



Protecting workers, whatever they're called

ACTU Research Note – May 2023

AUSTRALIA NEEDS A
Pay Rise
Australian Unions
2013-2024

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From insecure work to wage theft, big businesses have found too many ways to exploit weaknesses in Australia's workplace laws enabling them to pay people less. They have been aided by 9 years of Coalition Governments either deliberately making things worse or just turning a blind eye. This has held back wage growth and held back people's lives.

This ACTU Research Note dives deeper into a key example of this: employers calling a worker a "contractor" to deny them all of the protections, pay and conditions that otherwise come with being an employee. Research included in this note finds that:

- Sham or "dependent" contracting is at record highs: for the first time ever, the majority of contractors are now unable to subcontract their own work.¹
- New "sole trader" ABNs and new pty ltd ABNs have outpaced employment growth since 2019, and have boomed during COVID.
- For big business, this is a cost cutting measure: workers on sham or dependent contracting arrangements earn \$242.80 less per week than genuine independent contractors. Totalled over a year, the pay gap comes in at \$12,644.² They also earn \$111 less per week than employees, or \$5,800 per year.
- Gig workers lose \$400 million a year in potential superannuation because they are not entitled to the superannuation guarantee that employees are, according to Industry Super Australia. This means that someone who works for just 5 years as a gig economy worker would have \$28,700 less at retirement than if they were engaged as an employee.
- 45 per cent of transport workers in the gig economy report being paid less than the minimum wage according to research by the Transport Workers Union.
- Unfair commercial pressures in road transport, facilitated by engaging drivers under different work arrangements are leading to deaths on the road, low pay, and poor working conditions.

¹ 'Characteristics of Employment, Australia' (Australian Bureau of Statistics, August 2022).

² Ibid, ACTU calculations.

Sham or dependent contracting exploded under the Coalition Governments of 2013-2022. Loopholes used by bosses were made wider by favourable findings in the courts, and workers' safety and wages were eroded by massive multinationals, particularly via the growth in gig or platform work during the pandemic.

What's in a name?

Most people who perform work are directly employed by their employer. As "employees" their terms and conditions come from Awards, Enterprise Agreements or individual contracts of employment, and they have the protection of labour law, including the *Fair Work Act*. They are also entitled to superannuation and are protected by workers' compensation and work health and safety laws, among other significant protections.

Yet some companies attempt to avoid their legal responsibilities to their workforce by engaging their workers as contractors. This includes a variety of practices, ranging from:

- Sham contracting: where a person is improperly engaged to perform work as a contractor when they should be an employee.
- Dependent contracting: where the contractor is highly dependent on businesses for their work and their relationship is "employee-like", a concept that can overlap with sham contracting.
- Genuine independent contracting: where a business, for example, outsources its work to sole contractors that may work for multiple clients.

While gig and platform work are relatively new, they can encompass all of these forms of work. And while these employer tactics to cut costs by evading employment law are not new, they have gotten a lot easier, thanks to two recent High Court decisions, and the rapid growth in gig and platform work during the pandemic.

The High Court overturns the definition on "employee"

In early 2022, two High Court decisions radically recast the legal test of whether or not someone is an employee or a contractor. In *Jamsek* and *Personnel Contracting*, the Court held that the terms of the contract, and not the reality of the relationship between the parties, is the overriding determinant of whether or not someone is an employee or a contractor.

Prior to these decisions courts would instead weigh up "multiple indicia" to determine this question including:

- Does the worker have authority over their own work?
- Is the worker permitted to work with other companies?
- Is the worker subject to a roster of work or regular hours of engagement?
- Is the worker able to negotiate the terms of the contract other than that which is offered by the company and is there a real ability to increase profitability by changing working arrangements?
- Does the worker contribute other substantial capital to performance of the contract?
- Is the worker permitted to delegate or subcontract work?

