (UK), *Understanding changes in self-employment in the UK: January 2019 to March 2022* (London, 2022), <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/understandingchangesinselfemploymentintheuk/january2019tomarch2022>.

<sup>23</sup> David Peetz, "Risk cycles, capitalism and the future of work", *Relations Industrielles / Industrial Relations*, 78, (forthcoming).

<sup>24</sup> Trakstar Hire, "Freelance vs. Full-time".

Figure 2: Decadal-average self-employment rates, OECD countries, 1980-2021



Source: OECD Employment Database; Data extracted on 10 Sep 2022 10:12 UTC (GMT) from OECD.Stat

## SELF-EMPLOYED WORKERS IN AUSTRALIA

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The decline in self-employment is also confirmed in data from the Australia Bureau of Statistics. The top line of Figure 3 shows a visible decline in the relative importance of self-employment over the last three decades. The *number* of self-employed workers in Australia, described by the ABS as ‘owner managers’ of incorporated and unincorporated businesses, was 1.4 million in 1991, rising to 2.1 million in 2022. As a *proportion* of total employment, however, self-employment fell from 19.1% in 1991 to 15.7% in 2022. Broadly speaking, the *rate* of self-employment was moderately stable through the 1990s, but started declining from the early- to mid-2000s.

This decline in self-employment shown in ABS data is also evident in the Household Income and Labour Dynamics in Australia (HILDA) survey: an annual, longitudinal survey of Australian households. HILDA shows a decline in what it calls ‘solo self-employment’ (i.e. without employees) from nearly 10% in 2001 to below 9% in 2016, while the proportion of employers (i.e. self-employed with employees) fell from below 8% in 2001 to below 6% in 2016.<sup>25</sup>

### Self-employed with and without employees

Changes in the numbers of self-employed *with* employees can be taken as an indicator of the opportunities for genuine small business operations. The great majority of business owners are small business owners (few large firms are owned by individuals), and for a small business to be considered successful in any way, we would expect it to eventually have employees.

Interpreting changes in the number of self-employed *without* employees is more problematic. This group probably includes three types of self-employed people:

- those establishing small businesses that do not yet have employees. If successful even in the short term, small businesses would be expected to come to have employees, so numbers in this component should essentially track the numbers of self-employed with employees;
- those who would otherwise be working as employees but are forced to be self-employed (e.g. because of no perceived opportunities as employees, or because their employer reclassifies them as contractors, or because the only way to do the type of work they are interested in is as a self-employed person);
- sole traders who have no aspiration to either have employees or be an employee.

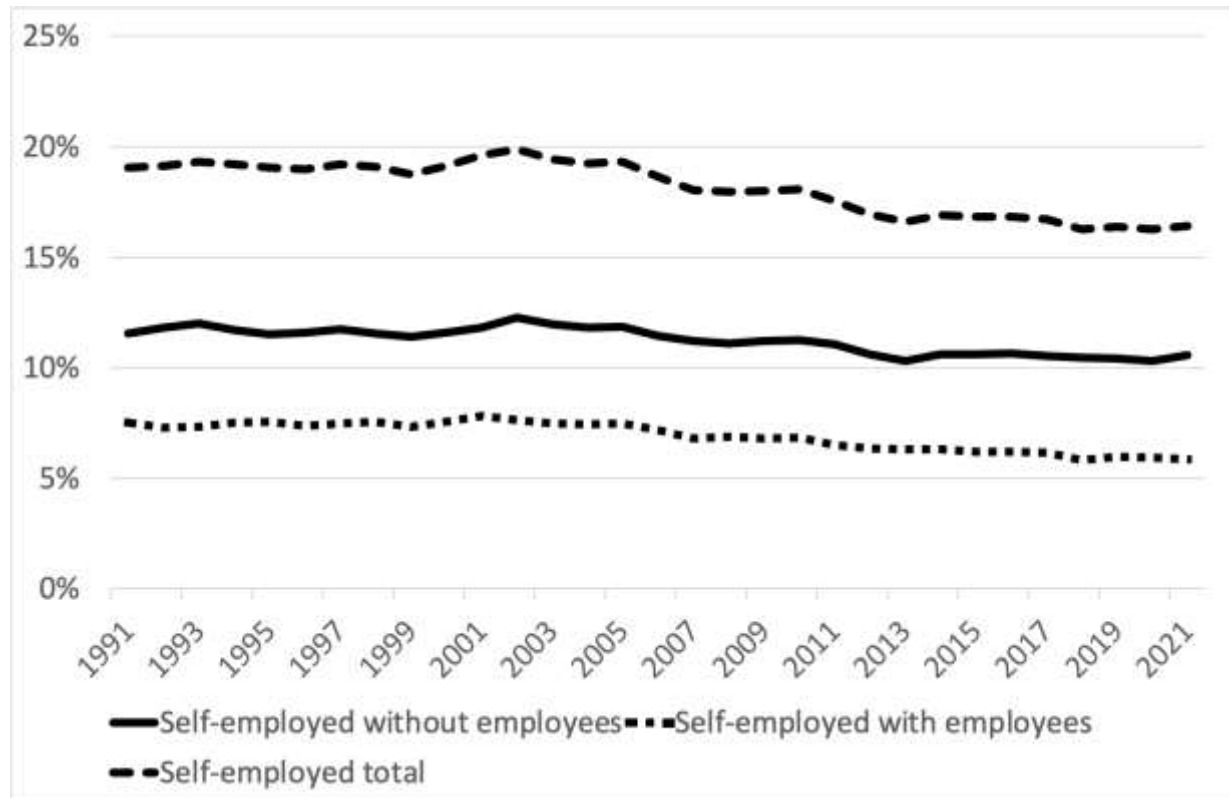
If, over a sustained period, the number of self-employed without employees moves differently to the number with employees, then it likely reflects changes in the numbers of

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<sup>25</sup> Roger Wilkins and Inga Lass, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 16*, Melbourne Institute: Applied Economic & Social Research, The University of Melbourne (Melbourne, 2018), chapter 6.

the second or third groups above, perhaps because of changes in the extent to which forces encouraging people who would otherwise be working as employees to become self-employed contractors.

**Figure 3 Rates of self-employment, total and with and without employees, Australia, annual averages, 1991-2021**



Source: Calculated from Australian Bureau of Statistics, 6291.0.55.001 – EM6 – Employed persons by Hours actually worked in all jobs, Sex and Status in employment of main job, January 1991 onwards, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/latest-release>.

Figure 3 indicates a decline in self-employment for those with employees, but also (to a smaller extent) for those without employees. This suggests a general decline over the three decades observed in the opportunities for genuine small business operations, only partially offset by a tendency for growth in the factors encouraging people who would otherwise be working as employees to become self-employed contractors. While there has undoubtedly been growth in the gig economy,<sup>26</sup> its extent has not been great enough to offset the underlying decline in self-employment, even of contractors without employees. Like the ABS data, the HILDA data show a sharper decline in the number of self-employed with employees, than without employees. Both sources imply that, within the overall category of

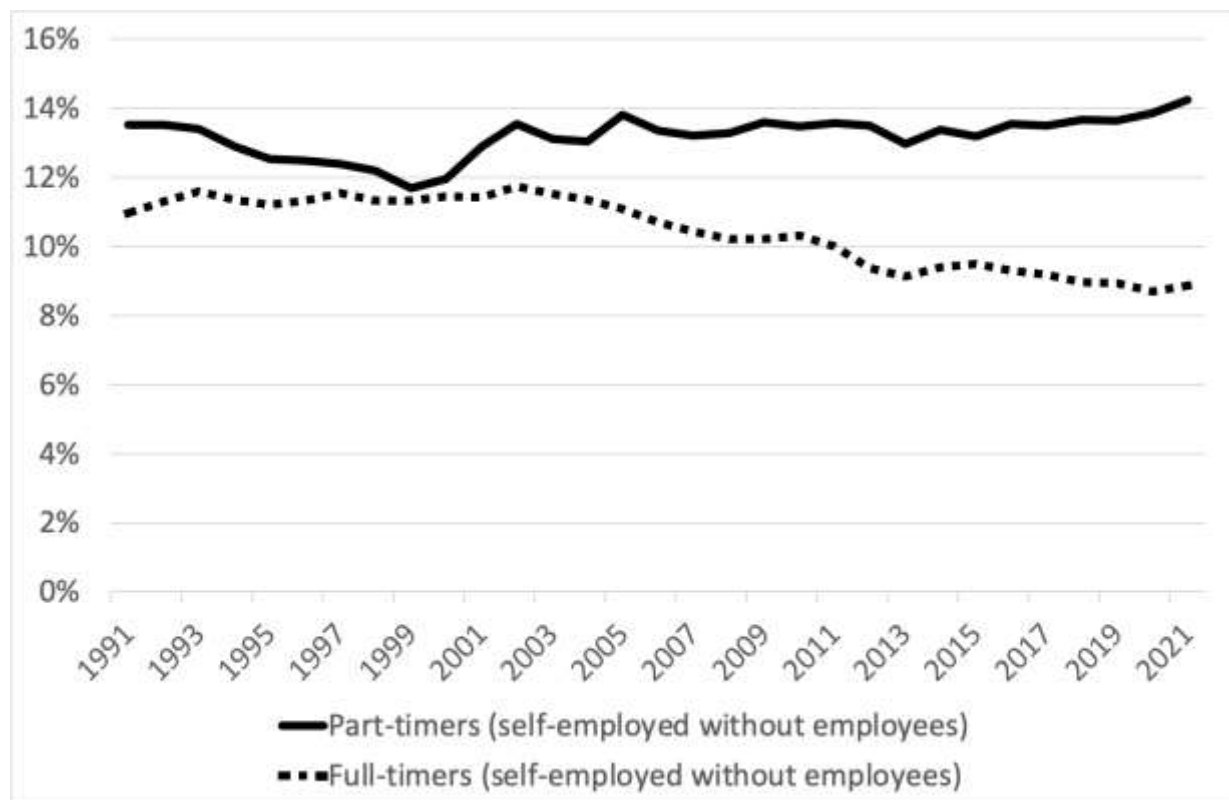
<sup>26</sup> De Stefano, The rise of the «just-in-time workforce» (fn 14).

self-employment, which is declining in relative terms, there has been a shift toward more vulnerable forms of self-employment: solo workers without employees.

## Part-time and full-time self-employed

One feature of the gig economy is that most people are engaged only part-time, since gig-type roles often do not offer enough work for full-time work, and underemployment is common.<sup>27</sup> Data showing the shares of owner-managers without employees amongst all full-time workers, and amongst all part-time workers, are illustrated in Figure 4.

**Figure 4 Rates of self-employment without employees, full-time and part-time workers, Australia, annual averages, 1991-2021**



Source: Calculated from Australian Bureau of Statistics, 6291.0.55.001 – EM6 – Employed persons by Hours actually worked in all jobs, Sex and Status in employment of main job, January 1991 onwards, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/latest-release>.

Two quite different trends are apparent. Amongst *full-time* workers, solo self-employment has declined. Yet amongst part-time workers, solo self-employment has grown, consistent

<sup>27</sup> Chartered Institute of Personnel and Development (CIPD), *To gig or not to gig? Stories from the modern economy*, CIPD (London, March 2017); Katriina Lapanjuuri, Robert Wishart, and Peter Cornick, *The Characteristics of Those in the Gig Economy*, Department for Business, Energy & Industrial Strategy (London, 2018); Janine Berg, *Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers*, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, International Labour Office (Geneva, 2016).

with the gig-economy's need for mostly part-time independent contractors. Other data indicate a majority of gig economy workers are part-time and, indeed, underemployed.<sup>28</sup> However, as Figure 4 shows, that growth in solo self-employment amongst *part-timers* is not enough to offset the decline in full-time self-employment, and hence overall self-employment has declined as a share of total employment.

These data, therefore, highlight another paradox: the rise of new models like Uber, with their use of contract labour rather than employees, has occurred alongside the continuing importance of waged employment. That paradox is explained by two things: the resistance of employees to greater insecurity; and the ongoing efficiency of waged employment as a means to control worker behaviour, alongside the ongoing urge of firms to cut costs. We turn to those issues shortly.

