

# COLLECTIVE BARGAINING BEYOND THE BOUNDARIES OF EMPLOYMENT: A COMPARATIVE ANALYSIS

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*Labour laws are designed in part to provide workers with adequate minimum labour standards, including access to collective voice and representation in establishing working conditions. They generally focus on 'employees' but an increasing number of workers are not employees. As Judy Fudge has observed, 'the forms of work and numbers of workers outside the scope of labour law has proliferated'. For example, in highly developed countries, self-employment ranges from 'freelance professionals to women who provide childcare in their homes, and to men who drive trucks or operate franchises for a living'. Collective bargaining laws that only empower 'employees' (which may be narrowly defined) to organise and bargain as a collective may leave many workers subject to more restrictive rules of contract, commercial and competition law. This article examines how jurisdictions in Australia and Canada have dealt with the question of collective bargaining by self-employed workers. The article develops a typology of regulatory models, outlining the features of each type of model and considering, in particular, the manner in which these models differ from widely applicable models of employee collective bargaining. It assesses the strengths and weaknesses of the models from the perspective of facilitating worker access to collective bargaining.*

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## I INTRODUCTION

Judy Fudge has observed that, ‘the forms of work and numbers of workers outside the scope of labour law has proliferated’.<sup>1</sup> For example, in highly developed countries, self-employment ranges from ‘freelance professionals to women who provide childcare in their homes, and to men who drive trucks or operate franchises for a living’.<sup>2</sup> Labour laws are designed to provide workers with adequate minimum labour standards, including access to collective representation and bargaining to establish and maintain fair working conditions. However, minimum labour standards generally only apply to ‘employees’ and an increasing number of workers are not employees.<sup>3</sup> Many workers who fall outside of the definition of ‘employee’ may benefit from minimum labour standards including access to collective bargaining.

Collective bargaining, as enshrined in the Conventions of the International Labour Organisation, is a basic labour standard provided for workers.<sup>4</sup> Collective representation and bargaining laws provide workers with an opportunity, in association with their fellows, to improve the conditions under which they labour. It is a self-help mechanism, facilitating worker voice, aiding industrial democracy and overcoming market failures which would otherwise leave workers with little individual capacity positively to impact their working conditions.

<sup>1</sup> Judy Fudge, ‘Blurring Legal Boundaries: Regulating for Decent Work’ in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 1, 3.

<sup>2</sup> *Ibid* 2.

<sup>3</sup> *Ibid* 3; International Labour Organization, *Global Employment Trends 2014: Risk of a Jobless Recovery?* (International Labour Office, 2014) 12.

<sup>4</sup> *Freedom of Association and Protection of the Right to Organise Convention* (ILO No 87), opened for signature 9 July 1948, 68 UNTS 17 (entered into force 4 July 1950); *Right to Organise and Collective Bargaining Convention* (ILO No 98), opened for signature 1 July 1949, 96 UNTS 257 (entered into force 18 July 1951). See also Committee on the Employment Relationship, International Labour Conference, *Report of the Committee on the Employment Relationship*, 91<sup>st</sup> sess, Agenda Item 5, Provisional Record 21 (18 June 2003) 23 [65].

Collective bargaining laws that only cover 'employees' leave many workers subject to the more restrictive rules of contract and competition law, with little opportunity to act collectively. Further, the contractual arrangements of self-employed workers pose difficult obstacles to developing accessible collective bargaining frameworks. Describing the necessity of a sophisticated response to the problem of facilitating collective bargaining for self-employed workers, Cranford, Fudge, Tucker and Vosko argued in 2005 that the 'law must support a variety of collective representation and bargaining schemes because no single mechanism can possibly respond to the diverse needs of the self-employed'.<sup>5</sup> To consider how this challenge is being met, this article considers various schemes in Australia and Canada which facilitate access to collective bargaining for self-employed workers. The article develops a typology of regulatory models, outlining the features of each model and assessing their strengths and weaknesses from the perspective of facilitating access to collective bargaining for self-employed workers.

The article begins by considering the challenges involved in providing access to collective bargaining for self-employed workers, before outlining the regulatory context in Australia and Canada. It then outlines three types of regulatory models for self-employed worker collective bargaining before considering the lessons to be drawn from these regulatory schemes.

## II CHALLENGES IN REGULATING COLLECTIVE BARGAINING FOR SELF-EMPLOYED WORKERS

Access to collective bargaining is an important component of the regulation of labour markets. It serves a number of purposes, including the correction of labour market failures, addressing unequal power distribution and the facilitation of worker voice. Most workers selling their labour are subject to market failures which make it difficult for them to negotiate as individuals.<sup>6</sup> Information asymmetries, transaction costs and the need to work in order to provide the necessities of life may mean that workers are price-takers, with

<sup>5</sup> Cynthia J Cranford et al, *Self-Employed Workers Organize: Law, Policy, and Unions* (McGill-Queen's University Press, 2005) 184.

<sup>6</sup> For discussion of market failure as the basis for legal intervention in labour markets, see Hugh Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17; Simon Deakin and Frank Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International, 2000) 29; Alan Hyde, 'What is Labour Law' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing, 2006) 37.

little capacity to set terms and conditions or negotiate for better outcomes. Equally, the superior position of employers under the law of contract and property extends this asymmetry into the life of the working relationship.<sup>7</sup> Collective bargaining may overcome these market failures and improve the position of workers relative to labour engagers.<sup>8</sup> It is an important mechanism in moderating power in work relationships.<sup>9</sup> Equally, collective bargaining is a tool of workplace democracy, fostering industrial citizenship.<sup>10</sup> It helps to overcome the pervasive notion of workplaces as private spaces and of managerial prerogative as sacrosanct.

In many national labour law systems, the scope of labour laws, including access to collective bargaining, is not extended to all workers but is limited to the more restrictive category of 'employee'. This reflects the link between the rise of protective labour law regulation and the model of work organisation that predominated early in the 20<sup>th</sup> century. Large scale manufacturing and other industries came to be structured through vertically integrated firms providing employment for life through long-term relational employment contracts with internal career paths and opportunities for promotion.<sup>11</sup> In this context, the dividing line between employees pursuing the business interests of their employer and self-employed 'entrepreneurs' was easier to discern and meant that implementing labour laws, including collective bargaining, in terms of a bright line distinction between employees and self-employed 'entrepreneurs' made sense.

However, the world of work has changed, in some ways beyond recognition (although in other ways more closely resembling older pre-Fordist models of work engagement).<sup>12</sup> Changes to forms of business organisation, the decline of the vertically integrated firm, and increases in business net-

<sup>7</sup> See Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Industrial Law Journal* 1.

<sup>8</sup> See above n 6.

<sup>9</sup> See Paul Davis and Mark Freedland (eds), *Kahn Freund's Labour and the Law* (Stevens & Sons, 3<sup>rd</sup> ed, 1983) 18; Lord Wedderburn, *The Worker and the Law* (Penguin, 3<sup>rd</sup> ed, 1986) 7-9.

