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CONTESTED TERRAINS

Can and how should the gig worker loophole be closed?

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Abstract

This article considers, summarises, and analyses the merits of various arguments regarding options for regulating (or not regulating) 'gig work', concluding with observations about currently proposed legislation. There is a strong argument for regulating gig work. Many workers are vulnerable, and many of the arguments against any form or regulation – in terms of innovation, productivity, employment, or the inevitability of this trend – lack merit. Current definitions of employment, indeed current labour law, are not adequate and many, but not all, gig workers are like employees in terms of the control exercised over them. However, treating gig workers as employees would encounter several problems. The outcomes would be uncertain. Not all would be covered. Many gig workers would be opposed (despite wanting protection). The gig firms could render such legislation ineffective, or alternatively succeed in mobilising opposition, almost ensuring such legislation would be revoked at the next change of government. Regulating gig work as a form of contracting is a viable alternative. It has the potential to attract support from gig workers themselves, undermining opposition by the gig firms, and attract support from some parts of capital. The New South Wales experience shows us that regulation of gig work as contracting is feasible and politically sustainable. Despite limitations, the 'Closing the Loopholes' Bill provides a sustainable model for regulating and protecting many 'gig economy' workers. It is time to envisage labour law as something that extends not just to employees but to many contractors as well.

Keywords: contractors; employment relationship; gig work; legislation; platform economy; regulation

JEL Codes: J08; J38; J88

Introduction

A major focus of contention in recent times has been the rise of the digital platform economy, raising questions about the future of the employment relationship, the vulnerability of platform workers, especially as most are hired as contractors rather than employees, and the question of whether and how to regulate to protect their interests and those of others.

The debate has been given focus by the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (hereafter the 'Loopholes Bill'), presently in the Federal Parliament. Amongst many other things, the 'Loopholes Bill' – in Part 16 – fulfils promises the Australian Labor Party (ALP) 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 (Thompson 2022). The Bill enables the Fair Work Commission to establish standards on matters like payment terms, deductions, working time, record-keeping, consultation, representation, and union delegates' rights for these 'regulated workers'.

The purpose of this article is to investigate whether gig work can be regulated and, if so, how should it be regulated. Or is the 'loophole', as some consider the existence of 'employee-like' work undertaken by contractors in the gig economy, too hard to close? The approach is, first, to consider the three main options for regulating (or not regulating) 'gig work'. I then summarise the arguments made by those supporting each of those options. The bulk of the article is taken up by analysis of the merits of those various arguments. The article concludes with some observations about the Loopholes Bill's approach to the issue. So, the paper does not go through the arguments around the Bill line by line; rather, it focuses on the broad issue of gig economy regulation, draws inferences about that, and then assesses the extent to which the Loopholes Bill meets those criteria. To anticipate the argument: there are three broad options for dealing with gig workers – do nothing, make them into employees, or regulate them without changing their status as contractors. The first is not justifiable, while the second has major practical limitations, though it should still be taken as far as practicality allows. The third approach, already used in New South Wales (NSW) for truck owner-drivers, has considerable potential for where the second cannot reach. The Loopholes Bill is an example of the third approach and, while it differs in some respects from the NSW legislation and has some key weaknesses, it still represents a major step forward.[1]

The terrain

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.

A subset of gig work is 'digital platform work', itself often referred to as 'gig work'. Indeed, when many people talk about the 'gig economy', they are exclusively referring to digital platform work. However, some gig work does not require digital platforms. The term 'gig' derives from the main income-earning activity of a musician or artist. Musicians and artists are the original gig workers, long predating that of digital platforms. Another group of gig workers who precede, by many years, digital platforms are road transport owner-drivers, whose situation is also a focus of the Loopholes Bill, through provisions that are very similar to, and sometimes the same as, those applying to digital platform workers. Road transport drivers and digital platform workers are what the Bill calls 'regulated workers'. So, in this article the term 'gig workers' mostly refers to these 'regulated workers'.

There are several ways in which platform activities can be classified (Stewart and Stanford 2017) but De Stefano (2016, 1) categorises two main forms of gig 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.

The digital platform work that is discussed in this article is mainly of the second variety, that is 'work on-demand via apps'. This is also sometimes called 'location-based platform work'

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(Sapara-Grant 2021). Broadly speaking, there are three schools of thought on the best approach for dealing with the location-based 'gig worker' issue. These can be summarised as:

1. do not regulate;
2. regulate gig work through making them employees; and
3. regulate gig work but leave them as contractors.

The arguments in favour of each approach are, briefly, as follows.

Why some say don't regulate

The argument for not regulating is one favoured by supporters of free markets, and, of course, the gig firms themselves.

The first strand of this argument is that 'gig work', 'independent contracting' or 'freelancing' (Freelancers Union and Elance-oDesk 2013), is the way of the future – and nothing should be done to try to stem this inevitable tide. It represents a revolt by workers and firms against the restrictions imposed by the employment relationship and the regulations that go with it (Phillips 2008). Regulating it would be swimming against the tide of history and ignoring participants' wishes to be free of the strictures of employment. One recruitment agency blogged, in 2016, that 'by 2020, 40% of the US workforce is expected to be independent contractors' (Trakstar Hire 2016).

A second line of argument is that regulating gig work would hamper innovation. Innovation is a driver of productivity, and so a third line of argument is that regulating gig work would hamper productivity, thus reducing the capacity for Australia to enjoy higher living standards.