## Gender and self-employment in Australia

With one key dimension in self-employment trends being the full-time/part-time distinction, and women known to be disproportionately engaged in part-time work, it is important to look at the gendered aspects of self-employment. Certainly, one of the features of changes in self-employment over the past three decades has been the increasing representation of women among the self-employed. Thus, women went from 31% of the self-employed in 1991 to 36% in 2021.

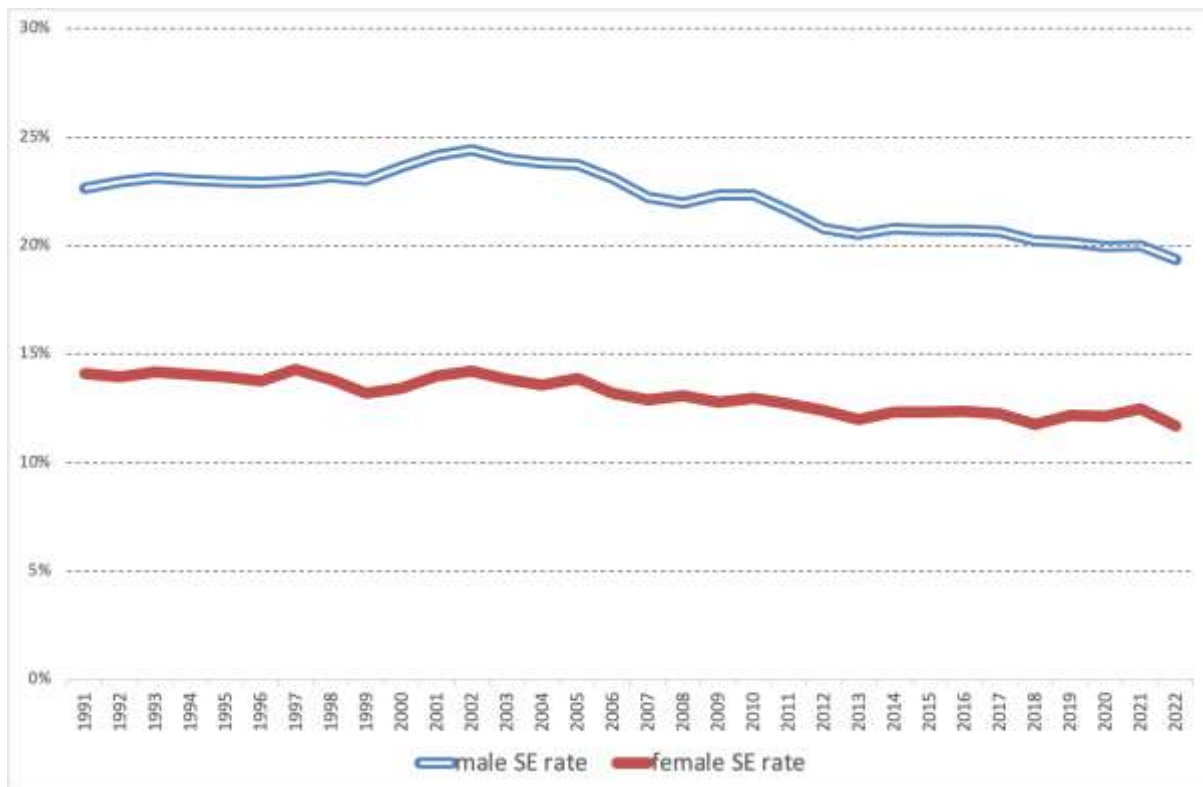
However, this growth in the female share of self-employment is *entirely* due to the growth of women's representation in the overall labour force, and signifies *no change* in the relative likelihood of women, versus men, to be self-employed. As shown in Figure 5, in 1991, 22.6% of employed men, and 14.1% of employed women, were self-employed; so the female self-employment rate was 62.3% of the male self-employment rate. We call this the female:male self-employment ratio. By 2022, only 19.4% of employed men, and 11.7% of employed women, were self-employed, and the female:male self-employment ratio had fallen slightly to 60.3%. The decline in the self-employment rate over three decades was thus almost identical between men and women.

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<sup>28</sup> CIPD, *To gig* (fn 27).



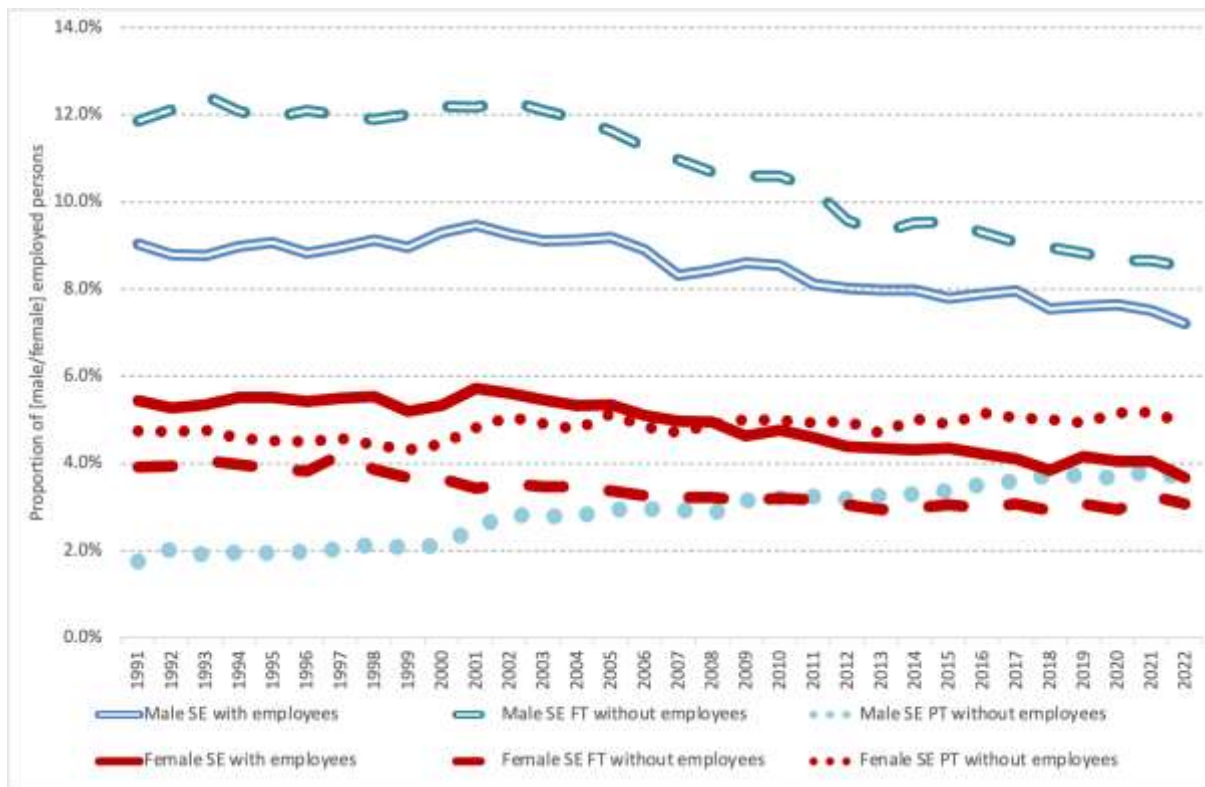
**Figure 5 Rates of self-employment by sex, Australia, annual averages, 1991-2021**



Source: Calculated from Australian Bureau of Statistics, 6291.0.55.001 – EM6 – Employed persons by Hours actually worked in all jobs, Sex and Status in employment of main job, January 1991 onwards, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/latest-release>

A collection of trends over three decades is illustrated in Figure 6, which shows different components of self-employment for both males and females. Those components are: self-employed with employees; self-employed without employees working full-time; and self-employed without employees working part-time. In this chart, we can see the effects of the core trends within self-employment across both sexes. Within the broader context of declining self-employment across both sexes, there are interesting distinctions that reflect patterns in genuine small business opportunities (apparent in the numbers of self-employed with employees) and in the growth or otherwise of full-time contractors and the part-time gig economy (apparent in the breakdown between full-time and part-time working hours). Bear in mind that while a majority of gig workers are in part-time employment, some are full-time, including a minority of digital platform workers and probably a majority of road transport owner-drivers; and even many part-time self-employed without employees would not be considered to be gig workers.

**Figure 6 Rates of self-employment (as a proportion of employed persons) by type of self-employment and full-time/part-time hours, Australia, annual averages, 1991-2021**



Source: Calculated from Australian Bureau of Statistics, 6291.0.55.001 – EM6 – Employed persons by Hours actually worked in all jobs, Sex and Status in employment of main job, January 1991 onwards, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/labour-force-australia-detailed/latest-release>.

In Figure 6 we can see that, amongst both men and women, there was a decline in small business opportunities, shown in the decline in the proportion of employed people who are self-employed with employees: a reduction of a fifth for men, and nearly a third for women. Amongst women, there was a decline (of 21% between 1991 and 2022) in self-employment without employees for those working full-time, but a small increase (of 4%) in self-employment without employees for those working part time. Amongst men, the trends are similar but considerably sharper. Full-time self-employment for men fell by 28%, while part-time self-employment without employees more than doubled.

The growth of part-time solo self-employment for men happened from a very low base, and this status amongst men was still lower (by about a quarter) than amongst women. This could reflect the growth of part-time employment among men generally (as a share of total male employment, male part-time employment also more than doubled between 1991 and 2022, to a level that was still only two-fifths that of female part-time employment). It could also reflect male dominance of part-time *gig* employment. One Australian survey found that

“female respondents were only half as likely as males to work on digital platforms,”<sup>29</sup> which would still imply a female presence broadly comparable to that amongst the self-employed as a whole. The ABS also estimated that male platform workers outnumbered females by over 2 to 1.<sup>30</sup>

## THE CHANGING CHARACTER OF SELF-EMPLOYMENT

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The preceding charts show that self-employment is not only in decline, its character is also changing. Over the medium term, three trends are evident in the data:

- Opportunities for genuine small business creation are declining. This is shown most clearly in the decline in the number of self-employed with their own employees, from 6.36% of all employed people in 2012 to just 5.54% in 2022, a fall of 13%. If the proportion of employed people who were self-employed with employees had remained the same over that period, there would be 112,000 more self-employed with employees in 2022 than there actually were. As most of these people were small business owners, there would have been nearly 110,000 more small businesses in 2022 than there actually were. There is evidence of growing barriers to entry to established markets for new small businesses, arising from the increasing power of existing dominant firms.<sup>31</sup>
- The number of self-employed people working only part-time jobs and ‘side hustles’ (to deploy a term also used by the ABS)<sup>32</sup> increased, from 4.00% to 4.25% of employed persons, a growth of 6%. If the proportion had remained the same, there would be 35,000 fewer part-time self-employed without employees. This trend could well reflect the growth of ‘gig work’, most of which is part-time.<sup>33</sup> (The ABS suspects that some part-time platform workers may not even record their platform work as a ‘job’, leading to a slight underestimation of gig work’s impact on employment figures).
- The number of full-time self-employed, without employees, fell from 6.60% of all employed people, to 5.93%, a drop of 10%. If this proportion had remained unchanged, there would be 91,000 more full-time self-employed without employees than there presently are. This probably reflects several different factors. As some full-timers without employees would eventually gain employees, it probably partly reflects the decline in small business opportunities noted above. It may have been

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<sup>29</sup> Paula McDonald, Penny Williams, Andrew Stewart, Robyn Mayes, and Damian Oliver, *Digital Platform Work in Australia: Prevalence, Nature and Impact*, Queensland University of Technology (Brisbane, November 2019), 35, [https://eprints.qut.edu.au/203119/19/Report\\_of\\_Survey\\_Findings\\_2020\\_002\\_doi.pdf](https://eprints.qut.edu.au/203119/19/Report_of_Survey_Findings_2020_002_doi.pdf).