<sup>10</sup> See Guy Davidov, 'Collective Bargaining Laws: Purpose and Scope' (2004) 20 *International Journal of Comparative Labour Law and Industrial Relations* 81.

<sup>11</sup> Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353, 353; See generally Katherine V W Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004) pt 1.

<sup>12</sup> See Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) ch 1.

works and supply chains have led to a substantial reduction in the number of workers engaged in long-term employment for a single firm.<sup>13</sup> Contractual arrangements that shift risk from labour engagers to labour providers and that expressly seek to avoid the engagement of labour under a contract of employment have become more widespread.<sup>14</sup> This has been accompanied by changes to the nature of the labour exchange between hirer and worker such that instead of job security, workers may be offered ‘employability’ — skills that they can take from one work contract to another.<sup>15</sup> The line between employee and entrepreneur has become increasingly difficult to draw, and the common law tests for determining whether a worker is an employee or is self-employed which are commonly relied upon to delineate the scope of labour law protections have lagged behind.<sup>16</sup> This has left many ‘self-employed’ workers beyond the scope of labour laws and without access to collective bargaining.

The need for access to effective collective bargaining for self-employed workers is well acknowledged. There is a range of literature, particularly out of Canada, which demonstrates that large sections of the self-employed workforce are not entrepreneurs and are not running their own small businesses.<sup>17</sup>

<sup>13</sup> See Collins, above n 11; Judy Fudge, ‘The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection’ in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing, 2006) 295.

<sup>14</sup> For discussion of the variety of contractual forms used to hire labour in the modern labour market, see Johnstone et al, above n 12, ch 3.

<sup>15</sup> Joellen Riley, ‘Who Owns Human Capital? A Critical Appraisal of Legal Techniques for Capturing the Value of Work’ (2005) 18 *Australian Journal of Labour Law* 1.

<sup>16</sup> See, eg, Andrew Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15 *Australian Journal of Labour Law* 235; Cameron Roles and Andrew Stewart, ‘The Reach of Labour Regulation: Tackling Sham Contracting’ (2012) 25 *Australian Journal of Labour Law* 258; Guy Davidov, ‘The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection’ (2002) 52 *University of Toronto Law Journal* 357. The common law tests for distinguishing between a contract of service (for employees) and a contract for services (for self-employed workers) are notorious for the ease with which contracting parties have been able to manipulate the status of a worker. However, recent developments in the common law of the UK and Australia have focused more heavily on the reality of working arrangements over express contractual terms: see *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 (discussed in Alan Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 *Industrial Law Journal* 328); *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146.

<sup>17</sup> Judy Fudge, Eric Tucker and Leah F Vosko, ‘Changing Boundaries in Employment: Developing a New Platform for Labour Law’ (2003) 10 *Canadian Labour and Employment Law Journal* 329; Judy Fudge, Eric Tucker and Leah Vosko, ‘The Legal Concept of Employment: Marginalizing Workers’ (Report, Law Commission of Canada, 25 October 2002) 8: ‘the conception of self-employment that links being self-employed inextricably with entrepre-

The self-employed are heterogeneous. While their ranks include genuinely entrepreneurial workers, increasingly also they include low paid, low status workers, who may be 'dependent' on one engager (so-called 'dependent contractors'),<sup>18</sup> or who may work for a number of engagers (independent contractors) but are entirely reliant on their own labour to support themselves and their families. They may be geographically dispersed, working in private homes, or shifting from short-term contract to short-term contract.<sup>19</sup> Self-employed workers may be as vulnerable, if not more vulnerable, than any other employee, particularly given that protective minimum standards legislation usually only applies to employees. Self-employed workers may therefore be doubly disadvantaged, denied access to basic minimum labour standards and institutionalised collective bargaining.<sup>20</sup>

This is not to suggest that access to collective bargaining rights for self-employed workers is a panacea. There is a crisis of labour law regulation, in Australia and overseas, especially as it pertains to the coverage and effectiveness of collective bargaining regimes designed and promulgated in the context of the mid-20<sup>th</sup> century industrial paradigm.<sup>21</sup> Providing self-employed

neurship, ownership, and autonomy has more to do with ideology than reality'; Matthew Waite and Lou Will, 'Self-Employed Contractors in Australia: Incidence and Characteristics' (Staff Research Paper, Productivity Commission, 2001) 3–5; Leah F Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford University Press, 2009). See also the case studies presented in Cranford et al, above n 5; Judy Fudge, Shae McCrystal and Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) chs 2, 6, 7, 8, 11–14.

<sup>18</sup> See, eg, Australian Council of Trade Unions, 'Lives on Hold: Unlocking the Potential of Australia's Workforce' (Report, Independent Inquiry into Insecure Work in Australia, 2012) 15–16.

<sup>19</sup> Fudge, above n 1, 2–3.

<sup>20</sup> For example, see the discussion of postal workers engaged under a tender system by Australia Post in Shae McCrystal, 'Organising Independent Contractors: The Impact of Competition Law' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 139.

<sup>21</sup> See, eg, Anthony Forsyth, 'Comparing Purposes and Concepts in United States and Australian Collective Bargaining Law' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 203; John Logan, 'After EFCA, What Next for Unions? The Future of Labour Law Reform and of Collective Bargaining in the United States' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 270; Sara Slinn, 'The Canadian Conception of Collective Representation and Bargaining' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 246; Peter Sheldon, 'What Collective Bargaining Future for Australia? Lessons from International Experience' in Joellen Riley and Peter Sheldon (eds), *Remaking Australian Industrial Relations* (CCH Australia, 2008) 235; William Brown and Sarah Oxen-

workers with collective bargaining rights, especially where regulation replicates employment based collective bargaining systems, may simply perpetuate existing problems. Cranford, Fudge, Tucker and Vosko identify the issues that must be considered in designing any scheme of collective bargaining for self-employed workers: getting them into a collective scheme; enabling them to establish and sustain bargaining relationships over time; and providing mechanisms for dispute resolution, particularly where strikes may be of limited utility.<sup>22</sup> For example, a solution as simple as extending coverage of existing collective bargaining schemes to groups of self-employed workers will be suitable for some workers, particularly those in situations of long-term dependence on a single engager. For other workers, it may be entirely unsuitable. The less work arrangements resemble standard employment, the less effective mainstream collective bargaining, predicated on the existence of a clearly identifiable single employer, will be in practice,<sup>23</sup> a problem that is also true for precarious employed workers.<sup>24</sup> The existence of well-entrenched collective bargaining structures for employed workers, particularly those with complex mechanisms for recognition and bargaining unit determination, may also complicate efforts to develop alternative bargaining structures.<sup>25</sup> Alternative models may be perceived as a threat to existing collective bargaining arrangements or to terms and conditions secured through bargaining.