But the High Court in *Personnel* and *Jamsek* focused almost exclusively on the terms of the contract and the rights they created rather than these practical considerations above. In short, a boss can call someone an "independent contractor" in their letter of offer, but treat them like an employee, without any of the protections of an employee. This creates a large incentive for employers to deliberately mischaracterise their workforce as contractors, give them inferior pay and conditions, with the knowledge that this will attract no negative legal consequences. It is no wonder then that the business lobby hailed the High Court's decision at the time as "sensible".³

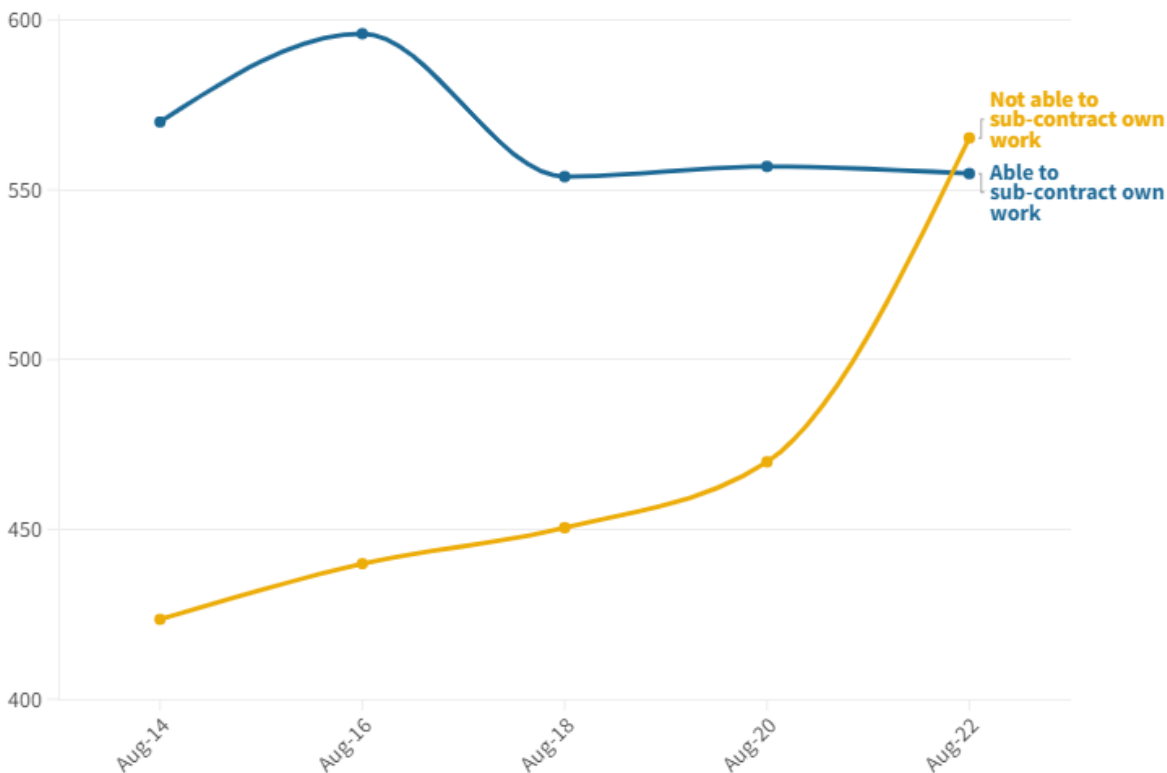
Prevalence of Sham or “Dependent” Contracting in the Australian Economy

Sham or dependent contracting in Australia is on the rise. More than 1.1 million workers are independent contractors accounting for 8 per cent of employed persons.

One of the best indicators for whether an independent contractor is truly independent is if they're able to sub-contract out their work to others. More than 565,000 contractors are unable to do so, outnumbering for the first time ever, those who can at just 550,000. This shows just how rapidly this form of dependent contracting is growing.