<sup>30</sup> Australian Bureau of Statistics, “Digital platform workers in Australia”, ABS, updated 13 November, 2023, <https://www.abs.gov.au/articles/digital-platform-workers-australia>.

<sup>31</sup> Andrew Leigh, “A more dynamic economy”, FH Gruen Lecture, Australian National University, updated 25 August, 2022, <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/speeches/fh-gruen-lecture-australian-national-university-canberra>.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

moderated by the smaller growth in full-time 'gig work'. And it probably also reflects the underlying forces discussed in the next section, that explain the overall decline in self-employment, arising from the way that businesses operate in modern capitalism.

## WHY IS SELF-EMPLOYMENT MOSTLY NOT GROWING?

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All the predictions of the “death of employment” (including a book by that title some time ago<sup>34</sup>), like the parallel myth of surging self-employment and independent contracting,<sup>35</sup> have not come to fruition – and they will not do so. This trend cannot be due to regulatory restrictions on its growth (which have been minimal, and certainly less onerous than restrictions placed on the use of employees). There are several better reasons why self-employment is in relative decline.

Compositional change in the overall economy plays only a role, but only a small role, in explaining the erosion of self-employment. While some sectors with high self-employment (such as agriculture) have shrunk, the owner-manager share of total employment declined in 11 out of 19 industries between 1991 and 2022, and rose in just 8.<sup>36</sup> If the employment share of each industry was the same in May 2022 as it had been in May 1991, but the industry self-employment rates in each industry were the same as now, then the share of owner-managers would still have fallen by 3.2 percentage points, instead of 4.8 percentage points. So roughly a third of the decline in self-employment is due to compositional change in the labour market. To put it another way, the changing structure of the labour market is reducing, not increasing, the role of self-employment. That, however, is not the only factor at work.

Another factor might be changing power relations within product markets. As mentioned, the number of people exiting self-employment may exceed the number entering it due to greater barriers to entry, if the power of existing dominant firms is increasing, and there is some evidence of this happening in Australia.<sup>37</sup> However, this mostly affects the numbers of self-employed *with* employees: that is, it influences small business opportunities. But it tells us nothing about the self-employees without employees. We should look at more fundamental aspects of the way in which markets operate in modern capitalism.

### The employment relationship suits businesses, too

A central reason for the long-term erosion of self-employment is that, in most settings, waged employment is still the most efficient way for corporations to exert control over

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<sup>34</sup> Ken Phillips, *Independence and the Death of Employment* (Ballan, Vic: Connor Court Publishing, 2008).

<sup>35</sup> Bernard Keane, "The Rise in Independent Contracting is a Myth", *Crikey!*, 22 September 2009.

<sup>36</sup> Australian Bureau of Statistics, "EQ05 - Employed persons by Industry division (ANZSIC) and Status in employment of main job, February 1991 onwards", (Canberra: ABS, June 2022 6291.0.55.001).

<sup>37</sup> Andrew Leigh, "A more dynamic economy", FH Gruen Lecture, Australian National University, updated 25 August, 2022, <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/speeches/fh-gruen-lecture-australian-national-university-canberra>.

labour. Workers who are not self-employed are in an employment relationship — whereby a worker is an ‘employee’ of a firm, which is the ‘employer’. The employment relationship is not an invention of unions trying to maintain control over the deployment of labour. Many trade unions that were founded in the 19<sup>th</sup> century began by representing self-employed contractors, not employees.

As capitalism developed and firms grew, it made sense for those firms to manage workers as ‘employees’. Contracting no longer worked in most circumstances, as no contract could fully foreshadow all the possible contingencies of the work that a firm wanted performed on its behalf. At first firms tried to manage workers as ‘servants’. But abuses of power were such that the ‘master and servant’ laws that had governed the relationship between business and labour were gradually replaced with laws that recognised the existence of the ‘employment relationship’. If business could not have workers as ‘servants’, the next best thing was to have them as ‘employees’.

The fact that workers were grouped together as employees also made it easier for trade unions to organise workers. So, over the long run, trade unions (many of which started as associations of independent contractors, such as trade guilds) came to be largely composed of waged employees, so much so that modern laws governing the relationship between unions and corporations were built on the foundation of the employment relationship. Likewise, most (but not all<sup>38</sup>) labour laws and minimum standards, generally crafted for the purposes of protecting workers, were also founded on the employment relationship. But the principles of trade unionism do not apply only to waged employment: rather, they aim to strengthen workers’ position in the conflict between corporations and labour over how work occurs and is compensated, and how surplus is distributed. In countries like Taiwan, support for unions is approximately as strong amongst the self-employed as amongst waged employees (the ‘working class’), in part because of high mobility between those two groups.<sup>39</sup>

As countries industrialise and develop, fewer workers inhabit what is often referred to as the ‘informal sector’ (characterised by self-employment), and a growing proportion of workers join the ‘formal’ sector, (as employees). Large firms in industrialising countries need employees, so that they can control the production process more directly and reliably.

In short, the employment relationship remains pervasive because it is usually the most efficient way for business to exercise control over its workforce. It is the most economically

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<sup>38</sup> Australian and New Zealand workplace health and safety laws place, on persons conducting a businesses or undertaking, a duty of care for the safety of workers, regardless of whether those workers are employees or contractors.

<sup>39</sup> Chin-Fen Chang and Heng-Hao Chang, "Who Cares for Unions? Public Attitudes toward Union Power in Taiwan, 1990-2005", *China Perspectives* 2010, no. 3 (2010), <https://doi.org/10.4000/chinaperspectives.5303>, <http://journals.openedition.org/chinaperspectives/5303>.

productive way for most aspects of work to be organised. It exists, and will continue to do so, because it is in the interests of business.

## Constraints and limits on platform work

Platform businesses (like Uber) have found novel ways to achieve and enforce employer control over work, productivity, supervision, and monetary flows outside of a standard waged employment relationship. Digital platforms provide a new, cheap form of control (through, for example, automated dispatch and pricing programs, customer ratings systems, and tracking apps) that might otherwise require an employment relationship. Algorithmic management systems can hire and fire, instantly adjust compensation, and monitor quality, while still shifting risks and costs to the workers who perform these services through a contractor-type relationship.

But even with these new techniques there are limits to the use of cost-cutting and risk-shifting through platform-based arrangements. Gig work will likely grow, but it will not overtake the employment relationship – nor even offset the decline of other, more traditional forms of self-employment. The platform business model potentially contains many contradictions, illustrated by the failure of many Uber-style businesses,<sup>40</sup> and even Uber itself has accumulated massive losses.<sup>41</sup> The financial viability of platforms is jeopardised by their reliance on abundant, low-cost pools of labour (which have been harder to tap in recent years); competition from new platforms; and limitations to the ‘control’ provided over workers by the technology.

For all these reasons, platform work has not expanded as rapidly as often assumed. Because of lack of accurate data on platform work and other gig jobs, estimates of its size are incomplete and uncertain. Some internet surveys have drawn upon ‘online panels’ of people who have registered with the polling firm to take part in surveys (often as part of other, paid work they do online). However, people engaged in the digital platform economy are disproportionately likely to register for such panels. Other surveys have included people who sell goods online (through intermediaries such as e-Bay) as part of the gig economy, but this activity mostly reflects sale of already-produced goods rather than new production, and the labour involved in these transactions is not relevant to the discussion here. Accurate

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<sup>40</sup> Steven Hill, "Good riddance, gig economy: Uber, Ayn Rand and the awesome collapse of Silicon Valley's dream of destroying your job", *Salon*, updated 28 March, 2016, [https://www.salon.com/2016/03/27/good\\_riddance\\_gig\\_economy\\_uber\\_ayn\\_rand\\_and\\_the\\_awesome\\_collapse\\_of\\_silicon\\_valleys\\_dream\\_of\\_destroing\\_your\\_job/](https://www.salon.com/2016/03/27/good_riddance_gig_economy_uber_ayn_rand_and_the_awesome_collapse_of_silicon_valleys_dream_of_destroing_your_job/).

<sup>41</sup> Uber's declared quarterly profit in 2023 offset only a small proportion of the losses it had accumulated since its founding. See also Yves Smith and Hubert Horan, "Can Uber Ever Deliver? Part Thirty-Three: Uber Isn't Really Profitable Yet But is Getting Closer; The Antitrust Case Against Uber", *Naked Capitalism*, updated 9 August, 2023, <https://www.nakedcapitalism.com/2023/08/hubert-horan-can-uber-ever-deliver-part-thirty-three-uber-isnt-really-profitable-yet-but-is-getting-closer-the-antitrust-case-against-uber.html>. The role of financialisation in allowing owners of platforms to extract surplus even from loss-making businesses is discussed in Jim Stanford, "The resurgence of gig work: Historical and theoretical perspectives", *Economic and Labour Relations Review* 28, no. 3 (2017).

estimates require more comprehensive and scientific methods not likely to be influenced by such biases. Using 2015 data from an official labour force survey, US economists Lawrence Katz and Alan Krueger estimated only 0.5% of US workers had identified customers through an online intermediary; this estimate was close to two other, independently derived estimates.<sup>42</sup> In Australia, the HILDA survey (a longitudinal household survey) found that, in 2020, 0.8% of employed people had engaged in digital platform work over the *four weeks* preceding the survey, with an average working week of 13 hours.<sup>43</sup> The incidence of gig employment at that time may have been affected by the pandemic, both downwards (e.g. for ride-hail) and upwards (e.g. food delivery). Other online surveys in the UK have found closer to 4% of workers had been gig workers at some time in the previous *year*, but one of those surveys found that only approximately 1% of the population *regularly* participated in gig work.<sup>44</sup> In Australia, the ABS estimated that in 2022-23, just under 1% (0.96%) of the employed population were 'digital platform workers', and most had been in this form of employment for under a year.<sup>45</sup> These findings were similar to estimates seen in the OECD and in HILDA data for Australia.

It appears that, at any one time, only a small number of people are actively working for digital platforms. Many more will have worked in it at some time to supplement their incomes, sometimes only once and with minimal effect. It seems likely that one per cent or less of the workforce is regularly engaged in platform work in a meaningful way; many others dip their toes into it, and then take them out again. The number of platform workers is dwarfed by the number of traditional independent contractors who do not rely on apps to find clients. The ABS estimated the total number of independent contractors at 8.3% of all employed persons in 2022.<sup>46</sup>

For many, gig work constitutes a second job, and the main job of these workers is usually as a waged employee. It is their main job that is their principal source of income, and which appears in most employment statistics. However, even allowing for the frequency of gig work as a secondary job would make little difference to the underlying trends described above. Amongst multiple job-holders, two fifths were owner-managers (usually without employees) in their second job in 2022; but that proportion has not changed noticeably since 2014, despite the growth of multiple job-holding in the same period.<sup>47</sup>

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<sup>42</sup> Lawrence F. Katz and Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015*, National Bureau of Economic Research (Washington DC, September 2016), <http://www.nber.org/papers/w22667>.

<sup>43</sup> Roger Wilkins et al., *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 20*, Institute of Applied Economic and Social Research (Melbourne, 2022), 89.

<sup>44</sup> Lapanjuuri, Wishart, and Cornick, *Characteristics*. CIPD, *To gig* (fn 27).

<sup>45</sup> Australian Bureau of Statistics, "Digital platform workers in Australia" (fn 30).

<sup>46</sup> Australian Bureau of Statistics, "Working Arrangements, August 2022", (Canberra: ABS, 2023). <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/working-arrangements/latest-release>.

<sup>47</sup> Australian Bureau of Statistics, "Characteristics of Employment, 2014 to 2022, Status in employment of second job by Reference year, unpublished data from Tablebuilder," 2023, accessed 13/9/23.