An additional complication is the intersection of labour law with competition law. In any given jurisdiction, the extent of collective bargaining coverage may be impacted by the scope of competition law exemptions for labour market actors. Such exemptions may be limited to bargaining over employment related matters or may be expressed more generally to cover workers or working conditions.<sup>26</sup> In extending collective bargaining rights to self-

bridge, 'Trade Unions and Collective Bargaining: Law and the Future of Collectivism' in Catherine Barnard, Simon Deakin and Gillian S Morris (eds), *The Future of Labour Law* (Hart Publishing, 2004) 63.

<sup>22</sup> Cranford et al, above n 5, 177–83.

<sup>23</sup> Shae McCrystal, 'Regulating Collective Rights in Bargaining: Employees, Self Employed Persons and Small Businesses' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 597, 614; Cranford et al, above n 5, 25–6.

<sup>24</sup> See, eg, Johnstone et al, above n 12, 137–40.

<sup>25</sup> See Beth Bilson, 'Future Tense: Some Thoughts about Labour Law Reform' (2005) 12 *Canadian Labour and Employment Law Journal* 233.

<sup>26</sup> See Shae McCrystal and Phil Syrpis, 'Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 421.

employed workers, the relationship of labour and competition statutes must be considered.

### III A TYPOLOGY OF COLLECTIVE BARGAINING MODELS FOR SELF-EMPLOYED WORKERS

The discussion will now examine a variety of different models used in Australia and Canada under which self-employed workers have access to some form of either informal or highly regulated collective bargaining. The discussion will consider the nature of the different mechanisms used, the relationship between self-employed worker collective bargaining and standard collective bargaining models, and how any potential competition law clashes have been dealt with. Models that facilitate self-employed worker access to collective bargaining tend to fall into three general types:

- 1 Provisions in mainstream collective bargaining statutes that permit their application to some self-employed workers;
- 2 Provisions in other statutes that permit self-employed workers to engage in collective action that would otherwise be unlawful; and
- 3 Industry or occupation specific collective bargaining regimes for self-employed workers.

The discussion will consider these three types in turn, providing examples from Australia and Canada, countries which have both implemented various approaches to facilitating access to collective bargaining for groups of self-employed workers.

Australia and Canada are federations dominated by a constitutional division of power between a federal parliament and state/provincial parliaments, and, with the exception of the Canadian province of Quebec, share a common law background. In Canada, labour relations for most workers are regulated at provincial level, while in Australia the majority of private sector workers are covered by the federal statute, the *Fair Work Act 2009* (Cth) ('*FW Act*').

In Canada, variants of the US *National Labor Relations Act* ('*Wagner Act*')<sup>27</sup> approach to collective bargaining have been adopted in the federal and provincial industrial relations statutes.<sup>28</sup> In *Wagner Act* models, employers will

<sup>27</sup> 49 Stat 449 (1935) (codified as amended at 29 USC §§ 151–169 (2013)). As to the *Wagner Act* model, see Mark Barenberg, 'The Political Economy of the *Wagner Act*: Power, Symbol, and Workplace Co-Operation' (1993) 106 *Harvard Law Review* 1379; Forsyth, above n 21.

<sup>28</sup> See Slinn, above n 21.

be required to recognise and bargain with the representative of their workers where those workers are able to prove majority support for bargaining exists at the particular enterprise or in a bargaining unit. Unions obtain exclusive bargaining rights and are the sole representative of all workers concerned. Once recognition rights are granted, good faith bargaining obligations are imposed on employers and unions regulating the process (not the substance) of bargaining without any positive obligation to reach agreement, and access to coercive pressure in the form of strikes and lockouts is permitted. Where agreements are reached, they generally apply to all workers in the bargaining unit and individual deviation is not permitted.<sup>29</sup> Australia, by contrast, has implemented a highly distinctive system of collective regulation for employees under the *FW Act*. While it borrows a number of concepts from the *Wagner Act* approach, notably in relation to good faith bargaining, the system contains many significant variations. For example, unions are not given exclusive bargaining rights, collective agreements are made between employers and their employees (after negotiation by bargaining representatives), and employers may choose to remunerate workers above the level set by a collective agreement.<sup>30</sup> Collective bargaining is underpinned by an extensive safety net consisting of a set of statutory minimum standards primarily covering leave entitlements (the ‘National Employment Standards’)<sup>31</sup> and industry or occupation level modern awards controlling working time, wage rates, remuneration for overtime or unsociable hours, workplace consultation and other matters.<sup>32</sup> The Australian and Canadian collective bargaining schemes will be referred to in this article as the ‘mainstream’ collective bargaining statutes or models of each country in order to distinguish collective bargaining models designed for self-employed workers.

In terms of coverage, both Australian and Canadian labour statutes rely on the concept of ‘employee’ to distinguish between those workers who are covered and those that are not. In Australia, the term ‘employee’ in the *FW Act* is defined by reference to the existence of an employment contract or

<sup>29</sup> For discussion of the *Wagner Act* model, see The Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentary* (Irwin Law, 8<sup>th</sup> ed, 2011) 279, see generally ch 5; Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Carswell Company, 1980) 124–8, see generally ch 4.

<sup>30</sup> See generally *FW Act* pt 2-4. See also Forsyth, above n 21.

<sup>31</sup> *FW Act* pt 2-2.

<sup>32</sup> *Ibid* pt 2-3. This safety net is discussed in Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) chs 10–11.

‘contract of service’ under the common law.<sup>33</sup> In most Canadian jurisdictions, the term ‘employee’ in labour statutes is not necessarily defined by reference to the common law but in practice the term has been interpreted to resemble the common law tests for determining the existence of a contract of service.<sup>34</sup> However, beyond this, the Australian and Canadian approaches to facilitating access to collective bargaining for self-employed workers differ considerably. As the discussion will demonstrate, many Canadian collective bargaining statutes deem ‘dependent contractors’ to be employees for the purposes of collective bargaining, entitling some self-employed workers to bargain under the same legislative regime as employees.<sup>35</sup> Australia, by contrast has, in recent years, maintained a legislative separation between employed and self-employed workers. The *Independent Contractors Act 2006* (Cth), which was introduced by a conservative Coalition Government in order to protect the ‘freedoms’ of independent contractors, prevents state parliaments from treating self-employed workers (as defined by the common law) as if they were employees with respect to workplace relations matters.<sup>36</sup> This means that beyond certain limited exceptions,<sup>37</sup> state parliaments cannot deem self-employed workers to be employees for the purposes of their industrial relations statutes or regulate their working conditions.<sup>38</sup> At federal level, the

<sup>33</sup> *FW Act* ss 11, 13–14. For the distinction in Australia between a contract of service and a contract for services, see *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

<sup>34</sup> See Michael Bendel, ‘The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law’ (1982) 32 *University of Toronto Law Journal* 374.