³ Ai Group (9 February 2022), "High court's sensible ZG Operations v Jamsek decision good for business certainty, investment and jobs", <https://www.aigroup.com.au/news/media-centre/2022/high-courts-sensible-practical-and-fair-zg-operations-v-jamsek-decision-will-be-good-for-business-certainty-investment-and-jobs/>

More sham contracting than ever



Source: ABS Characteristics of Employment, 2014 to 2022, Whether able to sub-contract own work by Reference year

This measure is particularly useful as workers who *are* able to subcontract out their own work are the *least likely* to be genuine employees. It also indicates:

- The worker may not be able to work for other companies, as their time must be devoted to the contract,
- They do *not* have authority over their own work as they are unable to contract someone to perform tasks within the service, and
- They are less likely to be able to negotiate with the employer terms which may increase profitability, and,
- They may be subject to a roster or hours of engagement as their labour is the one which is required to perform work for the entity.

For big business, this is a cost cutting measure: workers on sham or dependent contracting arrangements earn \$242.80 less per week than genuine independent contractors. Totalled over a year, the pay gap comes in at \$12,644.⁴ They also earn \$111 less per week than employees, or \$5,800 per year.

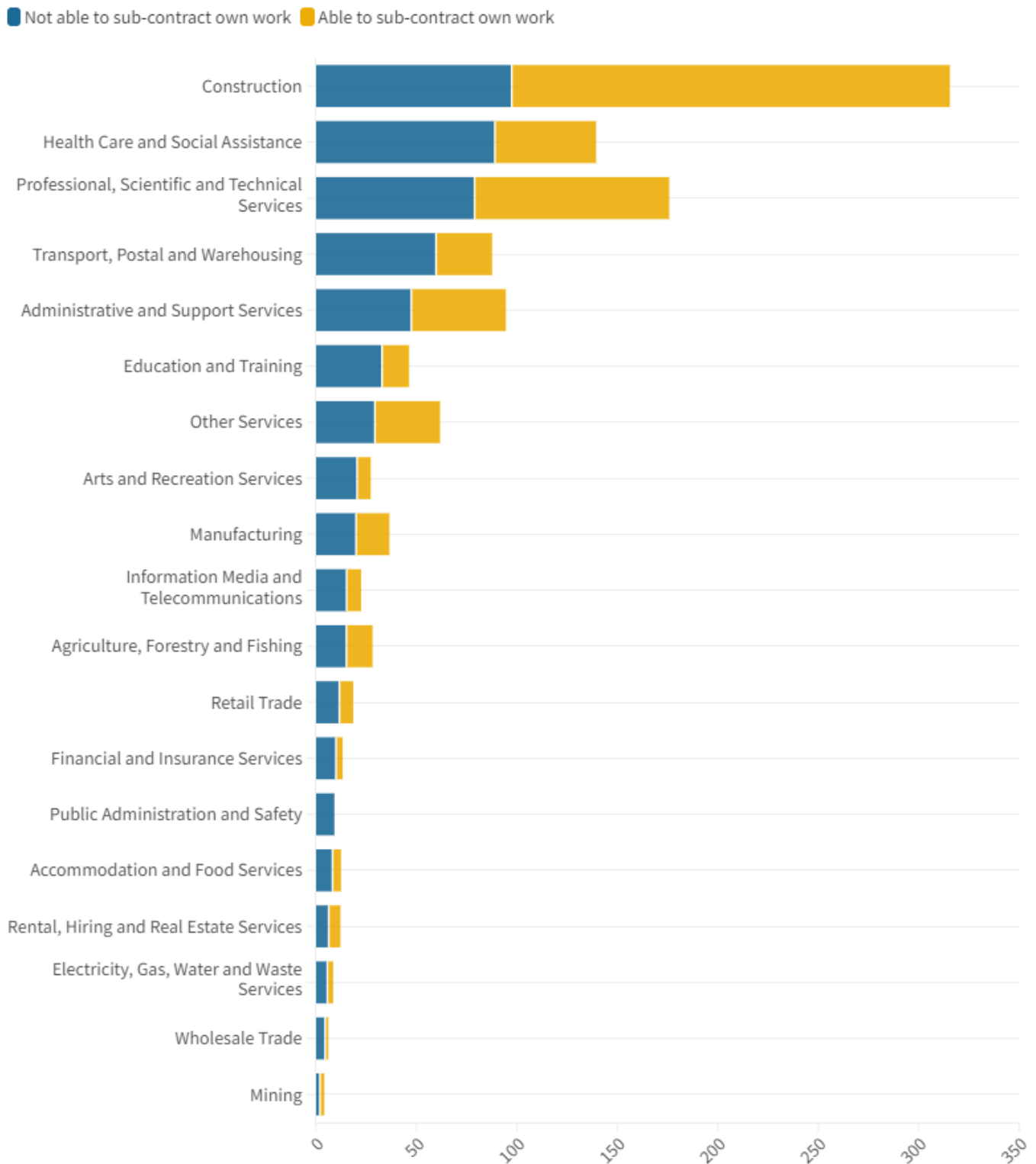
⁴ ABS Characteristics of Employment, August 2022, ACTU Calculations.