It is also argued that gig work provides employment that would otherwise not exist, and so regulation of the pay and conditions in it will hamper employment. Another proposition is that regulating gig work would hamper the flexibility of labour. Closely related to this is the argument that gig workers themselves do not want regulation; in particular, gig workers do not want to be turned into employees, as they value the flexibility that their contractor status brings.

Why some say regulate as employees

Those who wish to see the gig work regulated focus on the vulnerability of gig workers, and the capacity of gig companies to use this vulnerability to undercut the pay and conditions of other workers, including by driving competitors out of business. Their vulnerability, and the threat to other workers, arise from the low pay afforded to gig workers and the difficult conditions under which they work, reflecting a power imbalance between them and the large firms.

As for how they should be protected, responses broadly fall into two categories. The first involves changing the employment status of gig workers from contractors to employees, as the control exercised by gig firms is similar in degree to the control exercised by employers over employees. The exclusion from employee status denies gig workers the protections and entitlements of employees, including annual and sick leave and protection from unfair dismissal. It is only through being classed as employees that they can receive adequate protection.

Why some say regulate as contractors

The alternative approach to regulation also takes, as a starting point, that vulnerability and low pay of gig workers, but questions whether this can only be done through the

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employment relationship. It argues that adequate regulation of gig workers can be achieved without their becoming employees. This is especially the case because of the attitudes of gig workers themselves, which are opposed to being turned into employees, and the greater political opposition that comes from doing so. Regulating gig workers as contractors, in this view, increases the opportunities for developing consensus between participants and hence for the sustainability of regulation. The experience of the regulation of road transport in New South Wales (via Chapter 6 of the *Industrial Relations Act (NSW)*) is cited as an example.

The merits of the issues

How do these arguments in favour of different approaches stack up against the evidence?

Way of the future

Is self-employment – the modus operandi of most gig work – inevitably increasing? Over the period from the 1980s to present, available OECD data for 36 countries (34 OECD plus Brazil and Russia) show that 15 countries had a fairly continuous *decline* in self-employment. Amongst these was the USA, in which self-employment averaged well below 10% in every decade. A further eight countries had general, but interrupted, declines in self-employment, and only four showed any sustained growth, while the remaining eleven had mixed outcomes or insufficient data. Within Australia, both Australian Bureau of Statistics (ABS) and Household, Income and Labour Dynamics of Australia (HILDA) survey data showed declines in self-employment both for those with employees and also (to a smaller extent) for those without employees. Amongst full-time workers, sole self-employment has declined. Yet amongst part-time workers, solo self-employment has grown, consistent with the gig economy's need for part-time independent contractors (Peetz 2023).

The idea of self-employment as the way of the future is wrong because the employment relationship is still the most efficient way for capital to exert control over labour. Moreover, the gig economy is not as big as many people think: probably around 1%, maybe less, of the workforce are regularly engaged in it (Katz and Krueger 2016; Wilkins et al. 2022; Australian Bureau of Statistics 2003), though many others dip their toes into it and then take them out again (Chartered Institute of Personnel and Development 2017), the numbers are likely growing, but they are presently exceeded by the numbers of independent contractors and comparable workers who do not rely on apps for their work.

Innovation, competition, and productivity

Innovation is important in delivering improvements in living standards, either through higher productivity or new products that consumers prefer. Innovation to circumvent employment laws and reduce pay or conditions does not improve productivity (a reduction in labour costs will reduce, not increase, productivity over the medium term (Salter 1969)), but it may produce a new product that consumers prefer (in which case the impact on living standards is ambiguous). Likewise, competition may increase productivity but alternatively it may reduce pay, depending upon whether, in the particular market, competition is on the basis of price (in which case, labour costs are driven down by competition) or product quality (in which case effort focuses on design or product features, and enhanced productivity). It is possible to innovate and promote competition in ways that improve consumer welfare without reducing pay and conditions.

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For example, an app that enables consumers to more quickly or efficiently access transport services or disability care, without reducing the incomes of those providing the services, would be an unambiguous improvement in living standards. If that cannot be achieved, it is not clear that an overall improvement in living standards has occurred. So, regulation should direct innovation to achieving social ends (higher consumer welfare without a reduction on worker pay and conditions).

Employment

It is unclear whether the availability of low-cost labour through an unregulated gig economy would lead to higher employment. The argument that it would do that is similar to the argument that removing minimum wage laws would have that effect. While this was a common view amongst economists in the 20th century, it is seriously contested now. This rethinking commenced with Card and Krueger's (1995) analysis of minimum wage changes at the state level in *Myth and Measurement*, and since then empirical evidence has not supported the ideas that reducing minimum wages and conditions would boost employment (Bishop 2018), that minimum wage increases in Britain have damaged employment there (Metcalf 2008) or that minimum wage increases hamper economic performance (Winkler 2019).

Flexibility

If flexibility is a desirable outcome, we first need to ask at what level this is being sought. At the macro-level, 'labour market flexibility', may be a desirable objective to the extent that it leads to better economic outcomes (e.g. in unemployment or inflation). Indeed, the Organisation for Economic Cooperation and Development (1994) considered this to be a laudable aim of public policy up until the global financial crisis. After that, the OECD observed it found no evidence that structural reform policies to promote flexibility had made labour markets 'less sensitive to severe economic downturns than was the case in the past' (OECD 2009). This is not that surprising in light of the recent research on the absence of a convincing link between minimum wages and employment, as discussed above.