<sup>35</sup> The extension of the collective bargaining statutes of many Canadian jurisdictions to dependent contractors is longstanding due to an influential paper by Harry Arthurs published in 1965: Harry Arthurs, ‘The Dependent Contractor: A Study of the Legal Problems of Countervailing Power’ (1965) 16 *University of Toronto Law Journal* 89; and a subsequent Government report: Privy Council Office, ‘*Canadian Labour Relations: Report of the Task Force on Labour Relations*’ (Information Canada, 1968) 138–9. The history of the extension of collective bargaining legislation to dependent contractors in Canada is outlined in Judy Fudge, Eric Tucker and Leah F Vosko, ‘Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada’ (2003) 10 *Canadian Labour and Employment Law Journal* 193, 204–9.

<sup>36</sup> *Independent Contractors Act 2006* (Cth) s 7. See Andrew Stewart, ‘WorkChoices and Independent Contractors: The Revolution That Never Happened’ (2008) 18(2) *Economic and Labour Relations Review* 53, 56–9. There are also ‘sham’ contracting provisions within the *FW Act* designed primarily to prevent an employer from misrepresenting employment as self-employment: ss 357–9. However, these provisions have been largely ineffective to prevent sham contracting in practice: see, eg, Office of the Australian Building and Construction Commissioner, *Sham Contracting Inquiry Report* (2011) 97–8 [5.79]–[5.86].

<sup>37</sup> *Independent Contractors Act 2006* (Cth) s 7(2) provides a limited exception for certain state laws governing outworkers and owner-drivers.

<sup>38</sup> *Ibid* s 7(1)(a).

*FW Act* has only been extended to cover a very limited class of self-employed workers — outworkers.<sup>39</sup>

Finally, both Australia and Canada have federal competition statutes prohibiting collusive or anti-competitive behaviour by collectives acting in markets for goods and services.<sup>40</sup> In both cases, the relationship between the labour and competition statutes is governed by an exemption found in the competition statute. The Australian exemption is limited to the pursuit of terms and conditions of employment by employees only.<sup>41</sup> The Canadian exemption is broader, exempting ‘combinations or activities of workmen or employees for their own reasonable protection as such workmen or employees’ — the inclusion of both ‘employees’ and ‘workmen’ suggesting that the protection extends beyond collective action solely by employees.<sup>42</sup> Litigation against combinations of self-employed workers for anti-competitive conduct appears to have been more extensive in Australia than it has been in Canada.<sup>43</sup>

#### *A Provisions in Mainstream Collective Bargaining Statutes That Permit Their Application to Some Self-Employed Workers*

One way to provide access to institutionalised collective bargaining for self-employed workers is through the use of deeming provisions in mainstream collective bargaining statutes. Workers covered by the deeming provisions are then able to organise and bargain in the same manner as employee workers. There are various advantages and disadvantages of this approach. The primary advantage is that deemed workers are immediately provided with access to an institutionalised and well-developed system of collective bargaining. Rules and processes for bargaining will be well understood, and there will

<sup>39</sup> Discussed below in Part III(A).

<sup>40</sup> *Competition and Consumer Act 2010* (Cth) pt IV; *Competition Act*, RSC 1985, c C-34, pt VI.

<sup>41</sup> *Competition and Consumer Act 2010* (Cth) s 51(2)(a).

<sup>42</sup> *Competition Act*, RSC 1985, c C-34, s 4(1)(a). In *Couture v Hewison* (1980) 105 DLR (3d) 556, the British Columbia Supreme Court found that a group of fishermen were not employees, but were workmen for the purposes of the exemption in the *Combines Investigation Act*, RSC 1970, c C-23, s 4 (as the *Competition Act* was then named). This finding was affirmed on appeal to the Full Court of the British Columbia Supreme Court in *Couture v Hewison* (1983) 145 DLR (3d) 55.

<sup>43</sup> A notable Australian case in this respect is *Gallagher v Pioneer Concrete (NSW) Pty Ltd* (1993) 113 ALR 159. As to Canada, see Fudge, Tucker and Vosko, ‘Employee or Independent Contractor?’, above n 35, 207.

be employee and union experience of working in the system.<sup>44</sup> There may also be institutional support for collective bargaining and government agencies to provide assistance and information, and potentially dispute resolution or first contract arbitration. In addition, deemed workers may be given the benefit of other aspects of the collective bargaining statute, such as minimum terms and conditions of engagement and other statutory protections.

Conversely, there are limitations to simply extending the coverage of existing collective bargaining statutes to a wider class of workers. The risk with this approach is that the statute itself may have substantial shortcomings and those difficulties may be perpetuated. In addition, the model of organising, representation and bargaining contained in the statute may be ill-suited to providing access to collective bargaining for many self-employed workers, except the most 'employee-like' of the self-employed.

Deeming provisions in mainstream collective bargaining statutes may function in different ways. The jurisdictions reviewed in this article reveal three subtly different mechanisms. The first extends the definition of 'employee' in a mainstream statute to a class of workers labelled as 'dependent contractors' and leaves a labour tribunal to determine which workers fall under the definition. The second allows a labour tribunal to identify classes of workers to whom it would be appropriate to extend the operation of the statute. The third involves the statutory identification of a particular occupational group of self-employed workers to whom the definition 'employee' extends. In this third example, the function of the labour tribunal is limited to ensuring that a relevant worker falls within the particular occupational group identified.

The first approach, extending coverage of mainstream collective bargaining statutes to 'dependent contractors', applies in several Canadian provinces. Two examples are the labour relations statutes of Ontario and British Columbia. In Ontario, the *Labour Relations Act* defines 'employee' to include a 'dependent contractor',<sup>45</sup> and defines 'dependent contractor' as

a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and

<sup>44</sup> See, eg, Cranford et al, above n 5, ch 2, which demonstrates the critical role that existing union organisation played in facilitating the organisation of self-employed rural route mail couriers for collective bargaining.

<sup>45</sup> *Labour Relations Act*, RSO 1995, c 1, s 1(1) (definition of 'employee').

conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.<sup>46</sup>

The British Columbia *Labour Relations Code* contains a provision in almost identical terms.<sup>47</sup> Both statutes take a minimalist approach — only including those workers whose work arrangements most closely resemble employment ('employee-like' workers). Indeed, it has been argued that the definitions of 'dependent contractor' do little in practice to extend the coverage of the collective bargaining statutes, as judicial and labour board extension of the concept of 'employee' under the statutes already extends beyond the concept of a contract of service at common law to include 'employee-like' workers.<sup>48</sup> However, the deeming provisions provide clarification that factors like ownership of tools should not prevent a worker from falling under the collective bargaining statute. This unequivocally allows for the inclusion of self-employed workers, like truck-owner drivers, where economic dependence on a single engager can be established.<sup>49</sup>

In practice, the extension of the definition of employee to include dependent contractors has not removed legal uncertainty about the status of certain workers in the Canadian jurisdictions that have adopted such an approach. Instead of complex jurisdictional issues concerning whether a worker is an employee or not, the jurisdictional argument has shifted to discussion of whether or not a particular worker is a dependent contractor.<sup>50</sup> Various labour boards have developed lists of indicia to assist with determining the answer to that question in any given scenario. For example, guided by the definition of 'dependent contractor' outlined above, the Ontario Labour Board has developed a list of 11 indicators to assist in determining if a worker is a

<sup>46</sup> Ibid (definition of 'dependent contractor').