## Risk can be shifted onto employees without making them self-employed

The shifting of risk from firms to employees (such as risks associated with fluctuations in customer demand) is often seen as a motive for the growth of self-employment. However, this risk-shifting does not require the creation of self-employment to occur. Corporations pursue many avenues to transfer risk onto workers. Doing this is an ongoing feature of capitalism. In part, the growth of gig employment can be seen as a new attempt to transfer risk from firms to workers (as well, of course, as reducing costs). But any insecurity meets resistance, and this resistance means that insecurity needs to evolve. That resistance might come from workers themselves; or from governments facing political pressure due to public concerns about insecure work; or from firms who themselves encounter the problems that insecure work creates. As problems with one form of insecurity arise, insecurity evolves.

A rise in self-employment is not needed by firms to enable them to transfer risk to workers. A push for self-employment, to reduce costs and transfer risk, can only go so far, because firms need to exercise adequate control over the process, quality, and conditions of work. The advanced development of algorithms can shift the frontier of control, as apps may enable firms to track workers or monitor consumer satisfaction with them, but that cannot replace *in toto* the employment relationship. A small number of platform businesses even voluntarily manage their workers as employees rather than contractors.<sup>48</sup>

Some firms may strategically use contractors as a means of reducing worker power. But they do not need to replace their whole employed workforce to do this, and indeed for the control-related reasons mentioned above it could be disastrous for a firm to do so. A mining or manufacturing company, for example, may just aim to have access to enough contractors (or labour hire workers) to make it impossible for a strike amongst salaried employees to halt production, thereby devastating union power at the worksite. Thus using contractors may reshape power and have symbolic benefits far outweighing the immediate cost considerations.

Other attempts at flexibility and risk transference also reach limits. For example, casual work seems like an easy way of saving money for businesses, by allowing costless flexibility in hiring and firing. But firms that use it too much discover their workforce lacks the commitment, innovativeness, experience and persistence of a permanent workforce. Costs of recruiting replacements, or intensive supervision required for new workers, can be substantial.<sup>49</sup> In tighter labour market conditions (such as Australia has experienced recently), it is easier for dissatisfied workers to find better jobs elsewhere, and harder for

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<sup>48</sup> Nick Bonyhady, "First gig economy delivery workers employed in Australia", *Sydney Morning Herald*, 30 June 2021; Susan Johnston Taylor, "Why These Gig-Economy Startups Hire Salaried Employees Instead Of Contractors", *Fast Company*, 22 May 2017, <https://www.fastcompany.com/40422073/why-these-on-demand-startups-dont-use-1099-contractors>.

<sup>49</sup> Peetz, "Risk cycles" (fn 23).



employers to replace them. For all these reasons, the use of casual employment (like gig work) is not without its drawbacks for firms.

The deeper causes of growing insecurity in employment in general are not limited to any specific type of employment contract or relationship. While choice of employment status matters, the underlying causes of broader job insecurity are linked to the ways organisations are being structured in modern times. Companies aim to minimise costs, transfer risk to workers, develop more complex supply chains, and generally centralise power and profits in the hands of specific pools of capital. The growing fragmentation and insecurity of work in the context of this corporate restructuring is referred to elsewhere as ‘not-there employment’.<sup>50</sup> Consequently, there is much precarity even in traditional forms of waged employment. The growth of precarity cannot be understood solely by the growth of non-standard employment forms (whether casual, contractor, or gigs).

Different industries look for different ways of cutting costs and hence have different levels of success with contrasting employment strategies. Franchising has grown in retailing. Labour hire in mining. Outsourcing in the public sector. Second jobs in manufacturing. ‘Spin-offs’ (subsidiaries) in communications. Casualisation in education and training. Global supply chains send jobs overseas to low-paid, often dangerous workplaces in many different industries.<sup>51</sup>

Hence ABS employment status categories do not directly measure the precarity of work experienced by people who now work in franchises, spin-offs, subsidiaries or contractor firms. But as their continued employment depends on the fortunes of their direct employer, more than the firm at the top of the chain, their precarity is real.

Through all these dimensions, insecurity gnaws away, even while the waged employment relationship remains the dominant mode for deploying labour. Self-employment, while useful, is not necessary to achieving the risk-shifting and cost-cutting desired by key employers. As one report about ‘freelancing’ reported, businesses are increasing their use of ‘contingent’ work, in no small part as a means of reducing costs.<sup>52</sup> However, contingent or insecure work can take many forms, and these forms change over time as they respond to various factors – including resistance from workers. If ‘freelancing’ means actual self-employment, without employees, then it is not growing but declining.

## RECAPITULATION

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Overall, the decline in self-employment has masked several, sometimes conflicting trends. They appear unrelated, but have a common theme: the growth of power in large firms. Small business opportunities have been in decline in the face of greater barriers to entry

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<sup>50</sup> David Peetz, *The Realities and Futures of Work* (Canberra: The Australian National University Press, 2019), ch 6.

<sup>51</sup> Ibid.

<sup>52</sup> Expert 360, *Getting Trendy 2017* (fn 8).

erected by larger firms. The extent of part time self-employment has increased, in part to meet the needs of large digital platforms for part-time gig workers. And full-time self-employment without employees has declined, in the context of the need by large firms to control the way that work is performed, since the employment relationship is the most efficient way to exercise that control.

As a result, over the past decade there were 112,000 fewer self-employed people with employees, 35,000 more part-time self-employed without employees, and 91,000 fewer full-time self-employed without employees than there would have been if their shares of total employment had remained unchanged.

While the self-employment sector has long been a repository of what might be called 'entrepreneurial spirit', genuine opportunities for that spirit have been in decline while large firms have sought to channel the entrepreneurial desire into intermittent gigs that pay little but serve those firms' interests.

Instead of becoming a new source of freedom from a wage-slave system, in which we could all one day freelance our way to prosperity, the character of self-employment is gradually being reshaped to suit the needs of larger firms. A shrinking share of self-employment provides genuine opportunities for innovation and entrepreneurship, while a growing share appears to now consist of vulnerable workers whose interests are not so clearly being met. The next part of this report looks in more depth at an important subset of the self-employed, an increasingly visible and vulnerable group: 'gig' workers. It investigates their vulnerability, their desire or otherwise for protection, the practicality of regulation to achieve that, and the merits of the relevant parts of the *Closing Loopholes* bill presently before the Parliament.

# Can and should self-employment be regulated?

This section first considers whether the circumstances of the self-employed *should* be regulated, and then whether they *can* be regulated. The flexibility and independence of self-employment are clearly major reasons why many people choose to be self-employed. But they are not the only reasons. To warrant regulation, the workers concerned must be vulnerable, otherwise regulation is not necessary. Their preferences (or the preference of those with whom they compete) are also relevant, as this affects whether regulation is sustainable and politically viable. Critically, it must also be feasible to undertake regulation: there must be practical mechanisms by which it could occur, and those mechanisms should not cause such distortions as would create costs that exceed the benefits of regulation. We deal with those issues in sequence.

## ARE THE SELF-EMPLOYED VULNERABLE?

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Many self-employed hold relatively strong positions in the labour market. Self-employed financial advisers, accountants and management consultants, for example, have a substantial amount of power in the labour market, and they may have chosen to be self-employed precisely because this higher power enables them to earn higher income. This may also be the case for some ‘tradies’ in traditional construction contractor roles. These people with high labour market power are unlikely to want to be reclassified as employees, nor to have their work closely regulated.

On the other hand, there is substantial evidence that some self-employed workers are, indeed, vulnerable. As McCrystal says, “There is a range of literature...which demonstrates that large sections of the self-employed workforce are not entrepreneurs and are not running their own small businesses.”<sup>53</sup> This vulnerability is especially evident in digital platform businesses.

There is growing concern that the legal structures underpinning some of these arrangements provide a mechanism for digital platforms or facilitators to shift business costs and risk to workers, and for workers to be exploited due to the way they are engaged. Work here involves short-term paid tasks as opposed to regular or long-term, on-going employment, and gig workers are normally engaged as self-employed contractors rather than employees. They may even be hired this way despite repeatedly working with the same clients (as, for example, often occurs in the care sector). As contractors, they lack most of the protections provided through labour law (and through the internal rules typically created within firms regarding employees). They can be terminated with little or no notice, and

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<sup>53</sup> Shae McCrystal, “Collective bargaining beyond the boundaries of employment: a comparative analysis”, *Melbourne University Law Review* 37 (2014).

without recourse to unfair dismissal laws, even if they are dismissed harshly, unjustly or unreasonably. They receive no compensation if dismissed.

These workers have very little power compared to the typically large platform businesses that engage them. They therefore have little say over the income they receive or the conditions under which they work. Most are underemployed: that is, they would prefer more hours of work than they are offered through these businesses.<sup>54</sup>

Platform workers often receive low incomes. Many gig workers receive incomes that, after expenses are taken into account, are below the relevant award wage they would receive if they were employees.<sup>55</sup> Outside Australia, many receive incomes equivalent to amounts below the minimum wage in the relevant country. They also receive few if any training opportunities.<sup>56</sup>

There are also health and safety implications for many gig workers. In Sydney alone, five independent courier riders died at work in just three months in 2020.<sup>57</sup> Two more died in Melbourne within two months in late 2020.<sup>58</sup> A survey of road transport and food delivery gig workers by the McKell Institute, funded by the Transport Workers Union and other bodies, found majorities of respondents reported experiencing threatening or abusive behaviour, work-related stress, anxiety or other mental health issues, missing income while sick or injured, having to work long hours to make enough money, and feeling pressured to rush or take risks to make enough money or protect their job. Significant minorities reported experiencing physical health issues or injuries from their work, difficulty affording everyday items, and/or having their accounts unfairly suspended or deactivated by their platforms.<sup>59</sup> While this study's data collection method likely encouraged an over-representation of dissatisfied responses, this evidence nevertheless strongly suggests many platform workers have very negative experiences in their jobs.

The adverse effects of vulnerable self-employment are not confined to digital platform work. In long distance road transport, for example, adverse effects of owner-driver arrangements have included: poor driver safety, including a high occupational fatality rate;<sup>60</sup> long working

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<sup>54</sup> Berg, *Income security* (fn 27); CIPD, *To gig* (fn 27).

<sup>55</sup> e.g. Fiona Macdonald, *Unacceptable risk: The dangers of gig models of care and social work*, Centre for Future Work (Melbourne, 2023), <https://futurework.org.au/report/unacceptable-risks/>.

<sup>56</sup> Berg, *Income security* (fn 27); CIPD, *To gig* (fn 27).

<sup>57</sup> Kamilia Palu, "Food delivery rider hit by truck becomes fifth death in three months", *Yahoo News*, 23 November 2020, <https://au.finance.yahoo.com/news/food-delivery-rider-hit-by-truck-becomes-fifth-death-in-three-months-122924369.html>.

<sup>58</sup> Nick Bonyhady, "DoorDash reveals second courier died in two-month span", *Sydney Morning Herald*, 10 September 2021, <https://www.smh.com.au/national/door-dash-reveals-second-courier-died-in-two-month-span-20210910-p58qhf.html>.

<sup>59</sup> Sarah Mawhinney, Joey Reinhard, and Marni Lefebvre, *Tough Gig: Worker Perspectives on the Gig Economy*, McKell Institute (Sydney, 2023).

<sup>60</sup> Safe Work Australia, *Work-related Traumatic Injury Fatalities, Australia 2020*, Safe Work Australia (Canberra, 2021), [www.safeworkaustralia.gov.au/](http://www.safeworkaustralia.gov.au/); Michael Quinlan, "FactCheck: do better pay rates for truck drivers

hours and low wages;<sup>61</sup> low incomes, high debt and insolvencies amongst owner-drivers; and incentives to drive fast, skip breaks and engage in other risk-taking behaviours. Poor safety for long-haul road transport has effects on other road users. Yet regulation was made difficult, both by the contractor status of many workers, and by Australia's federal system of industrial relations regulation – which means that workers have been subject to different state laws (rather than a unified federal system).