So perhaps the more pertinent level for examining flexibility is the micro level, that of the firm and the worker. Certainly, the gig economy provides flexibility for the firm, in the ability to vary the number of workers and their pay almost without limits and without conscious action. For the worker, it provides flexibility in starting and finishing times and hours worked that are beyond what most casual jobs would offer, as the direct consent of the employer is not required. This is portrayed as a major plus for gig workers, even by the president of the Ride Share Drivers Association of Australia (RSDAA), who was quoted as referring to the importance to gig workers of 'the flexibility of working hours' (Marin-Guzman 2018). Its significance should not be underestimated: in a UK survey of gig 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 (Chartered Institute of Personnel and Development 2017, 32). We explore the implications of this for workers' preferred status in the next part of this section.

What workers want

In 2014, the Resolution Foundation (D'Arcy and Gardiner 2014) published a survey of self-employed UK workers (of which gig workers are a subset). It asked them whether, taking everything into account, they would prefer to be self-employed or an employee. Excluding

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the 'don't knows', 83% of self-employed said they would prefer to remain self-employed, and 17% said they would prefer to be employees. Amongst gig economy workers, it seems likely that interest in becoming employees is higher, but probably not constituting a majority. A US survey of Uber drivers by Berger et al. (2019) (two of the authors being Uber employees) claimed that 81% of drivers said they would rather be independent contractors than employees. Uber and Lyft have commissioned other opinion surveys, for example in the US and New Zealand, claiming similar majorities of its drivers prefer to be contractors (Benenson Strategy Group 2020; Moreno 2020; Tibshraeny 2023), but there are questions about the objectivity of surveys in which the app firm itself is a participant. In the UK, an internal survey of minicab drivers using a 'rideshare' app, found that 31% of minicab drivers wanted 'worker' status, while 59% preferred to be independent contractors. Notwithstanding doubts about the validity of some existing surveys, and the general unevenness of data, I have been unable to identify credible studies in which a majority of gig workers, presently contractors, seek employee status. While the president of the RSDAA pointed out that their drivers would be better off as employees than contractors, she added that 'the majority of drivers if asked would prefer to remain contractors due to the flexibility of working hours' (Marin-Guzman 2018). This does not preclude the possibility that some workers *decide* against becoming gig workers because they cannot be employees.

That said, while many gig workers do not want to become employees, it is very likely that this attitude varies substantially between sectors. For example, while Uber has made use of opinion surveys to assert that the majority of 'rideshare' drivers do not want to become employees, this may not be the case in the care sector. A majority (over two-thirds) of National Disability Insurance Scheme (NDIS) workers surveyed by the NDIS Quality and Safeguards Commission considered that they were employees, not contractors (NDIS Commission 2023, 8, plus Data Supplement – Appendix B – Survey Analysis, spreadsheet 'Roles' tab.). There is no evidence that a majority of gig workers in disability care would prefer to be contractors than employees.

There is a recent history of some groups of self-employed workers, especially those in the gig economy, undertaking collective action to protect their incomes or conditions and advance their interests (Burns 2014; Griswold 2014; Kilhoffer et al. 2017; Minter 2017; O'Donovan 2017; Sansom 2017). Globally, across four platform sectors – ride-hailing, food delivery, courier services and grocery – at least 1,271 worker protests were publicised between January 2017 and July 2020 (Ioulia Bessa et al. 2022). Widespread collective action strongly suggests these workers seek protection.

Survey evidence confirms this interpretation. The British survey that showed many gig workers wanted 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)', and only 11% disagreed (Chartered Institute of Personnel and Development 2017, 32). Gig workers' likely desire to remain contractors does not stop a majority of gig workers from wanting regulatory intervention for protection. While they might not see regulation as leading to employee status, they may see it as leading to their protection from capricious behaviour by large corporations and establishing minimum standards to protect their pay and conditions, discussed next.

The views of the affected workers are never determinative of whether regulation is appropriate: we do not eschew minimum wage laws merely because some workers are 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 numerous 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.

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Vulnerability

As contractors, gig workers lack the protection 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 without recourse to unfair dismissal laws if they are dismissed harshly, unjustly or unreasonably. They receive no compensation if dismissed.

They have very low power compared to the typically large gig firms that hire them. They therefore have little say over the income they receive or the conditions under which they work. Most are underemployed, that is, they are after more hours of work than they are offered by the gig firms (Berg 2016; Chartered Institute of Personnel and Development 2017).

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 (Campbell 2019). Outside Australia, many receive incomes equivalent to amounts below the minimum wage in the relevant country (CIPD 2017). They receive fewer training opportunities than other workers. There are also adverse health and safety implications for many gig workers.

As platform technology has developed, gig workers' vulnerability has increased, the nexus between fares and driver payments has been broken, and in the US Uber's average 'take rate' (the proportion of the fare that it extracts) has risen from 21% over 2015–2021 to 28% in 2022 (Smith and Horan 2023). As the opportunities for large digital corporations to extract surplus from workers increase, the vulnerability of the latter intensifies and the argument for regulation strengthens.

Control

A key matter in determining whether a person is an employee or contractor has been the form of control exercised by the firm over the worker. Prior to recent High Court of Australia cases, criteria (or 'indicia') had been developed by tribunals, the courts and even the Australian Taxation Office (ATO) to determine whether persons were employees or independent contractors. The High Court did not overturn the indicia approach but said it must be applied to the written contract, not the contract as it is performed.