<sup>47</sup> *Labour Relations Code*, RSBC 1996, c 244, s 1 (definitions of 'independent contractor' and 'employee').

<sup>48</sup> Bendel, above n 34.

<sup>49</sup> Ownership of tools, and in particular vehicles, has been a significant factor in Australian common law cases applying the multiple indicia test to determine if a worker is an employee or is self-employed: see *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, 404–5 (Dixon J); *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537, 538 (Meagher JA); *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 44 [56] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

<sup>50</sup> Fudge, Tucker and Vosko, 'Changing Boundaries in Employment', above n 17, 206.

dependent contractor or an independent contractor.<sup>51</sup> The list includes factors like the capacity to use substitute labour, evidence of entrepreneurial activity, sale of services to the market generally and the degree of economic mobility or independence experienced by the worker.<sup>52</sup>

Where a worker is able to demonstrate that they fall within the definition of dependent contractor, they will be able to exercise all of the collective bargaining rights accorded to employees under the statutes, including provisions relating to recognition, bargaining rights, strike action and first collective agreement arbitration. For the most part, the statutes apply neutrally to the workers except with respect to the determination of bargaining units for the purposes of collective bargaining. In Ontario, the legislative presumption is for the certification of bargaining units of dependent contractors separately to any employee bargaining unit, unless a majority of dependent contractors wish to be included in a bargaining unit with other employees.<sup>53</sup> In British Columbia, where there is an existing employee bargaining unit, the Labour Relations Board must consider whether or not inclusion of dependent contractors in that unit would be 'more appropriate' and only certify a separate unit if it is not.<sup>54</sup> Further, classification as a dependent contractor only gives workers access to collective bargaining. It does not extend to recognition under minimum standards legislation which, for covered employees, offers a floor of protection against which to bargain.<sup>55</sup> This means that dependent contractors must bargain against the background common law position.

The second deeming mechanism, whereby a labour tribunal may identify those workers to whom coverage of the mainstream collective bargaining statute should extend, is exemplified by the labour relations statutes in the Canadian provinces of Saskatchewan and Manitoba. In these jurisdictions the relevant labour boards may extend coverage of the definition of employee in

<sup>51</sup> *Canada Labour Congress, Chartered Local Union No 1689 (Canadian Association of Burlesque Entertainers) v Algonquin Tavern* (1981) 3 CLRBR 337, [64] (Ontario Labour Relations Board). This case is discussed in Brian A Langille and Guy Davidov, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21 *Comparative Labor Law & Policy Journal* 7, 28.

<sup>52</sup> This list may be compared to the list of indicia used in Australia to distinguish between an employee and a self-employed worker summarised in *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 53 ATR 30, 42-5 [34] (Lawler V-P, Hamilton DP and Commissioner Bacon).

<sup>53</sup> *Labour Relations Act*, RSO 1995, c 1, s 9(5).

<sup>54</sup> *Labour Relations Code*, RSBC 1996, c 244, s 28.

<sup>55</sup> *Employment Standards Act*, RSO 2000, c 41 (Ontario); *Employment Standards Act*, RSBC 1996, c 113 (British Columbia).

the labour relations statutes to any person designated by the board for that purpose.<sup>56</sup> In Saskatchewan, the statute clarifies that a person engaged to perform services may be included in the definition of employee if ‘in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining’.<sup>57</sup> There is no further guidance to the exercise of the discretion in the statute. In both Saskatchewan and Manitoba, once the relevant labour board determines that the terms of the relevant work contracts are suitable for collective bargaining, the workers are treated as employees for the purposes of the statute.

Unlike the provisions used in Ontario and British Columbia, the statutes in Saskatchewan and Manitoba do not restrict the potential coverage of collective bargaining to ‘dependent contractors’.<sup>58</sup> In theory, this permits the extension of collective bargaining to a broader class of self-employed workers than would be permitted under the statutes of other Canadian provinces. However, this has not been the experience in practice. The jurisprudence on the application of the extension provisions appears to have developed along similar lines to the other Canadian jurisdictions discussed.<sup>59</sup> Indeed, the clarification in the Saskatchewan legislation was apparently implemented because the Labour Relations Board had initially interpreted its remit under the provision as only permitting employees to engage in collective bargaining.<sup>60</sup>

The third deeming mechanism, coverage by a mainstream collective bargaining statute of a particular occupational group of self-employed workers, is exemplified by the Australian example of textile, clothing and footwear outworkers. As discussed above, the mainstream labour relations statute in Australia, the *FW Act*, applies almost exclusively to employees. However, amendments passed in 2012 extended the definition of ‘employee’ in the Act to include self-employed outworkers in the textile, clothing and footwear industry.<sup>61</sup> The differences between this extension of labour law protection in

<sup>56</sup> *Trade Union Act*, RSS 1978, c T-17, s 2(f)(iii) (definition of ‘employee’) (Saskatchewan); *Labour Relations Act*, RSM 1987, c L-10, s 1 (definition of ‘employee’) (Manitoba).

<sup>57</sup> *Trade Union Act*, RSS 1978, c T-17, s 2(f)(i.1).

<sup>58</sup> *Trade Union Act*, RSS 1978, c T-17, s 2(f) (definition of ‘employee’) (Saskatchewan); *Labour Relations Act*, RSM 1987, c L-10, s 1 (definition of ‘employee’) (Manitoba).

<sup>59</sup> Fudge, Tucker and Vosko, ‘Employee or Independent Contractor?’ above n 35, 207.

<sup>60</sup> Langille and Davidov, above n 51, 26–7.

<sup>61</sup> *Fair Work Amendment (Textile, Clothing and Footwear) Act 2012* (Cth), inserting s 789BB into the *FW Act*.

Australia and the Canadian examples are instructive, primarily because of significant differences in the collective bargaining model enshrined in the *FW Act*.