The industries where this is rife are construction, transport, professional services, health care and social assistance and administration and support services.

Nearly one third of independent contractors are engaged in the construction industry. The Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) has previously calculated that between 26% and 46% of so-called independent contractors in the construction industry are engaged on sham contracts.⁵

⁵ CFMEU Construction & General (March 2011), Race to the Bottom: Sham Contracting in Australia's Construction Industry, page 2.

Industry of main job and whether able to sub-contract own work

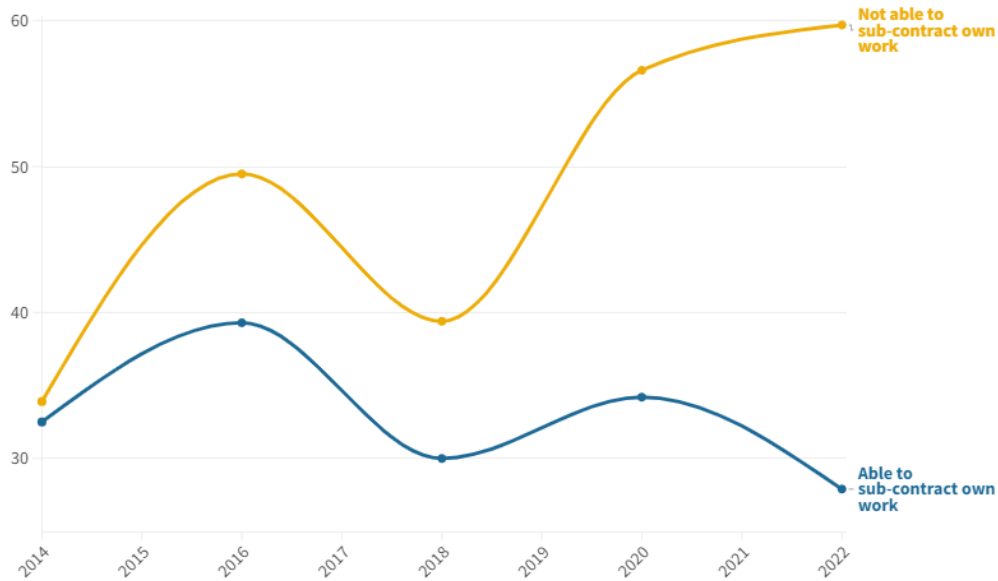


Dataset: ABS Characteristics of Employment, 2014 to 2022, TableBuilder

Of the industries which have the highest prevalence of independent contractors the ones which have received the most pronounced growth are those which are also dominated by 'independent contractors' who may not subcontract out their own work.