Control featured heavily in those indicia, and control over working hours was one of the most important. Amongst mainstream employers, organisational control of employees' working time has become less important over recent decades than organisational control of the product employees generate for the employer (Fear 2011; Kenyon 2016), yet control of working time remained one of the indicia used to determine whether someone is an employee or a contractor. A Philadelphia US District Court decision acknowledged that Uber could: terminate a driver's access to the Uber App; deactivate a driver for cancelling trips, failing its background check policy, falling short of the required 4.7-star driver rating, or soliciting payments outside of the Uber App; make deductions against a driver's earnings; and limit the number of consecutive hours that a driver may work. Yet against the more traditional indicia, Uber was not an employer and its drivers were independent contractors.[2] After finding that the relevant Uber driver was a contractor, the Court commented that Uber and Lyft 'present a novel form of business that did not exist at all ten years ago' and added 'With time, these businesses may give rise to new conceptions of employment status'.[3] Virtual platforms provide a new, cheap way of control that may replace the need for the employment relationship. Electronic systems enable control and surveillance, rating systems in many platforms minimise the costs of monitoring quality.

The law in Australia has provided no expanded conceptions of employment status. In Australia, recent High Court decisions[4] have made clear that virtually all gig workers would now be treated as contractors, provided the contracts drafted by the gig firm

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indicated (when the indicia approach was applied to them) that the workers were contractors. While reducing uncertainty (of which there was much), this further restricted the potential avenues for redress for vulnerable gig workers.

Internationally, the outcome of trying to define gig workers as employees has been mixed, even in the UK (e.g. Gall 2016; Grierson and Davies 2017; Moylan 2017). This is partly because of different interpretations by courts, tribunals and other bodies, but also because of the strong political resistance from platform firms to attempts to define their workers as employees, leveraging the fact that quite a number of gig workers like to conceive of themselves as independent, self-employed people, as well as customers' preference for cheap services. 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 get around that (Bell 2021). In the end, though, platform firms can afford regulation (Fang 2022) and they end up adhering, 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) (Hughes 2017), fare regulation in Massachusetts (Schoenberg 2016) and driver accreditation requirements in several jurisdictions (intellinews 2018).

An ambitious approach was taken in California under Bill AB5. That law was enacted in 2019 after the California Supreme Court had adopted an 'ABC' test, in which a worker was assumed to be an employee unless the firm proved *all* of three criteria: the worker is free from direction and control; the work is performed away from employer premises; and the worker is customarily engaged in a similar but independently established occupation or business.[5] It was the subject of an expensive and successful oppositional campaign by Uber and other rideshare firms that led to AB5's defeat through 'Proposition 22' (Conger 2020; Murphy 2020). The AB5 approach would capture many gig workers (otherwise gig firms would not have campaigned against it), but not those where all three criteria could be successfully argued – for example, most Airtasker workers and some food delivery and rideshare drivers, especially those who multi-app. Gig firms would arrange their contracts to maximise the number of uncovered workers, which would plausibly be quite successful in the above areas and in fields such as aged and disability care.

The potential for protection as contractors

The main alternative approach is not to redefine self-employed workers as employees (regulated through the award system), but instead to regulate payments and selected other aspects of work outside the employment relationship. Any regulation needs to be tailored to the circumstances of the industry where it occurs. In some cases, regulation may be expressed in a minimum hourly rate but in others as a piece rate (as per New York taxi and 'rideshare' drivers (International Transport Forum 2019)). Each industry is different, and it is difficult, probably impossible, to express minimum standards for gig workers or other relevant self-employed people, in national, across-the-board terms. But with a national minimum wage (and, in Australia, minimum award wages), there are already useful benchmarks from which specific industry standards could be drawn.

While regulation of contractors may seem difficult, there are important precedents. In 1979, New South Wales 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,[6] this statute enables the NSW IRC to issue 'contract determinations' that specify minimum standards for the drivers concerned. That state's 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, namely minimum terms and conditions set by industry. For example, the

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'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', analogous to 'collective agreements', between owner-drivers and firms.

Regulation has avoided treating the owner-drivers as employees. This was important for obtaining support from the owner-drivers, many of whom identify as entrepreneurs rather than employees. Classifying owner-drivers as employees would likely be resisted by both the owner-drivers and the corporations.

The Chapter 6 legislation has survived changes of government and sustained periods of conservative rule, including from 1988 to 1995 and, again, from 2011 to 2013. It avoids transport operators being forced to contract out work to compete against unsustainable contracting practices and low rates. Key companies support the system if they are able to obtain certainty through minimum standards and minimisation of 'unfair' competition.

The Chapter 6 experiment has led to a demonstrable improvement in occupational safety for road transport drivers (and other road users) in NSW (Peetz 2022), along with improvements in pay (through the raising of the floor). 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 feared (and about which corporations fear-mongered) could accompany employee status.

There are limits, however. The Chapter 6 framework provides little supply chain accountability, which would otherwise have shaped corporate decisions at the initial contracting stage. There are areas that could be regulated if the workers were classed as employees, but which are not regulated through the Chapter 6 approach, such as training.

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 the time of writing, that Chapter had not been proclaimed to take effect as it would be largely made redundant by the Loopholes Bill.