As technology has developed, the vulnerability of some digital platform workers has increased. For example, in earlier years ride-hail companies like Uber were criticised for extracting a significant proportion of its drivers' payments. The consumer would be quoted a price for being taken from A to B, and the company would take its share before the money was passed on to the driver. Algorithms enabled the company to engage in 'surge pricing', whereby the prices consumers paid (and incomes drivers received) would be higher at peak times or during special events (eg downpours or transport strikes). Most recently, however, these algorithms have become more sophisticated, now taking separate account of the behaviour of individual drivers and consumers. Two consumers wanting an identical ride will be charged different fares, based on what the algorithm predicts each will bear; and two drivers providing that identical ride will receive different payments, based on what the algorithm predicts each will accept. Thus the nexus between fares and driver payments has been broken. In the US, Uber's average 'take rate' (the proportion of the fare that it extracts) has risen from 21% over 2015-21 to 28% in 2022.<sup>62</sup> As the opportunities for large digital platforms to thus extract surplus from workers increases, the vulnerability of the latter intensifies – and the argument for regulation strengthens.

## DO THE SELF-EMPLOYED WANT TO BE REGULATED?

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The views of self-employed workers towards regulation are complex and divided. In brief, it appears that many self-employed do not want to be classed as employees, but a minority do. However, much evidence indicates that a majority of vulnerable gig workers want the law to provide them more protection against the power of the platforms they work for.

### Do they want to be employees?

An important issue for regulating to protect the interests of the self-employed in general, and gig workers in particular, is whether they would prefer to remain self-employed, or be reclassified as employees. Information on these preferences is limited, though the available sources tend to point in a similar direction.

In the UK, the Resolution Foundation conducted a survey of self-employed workers in 2014. It asked whether, taking everything into account, they would prefer to be self-employed or

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improve safety?", *The Conversation*, 13 April 2016, <https://theconversation.com/factcheck-do-better-pay-rates-for-truck-drivers-improve-safety-57639>.

<sup>61</sup> Australian Bureau of Statistics, "Employee Earnings and Hours, Australia", (Canberra: AGPS, 6306.0).

<sup>62</sup> Smith and Horan, "Can Uber ever deliver?" (fn 41).

employees. Excluding the 'don't knows', 83% of self-employed said they would prefer to remain self-employed, while one in six said they would prefer to be employees. However, the preference for being an employee was stronger amongst those who had only become self-employed within the preceding five years (28%) — that is, since the Global Financial Crisis — than amongst long-term self-employed (11%).<sup>63</sup> This might suggest that some of those who moved into self-employment did so as a last resort because of poor employment opportunities, and would prefer being employees of decent jobs were available. Other evidence suggests that inability to find waged employment or other short-term financial problems have been motivating factors for some recent recruits to the gig economy.<sup>64</sup>

Amongst platform workers, it seems likely that interest in becoming employees is higher, but probably still not constituting a majority. In a UK survey of platform workers, half agreed that 'People working in the gig economy make a decision to sacrifice job security and workers' benefits for greater flexibility and independence', and only 19% disagreed.<sup>65</sup>

Keep in mind that, for most gig workers, gig work provides only a minority of their income. Only 26% in the UK survey said they got 'enough work on a regular basis working in the gig economy', and 60% said they did not. For only 25% of respondents gig work was their main job; for 67% it was not. Some 35% were not currently saving for retirement, compared to 27% of other workers. Yet 34% said they were confident they would 'have enough savings or a big enough pension to live in a way they consider comfortable when they stop working', compared to 21% of other workers. There thus appeared to be something of an 'optimism bias' amongst gig workers, leading them to expect a better retirement despite having low incomes and smaller savings.<sup>66</sup> Unsurprisingly, 25% said they felt optimistic most or all of the time, compared to just 14% amongst other workers. They also felt freer than other workers: 60% were satisfied with 'The amount of flexibility to decide working hours', compared to 44% of other workers; and 55% of gig workers were satisfied with the 'independence and autonomy/control experienced at work', compared to 48% of other workers. Notably, the median gig pay in transport or food delivery was only 6 pounds per hour (the minimum wage then was 7.5 pounds), and over a third earned less than 5 pounds per hour. Hence 20% of gig workers said they found it 'difficult' to manage, about half more than the 13% of other workers who said that. Yet 46% of gig workers (compared to 26% of others) expected their economic situation to improve over the coming year.<sup>67</sup>

Other sources (albeit possibly less reliable) reinforce the perception that many gig workers desire self-employment. A US survey of Uber drivers by Berger, Frey, Levin and Danda (two of whom were Uber employees) reported that 81% would prefer to be independent

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<sup>63</sup> Conor D'Arcy and Laura Gardiner, *Just the job – or a working compromise? The changing nature of selfemployment in the UK*, Resolution Foundation (London, 2014).

<sup>64</sup> CIPD, *To gig* (fn 27).

<sup>65</sup> *Ibid*, p32.

<sup>66</sup> Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).

<sup>67</sup> CIPD, *To gig*, 14, 16 (fn 27).

contractors than employees.<sup>68</sup> Uber and Lyft have commissioned other opinion surveys, including in the US and New Zealand, claiming similar majorities of its drivers prefer to be contractors,<sup>69</sup> but there are questions about the objectivity of surveys commissioned by the firm itself. The *Australian Financial Review* (AFR) reported the qualified views of the Ride Share Drivers Association of Australia (RSDAA), a body that has been critical of Uber's charges and behaviour.<sup>70</sup> Its president, Rosalina Kariotakis, was reported as observing that:

“...Drivers were also struggling to earn a sustainable income due to increasing costs and an ‘oversupply’ of drivers in the market. ‘The RSDAA believe that in the current marketplace drivers would be in a better position if classified as employees as it would introduce minimum wages and entitlements.’”<sup>71</sup>

However, she also believed that “the majority of drivers if asked would prefer to remain contractors due to the flexibility of working hours.”<sup>72</sup>

In the UK, an internal survey of minicab drivers using the FREENOW app, found that 31% of minicab drivers wanted ‘worker’ status (a status that includes ‘employees’ but also some workers with partial rights compared to employees), while 59% preferred to be independent contractors. This survey was followed by an agreement with the GMB union enabling drivers to choose between ‘worker’ status and having independent contractor status.<sup>73</sup>

In Australia, the ABS asked about the type of work digital platform workers would prefer. Just 27% said they would prefer ‘only wage based employment’, but another 37% said they would prefer a combination of digital platform work and wage-based employment. This is not the same as asking them whether they would prefer that their digital platform work engaged them as employees, and the answers reflected that fact that 53% undertook digital platform work in addition to their main job, and 83% did less than 30 hours per week of digital platform work (the median hours worked was just 10).

While many gig workers do not want to become employees, it is very likely that this attitude varies substantially between sectors. For example, this may not be the case in the female-dominated care sector. A majority (over two thirds) of NDIS workers surveyed by the NDIS

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<sup>68</sup> Thor Berger et al., “Uber Happy? Work and Wellbeing in the ‘Gig Economy’”, *Economic Policy* 34, no. 99 (2019).

<sup>69</sup> J Edward Moreno, “Uber poll: Drivers ‘overwhelmingly support’ independent contractor status”, *The Hill*, 25 August 2020, <https://thehill.com/policy/technology/513506-uber-poll-drivers-overwhelmingly-support-independent-contractor-status/>; Jenée Tibshraeny, “Uber ups ante on contractor v employee debate”, *New Zealand Herald* (21 July 2023), <https://www.nzherald.co.nz/business/uber-ups-ante-on-contractor-vs-employee-debate/K6EHL5G6LFBHFH5VIE242QGJJI>; Benenson Strategy Group, “App-based drivers and voters study”, updated 24 August, 2020, <https://www.bsgco.com/post/app-based-drivers-voters-study>.

<sup>70</sup> Caitlin Cassidy, “Australian Uber drivers warn of mass exodus if base pay rates remain unsustainably low”, *Guardian*, 16 May 2022, <https://www.theguardian.com/australia-news/2022/may/17/australian-uber-drivers-warn-of-mass-exodus-if-base-pay-rates-remain-unsustainably-low>.

<sup>71</sup> David Marin-Guzman, “Future of work inquiry seeks to cover gig economy under employment definition”, *Australian Financial Review*, 19 September 2018.

<sup>72</sup> *Ibid.*

<sup>73</sup> LLB Reporter, “31% of minicab drivers want worker status”, *London Loves Business*, updated 14 September, 2023, <https://londonlovesbusiness.com/31-of-minicab-drivers-want-worker-status/>.

Quality and Safeguards Commission believed that they were already employees, not contractors.<sup>74</sup> There is no evidence that a majority of gig workers in disability care would prefer to be contractors than employees. In the ABS survey of digital platform workers mentioned above, 41% of women (but only 19% of men) said they would prefer 'only wage based employment'.

The situation of care workers raises another consideration. There are public policy concerns about the use of gig work in the care sector (and other essential services), relating to the quality of care. In the absence of regulation, competition between providers creates incentives for firms to minimise labour costs through casualisation or gig work, at potential expense to patient care. In this sector, the preferences of individual workers need to be weighed against other policy priorities.

Ultimately, the views of affected workers are not solely determinative of whether regulation is appropriate: for example, we do not eschew minimum wage laws merely because some workers would be willing to work for sub-minimum wages. Such standards protect not only the workers directly involved, but also minimise a 'race to the bottom' that could adversely affect the conditions for other workers. However, the attitudes of those involved can legitimately shape the form that regulation takes, as they can influence the implementation and politics of regulation.

## Do they want to be protected?

There is a recent history of some groups of self-employed workers, including in gig roles, undertaking collective action to protect their incomes or conditions and advance their interests.<sup>75</sup> So frequent have these disputes become that researchers have developed a global online 'Index of Platform Labour Protest', which identified 1,271 instances of worker protest between January 2017 and July 2020 in four platform-work sectors: ride-hailing, food

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<sup>74</sup> NDIS Commission, *Insights Report: Own Motion Inquiry into how Platform Providers operate in the NDIS Market*, NDIS Commission (2023), p.8, plus Data Supplement - Appendix B - Survey Analysis, spreadsheet 'Roles' tab., <https://www.ndiscommission.gov.au/own-motion-inquiry-platformproviders>.

<sup>75</sup> Caroline O'Donovan, "Uber Rallies Drivers Against Teamster Unionization Efforts With Podcasts And Pizza Parties", *Buzzfeed News*, 10 March 2017; Kate Minter, "Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales", *Economic and Labour Relations Review* 28, no. 3 (2017); Anna Sansom, "Bicycle couriers protest against takeaway food service Deliveroo", *France24*, 12 August 2017, <http://www.france24.com/en/20170812-france-paris-protest-food-delivery-service-deliveroo-financial-insecurity-emmanuel-macron>; Zachary Kilhoffer, Karolien Lenaerts, and Miroslav Beblavý, *The Platform Economy and Industrial Relations: Applying the old framework to the new reality*, Centre for European Policy Studies (Brussels, 2017); Rebecca Burns, "The Sharing Economy's 'First Strike': Uber Drivers Turn Off the App", *In These Times*, 22 October 2014, [http://inthesetimes.com/working/entry/17279/the\\_sharing\\_economy\\_first\\_strike\\_uber\\_drivers\\_turn\\_off\\_the\\_app](http://inthesetimes.com/working/entry/17279/the_sharing_economy_first_strike_uber_drivers_turn_off_the_app); Alison Griswold, "Uber Just Caved on a Big Policy Change After Its Drivers Threatened to Strike", *Slate*, 12 September 2014, [http://www.slate.com/blogs/moneybox/2014/09/12/uber\\_drivers\\_strike\\_they\\_protested\\_cheap\\_uberx\\_fares\\_uber\\_backed\\_down.html](http://www.slate.com/blogs/moneybox/2014/09/12/uber_drivers_strike_they_protested_cheap_uberx_fares_uber_backed_down.html).



delivery, courier services and grocery.<sup>76</sup> There were 527 instances in food delivery alone.<sup>77</sup> The main cause of disputes, globally, has been pay, but with “considerable geographical variation when it comes to other causes for dispute.”<sup>78</sup> The frequency of collective action strongly suggests these workers are seeking avenues to win better pay, conditions, and security – including through protective regulation.