Transport, Postal and Warehousing

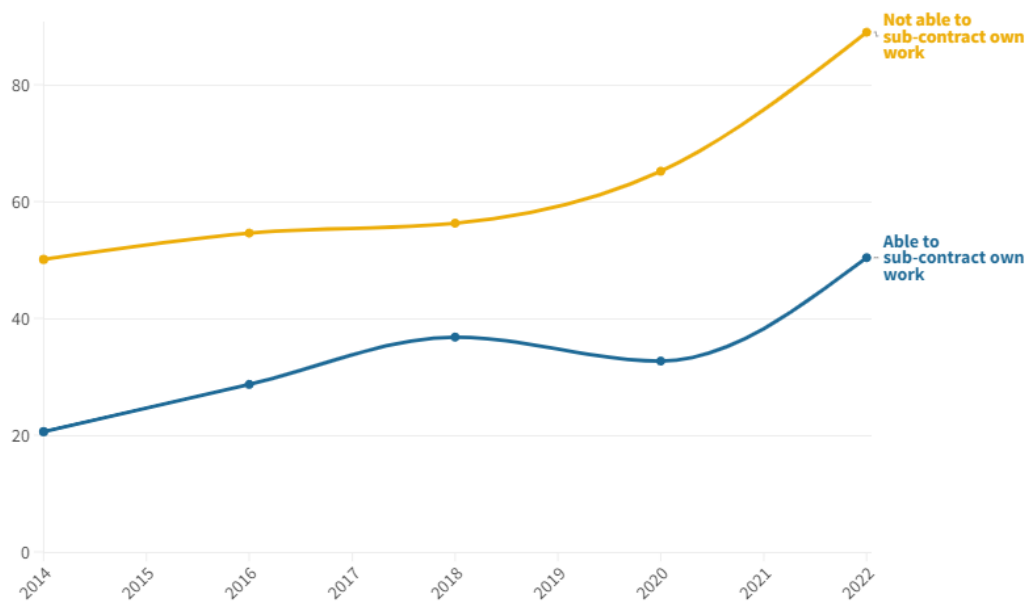
Industry of main job by Reference year and Whether able to sub-contract own work



Source: ABS Characteristics of Employment, 2014 to 2022, TableBuilder

Health Care and Social Assistance

Industry of main job by Reference year and Whether able to sub-contract own work



Source: ABS Characteristics of Employment, 2014 to 2022, TableBuilder

The explosion of workers employed as independent contractors in both the transport and health sector are driven by the rise of the gig economy, particularly in response to the pandemic and the associated lock-downs.