Political sustainability

More than anything else, employment status is the issue that motivates expensive oppositional campaigns by the affected firms. Those campaigns frequently co-opt the workers themselves, many of whom do not want to be employees. The ability of industry to capture regulators would potentially prevent any policy action from taking place if there was not a legislative obligation for action. Rideshare firms have shown they have the skills for policy capture (Borkholder et al. 2018).

That said, not all attempts at regulating gig workers or the self-employed are doomed to encounter determined political opposition. In New South Wales, Chapter 6 regulation of independent contractors involved in road freight transport (owner-drivers) has been successfully achieved for over four decades, since the late 1970s. As mentioned, successive conservative Coalition governments in NSW have traditionally supported Chapter 6. Chapter 6 has also survived a conservative federal government's 2006 takeover of industrial relations which would have effectively put an end to the system, had it rescinded the state governments' jurisdictional power to regulate standards for independent contractors. This framework survived because it was able to appeal to the 'small business' ethos of some politicians, as 'small business' people are seen as a natural

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constituency of conservative parties (Knott 2022). It also mobilised owner-drivers along with employee transport workers to protect the legislation. Indeed, in 1994, the scope of Chapter 6 was extended to encompass owner-drivers using other vehicles (including bicycles), and goodwill provisions were inserted. A Coalition government amended the NSW legislation, establishing a contract of carriage tribunal to deal with disputes over goodwill. Even in 2016 (when the federal Road Safety Remuneration Tribunal (RSRT) was centre stage) many firms sought to retain the NSW system to avoid low-cost operators taking advantage of an unregulated system, favouring the greater certainty of the Chapter 6 system. The conservative NSW Government chose not to undermine the system due to its significance for small business owner-drivers.

The sustainability of Chapter 6 was a stark contrast to the fate of the RSRT, which was established as a separate tribunal (not part of the Fair Work Commission (FWC)) to perform somewhat similar transport regulation functions at the federal level. The RSRT only operated for too short a time for any proper evaluation of its impact to be made. It was abolished by a conservative government three years after a Labor government had established it. This followed a political campaign by major national trucking and logistics organisations (more hard-line than NSW equivalents) and after the federal Liberal Party opposed it. A narrative of 'freedom' was popular amongst owner-drivers and used to great effect by the large corporations to garner support from owner-drivers, especially as there were technical weaknesses in the RSRT's key determination concerning the treatment of 'backloads'. While the different institutional structures may have mattered (i.e. establishing a separate tribunal vs operating within an existing industrial tribunal) the different politics surrounding the RSRT and Chapter 6 played a major role in explaining the different longevities of the two systems (Peetz 2022).

Policy implications and the Loopholes Bill

From the foregoing, we can conclude the following. First, there is a strong argument for regulating gig work. The workers (or at least, many of them) are vulnerable, and many of the arguments against any form or regulation – in terms of innovation, productivity, employment or the inevitability of this trend – lack merit. Second, many, but not all, gig workers are like employees in terms of the control exercised over them, and current definitions of employment, indeed current labour law, are not adequate. Third, however, redefining or treating gig workers as employees would encounter several problems. The outcomes would be uncertain, as ultimately courts would determine how to interpret legislative formulations. Not all gig workers would be covered. Many gig workers would be opposed (even though they want protection, they do not want to be classed as employees). The gig firms themselves have shown themselves capable of rewriting their contracts and rewiring their business models to circumvent legislation anyway. Alternatively, if f a legislative redefinition was effective, the gig firms would be vociferously opposed, and would likely succeed in mobilising opposition from many gig workers themselves (as well as from the usual suspects in such campaigns). This in turn would almost ensure such legislation would be revoked at the next change of government.

These problems lead to a fourth conclusion, that regulating gig work as a form of contracting, is a viable and promising alternative. It has the potential to cut off opposition by gig workers themselves (who would instead be a likely source of support), which in turn would undermine opposition by the gig firms. Indeed, as the experience with Chapter 6 regulation of road transport in New South Wales shows, many parts of capital may indeed swing support behind regulation (with the rhetoric of a level playing field), in turn making subsequent revocation of enabling legislation considerably less likely. Chapter 6 also shows us that regulation of gig work as contracting is feasible and sustainable.

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Plausibly, then, the principal questions to be addressed in regulating the pay and conditions of vulnerable gig workers 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? For example, should standards be 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', by which centrally established standards (for employees) are translated into standards that can be applied to workers outside the employment relationship who still warrant regulation (Peetz 2021).

Let us turn to the implications of the Loopholes Bill. As discussed at the beginning, the Loopholes Bill seeks to provide new protections for gig workers. It focuses, in Part 16, on vulnerable workers. It 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 Bill details consultation processes the FWC must engage in for both types of regulated workers before finalising a decision. It improves on Chapter 6 in enabling the FWC to make orders regarding participants in road transport 'contractual chains'.

In the Loopholes Bill, 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 a lot of arguments in proceedings. Inevitably, bringing the self-employment model up to the remuneration level of equivalent employees would increase costs. Beneficiaries would 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 arguably not be unreasonable to adversely affect them.

The Bill tells 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 (Workplace Express 2023). 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 receive similar pay to award-based employees performing similar work. A corollary is that the starting point for regulation of vulnerable gig workers should be the standards that apply for relevant employees.

