SELF-EMPLOYED AUSTRALIA

The registered business name of
Independent Contractors Australia
Incorporated Victoria No A0050004U
ABN: 54 403 453 626
www.selfemployedaustralia.com.au
PO Box 13103 Law Courts 8010 Vic

Submission to the Productivity Commission Interim Report
5-year Productivity Inquiry
A more productive Labour market
Interim Report

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This submission comments on section 2.4: 'Regulation and digital platform work' of the Productivity Commission's Interim Report. This section of the Interim Report discusses the gig economy, gig platforms, independent contractors and the self-employed sector and how these forms of work should be regulated. Below Self Employed Australia responds to this discussion.

Overview – Regulation Principles

Self-Employed Australia (SEA) takes the view that people have a right to be self-employed—that is, to be their own boss. No regulation of gig platforms or other labour environments should restrict, take away from or diminish that right, either directly or through connivence. SEA opposes any regulation of gig platforms that harms the right to be self-employed.

Within this context we support the Commissions statement that:

> Regulation should evolve to meet the workplace relations challenge of innovative new business models, without stymying their potential contributions to productivity. (page ix)

Identifying who is self-employed – ILO

There is often alleged to be confusion about how to identify the difference between an employee or a self-employed (independent contractor) person. The Interim Report raises this. In fact, there is no confusion.

The simple legal and behavioural truth is that

- An **employee** earns income through the **employment contract**.
- A **self-employed (independent contractor**) person earns income through the **commercial contract.**

It is as straightforward as that.

The International Labour Organisation has stated that this is the simple truth.

In 2003 the International Labour Organisation resolved the definition of 'worker' as follows.

> The **term employee** is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship.
>
> The **term worker** is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee.
>
> **Self-employment** and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.
> Report of the Committee on the Employment Relationship (page 52)

In other words

- the term *worker* is a generic term.

Underneath that are two sub-terms:

- Employee
- Self-employed person

In the first half of 2005, the ILO office in Geneva produced a 90-page Report and questionnaire in preparation for the 2006. (See here for the Report.) The Report "…is based on a review of the relevant laws in more than 60 ILO member states" (par 70) across both common law and roman law jurisdictions. It is arguably the most authoritative, factual survey and report on how the law globally identifies the difference between an employee and a self-employed person. The Report states:

> What is surprising is the amount of convergence between the legal systems of different countries in the way they deal with this [distinguishing employment] and other aspects of the employment relationship, even between countries with different legal traditions or those in different parts of the world…. Irrespective of the definition used, the concept of a worker in an employment relationship has to be seen in contrast to that of a self-employed or non-dependent worker… (Paragraphs 86-87)

This ILO report formed the backdrop to the 2006 ILO debate on the issue. The 2006 debate concluded with the following 2006 ILO Recommendation.

> "National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships…" (Page 77, Item 8)

Australia is a signatory to this ILO labour definitional settlement. It therefore has obligations arising from it with which it must comply.

Based on this 2006 ILO obligation the Australian Parliament enacted the *Independent Contractors Act* (2006) along with the (anti) sham contracting provisions of the *Workplace Relations Act*.

The statement from the Productivity Commission's Interim Report quoted above that,

> Regulation should evolve to meet the workplace relations challenge of innovative new business models, without stymying their potential contributions to productivity.

is completely consistent with the ILO 'instruments' outlined above and to which Australia's has obligations.

SEA submits that regulation of the gig/platform economy must be bound by these ILO obligations.

Platform/gig work – Comment on statistics

The Interim Report suggests that there is inadequate clarity on the number of people in the gig/platform economy. SEA has completed a comparative statistical analysis of platform and gig work from the UK, USA and Australia that may be helpful. Link here.

However we consider the data from the Victorian Gig Inquiry are probably the best guide at this stage. What is most instructive from those data is that platform/gig work is overwhelmingly a 'top up' form of income.

Of Australia's workforce of around 11.9 million

- 7 per cent (*around 830,000)* have done gig work in any year. But
- only 0.19 per cent of the total workforce (*around 22,500)* have earned their full-time income from gig work.

In other words, around 807,000 people do gig as 'odd job'-type work in addition to (say) their full-time job.

These Victorian statistics do not fit with the TWU's survey referenced in the Interim Report:

> About 77.6 per cent of rideshare drivers and 86.1 per cent of food delivery platform workers who responded to a Transport Workers' Union (TWU) say that platform work was their main source of income (TWU 2021, p. (p76)

Any suggestion that this TWU survey reflects actual income dependency is hard to believe when compared with the Victorian government data that only 22,000 people nationally use platform/gig work for their full-time income.