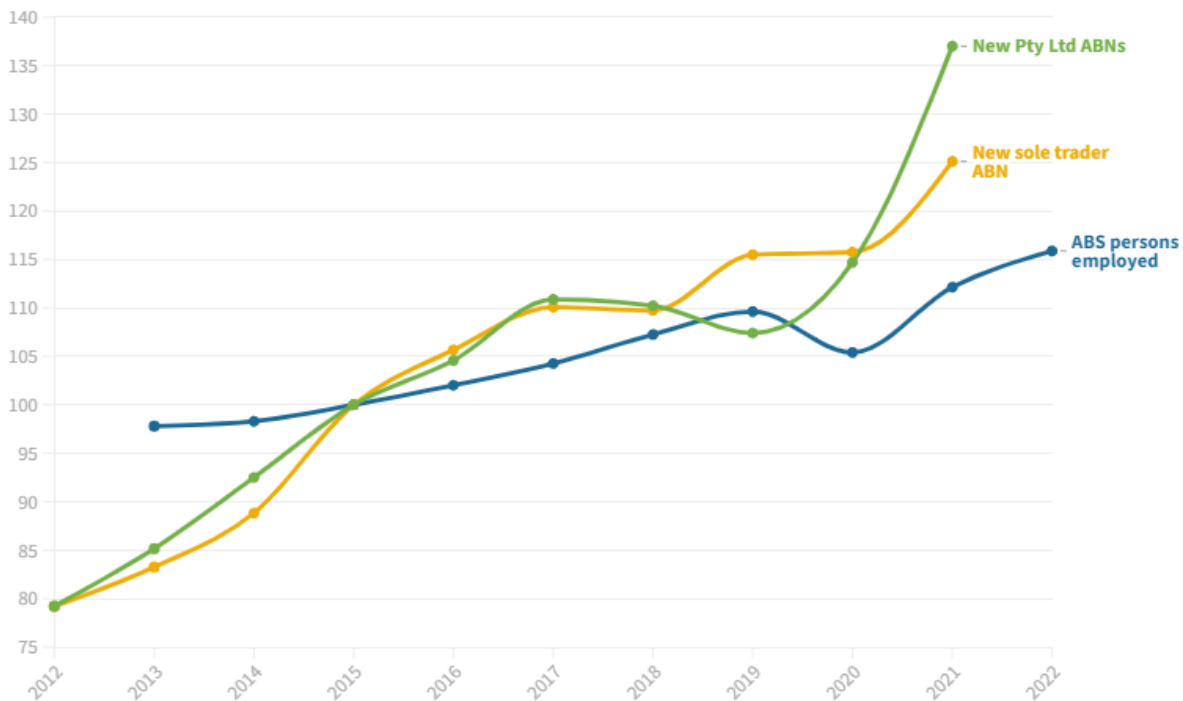
The Gig Economy

Gig economy workers are some of the least secure and lowest paid workers in the country. Despite performing work which would ordinarily be performed by employees, multinational tech giants have pushed these workers into contracting relationships, with little to no rights.

There is absolutely nothing new about this corporate tactic. It is age old. What is new is its growth, as technology has enabled companies like Uber and disability service provider Mable to engage and control vulnerable contractors at scale while avoiding employment law.

Rapid growth in ABNs is outpacing employment growth

All indexed, 2015 = 100



Sources: ABS, Labour Force Australia, November 2022, ABS, Working Arrangements August 2021, ABS, Characteristics of Employment, Australia

Recent data from the ABS shows that New Pty Ltd ABNs and new Sole Trader ABNs have outpaced employment growth since 2019, and have boomed through COVID.

Gig workers often earn well below minimum wage, with 45 per cent of transport gig workers reporting they earn less than the minimum wage.⁶ Of those who need to work more than 40 hours per week in the gig economy, 66 per cent earn less than minimum wage.⁷

⁶ Sarah Mawhinney, Joey Reinhard, and Lefebvre Marni, *Tough Gig: Worker Perspectives on the Gig Economy* (McKell Institute, 2023).

⁷ Mawhinney, Reinhard, and Marni.

Uber itself brags about workers in Uber Eats being paid below the transport award, claiming workers in Sydney ‘takes home’ \$21.55 per hour during peak mealtimes.⁸

Uber Eats wage claim, average wage rate during peak mealtimes (2021)

\$21.55/hour, no superannuation paid

Minimum hourly rate, casually employed as a Transport Worker Grade 1, bicycle courier in the Road Transport and Distribution Award (2021)

\$26.26 per hour plus paying superannuation

The gig economy disproportionately exploits already vulnerable parts of the community including recent immigrants, those with difficulty finding employment, and women. Uber itself brags that a boom in UberEats riders could be attributed to the lack of Government support available during the pandemic, “nearly 8 in 10 delivery workers on Uber Eats were not able to access government support during the pandemic” and that six in ten delivery workers joined a delivery platform during COVID-19 to support themselves financially.”⁹ During the pandemic, the Morrison Government denied casuals with less than 12 months of service access to JobKeeper payments. At least 540,000 casual workers lost their job over that time in 2022.¹⁰

Industry Super Australia has found that gig economy workers lose \$400 million a year in potential superannuation because, unlike employees, they do not have a clear entitlement to it. Even temporary work in the gig economy has long term impacts on workers security in retirement.