There is a long history in Australia of regulating outwork in the textile, clothing and footwear industry, including both hard and soft regulatory techniques.<sup>62</sup> Outworkers in Australia are often engaged as self-employed, although there are occasions where tribunals have found their arrangements to constitute employment.<sup>63</sup> The amendments to the *FW Act* are the latest development made against a background of state legislation establishing codes of practice, developing minimum payment standards, and allowing workers to reclaim unpaid entitlements from businesses operating in supply chains who are ultimately responsible for controlling the work performed by outworker labour.<sup>64</sup> The state regimes have included outworker provisions, deeming outworkers to be employees for certain purposes (including some minimum employment standards and enforcement mechanisms) but generally have not extended collective bargaining rights to these workers.<sup>65</sup>

The 2012 amendments to the *FW Act* deem covered contract outworkers in the textile, clothing and footwear industry to be employees for the purposes of most provisions in the statute.<sup>66</sup> This gives many of these workers access to the collective bargaining regime. They are also covered by the extensive minimum labour standards provided by the statute.<sup>67</sup>

How useful are mainstream collective bargaining mechanisms to low-paid textile, clothing and footwear outworkers? These workers experience economic and geographic isolation and face tremendous obstacles in organising, and in identifying engagers with whom to bargain.<sup>68</sup> Even where they can clearly

<sup>62</sup> An historical overview of the provisions is set out in Shelley Marshall, 'Australian Textile Clothing and Footwear Supply Chain Regulation' in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010) 555.

<sup>63</sup> See, eg, *Re Clothing Trades Award 1982* (1987) 19 IR 416, 439 (Riordan DP).

<sup>64</sup> See Johnstone et al, above n 12, 103–7; Marshall, above n 62.

<sup>65</sup> See, eg, *Outworkers (Improved Protection) Act 2003* (Vic) s 4. As noted above at n 37, the effect of this statute is preserved by s 7(2) of the *Independent Contractors Act 2006* (Cth).

<sup>66</sup> Due to constitutional limitations, the provisions do not encompass all outworkers in the Australian textile, clothing and footwear industry: see *FW Act* s 789BB.

<sup>67</sup> These minimum standards also include provisions allowing for the collection of any unpaid monies from parties higher in the supply chain: see *FW Act* ss 789CA–CF.

<sup>68</sup> For discussion of the difficulties of regulating outworkers in the textile, clothing and footwear industry in Australia, see Kerry Wardlaw and Jennifer Curtin, 'Outworkers and Precarity: The Case of Victorian Clothing Workers' (2005) 37 *Just Policy* 72; Sally Weller, 'Regulating Clothing Outwork: A Sceptic's View' (2007) 49 *Journal of Industrial Relations* 67.

identify an engager to bargain with, control is generally exercised higher up the supply chain and engagers may have little or no room to move in bargaining. However, the *FW Act* contains a 'low-paid bargaining stream', designed to facilitate collective bargaining in sectors with a history of low pay and little or no collective bargaining.<sup>69</sup> In particular, the provisions allow for multi-employer (or sector-based) bargaining between employers and bargaining representatives to occur, facilitated by the labour tribunal, the Fair Work Commission, without a requirement to establish majority employee support for bargaining to commence.<sup>70</sup> Where this is ordered by the Fair Work Commission, employer participation is compulsory, overcoming recognition problems, and good faith bargaining obligations apply to all of those involved in the process.<sup>71</sup> There is also potential for the imposition of an arbitrated outcome if the parties cannot reach agreement, but only for a first collective agreement (ie, first contract arbitration).<sup>72</sup> Provision is also made to bring to the bargaining table parties who have control over the subject of bargaining, even though the workers concerned have no direct contractual relationship with them. The Fair Work Commission

may provide assistance by directing a person who is not an employer specified in the authorisation to attend a conference at a specified time and place if the [Fair Work Commission] is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made.<sup>73</sup>

Unfortunately, the likelihood of the low-paid bargaining stream successfully facilitating access to collective bargaining for workers who have historically been disenfranchised from collective bargaining in Australia appears to be remote. The provisions were introduced in 2009, and to date have only been the subject of two substantive applications.<sup>74</sup> It has been criticised as being inflexible and for placing too many hurdles between an application and first

<sup>69</sup> *FW Act* pt 2-4 div 9.

<sup>70</sup> *Ibid* ss 242-3, 246.

<sup>71</sup> *Ibid* ss 173(2)(d), 228(1), 230(2).

<sup>72</sup> *Ibid* ss 260-5.

<sup>73</sup> *Ibid* s 246(3).

<sup>74</sup> One of those applications was authorised: *United Voice v Australian Workers' Union of Employees, Queensland* (2011) 207 IR 251. The other was rejected: *Australian Nursing Federation v IPN Medical Centres Pty Ltd* [2013] FWC 511 (17 June 2013).

contract arbitration.<sup>75</sup> However, if these obstacles could be overcome, it could be an innovative model offering the chance for collective bargaining without the tricky obstacles of securing recognition or negotiating individually with a range of employers — obstacles that are particularly pertinent for many self-employed workers. The potential to bring controlling parties to the bargaining table could be of real assistance in supply chain contexts.<sup>76</sup> The significance of the capacity to negotiate with multiple enterprises cannot be overstated. Fragmentation of the work arrangements of workers labouring ostensibly for the same enterprise through multiple engagers is a common feature of the organisation of work in supply chains.<sup>77</sup> The *FW Act* also provides a floor of statutory protections against which to collectively negotiate, bolstering the position of workers at the commencement of negotiations.

The three approaches to ‘deeming’ self-employed workers to be employees for the purposes of mainstream collective bargaining statutes differ mainly in terms of how the decision is made that particular workers will or will not be covered. The first two examples involve vesting the decision in a labour tribunal, with or without a broad discretion over the categories of worker to be covered. What the Canadian examples demonstrate is that such an approach may simply perpetuate the ‘employee or contractor’ problem, shifting it to a question of ‘dependent or independent contractor’. The Australian example of identifying an occupational group for coverage avoids this problem, but is a piecemeal solution, particularly where coverage of a particular occupational group relies on the passage of legislation through Parliament.

Whatever approach is chosen, deeming provisions like the ones discussed may be appropriate for those self-employed workers who are artificially disguised as contractors or who work in ‘employee-like’ contractual arrangements. However, where such workers are only deemed to be employees for the purposes of collective bargaining and not for the purposes of minimum statutory entitlements, they enter collective bargaining negotiations at a disadvantage as compared to any employees in the same sector. Difficulties

<sup>75</sup> Richard Naughton, ‘The Low-Paid Bargaining Scheme — An Interesting Idea, But Can it Work?’ (2011) 24 *Australian Journal of Labour Law* 214. Naughton’s conclusions in this respect are supported by the subsequent rejection of an application for a low-paid bargaining authorisation due to ‘logistical’ difficulties: *Australian Nursing Federation v IPN Medical Centres Pty Ltd* [2013] FWC 511 (17 June 2013) [155] (Watson V-P).

<sup>76</sup> Rae Cooper and Bradon Ellem, ‘Fair Work and the Re-Regulation of Collective Bargaining’ (2009) 22 *Australian Journal of Labour Law* 284, 301.