What the Bill does *not* do is redefine any regulated workers as employees. Indeed, it prevents the FWC from doing this through the Part 16 processes, and amendments negotiated with digital platform firms reinforce this limitation (Workplace Express 2023). Elsewhere – in Part 15 – the Bill attempts to revert to an 'old' definition of employee – one that preceded the High Court's ruling that it's what the contract says, not what actually happens, that is important. This is likely to lead to some gig workers being redefined as contractors, since the situation that existed before recent High Court decisions was more favourable to this possibility. Still, the former situation had left many outside of employee status and led to some complaints about the inadequacy and uncertainty of the law regarding the treatment of gig workers. Part 15 will not make much difference to platform workers, who tended to be treated as contractors anyway under the old definition. The gig worker provisions provide a certainty of process for gig workers as self-employed workers, that is unavailable to those gig workers who do not become defined as employees.

So there remains a strong argument for going further than Part 15, perhaps by legislating a new definition of employee and contractor along the lines of that applying in Bill AB5 in California. The limitations of this approach would be twofold. The first is its political sustainability. Bill AB5 generated strongly organised opposition in California, and

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the ALP government in Australia has shown little stomach for such a fight. Even if it did, the next Coalition government would likely repeal such a law. The second is that there would be uncertainty at the margins, and inevitably some gig workers would still not be covered. The Loopholes Bill provides a sustainable model with the potential for regulating and protecting many 'gig economy' workers.

There are some weaknesses in the approach. For example, the ability of the FWC to issue non-binding 'guidelines', as an alternative to enforceable standards, could dilute regulation, providing an 'easy way out' if the tribunal is inclined to look for one. Conversely, the explicit exclusion of some matters (such as rosters) 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.

A final limitation of the Bill concerns its coverage of topics – most obviously, the (unsurprising) absence of workers' compensation from its reach. That is considered a matter for State parliaments. The matter would be easily addressed if gig workers were redefined as employees (as all jurisdictions give automatic coverage to employees within their scope), but neither Chapter 6 nor the Loopholes Bill, do this; nor do they assign workers' compensation coverage to gig workers. Yet if gig economy 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 is 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 economy firm supplying a worker who delivered a passenger or a meal, or undertook some other task for a third person, could be required to pay a workers' compensation premium to cover that worker, based on a percentage of the firm's or the worker's take. Whether this happens is largely a matter for State Parliaments which, at the time of writing, were dominated by the ALP.

What about the institutional arrangements? Is it wise to hand this responsibility to the FWC? The experience of the NSW IRC in handling Chapter 6 indicates it is feasible for an industrial tribunal to successfully deal with industry-specific issues for contractors. That it is still going, while the RSRT is consigned to history, suggests it may be better than creating a separate agency. For road transport, the Loopholes Bill establishes processes to ensure industry input into decisions. For digital platforms, the original Bill was less prescriptive but amendments negotiated with major digital platforms promise to bolster consultation with industry, requiring the FWC to publish a notice of intent before setting standards, and to genuinely engage with affected parties (Workplace Express 2023). Although seen as concessions, in the long run such changes probably increase the long-term sustainability of the approach.

Over much of the 20th century, the scope of Australian labour law extended to cover several matters not originally conceived as part of the employment relationship. Recent changes under conservative governments sought to reverse that, tightening allowable matters in awards and even agreements to matters falling within a strict conceptualisation of the employment relationship (Bray and Stewart 2013). Labour law needs to be reconceptualised, not just as something with a broader vision of what is relevant to the employment relationship, but with a broader vision of to whom labour law applies. It is time to envisage labour law as something that extends not just to employees but to many contractors as well. Whether the Loopholes Bill effectively does that is something that can only be truly seen once it is in place, but it represents a good start.

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Notes

1 The arguments in several parts of this article, especially those concerning the "Way of the Future", along with some other issues, are elaborated upon in more depth in Peetz (2023).
2 Razak v. Uber Technologies Inc., U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:16-cv-00573, p. 25.
3 Razak v. Uber Technologies Inc, pp. 27–28.
4 Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd *[2022]* HCA 1 (Personnel Contracting); ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2.
5 Dynamex Operations West, Inc. v. Superior Court, discussed in (Kun and Sullivan 2018; Lebowitz 2018).
6 https://legislation.nsw.gov.au/view/html/inforce/current/act-1996-017.