- A typical transport and food delivery gig worker working 14.5 hours per week in their early 20s could be missing out on \$1,900 in super contributions per annum. Those who work in that sector of the gig economy for 3 years could have \$17,200 less in their super balance at retirement, while those working for 5 years could have \$28,700 less at retirement.¹¹
- A typical carer in the gig economy working 8.6 hours per week in their early 20s could be missing out on \$1,100 in super contributions per annum. Those who work in the sector for 3 years could have \$10,800 less in their super balance at retirement, while those working for 5 years could have \$17,500 less at retirement.¹²

Gig workers are often subjected to unsafe work and are rarely covered by work health and safety laws, and are often ineligible for workers compensation. Delivery riders who miss

⁸ Accenture commissioned by Uber, *Making Delivery Work for Everyone*, March 2021.

⁹ Accenture commissioned by Uber.

¹⁰ ABS, *Characteristics of Employment*, August 2022

¹¹ Tina Samardzija, Bruce Bastian, and Lu, *Extending the Super Guarantee to Gig Workers* (Industry Super Australia, 2023).

¹² Samardzija, Bastian, and Lu.

periods of work due to injury have no support as they're considered business owners rather than employees.

Gig workers feel forced to put themselves at risk to make enough money and protect their job. 51 per cent of respondents to a McKell Institute report indicated that gig workers are putting themselves at risk and more than half have work-related stress, anxiety or mental health issues.¹³ Further, a reported 33% of food delivery workers are seriously hurt or injured, 70% fear being killed every day¹⁴ and the pressure arising from low remuneration is reported by workers to be the major cause of this safety crisis.¹⁵

A safe, sustainable, viable and fair road transport industry

The road transport industry is a price-taking industry that operates on small margins and tight deadlines. Decades of evidence including academic reports,¹⁶ Parliamentary Inquiries¹⁷ and judicial findings¹⁸ have established that where unfair commercial influence and pressure is applied to transport operations, business viability is compromised with deadly consequences for road transport workers and all road users.

As it stands, the road transport industry is responsible for more workplace deaths than any other industry,¹⁹ a figure made even more tragic by the number of other road users also killed in heavy vehicle crashes. The transport, postal and warehousing industry consistently has one of the largest insolvency rates.²⁰ In recent months Scotts Refrigerated Logistics, the largest refrigerated transport operator in Australia with contracts with ASX listed companies, collapsed due in part to commercial pressures²¹ while Rivet Mining Services, a transport operator operating in the supply chain of major mining companies, also fell into administration.

The sustainability and viability of transport operators and transport workers is determined by economic arrangements imposed by those at the top of supply chains. Many transport operators, even those seemingly large enough to properly negotiate, are often dictated commercially unviable terms, such as 90 days plus payment periods, which in turn puts

¹³ Mawhinney, Reinhard, and Marni.

¹⁴ TWU, 2020 Survey Shows \$10 pay for Food Delivery Workers as NSW Politicians Push for more rights, <https://www.twu.com.au/press/survey-shows-10-pay-for-food-delivery-workers-as-nsw-politicianspush-for-more-rights/>

¹⁵ Centre for WHS, 2020, *Work health and safety of food delivery workers in the gig economy*, (Sydney: NSW Government, 2020)

¹⁶ See, for example, *Burning the Midnight Oil* – footnote 8 in Sterle sub and Wright/ Quinlay footnote 13 in Sterle sub and Belzer footnote 15 Sterle sub

¹⁷ See, for example, Sterle Inquiry Recommendations

¹⁸ See, for example, *WorkCover Authority of NSW v Hitchcock* (2004) 139 IR 439.

¹⁹ Sterle footnote 33

²⁰ Sterle footnote 54

²¹ In an administrator report

pressure on the transport workers they engage. Employee transport workers are often unable to bargain with those with the economic power while non-employee transport workers often have such little bargaining power they are effectively presented with 'take it or leave it' propositions that can force them to either accept work without making a profit or being forced to cut corners in order to do so.

Transport operators and transport workers, regardless of label, urgently require Federal Government intervention in order to stop the deadly downward spiral in standards. The market has clearly failed and the proliferation of so-called 'gig' arrangements has only exacerbated the problem.