<sup>77</sup> See Marshall, above n 62.

may also arise with respect to the collective bargaining model itself. Identification of an employer, determination of bargaining units and achievement of majority support for recognition are matters that may prove to be considerable obstacles for even standard employees. They become increasingly difficult for workers the more their working arrangements diverge from standard employment. Self-employed workers may have many different engagers — bargaining models focused on the enterprise may not be useful for these workers. They may work off-site and be difficult to organise, meaning that establishing majority support for union representation becomes an insurmountable hurdle. Further, in jurisdictions where bargaining unit determination is critical to the potential strength of workers in the collective bargaining process, siloing deemed workers into their own bargaining units may exacerbate this disadvantage, perpetuating continued difference of treatment and denying workers access to the collective strength of the wider bargaining unit. Where deemed workers face multiple barriers to meaningful collective bargaining in a mainstream collective bargaining model, statutory mechanisms, like the low-paid bargaining provisions in the Australian legislation, may provide a solution if adapted appropriately.

A final consideration is the intersection of deeming provisions with competition law. In Australia, the competition statute only provides an exemption for collective bargaining conduct with respect to terms and conditions of employment.<sup>78</sup> Depending on how this provision is interpreted, it may not cover collective agreements between workers who are deemed to be employees for the purposes of the *FW Act*. If the exemption in the competition statute is interpreted as referring to the collective conduct of those with a contract of service at common law, then workers deemed to be employees under the *FW Act* would not fall under the exemption. A similar potential problem has been identified with respect to the scope of the exemption in the Canadian competition statute and dependent contractors deemed to be employees.<sup>79</sup> However in Canada, the extension of the competition exemption to ‘workmen’ may resolve the problem if workmen is interpreted to include dependent contractors.<sup>80</sup> A solution to the problem in Australia is not as immediately obvious.

<sup>78</sup> *Competition and Consumer Act 2010* (Cth) s 51(2)(a).

<sup>79</sup> Bendel, above n 34, 405–6.

<sup>80</sup> *Ibid*; *Competition Act*, RSC 1985, c C-34, s 4(1)(a).

*B Provisions in Other Statutes That Permit Self-Employed Workers to Engage in Collective Action That Would Otherwise Be Unlawful*

The second approach to providing access to collective bargaining for groups of self-employed workers is to enable self-employed workers to engage in collective bargaining that would otherwise be unlawful outside of the context of a mainstream collective bargaining statute. In such a case, an independent party may make an assessment, before bargaining commences, of whether collective bargaining would be appropriate for the workers concerned. The assessment might relate to whether collective bargaining will assist the workers, or whether collective bargaining would be inappropriate as providing the workers with too much market power. The purpose for making such an assessment will drive the type of test to be applied in any given case and the body that is chosen to administer the test.

An example of this approach is found in the Australian competition statute. As discussed above, the *FW Act* is limited in application to ‘employees’. Self-employed workers are treated as business actors subject to the laws of contract and commercial law, a situation reinforced by the provisions of the *Independent Contractors Act 2006* (Cth). While special provisions apply to textile, clothing and footwear contractors, there is no general separate treatment of ‘dependent’ contractors for the purposes of collective bargaining.<sup>81</sup>

However, despite this, the *Competition and Consumer Act 2010* (Cth) allows the competition regulator to authorise proposed collective bargaining conduct by collectives of self-employed workers that would otherwise infringe anti-competitive conduct prohibitions under the statute.<sup>82</sup> These provisions were not designed specifically for use by workers, but can be used by any business actors, including workers, to convince the competition regulator that proposed conduct should be allowed to go ahead, despite its anti-competitive effect. As more and more workers are ‘redefined’ from employee to self-

<sup>81</sup> Note that there are some specific state statutory provisions that allow for collective bargaining by certain groups of self-employed workers and whose continued effect is exempted from the operation of s 7 of the *Independent Contractors Act 2006* (Cth) (see above n 37). In NSW, the *Industrial Relations Act 1996* (NSW) ch 6 pt 3 provides for the approval of collective agreements created by drivers of public vehicles and carriers. In Victoria, the *Owner Drivers and Forestry Contractors Act 2005* (Vic) s 25 allows for the appointment of bargaining agents by groups of contractors. At federal level, the *Road Safety Remuneration Act 2012* (Cth) pt 3 permits collective bargaining by self-employed road transport drivers.

<sup>82</sup> *Competition and Consumer Act 2010* (Cth) s 88.

employed,<sup>83</sup> there is potential for them to use the provisions to ensure that their collective arrangements do not breach the competition statute.

Where a group of self-employed workers seeks authorisation for collective bargaining, they must convince the Australian Competition and Consumer Commission ('ACCC') that the proposed collective bargaining conduct will be of 'public benefit'.<sup>84</sup> 'Public benefit' can be shown where the public benefits to be produced by the proposed conduct outweigh the anti-competitive detriment that would result from allowing the conduct to proceed.<sup>85</sup>

Thus, the process for authorising proposed collective bargaining is carried out under a competition statute by a competition regulator. The focus of the assessment is on the economic impacts of collective bargaining — both positive and negative. The detriment flowing from the conduct is assessed by ascertaining its anti-competitive effect. In this context, collective bargaining by self-employed workers who are otherwise competitors in the market for their services reduces competitive pressures between the workers and detrimentally impacts upon price signals which direct resources to their most efficient use.<sup>86</sup> The extent of anti-competitive detriment will be determined by reference to the degree of existing negotiations in the market, the size of the group relative to the market (ie, density), any existing market power held by the group, and the inclusion of any elements of compulsion in the proposal.<sup>87</sup> High density, existing market power or existing negotiations all mean that proposed arrangements will be considered to produce high anti-competitive detriment. Any degree of compulsion in the proposed arrangements, such as a requirement to participate or abide by any agreement reached or a boycott of the target of the bargaining, will generally be found to produce a degree of anti-competitive detriment that is too high to overcome.<sup>88</sup>

<sup>83</sup> In relation to the concept of 'redefining', see Stewart, above n 16.

<sup>84</sup> *Competition and Consumer Act 2010* (Cth) ss 90, 93AC(1).

<sup>85</sup> See ACCC, *Guide to Collective Bargaining Notifications* (2011) 24.

<sup>86</sup> See, eg, ACCC, 'Draft Objection Notice in Respect of a Collective Bargaining Notification Lodged by the AMA (Vic) Pty Ltd on Behalf of a Group of Doctors at Werribee Mercy Hospital' (Draft Objection Notice, Public Register Number C2007/1930, 8 November 2007) 17 [3.58] ('Draft Objection Notice'); ACCC, 'Assessment: Collective Bargaining Notification Lodged by the Australian Newsagents' Federation' (Assessment, Public Register Number C2007/1612, 13 September 2007) 12 [3.25].

<sup>87</sup> ACCC, *Guide to Collective Bargaining Notifications*, above n 85, 29–32.

<sup>88</sup> Shae McCrystal, 'Is There a "Public Benefit" in Improving Working Conditions for Independent Contractors?: Collective Bargaining and the *Trade Practices Act 1974* (Cth)' (2009) 37 *Federal Law Review* 264, 281–2; Warren Pengilly, 'The Competition Tribunal and Chicken Meat: Do Exclusionary Provisions Have Any Future Hope of Authorisation?' (2006) 14 *Competition and Consumer Law Journal* 196.