Survey evidence confirms this interpretation. The British survey cited above, which showed many gig workers desire flexibility, also found that 63% agreed that ‘The Government should regulate the gig economy so that all working in it are entitled to receive a basic level of rights and benefits (for example Living Wage/ holiday pay).’ Only 11% disagreed with that proposition.<sup>79</sup> Related to this, 57% agreed that ‘Gig economy firms are exploiting a lack of regulation for immediate growth’, with 11% disagreeing.<sup>80</sup> Clearly, many gig workers want benefits equivalent to those available to employees. For example, 50% agreed (18% disagreed) that ‘Gig economy firms should have an obligation to provide an occupational pension scheme for the people they engage to provide services’. In addition, 58% agreed (11% disagreed) that ‘Gig economy companies should invest in training and education for the people they engage to provide services’.<sup>81</sup>

All up, the data on gig worker attitudes indicate that many, probably a majority, of gig workers would prefer to remain independent contractors, though some clearly want employee status. There are methodological questions about potential bias regarding those studies that have used contractor lists from a gig firm to sample employees. However, no credible evidence suggests a majority of gig workers, presently contractors, seek employee status. The desire for continued contractor status is doubtless linked to gig workers seeing themselves as independent, entrepreneurial and getting ahead, or preferring the perceived flexibility of contractor status. Many gig workers imagine themselves as independent people who will make it good in life, even if in reality these aspirations are often unfulfilled and they end up at the beck and call of large corporations. This does not stop a majority of gig workers, however (probably along with some other vulnerable contractors), from wanting regulatory intervention for protection. While they might not see regulation as leading to employee status, they do see it as protecting them from unfair treatment by the platforms they work for, and they would like to see minimum standards established to protect their pay and conditions. This presents a regulatory challenge, as most existing regulatory

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<sup>76</sup> Ioulia Bessa et al., *A global analysis of worker protest in digital labour platforms*, International Labour Organisation (Geneva, June 2022).

<sup>77</sup> Mark Stuart et al., “Labor Unrest and the Future of Work: Global Struggles Against Food Delivery Platforms”, *Labor Studies Journal* 48, no. 3 (2023), <https://doi.org/10.1177/0160449X231178780>.

<sup>78</sup> Vera Trappmann et al., “Leeds Index of Platform Labour Protest”, University of Leeds, 2023, <https://business.leeds.ac.uk/research-ceric/dir-record/research-projects/1721/leeds-index-of-platform-labour-protest>.

<sup>79</sup> CIPD, *To gig*, 32 (fn 27).

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

interventions protecting workers' pay and conditions have been built around the idea that workers are employees. Most interventions, that is, but not all.

## THE CLASS POLITICS OF GIG WORK REGULATION

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While many of the worst vulnerabilities of gig workers could be addressed by redefining them as employees, this approach encounters three difficulties. First, at an international level the outcomes of trying to define gig workers as employees have been mixed, even in the UK.<sup>82</sup> This is partly because of different interpretations by courts, tribunals and other bodies of specific criteria or tests established through legislation to determine employee status.

Second, even when a rule is devised to interpret the contracts that gig workers sign as employment contracts, gig firms could (and do) amend their contracts to circumvent those new provisions.<sup>83</sup>

Third, there is strong political resistance from gig firms to attempts to define their workers as employees, not least because with employee status, liability for third party damages transfers from the individual to the employer. The platforms leverage the fact that many gig workers conceive of themselves as independent, self-employed people; they also leverage customers' preference for continued delivery of cheap services through platform labour models. For example, legislation in California that would have redefined many platform workers as employees was the subject of an expensive and successful campaign by Uber and other ride-hail firms, that granted effective exemption from these laws for ride-hail companies through 'Proposition 22'.<sup>84</sup> More than anything else, employment status is the issue that motivates expensive oppositional campaigns by the affected firms. The ability of the platform industry to capture regulators would also undermine policy interventions. Ride-hail firms have themselves shown this to be the case.<sup>85</sup>

This is not to say that platform work need be killed off if the workers are defined as employees. In the end platform firms can afford regulation,<sup>86</sup> and they end up adhering,

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<sup>82</sup> e.g. Jamie Grierson and Rob Davies, "Pimlico Plumbers loses appeal against selfemployed status", *Guardian*, 11 February 2017; Gregor Gall, "Is Uber ruling the beginning of the end for bogus self-employment?", *The Conversation*, 5 November 2016; J Moylan, "Bike courier wins 'Gig' economy employment rights case", *BBC News*, 7 January 2017.

<sup>83</sup> J Bell, "Uber Eats announces new business model and contracts for riders", *Human Resources Director*, 30 January 2021, <https://www.hcamag.com/au/specialisation/industrial-relations/uber-eats-announces-new-business-model-and-contracts-for-riders/245068>.

<sup>84</sup> K Conger, "Uber and Lyft Drivers in California Will Remain Contractors", *New York Times*, 7 November 2020, <https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html>; C Murphy, "Uber bought itself a law. Here's why that's dangerous for struggling drivers like me", *Guardian*, 12 November 2020, <https://www.theguardian.com/commentisfree/2020/nov/12/uber-prop-22-law-drivers-ab5-gig-workers>.

<sup>85</sup> Joy Borkholder et al., *Uber State Interference: How Transportation Network Companies Buy, Bully, and Bamboozle Their Way To Deregulation*, National Employment Law Project and Partnership for Working Families (New York, 2018)..

<sup>86</sup> Lee Fang, "Uber CEO admits company can afford labor protections for drivers", *Intercept*, 7 January 2022, <https://theintercept.com/2022/01/07/uber-drivers-labor-protections-dara-khosrowshahi-european-union/>.

grudgingly, to most standards that are imposed on them — other than defining their workers as employees. Thus Uber, for example, has accepted training requirements in Quebec (despite first threatening to quit the Canadian province),<sup>87</sup> fare regulation in Massachusetts,<sup>88</sup> and driver accreditation requirements<sup>89</sup> in several other jurisdictions.<sup>89</sup>

A sobering experience in this regard was the fate of the Road Safety Remuneration Tribunal (RSRT). Established by a federal Labor government in 2012, it was abolished four years later by a Coalition government after major national trucking and logistics organisations (more hard-line than their NSW equivalents) opposed it. A narrative of ‘freedom’ was popular amongst owner-drivers, and used to great effect by the trucking corporations to garner their support. The campaign against the RSRT was aided by technical weaknesses in the RSRT’s key determination concerning the treatment of ‘backloads’.<sup>90</sup>

That said, not all attempts at regulating gig workers or the self-employed are doomed to fail in the face of such determined political opposition. In New South Wales, regulation of independent contractors involved in road freight transport (owner-drivers), through what is now Chapter 6 of the state’s *Industrial Relations Act*, has been successfully maintained for over four decades, since the late 1970s (discussed below). Successive Coalition governments in NSW supported Chapter 6, and the provisions even survived the federal Coalition government’s 2006 takeover of industrial relations – which could have effectively put an end to the system, if it had rescinded the state governments’ jurisdictional power to regulate standards for independent contractors. The Chapter 6 framework survived because it appealed to the ‘small business’ ethos of some conservative politicians, while mobilizing owner-drivers along with employee transport workers to protect the legislation. Owner-drivers, like other ‘small business’ people, are seen as a natural constituency of the Coalition.<sup>91</sup> This has been enough to prevent repeal of these provisions when government has changed in NSW (or even nationally). Indeed, in 1994, the scope of Chapter 6 was extended to encompass owner-drivers using other vehicles (including bicycles). A Coalition

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<sup>87</sup> J Hughes, "Uber Threatens to Leave Quebec Over New Driver Training Requirements", *The Drive*, 27 September 2017, <https://www.thedrive.com/article/14652/uber-threatens-to-leave-quebec-over-new-driver-training-requirements>; .

<sup>88</sup> S Schoenberg, "Gov. Charlie Baker signs law regulating Uber and Lyft in Massachusetts", *Masslive.com*, 2016, [https://www.masslive.com/politics/2016/08/gov\\_charlie\\_baker\\_signs\\_law\\_regulating\\_uber\\_and\\_lyft\\_in\\_massachusetts.html](https://www.masslive.com/politics/2016/08/gov_charlie_baker_signs_law_regulating_uber_and_lyft_in_massachusetts.html).

<sup>89</sup> bne intellinews, "Uber reaches agreement with the Czech government", updated 12 March, 2018, <https://www.intellinews.com/uber-reaches-agreement-with-the-czech-government-138071/>.

<sup>90</sup> Peter Shields, "Centre lane for ‘safe rates’", *Australian*, 4 April 2019, <https://www.theaustralian.com.au/nation/politics/centre-lane-for-safe-rates/news-story/49e2c54890fdb7f570c6437f417924ab>; National Road Transport Association, "Complying with the RSRT Contractor Driver Minimum Payments Order", NRTA, 2016, [https://www.shaws.net.au/wp-content/uploads/2016/03/COMPLYING-WITH-THE-ORDER\\_NATROAD-INFO-SHEET260216.pdf](https://www.shaws.net.au/wp-content/uploads/2016/03/COMPLYING-WITH-THE-ORDER_NATROAD-INFO-SHEET260216.pdf).

<sup>91</sup> Matthew Knott, "'We've got the numbers': Why politicians are wooing Indian Australians", *Sydney Morning Herald*, 15 April 2022, <https://www.smh.com.au/national/we-ve-got-the-numbers-why-politicians-are-wooing-indian-australians-20220414-p5adgj.html>.

government was the most recent to bring positive amendments to the NSW legislation, by establishing a contract of carriage tribunal to deal with disputes over goodwill.

When the Chapter 6 system was questioned in 2016 following the abolition of the federal Road Safety Remuneration Tribunal (at the same time as the parties were trying to update a key instrument in this regulation, known as the General Carriers Contract Determination), the key players within the system worked together to seek agreement on a new fit-for-purpose instrument. They also sought to show that the entire system worked, in the face of pressure on the (Coalition) state government to intervene and perhaps abolish the entire system. Major transport companies and employer organizations were involved in a three-week conciliation before the NSW IRC. Many employers sought to retain the system to avoid low-cost operators taking advantage of an unregulated system; they favoured the greater certainty of the Chapter 6 system.

## WHAT HAS BEEN DONE?

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Various attempts have been made to regulate selected forms of self-employment.<sup>92</sup> One recent overseas example concerned the search for a means of ensuring ride-hail and taxi drivers in New York received at least that jurisdiction's minimum wage (\$US15 per hour in New York City). It was not simple. Both were paid a piece rate, and much of drivers' time was spent between jobs, either sitting in ranks or driving around waiting for a job to appear. Rather than focusing on how ride-hail drivers could be reclassified as employees, New York focused on finding an equivalent for contractors of the hourly minimum wage. After extensive consultation (though not consensus), city officials developed a system that involved setting a minimum charge (a 'flag fall' plus a rate per kilometre) based on estimates of what an equivalent hourly minimum wage would be – after taking account of time spent waiting between paying jobs, as well as the value of other benefits such as paid leave.<sup>93</sup>

In Australia, the most relevant examples of regulation of some forms of self-employment both originated in New South Wales, concerning apparel outworkers and road transport workers. These are both long-standing examples of 'gig' (but non-platform) contracting models.

### Clothing outworkers

Outworkers represent a classic 'periphery' workforce comprising people who were typically classed not as employees but as contractors. Migrant women had been disproportionately

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<sup>92</sup> Andrew Stewart and Jim Stanford, "Giving platform workers a say: regulating for voice in the gig economy", in *Missing Voice?*, ed. Adrian Wilkinson et al. (Cheltenham, UK: Edward Elgar, 2022).