All major parts of the road transport industry, including retail clients, major road transport operators, road transport operators in the 'gig' economy, transport associations and the TWU, have recognised these pressures and advocated for a program of fundamental change.²² This includes establishing a body with specialist expertise in road transport to set enforceable standards and resolve disputes for all transport supply chain participants, including road transport workers engaged as employees, owner drivers and gig transport workers. Failure to cover all of them will just cause businesses to restructure to reclassifying their workers or give one part of the road transport market an unfair competitive advantage over another. Given the breadth of the powers required and the manner in which those powers need to be exercised, a specialist Road Transport Division in the Fair Work Commission should be established to maintain a safe, sustainable, viable and fair road transport industry.

Protecting workers – whatever they are called

The tactics of big business and now two High Court decisions, have made a mess of who is and who isn't an employee, and the labour law protections that come with it. And it is workers, often at the bottom of supply chains, that pay the price with lower pay and unsafe working conditions. In the middle of a cost of living crisis, and a surge in "dependent" contracting arrangements, this has to end.

Solutions to this exploitation need to close all the loopholes that big business currently exploits. Those solutions also need to anticipate the next round of evasion tactics their expensive corporate lawyers will look for.

As a first step, the *Fair Work Act* needs a common sense definition of who is and who isn't an employee. The High Court decisions in *Jamsek* and *Personnel* are just invitations for big business to mislabel someone a contractor and get away with it.

²² Road Transport Roundtable 29 August 2022, Agreed Principles for a Safe, Sustainable & Fair Road Transport Industry. <https://www.twu.com.au/wp-content/uploads/2022/08/Transport-Roundtable-Principles.pdf>

Secondly, even then, a business could still deliberately mislabel someone, knowing that individual workers don't have the legal resources to engage in a long and expensive court case. So there needs to be a quick and easy way for the Fair Work Commission to sort out who is and who isn't an employee.

Thirdly, that will still leave many workers that are contractors, but still facing significant vulnerabilities and risks. These "employee-like" workers deserve at least the minimum protections of the Fair Work Act. The Fair Work Commission should therefore be given the powers to regulate such "employee-like relationships" by setting minimum standards and conditions and resolving disputes. The Commission could determine that a class of contractors are "employee-like" with reference to their degree of vulnerability, risk and job insecurity they face, as well as the degree of disparity of economic and bargaining power between the worker and the business, and similarity with directly employed workers, among other factors. The objective of these new powers would be to ensure that all workers have rights, entitlements and protections that reflect their reliance and dependency upon those engaging them.

Fourthly, given the significant power imbalance in the road transport industry that allows key powerful players to drive down conditions for all workers, there should be a specific Road Transport Division (RTD) established within the Fair Work Commission as discussed above. Given the breadth of the task to achieve a safe, sustainable and viable road transport industry, the new RTD should:

- Set enforceable standards that cover the whole industry, including workers that are employees, owner drivers and gig workers, and
- Be compelled to consider the entire supply chain, from head to toe, to ensure a holistic solution is developed and implemented rather than a piecemeal approach that just risks transferring pressures elsewhere in the supply chain.
- Have the power to resolve disputes.

Fifthly, to better clamp down on sham contracting, the prohibitions in the Fair Work Act need to be significantly improved. Currently, an employer can dodge liability for engaging in sham contracting if they did not know or were not reckless as to whether or not a contract was a contract of employment and not a contract for services. This "state of mind" test is narrow and ineffective. Instead the *Fair Work Act* should be changed simply to prohibit sham contracting, rather than focus on the state of mind of the employer involved.

Finally, independent contractors themselves need better protections, especially from unscrupulous bigger businesses imposing unfair contracts upon them. This is especially the case if key groups of contractors are not covered by the proposed powers of the FWC to regulate "employee-like" work relationships. Bringing the Unfair Contracts provisions back into the Fair Work Act and strengthening them will be key.