The Interim Report states

> There is no standard definition for platform work, or what the 'on-demand' economy comprises. (And). Most platform workers are classified as independent contractors. (page 65)

First, we say that focusing on 'independent contractors' in the Interim Report is too narrow. The more correct perspective is to look at all self-employed people, which takes into account 'owner managers' as identified by the ABS. Our summary of those statistics is as follows:

Year	Independent Contractors [Definition from 2008]	Owner Managers (self-employed)		**Total self-employed**
		With employees	Without employees	
2021 Aug[16]	1,003,600	805,800	1,391,900	2,197,700
2021 Aug[16]	7.8%	6.2%	10.8%	17.0%
2019 Aug[15]	1,049,300	756,700	1,397,500	2,154,200
2019 Aug[15]	8.2%	5.9%	10.9%	16.8%
2016 Aug[13]	1,028,800	729,400	1,288,000	2,017,400
2016 Aug[13]	8.7%	6.2%	10.9%	17.1%

2015 Aug[12]	1,012,200	764,700	1,310,200	2,074,900
2015 Aug[12]	8.7%	6.6%	11.2%	17.8%

https://selfemployedaustralia.com.au/independent-contractors-how-many/independent-contractors-how-many-in-australia/

Second, we say that it's quite clear what 'platform work' is. It is an administrative process for managing 'set job' work most frequently referred to as 'gig' work. This is not something new, having been the primary structure of the entertainment industry for decades even centuries, for example.

The Beatles, The Stones, Cold Chisel, AC/DC all did and/or do 'gigs'. Like countless musicians, stand-up comedians, crooners, harpists, you name them, they all do gigs. It's the lifeblood of the entertainment industry locally and globally.

A gig is pretty simple. There's a contract for a set price to do something. "Come to my pub. Play for three hours and I'll pay you a thousand bucks", says the pub manager. "Done", says the singer. The singing done and the money paid. End of contract.

What's happened over the last 15 years-or-so is that this familiar entertainment industry 'gig' model has taken new forms. Now gig work is available for ride-share, food delivery, aged and disability care, and odd jobs. The list goes on.

What's happened is that online technology has made gig work secure. Gig platforms enable anyone wanting to do a job to connect with someone needing a job done. The revolution is that job specifics and price are upfront and agreed by the parties. The gig platforms also make the payments and enable both the 'doer' and the 'receiver' of the service to rate each other. Platform work is easy to understand and readily identifiable.

Gig/platform work and Coase's theory of the firm

Gig platforms challenge the theory of the firm expounded by Ronald Coase in 1937 and accepted as economic gospel ever since.

In simplified lay terms, Coase argued that only the employment-structured firm could manage and contain transaction costs. That is, that the control mechanisms embedded in the employment contract enabled efficiencies in the delivery of goods and services that could not be achieved through other contract models. Coase came to this position having studied firms' operations in a pre-World War II environment.

What has occurred in the 21st century is that technology has overtaken Coase's argument. It's not that Coase's theorem is no longer relevant. Many large firms and particularly large government organisations operate on Coasean assumptions. Coase observed a pre-World War II economy where commercial contracts were all paper-based and slow to put into place. Information technology, in all its forms, now enables commercial contract transactions to happen almost instantaneously.

Gig platforms are at the cutting edge of the application of new on-line contract management technology. The platform model and operations challenge the Coasean model

of the firm because technology platform firms make transactions costs cheaper, simpler and more reliable than those found in Coasean 'employment firms'. This explains much of the political push-back against platforms.

Coasean firms are under competitive pressure from non-Coasean (platform, etc) firms. The institutions that regulate Coasean firms are involved in a battle for their relevance and future. These institutions are private, public, legal and academic. They feel highly threatened by both the existence of self-employed people, gig work and gig platforms. They are marshalling their well-entrenched political power to stop or limit competition for power. This explains the 'third way' push.

The Third Way Push

The 'third way' push is referenced in the Interim Report. (Page 71) The idea of a 'third way' involves allocating employment 'rights' to self-employed people, such as holiday pay for example.

This 'third way' idea has been around since the 1960s. It was initiated by a Professor Arthurs of Canada in his 1965 thesis *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*. Arthurs' thesis was based on a study of self-employed fisherman working off the east coast of Canada who had only one cannery where they could effectively sell their catch. Arthurs argued that although the fisherman were operating as small business people, they were nonetheless 'dependent'.