<sup>93</sup> James A Parrott and Michael Reich, *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment*, The New School, Center for New York City Affairs (New York, 2018); International Transport Forum, *Regulating App-Based Mobility Services*, Organisation for Economic Cooperation and Development (Paris, 2019); David Peetz, "Institutional experimentation, directed devolution and the search for policy innovation", *Relations Industrielles/Industrial relations* 76, no. 1 (2021).

represented amongst the 'outworkers' sector of this industry, where pay and conditions are amongst the worst in labour markets in many industrialised countries.<sup>94</sup>

Their situation has been so exploitative that, at times, special regulatory arrangements have been put in place to cover these outworkers.<sup>95</sup> The policy focus has been on deeming contractors to be employees. This has occurred in some state jurisdictions and been facilitated by apparel outworkers' tendency to work repeatedly for the same firm. In New South Wales, the Clothing Trades (State) Award defined an outworker as "a person who performs hand or machine sewing in the construction of a garment or part thereof being work performed other than in a factory or workshop, for an employer outside the employer's workshop or factory under a contract of service". Employers often claimed that outworkers were not employees but independent contractors.<sup>96</sup> Hence, clothing outworkers in NSW became treated as "deemed employees" under state law.<sup>97</sup> Subsequently, Queensland broadened the legislative definition of employee to include outworkers, and gave the state tribunal the power to declare certain contractors to be employees<sup>98</sup> after considering such factors as their economic dependency, their bargaining power, whether the contract circumvented an award or agreement, and circumstances such as whether they were low paid, female, young, from a non-English speaking background, or outworkers. The Queensland tribunal subsequently deemed dependent contractors working for a security firm to be employees, but rejected on the grounds of lack of evidence an application regarding shearers.<sup>99</sup> At the federal level, the *Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* extended most provisions of the Fair Work Act to contract outworkers, to enable outworkers to recover unpaid entitlements up the supply chain and to extend right of entry rules applying to suspected breaches affecting outworkers to the entire apparel industry.

## Road transport in New South Wales

The main alternative approach is not to redefine self-employed workers as employees and regulate them through the award system, but to instead regulate payments and selected other aspects of work outside the employment relationship.

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<sup>94</sup> Mindy Thorpe, "Outworkers", in *Pay Equity in Queensland*, ed. David Peetz and Rosemary Hunter (Brisbane: Centre for Research on Employment and Work and Socio Legal Research Centre, Report to Department of Employment Training and Industrial Relations, Queensland Government Submission, *Pay Equity Inquiry*, Queensland Industrial Relations Commission, No B1568 of 2000, 2000).

<sup>95</sup> Igor Nossar, Richard Johnstone, Anna Macklin, and Michael Rawling, "Protective legal regulation for home-based workers in Australian textile, clothing and footwear supply chains", *Journal of Industrial Relations* 57, no. 4 (2015).

<sup>96</sup> Industrial Relations Commission of NSW (Glynn J), *Pay Equity Inquiry: Reference by the Minister for Industrial Relations pursuant to Section 146 (1)(d) of the Industrial Relations Act NSW 1996*, Report to the Minister, Vol. 1 (Sydney, 14 December 1998).

<sup>97</sup> *Industrial Relations Act 1996 (NSW)* s.5(3), Schedule 1(1)(f)

<sup>98</sup> *Industrial Relations Act 1999 (Qld)*, ss 6, 275

<sup>99</sup> Department of Industrial Relations (Queensland), *The Operation of the Industrial Relations Act 1999: The First Two Years*, DIR (Brisbane, 2001), 22-23.

The New South Wales Parliament in 1979 legislated to allow the New South Wales Industrial Relations Commission (NSW IRC) to regulate minimum terms of contracts for owner-drivers of trucks and other 'contract carriers'. Now known as Chapter 6 of the New South Wales *Industrial Relations Act*,<sup>100</sup> this statute enables the NSW IRC to issue 'contract determinations' that specify minimum standards for the drivers concerned. The Industrial Relations Commission can regulate pay rates, union recognition and dispute settlement, for owner drivers. These standards are analogous to Awards in NSW labour regulation, since they set minimum terms and conditions by industry. For example, the 'General Carriers Contract Determination 2017' establishes, for various types of owner-drivers of trucks, minimum rates of remuneration, comprising a per-kilometre rate, an hourly rate (both varying by truck size and type), allowances and a minimum earnings guarantee, and formulae for adjustment of these, plus entitlements to annual leave, rest breaks and various minimum standards of work and obligations. That Determination also establishes union representation rights, where sought by workers. The NSW IRC can also approve 'contract agreements', which are analogous to 'collective agreements' in employee relations regulation, between owner-drivers and firms.

This approach to regulation has avoided treating the owner-drivers as employees. This was important for obtaining support from the owner-drivers, many identifying as entrepreneurs rather than employees. Classifying owner-drivers as employees would have likely been resisted by both the owner-drivers and the corporations.

As noted above, the Chapter 6 legislation has survived changes of government and sustained periods of Coalition rule. This system promotes shared interests among unions and those transport operators who would otherwise be forced to contract work out to compete against unsustainable contracting practices and low rates. The parties reach agreement on some matters, but on others disagreement leads to arbitration. Once a contract determination is issued, they work together in maintaining it (e.g., in applying the formula to keep the minimum remuneration up to date). As a result, support for the system has come from key companies which are able to obtain certainty through minimum standards and, to a certain degree, be protected from unfair competition.

The Chapter 6 experiment has led to a demonstrable improvement in occupational safety for road transport drivers (and safety for other road users) in NSW,<sup>101</sup> along with improvements in pay. Drivers have greater control over working time because of less pressure to deliver goods within a defined period, and in that sense have more autonomy. The maintenance of contractor status has also avoided the losses of autonomy that owner-drivers could fear would accompany employee status (and about which corporations could fear-monger).

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<sup>100</sup> *Industrial Relations Act 1996 (NSW)* No 17, <https://legislation.nsw.gov.au/view/html/inforce/current/act-1996-017>.

<sup>101</sup> David Peetz, "Road transport regulation, safety and prospects for the "gig economy"", *Australian Journal of Labour Law* 35, no. 3 (2022).

There are limits to this model, however. The Chapter 6 framework provides little supply chain accountability, which could shape corporate decisions at the initial contracting stage. This issue was addressed in the short-lived Road Safety Remuneration Tribunal model. There are other areas (such as training) that could be regulated if the workers were classed as employees, but which are not regulated through the Chapter 6 approach.

The Chapter 6 framework very clearly formed the model for the drafting of legislation in Queensland to provide protection for independent courier drivers — in the form of Chapter 10A of the Queensland *Industrial Relations Act*. At time of writing, that Chapter had not been proclaimed to take effect, as it would be made largely redundant by the federal *Closing Loopholes* bill, discussed later.

## OPTIONS AND CRITERIA FOR REGULATING SELF-EMPLOYMENT

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For many self-employed people, it is neither necessary, appropriate, nor feasible to regulate their employment. Many are not vulnerable to exploitation. They earn more than could be guaranteed by minimum standards regulation. Some have more power than the clients who provide their income.

Crowdwork, one of the two major forms of digital platform work mentioned earlier in this report, would often not lend itself to regulation, despite the vulnerability of many crowdworkers. This is because the client, platform and worker may all potentially be in different countries with different minimum wage frameworks, and hence the practical opportunities for regulation would be infrequent.<sup>102</sup>

But for another group of self-employed — including many on-demand or location-based digital platform workers — the story is different. They are vulnerable to exploitation by large, powerful organisations. In some cases, not only their income security but also their safety is placed at risk. Sometimes the safety of the public is also placed at risk.

As suggested above, two important criteria need to be satisfied before intervening to regulate the conditions of self-employment. First, the workers must be vulnerable, such that they *need* protection, Second, a viable mechanism must exist to *enable* their work to be efficiently regulated. For a minority of the self-employed — including many platform workers — those criteria are satisfied, and regulation is ultimately possible and appropriate. So, what other principles should guide such regulation?

First, we should consider whether they really are employees: is their status as independent contractors only a pretence? It is beyond the scope of this paper to review the various tests for employment status proposed in numerous jurisdictions, and their application to various

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<sup>102</sup> There may be opportunities for regulation where many/most workers and their employers are in one country, such as journalists and others in cultural industries where there is local demand for locally produced content.

classes of gig workers. Suffice it to say that, in cases where gig workers are employees, then the law should enable them to be clearly defined and treated as such. For current gig workers who should, by appropriate tests, be treated as if they genuinely are in waged employment, an important part of the regulatory response should be to strengthen protection against sham contracting.

Second, if they genuinely are not employees, then the outcome of regulation should, financially, be relatively indifferent between a self-employment model versus an employment relationship model. Corporations should not be able to shift workers into self-employed status simply because it is cheaper for them to do so. Workers should not be forced to lose the flexibility that self-employment offers in the absence of offsetting benefits. Where self-employed workers are doing work broadly comparable to that of employees, the mode of regulation should not, in itself, favour one business model over another. In other words, the guarantees for financial security and benefits to workers of either mode of work should be broadly comparable, and the choice between modes should be cost-neutral (after accounting for risk) between employment and contractor relationships.

Third, any regulation needs to be tailored to the circumstances of the industry where it occurs. Each industry is different, and it is difficult, probably impossible, to express minimum standards for all types of gig workers or other relevant self-employed people, in national, across-the-board terms.

A corollary of these principles is that the starting point for regulation of vulnerable self-employed workers should be the standards that apply for relevant employees in those sectors. Most countries have a minimum wage, expressed in hourly terms (that is, dollars per hour or some monetary equivalent), that all employees should receive. In several countries, these minimum wages differ by location, industry or occupation. Australia is one example of that, with Modern Awards setting out minimum wages and conditions which vary by industry and occupation. Yet the Awards system also aims to preserve a matrix of consistency, such that two workers with similar skill levels, but in different industries or occupations, are subject to similar minimum wages.

Thus the principal questions that should be addressed in regulating the pay and conditions of vulnerable gig workers, for whom regulation is feasible, should be: what are the minimum standards for the pay and conditions of comparable employees; and how can equivalent minimum standards be expressed for those comparable gig workers? It might be that the standards are expressed as hourly rates, or piece rates, or some combination of the two. It might be that considerable research is necessary to identify equivalence (especially if piece rates rather than hourly rates are to be used). The principles above are consistent with an approach of 'directed devolution', explained elsewhere, by which centrally established



standards (for employees) are translated into standards that can be applied to workers outside the employment relationship but who still warrant regulation.<sup>103</sup>

## THE CLOSING LOOPHOLES BILLS

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The federal government's *Fair Work Legislation Amendment (Closing Loopholes) Bill* contained major amendments to the treatment of gig workers, along with changes affecting many other aspects of industrial relations (including labour hire, casual employment, wage theft, redundancy, multi-employer agreements, workplace delegates' rights, discrimination, and the definition of employment). In December 2023 the bill was split into two, with many parts left in a bill that was passed by both Houses of Parliament, while the remainder were moved into a new bill — the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill* — that will be considered in early 2024. Provisions affecting gig workers (in Part 16 of the original bill) were moved into the 'No. 2' bill. These accounted for 100 pages of the original 284-page bill,<sup>104</sup> and constitute by far the biggest part of the 'No. 2' bill. The term 'the bill', used below, refers equally to both the original bill and the 'No. 2' bill, as the act of splitting the bill did not, in itself, alter the gig worker provisions.

These gig worker provisions can be assessed against the above principles.

The bill fulfils promises the Labor Party made before the election to regulate two types of workers: road transport owner-drivers (one of the original categories of 'gig workers'); and 'employee-like' workers in the digital platform economy.<sup>105</sup> These two groups are what the bill calls 'regulated workers'.

As most digital platform workers are not employees but ostensibly contractors, they are not covered by Modern Awards. The explanatory memorandum to the original bill, in effect, estimates the cost of non-employee status to platform workers in three main sectors of coverage (ride-hail, food delivery and community care) at \$450 million per year.<sup>106</sup> (It is hard to judge the reasonableness of this estimate.<sup>107</sup>)

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<sup>103</sup> Peetz, "Institutional experimentation, directed devolution" (fn 93).

<sup>104</sup> Australian Government, "Fair Work Legislation Amendment (Closing Loopholes) Bill 2023: Text of Bill — First Reading", Parliament House, 2023, [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r7072](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7072).