References

Australian Bureau of Statistics (2023) Digital Platform Workers in Australia, *ABS*, 13 November. https://www.abs.gov.au/articles/digital-platform-workers-australia.
Bell J (2021) Uber Eats announces new business model and contracts for riders. *Human Resources Director*, 30 January, 2021. Available at: https://www.hcamag.com/au/specialisation/industrial-relations/uber-eats-announces-new-business-model-and-contracts-for-riders/245068.
Benenson Strategy Group (2020) App-based drivers and voters study. Last Modified 24 August. Available at: https://www.bsgco.com/post/app-based-drivers-voters-study.
Berg J (2016) *Income Security in the on-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*. Geneva: Inclusive Labour Markets, Labour Relations and Working Conditions Branch, International Labour Office.
Berger T, Frey CB, Levin G and Danda SR (2019) Uber happy? Work and wellbeing in the "Gig Economy". *Economic Policy* 34, 429–477.
Bishop J (2018) *The Effect of Minimum Wage Increases on Wages, Hours Worked and Job Loss*. Sydney: Reserve Bank of Australia.
Borkholder J, Montgomery M, Chen MS and Smith R (2018) *Uber State Interference: How Transportation Network Companies Buy, Bully, and Bamboozle Their Way To Deregulation*. New York: National Employment Law Project and Partnership for Working Families.
Bray M and Stewart A (2013) From the arbitration system to the 'fair work act': The changing approach in Australia to voice and representation at work. *Adelaide Law Review* 34, 21–41.
Burns R (2014) The sharing economy's 'First Strike': Uber drivers turn off the app. *In These Times*, 22 October, 2014. Available at: http://inthesetimes.com/working/entry/17279/the_sharing_economy_first_strike_uber_drivers_turn_off_the_app.
Campbell AF 2019. The recession hasn't ended for gig economy workers. Vox, 28 May, 2019. Available at: https://www.vox.com/policy-and-politics/2019/5/28/18638480/gig-economy-workers-wellbeing-survey.
Card D and Krueger A (1995) *Myth and Measurement: The New Economics of the Minimum Wage*. Princeton, NJ: Princeton University Press.
Chartered Institute of Personnel and Development (2017) *To Gig or Not to Gig? Stories from the Modern Economy*. London: CIPD.
Conger K (2020) Uber and lyft drivers in California will remain contractors. *New York Times*, 7 November, 2020. Available at: https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html.
D'Arcy C and Gardiner L (2014) *Just the Job – Or a Working Compromise? The Changing Nature of Self-employment in the UK*. London: Resolution Foundation.
De Stefano V (2016) *The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowdwork and Labour Protection in the 'Gig-Economy'*. Geneva: International Labour Office.
Fang L (2022) Uber CEO admits company can afford labor protections for drivers. *Intercept*, 7 January, 2022. Available at: https://theintercept.com/2022/01/07/uber-drivers-labor-protections-dara-khosrowshahi-european-union/.
Fear J (2011) *Polluted Time: Blurring the Boundaries between Work and Life*. Policy Brief No. 32, Canberra: The Australia Institute.
Freelancers Union, and Elance-oDesk (2013) *Freelancing in America: A National Survey of the New Workforce*. New York: Freelancers Union. https://www.shareable.net/wp-content/uploads/2014/09/https__fu-web-storage-prod.s3.amazonaws.com_content_filer_public_c2_06_c2065a8a-7f00-46db-915a-2122965df7d9_fu_freelancinginamericareport_v3-rgb.pdf
Gall G (2016) Is Uber ruling the beginning of the end for bogus self-employment? *The Conversation*, 5 November, 2016. https://theconversation.com/is-uber-ruling-the-beginning-of-the-end-for-bogus-self-employment-68010.

https://doi.org/10.1017/elr.2023.57 Published online by Cambridge University Press

Grierson J and Davies R (2017) Pimlico plumbers loses appeal against selfemployed status. *Guardian*, 11 February, 2017.
Griswold A (2014) Uber just caved on a big policy change after its drivers threatened to strike. *Slate*, 12 September, 2014. Available at: http://www.slate.com/blogs/moneybox/2014/09/12/uber_drivers_strike_they_protested_cheap_uberx_fares_uber_backed_down.html.
Hughes J (2017) Uber threatens to leave Quebec over new driver training requirements. *The Drive*, 27 September, 2017. Available at: https://www.thedrive.com/article/14652/uber-threatens-to-leave-quebec-over-new-driver-training-requirements.
intellinews, bne (2018) *Uber Reaches Agreement with the Czech Government*. Last Modified 12 March. Available at: https://www.intellinews.com/uber-reaches-agreement-with-the-czech-government-138071/.
International Transport Forum (2019) *Regulating App-Based Mobility Services*. Paris: Organisation for Economic Cooperation and Development.
Ioulia Bessa SJ, Neumann D, Stuart M, Trappmann V and Umney C (2022) *A Global Analysis of Worker Protest in Digital Labour Platforms*. Geneva: International Labour Organisation, ILO Working Paper 70. www.ilo.org/wcmsp5/groups/public/—dgreports/—inst/documents/publication/wcms_849215.pdf.
Katz LF and Krueger AB (2016) *The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015*. Washington, DC: National Bureau of Economic Research. Available at: http://www.nber.org/papers/w22667.
Kenyon G (2016) The curse of flexible work. *BBC*. 9 September. https://www.bbc.com/worklife/article/20160909-the-curse-of-flexible-work.
Kilhoffer Z, Lenaerts K and Beblavý M (2017) *The Platform Economy and Industrial Relations: Applying the Old Framework to the New Reality*. Brussels: Centre for European Policy Studies.
Knott M (2022) 'We've got the numbers': Why politicians are wooing Indian Australians. *Sydney Morning Herald*, 15 April, 2022. Available at: https://www.smh.com.au/national/we-ve-got-the-numbers-why-politicians-are-wooing-indian-australians-20220414-p5adgj.html.
Kun MS and Sullivan KD (2018) California supreme court adopts "ABC Test" for independent contractors. *Wage and Hour Defense Blog*. Epstein Becker Green. Last Modified 30 April. Available at: https://www.wagehourblog.com/.
Lebowitz T (2018) California's top court creates new test for independent contractor vs. employee, re-interprets 102-year old definition. *Who Is My Employee? Baker Hostetler LLP*. Last Modified 30 April. Available at: https://whoismyemployee.com/.
Marin-Guzman D (2018) Future of work inquiry seeks to cover gig economy under employment definition. *Australian Financial Review*, 19 September, 2018. https://www.afr.com/policy/economy/future-of-work-inquiry-seeks-to-cover-gig-economy-under-employment-definition-20180919-h15l5m.
Metcalf D (2008) Why has the British National minimum wage had little or no impact on employment? *Journal of Industrial Relations* 50, 489–512.
Minter K (2017) Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales. *Economic and Labour Relations Review* 28, 438–454.
Moreno JE (2020) Uber poll: Drivers "overwhelmingly support" independent contractor status. *The Hill*, 25 August, 2020. Available at: https://thehill.com/policy/technology/513506-uber-poll-drivers-overwhelmingly-support-independent-contractor-status/.
Moylan J (2017) Bike courier wins 'Gig' economy employment rights case. *BBC News*, 7 January, 2017. https://www.bbc.com/news/business-38534524.
Murphy C (2020) Uber bought itself a law. Here's why that's dangerous for struggling drivers like me. *Guardian*, 12 November, 2020. Available at: https://www.theguardian.com/commentisfree/2020/nov/12/uber-prop-22-law-drivers-ab5-gig-workers.
NDIS Commission (2023) *Insights Report: Own Motion Inquiry into How Platform Providers Operate in the NDIS Market*: National Disability Insurance Scheme Commission. Available at: https://www.ndiscommission.gov.au/own-motion-inquiry-platformproviders.
O'Donovan C (2017) Uber rallies drivers against teamster unionization efforts with podcasts and pizza parties. *Buzzfeed News*, 10 March, 2017. https://www.buzzfeednews.com/article/carolineodonovan/uber-to-seattle-drivers-protect-your-freedom-from-the-teamst.
Organisation for Economic Cooperation and Development (1994) *The OECD Jobs Study: Facts, Analysis, Strategy*. Paris: OECD.
Organisation for Economic Cooperation and Development (2009) *Employment Outlook*. Paris: OECD.
Peetz D (2021) Institutional experimentation, directed devolution and the search for policy innovation. *Relations Industrielles/Industrial Relations* 76, 69–89.
Peetz D (2022) Road transport regulation, safety and prospects for the "gig economy." *Australian Journal of Labour Law* 35, 165–184.
Peetz D (2023) *Self Self-Employment myths and realities: How widespread can 'gig' work become, and how could it be regulated?* Canberra: Centre for Future Work, Australia Institute.