The self-employed dependency concept was central to the ILO debates on the 'employment status' between around 1996 and 2003. Significantly it was removed as a discussion point in the ILO paper of 2005 (referred to earlier) following the 2003 identification that there are only employees or self-employed people and nothing 'in between'. This was reinforced in the 2005 paper reporting on the truth of the law on this matter globally. That is, to argue or 'invent' a third way definition is to argue that a commercial contract (self-employment) can be a little bit an employment contract. This is a nonsense at law and in practice.

However, the third way idea remains alive. Principally it is alive most recently because of the UK Uber decision of 2021 that allocates some employee entitlements to Uber ride-share drivers. This UK decision, however, is drawn from section 230(3) of the UK *Employment Rights Act 1996*. This predates the ILO determinations of 2003 and 2006. Yet the law remains on the UK statute books.

It creates a statutory definition of 'workers' that sits outside the common law. It defines this 'other worker' as an individual working under,

> "…any other contract, … whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly."

This UK statute could presumptively be used as a model for the current Australian government's proposal to give 'employment rights' to self-employed people. Parliaments

can make laws declaring anything they like, whether this fits reality or not. Parliaments can declare, for example, that an apple must be labelled an orange.

In this instance, the ‘third way’ proposal badly distorts the commercial contract, a contract this is strictly regulated under competition law. The intrusion of employment law into commercial contract law is fraught with danger for commercial activity and the operations of a competitive market economy. This creates havoc in commercial contracts and is doing serious damage to the UK economy at present.

In August 2022, the London School of Economics reported that UK self-employed numbers were down by 500,000, and dropping. It said, ‘The economy is not going to recover until we start treating them (self-employed people) better.’

Should platform pay and conditions be regulated?

The Interim Report raises this issue. (page 75)

The answer is ‘yes’ and ‘no’. Where platform work is undertaken by employees, they are and should be subject to all the same regulations applying to any employee.

Where platform work is undertaken by self-employed (independent contractor) people, the work is and should be subject to commercial-style regulation.

Regulation of self-employed (independent contractors) is currently and should remain subject to appropriate regulation as follows:

Unfair contract laws. That is the contract between platform and worker must comply with these competition/commercial based laws. This is a key protection.

Work safety laws. (Interim Report pages 86 & 89) The legislative structure of all OHS laws in Australia embraces self-employed (independent contractors) persons within the responsibility loop of both the worker and those who engage them. That is, every party is responsible for what they reasonably and practicably control.

Road Safety: The much reported and (correctly) concerning coverage of multiple road deaths of food delivery drivers in NSW is arguably not a function per se of platform/gig work but rather a result of the state of the roads in NSW at the time. That is, the move to road separation (for example) of bikes/scooters etc from vehicle traffic is a positive response to such tragic deaths.

Workers’ Compensation. (Interim Report page 87) There is justifiable criticism of the lack of access to injury compensation for people working through platforms as self-employed people (independent contractors).The criticism here must, however, be levelled squarely at the state and national workers’ compensation schemes, for they all prohibit individual self-employed (independent contractors) from accessing the schemes. There is urgent need to reform the workers’ compensation schemes in this respect to enable individual self-

employed people to directly register with the schemes without being forced into 'employment.'

Minimum Rates: The *Independent Contractors Act* (2006) provides that no independent contractor can be paid below that of a like-employee. This provision, however, has rarely been used. In this respect there is a regulatory failure. However, there is a critical balance that must be struck here. Ensuring 'minimum rates' are upheld cannot and should not be abused in such a way that controlling 'rates' creates circumstances of price-fixing and breach of competition laws. Any regulation in this area must have firm ACCC oversight.

Collective bargaining. (Interim Report pages 81-84) Similarly, any collective bargaining capacity must ensure that such bargaining is not abused for the purposes of monopoly or quasi-monopoly creation and the breaching of competition laws. Collective bargaining for self-employed (independent contractors) is available through ACCC processes and this is appropriate.

Dispute Resolution. (Interim Report page 85)
Over the last decade or so, Australian governments (state and federal) have created small business commissioners. The Commissioners have a primary role facilitating dispute resolution for self-employed persons. Arguably these functions are unique in the world. For the most part the Commissioners operate as mediators. Success rates on resolution are reported as high. However, the NSW Commissioner's powers extend to the ability to report to the courts where this is deemed helpful. While in most cases mediation should be the preferred process, SEA cautiously supports consideration of extending those powers along the lines that apply in NSW.