<sup>105</sup> Angus Thompson, "'Laws hopelessly outdated': Unions push for independent body for gig workers", *Sydney Morning Herald*, 8 February 2022, <https://www.smh.com.au/national/nsw/laws-hopelessly-outdated-unions-push-for-independent-body-for-gig-workers-20220207-p59ubl.html>.

<sup>106</sup> Australian Government, "Fair Work Legislation Amendment (Closing Loopholes) Bill 2023: Explanatory Memorandum", Parliament House, 2023, [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r7072](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7072). pp 63-67.

<sup>107</sup> it may be an overestimate as the estimate of the number of workers affected is based on the Victorian survey (McDonald et al., *Digital Platform Work* (fn 29)) which is many times the number estimated by the ABS (Australian Bureau of Statistics, "Digital platform workers in Australia" (fn 30)). On the other hand, the ABS estimated that these three sectors accounted for only seven in ten digital platform workers. That said, there are

The bill enables the Fair Work Commission (FWC) to establish standards on matters like payment terms, deductions, working time, record-keeping, consultation, representation and union delegates' rights for these two categories of 'regulated workers'. The bill says such standards can only be established where the workers have low bargaining power, are being paid less than equivalent employees or have little authority over their work. The FWC can establish standards in response to an application from a union, business, or the Minister, or on its own initiative. The bill details consultation processes the FWC must engage in for both types of regulated workers before finalising a decision. It can also issue non-binding 'guidelines' as an alternative to enforceable standards.

The bill instructs the FWC to tailor regulation to the circumstances of the workers and their industry, and amendments negotiated with digital platform firms ensure it is also appropriate for the unique nature of digital platform work.<sup>108</sup> The FWC is told not to give preference to one business model over another. In other words, once costs are taken into account, it should mean regulated workers get similar pay to award-based employees performing similar work. This is a critical intention.

What the bill does *not* do is redefine any regulated workers as employees. Indeed, it prevents the FWC from doing this of its own accord through the Part 16 processes, and amendments to the legislation negotiated with digital platform firms reinforce this limitation.<sup>109</sup> Elsewhere, the bill attempts to resuscitate a traditional definition of employee — one that preceded recent High Court rulings that affirmed that employment status depends solely on the wording of the contract of engagement, not on the actual conditions and practices of the work. This is likely to lead to some contractors being redefined as employees, since the situation that existed before recent High Court decisions was more favourable to this possibility. Still, that former situation had left most gig workers outside of employee status, and led to some complaints about the inadequacy and uncertainty of the law regarding the treatment of gig workers and other allegedly self-employed or precarious workers.<sup>110</sup> Therefore, Part 15 of the bill will not likely make much difference to platform workers, as most tended to be treated as contractors anyway even under the old definition.

The *Closing Loopholes* bill clearly takes, as its inspiration, the reforms to road transport regulation in New South Wales, through Chapter 6 of the *IR Act* discussed previously. As mentioned, these provisions have survived for over four decades and several changes of

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many uncertainties associated with such estimates anyway, such as the use of average hourly wages from the Victorian survey.

<sup>108</sup> Workplace Express, "Burke negotiates changes to Loopholes gig provisions", *Workplace Express*, 9 November 2023, [https://www.workplaceexpress.com.au/nl06\\_news\\_selected.php?act=2&nav=10&selkey=62881](https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=62881).

<sup>109</sup> *Ibid.*

<sup>110</sup> Andrew Stewart, "Redefining Employment? Meeting the Challenge of Contract and Agency Labour", *Australian Journal of Labour Law* 15, no. 3 (2002); Joellen Riley Munton, *Defining Employment and Work Relationships under the Fair Work Act*, Centre for Employment and Labour Relations Law, Melbourne Law School (Melbourne, 2022), [https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0007/4268797/Policy-Brief-1\\_2022.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0007/4268797/Policy-Brief-1_2022.pdf).

government. The potential political sustainability of the gig work provisions in the *Closing Loopholes* bill is thus perhaps its greatest asset for vulnerable workers.

Wary of potential overreach, the bill does not allow the new minimum standards to cover several matters, including: overtime pay, rostering, purely commercial issues, health and safety matters covered by other laws, or other topics prescribed by regulation. Likewise, the FWC is instructed to avoid unreasonable adverse impacts upon industry participants, including on sustainable competition, business viability, innovation and productivity. This will no doubt lead to considerable argument in proceedings. How the FWC balances this requirement against the objective of not favouring one business model over another will be critical in determining how beneficial the legislation is to these disadvantaged workers. Inevitably, bringing remuneration in the self-employment model up to the level of equivalent employees would increase costs. The platform firms will argue this would adversely affect innovation and competition. However, if all innovation does is find new ways of cutting workers' pay, and all competition does is privilege sub-award operators at the expense of those paying the community standard, it would not be unreasonable to adversely affect them. The bill's regulation powers provide various opportunities for the Minister to widen, or narrow, the scope of activities in this jurisdiction.

There are some weaknesses in the approach. For example, the availability of non-binding guidelines could dilute regulation, proving an 'easy way out' if the tribunal is inclined to look for one. Conversely, the exclusion of certain matters (like overtime pay) reduces the flexibility of the FWC to find the best solution to the issues it encounters. FWC determinations will not be nearly as encompassing as Awards or agreements that cover employees. The bill could have been more explicit about aligning Award and contractor pay rates and about allowing 'regulated workers' to be redefined as employees if the employee definition in Part 15 warranted. Contractors outside the platform economy (aside from those involved in road transport) are not covered.

The most important among the various subjects excluded from FWC standard-setting under the bill is likely workers compensation. That is mostly because workers compensation is a matter for state governments; when industrial relations powers were handed to the Commonwealth through the corporations power in the Howard government's *WorkChoices* legislation, it was agreed to leave workers compensation in the hands of the states. This matter would be easily addressed if gig workers were redefined as employees (since all jurisdictions give automatic coverage to employees within their scope), but neither Chapter 6, nor the *Closing Loopholes* bill, do this; nor do they assign workers compensation coverage to gig workers. Yet if gig workers are sufficiently 'employee-like' to warrant protection through minimum standards established by the FWC, they are certainly also deserving of coverage by workers compensation systems. One viable approach would be to redefine the coverage of workers' compensation laws and responsibilities to include those who work under agency arrangements, and to require the intermediaries or agencies to pay premiums. A platform business engaging a worker to deliver a passenger or a meal, or to

undertake some other task for a third person, could thus be required to pay a workers' compensation premium to cover that worker, based on a percentage of the firm's or the worker's revenue. Whether this happens is largely up to state parliaments (which, at time of writing, were led mostly by the ALP).

Despite these weaknesses, the *Closing Loopholes* bill provides a sustainable model for regulating and protecting many gig economy workers. When viewed against the criteria outlined in the previous section, the bill performs very well, despite the above weaknesses. It does not attempt to turn into employees workers who do not wish to be turned into employees. It aims to be neutral between employee-based and contractor-based business models. It allows regulation to be tailored to the circumstances of the particular industries or occupations concerned. Its success could provide future parliaments with a model for legislation to protect other vulnerable contractors and gig workers who do not work through digital platforms.

# Conclusions

Contrary to popular myth, self-employment is *not* growing inexorably. In Australia, and indeed in most industrial countries, it is declining. This decline has masked several, sometimes conflicting trends. They appear unrelated, but have a common theme: the growing power of large firms. Small business opportunities have been in decline in the face of greater barriers to entry erected by larger firms. The extent of part time jobs or ‘side hustles’ has increased, in part to meet the needs of large digital platforms for part-time gig workers. And full-time self-employment without employees has declined, in the context of the continuing need by large firms to control the way that work is performed, since the employment relationship is the most efficient way to exercise that control.

There are strong economic reasons why waged employment remains the dominant form of paid employment in industrial economies, and is likely to stay that way. Nevertheless, regulatory reforms are required both to protect existing workers in insecure self-employment or contractor roles, and to limit the extent to which businesses can evade existing rules protecting employees by superficially restructuring their roles as contractors. The need for these reforms is reinforced by the changing composition of self-employment: with relatively fewer self-employed pursuing genuine small business opportunities (with employees), and relatively more in part-time, solo roles. Providing better protection for these most vulnerable self-employed will have broader benefits for the economy (including productivity), by ensuring that resources are not excessively allocated to low-cost but poorly productive uses. Such arrangements, especially where they imply much idle time (e.g. waiting time between clients), put no incentive on the firm to ensure workers’ time is used efficiently.

Regulation *can* protect some self-employed workers, provided two simple and important criteria are satisfied: the workers are vulnerable and *need* protection, and a viable mechanism exists that *enables* their work to be efficiently regulated.

Many self-employed people do not need or want protection through regulation. They have sufficient market power and resources, often including specialised skills, to generate high and/or secure incomes, or at least are capable of taking on the risk that they will successfully do so. However, a growing share of self-employed people are vulnerable to exploitation. They are in a situation of low power compared to the corporations on which they depend for work and income. They typically have low and insecure pay, often below that of equivalent employees and below the minimum standards of labour law. Some face physical danger. This includes many platform workers, not least those in passenger transport, food delivery and care work, and some independent contractors such as those in road transport and apparel outwork.

The viability of regulation is influenced by the preferences of potentially affected workers, the political sustainability of regulation, and the logistics of making regulation work.

For some self-employed workers whose ongoing relationship is typically with a single firm (such as apparel outworkers), it may be feasible to redefine them as employees, for example through legislative deeming. Many vulnerable self-employed workers, though (perhaps a majority), do not wish to become employees. Moreover, redefining them as employees can evoke powerful opposition from the corporations that benefit from their labour; this opposition is accentuated if the corporations are able to mobilise the targets of the regulation against the policies that are meant to protect them. In such circumstances, even if a form of regulation can be introduced by one side of politics against organised opposition, it is typically in the interests of the other side of politics to repudiate it once the governing party changes. So if significant numbers of the group targeted for protection do not actually want the form of protection afforded, it not only creates problems for the efficacy of protective regulation, it also creates problems for its political sustainability.

A solution, then, lies in regulating for protection of vulnerable workers *as if* they were employees while maintaining the self-employed status of those targeted workers. That is, by providing similar levels of protection for selected self-employed and for employees, but through different mechanisms. It is unlikely that a single regulatory decree could do this. Sometimes protection might require use of piece-rate rather than time-rate bases for minimum standards. Sometimes time-rate bases would work. The key issue is that the approach taken should be tailored to the particular circumstances of the workers concerned, but should, to the extent possible, provide equivalent protection to vulnerable self-employed workers. In other words, it takes as its benchmark the protections afforded to employees.

An example of a regulatory approach consistent with this analysis is the Chapter 6 regulation of road transport contractors in New South Wales. The federal government's *Closing Loopholes* bill is another example of this approach, and while it has some weaknesses, including in its scope of coverage, it is consistent with the principles for best practice regulation of the gig economy and vulnerable independent contractors described above.

Workers do not have to be waged employees to have their income levels and conditions of work protected. When trade unionism and labour regulation emerged, many workers were not employees. Over the last century, however, labour law has developed in such a way as to privilege the regulation of conditions of employees, but largely ignore the conditions of those outside the employment relationship. This was partly because that was easier, and partly because the employment relationship model was dominant anyway – since it has been in the interests of business to control as many workers as possible through that arrangement.

It is time that labour law reached beyond the employment relationship to ultimately cover all vulnerable workers, regardless of their status – provided that, in doing so, it recognises that there are many self-employed people for whom regulation would be unwarranted, inappropriate or impractical.

To summarise, for many self-employed workers, probably a majority, at least one of the regulatory criteria mentioned above is not satisfied: namely, that the workers are vulnerable and *need* protection, and a viable mechanism exists that *enables* their work to be efficiently regulated. For a growing share of self-employed, though — including many working for digital platforms and in other gig jobs — these criteria for regulation are satisfied. Regulation established in such circumstances could provide a better future for those in self-employment who satisfy those criteria. Regulation is ultimately possible and appropriate. The *Closing Loopholes* bill is consistent with this approach, and represents a clear improvement on the status quo.