https://doi.org/10.1017/elr.2023.57 Published online by Cambridge University Press

Phillips K (2008) *Independence and the Death of Employment*. Ballan, VIC: Connor Court Publishing.
Salter WEG (1969) *Productivity and Technical Change*. Cambridge, UK: Cambridge University Press.
Sansom A (2017) Bicycle couriers protest against takeaway food service Deliveroo. *France24*, 12 August, 2017. Available at: http://www.france24.com/en/20170812-france-paris-protest-food-delivery-service-deliveroo-financial-insecurity-emmanuel-macron.
Sapara-Grant A (2021) Location-based platform work presents benefits—and risks—to workers in the global south. *DAI Global*. Last Modified 4 November. Available at: https://dai-global-digital.com/location-based-platform-work-presents-benefits-and-increasing-risks-to-workers-in-the-global-south-part-1.html.
Schoenberg S (2016) Gov. Charlie Baker signs law regulating Uber and Lyft in Massachusetts." *Masslive.com*. Available at: https://www.masslive.com/politics/2016/08/gov_charlie_baker_signs_law_regulating_uber_and_lyft_in_massachusetts.html.
Smith Y and Horan H (2023) Can Uber ever deliver? Part thirty-three: Uber isn't really profitable yet but is getting closer; the antitrust case against Uber. *Naked Capitalism*. Last Modified 9 August. Available at: 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.
Stewart A and Stanford J (2017) Regulating work in the gig economy: What are the options? *Economic and Labour Relations Review* 28, 1–18.
Thompson A (2022) 'Laws hopelessly outdated': Unions push for independent body for gig workers. *Sydney Morning Herald*. Available at: https://www.smh.com.au/national/nsw/laws-hopelessly-outdated-unions-push-for-independent-body-for-gig-workers-20220207-p59ubl.html.
Tibshraeny J (2023) Uber ups ante on contractor v employee debate. *New Zealand Herald*. Available at: https://www.nzherald.co.nz/business/uber-ups-ante-on-contractor-vs-employee-debate/K6EHLSG6LFBHFH5VIE242QGUJI.
Trakstar Hire (2016) Freelance vs. full-time: The pros and cons of Hiring an independent contractor. *Trakstar Hire*. Last Modified 23 February. Available at: https://hire.trakstar.com/blog/freelance-vs-fulltime-pros-cons-hiring-independent-contractor.
Wilkins R, Vera-Toscano E, Botha F, Wooden M and Trinh T-A (2022) *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 20*. Melbourne: Institute of Applied Economic and Social Research.
Winkler MA (2019) States with high minimum wages are doing just fine. *Bloomberg*, 26 July, 2019. Available at: https://www.bloomberg.com/opinion/articles/2019-07-26/minimum-wage-hikes-don-t-stifle-state-economic-booms.
Workplace Express (2023) Burke negotiates changes to Loopholes gig provisions. *Workplace Express*, 9 November 2023. Available at: https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=62881.

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