Two examples illustrate this problem. A group of chicken meat growers sought authorisation for collective bargaining conduct including the right to engage in a collective boycott. The growers were price-takers, powerless actors within complex contract networks where terms were entirely dictated by the purchasers of chicken meat. With their personal resources sunk into expensive chicken farming operations, these primary producers were left with little room to manoeuvre or exit the industry.<sup>89</sup> However, while they were permitted to engage in collective bargaining, they were denied the right to a collective boycott, as it had the potential to give them too much market power.<sup>90</sup> In another case, a group of medical doctors, contracted to a public hospital were denied the opportunity to collectively bargain at all.<sup>91</sup> Despite evidence that the doctors were subject to take-it-or-leave-it contracting arrangements and had been unable to negotiate as individuals, it was found that their positions and skills lent them too much individual power to allow collective bargaining.<sup>92</sup>

Once the level of anti-competitive detriment is established, the ACCC will assess the public benefit that will flow from the proposed conduct. While a public benefit can be 'anything of value to the community generally',<sup>93</sup> in practice the focus is on efficiency gains that can be made by allowing collective bargaining to occur.<sup>94</sup> Public benefits in this context include arrangements that provide parties with greater input into contracts to enable efficiency gains, transaction cost savings, greater information exchange and the facilitation of new market entrants.<sup>95</sup> Improved industrial relations or increased bargaining power are not considered to be public benefits for this purpose.<sup>96</sup> Equally, while the 'public' to whom the benefits of any efficiency gains can flow includes the proposed participants in the collective bargaining process (in the form of increased remuneration or better working condi-

<sup>89</sup> For discussion of the contractual situation applicable to these workers, see Joe Isaac, 'Collective Bargaining under Trade Practices Law' (2008) 19(1) *Economic and Labour Relations Review* 39, 47–53; Pengilley, above n 88.

<sup>90</sup> *Re VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT 2 (21 April 2006) [454] (Heerey J, Dr Beerworth and Professor Walsh).

<sup>91</sup> ACCC, Draft Objection Notice, above n 86.

<sup>92</sup> *Ibid* 27 [3.141].

<sup>93</sup> *Re Queensland Co Operative Milling Association Ltd* (1976) 8 ALR 481, 510 (Woodward J, Mr Shipton and Professor Brunt).

<sup>94</sup> McCrystal, above n 88, 277.

<sup>95</sup> ACCC, *Guide to Collective Bargaining Notifications*, above n 85, 32–5.

<sup>96</sup> *Ibid* 35–6.

tions),<sup>97</sup> more weight appears to accord to gains that flow to the consuming public.<sup>98</sup>

The consequences of this approach to the assessment of 'public benefit' is that in order to receive the imprimatur of the ACCC to proceed with collective bargaining arrangements without breaching the statute, the proposal must come from parties who are in a very weak bargaining position and the proposal must be for arrangements that are entirely voluntary. Where both of these requirements are met, the ACCC is likely to find that the anti-competitive detriment is sufficiently low to be overcome by the 'efficiencies' that can be gained by collective bargaining. The ACCC is unlikely to permit collective bargaining which resembles traditional labour market collective bargaining. Such bargaining may involve resistance from either party, coercive bargaining tactics or the pursuit of an enforceable outcome. In the competition realm, these elements produce too much anti-competitive detriment to be overcome by public interest considerations.

Because these provisions were not designed for workplace collective bargaining, there is no institutionalised support for collective bargaining that is authorised by the ACCC. There are no mechanisms governing the bargaining process, representation, or scope of agreements that may be reached, or providing for the legality or enforcement of agreements.<sup>99</sup> The process appears to have been designed to facilitate voluntary collective agreements between groups of business actors (eg, primary producers, etc), where all parties want to reach agreement, everyone is agreed about the positive benefits that may flow from an agreement, and there is unlikely to be any problems around enforcement of outcomes. It struggles to accommodate a situation where one party is reluctant or refuses to bargain, or where a collective wants to use pressure to coerce another party into a particular outcome (even though the statute provides for authorisation of proposed collective boycotts).<sup>100</sup> As such, this is not an example of an institutionalised collective bargaining process for a group of self-employed workers. Instead, it demonstrates how a competition regulator approaches the question of whether a group of workers should be able to engage in collective bargaining. The ACCC is granting a privilege only

<sup>97</sup> *Qantas Airways Ltd* [2004] ACompT 9, [183] (Goldberg J, Mr Latta and Professor Round), quoting *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385, 391–2 (Northrop J, Mr Walker and Professor Johns).

<sup>98</sup> *Qantas Airways Ltd* [2004] ACompT 9, [185] (Goldberg J, Mr Latta and Professor Round).

<sup>99</sup> See Shae McCrystal, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20 *Australian Journal of Labour Law* 1.

<sup>100</sup> *Competition and Consumer Act 2010* (Cth) s 88(1).

where the public interest, as understood in a competition framework, is furthered.

The development of a scheme of collective bargaining for self-employed workers, where an assessment is made at the outset of the suitability of such workers for bargaining, could have advantages. In particular, such an assessment could focus on the working conditions and opportunities for negotiation that exist for a group of workers. If the manner in which self-employed workers are engaged is largely irrelevant in considering whether they should be able to access collective bargaining, there would be less incentive for labour engagers to design contracting strategies to avoid the application of labour laws. Further, such a mechanism may assist in identifying and distinguishing truly 'entrepreneurial' workers for whom collective bargaining may not be considered appropriate. However, as the above discussion demonstrates, such decisions would be highly context specific and the crucial regulatory consideration will be which body is entrusted with decision-making and how any test is defined. Further, such a model would not provide certainty for self-employed workers as decisions would be made on a case by case basis, and may or may not be extended beyond the particular collective seeking to undertake collective bargaining. Finally, any risk that such a mechanism could be brought into mainstream collective bargaining statutes should be weighed in the balance.

### *C Industry or Occupation Specific Collective Bargaining Regimes for Self-Employed Workers*

The third approach to providing access to collective bargaining for self-employed workers is to enact industry or occupation specific bargaining regimes for a class of workers in an industry or occupation. Such regimes may be implemented with or without independent boards or tribunals and may apply to all labour market participants in a particular sector (both employed and self-employed workers), or only to self-employed workers.

A particular industry or occupation specific bargaining regime may be developed for any number of reasons. Even where access to collective bargaining is not the primary motivation behind the development of a regime, it offers an opportunity to take into account the particular difficulties and contractual arrangements experienced by the self-employed workers concerned. The discussion in this Part will outline three industry or occupation specific bargaining systems considering the significant features of each. They are the Canadian scheme for artist workers, the Quebec scheme for home childcare workers and the Australian scheme for road transport drivers.

### 1 *Self-Employed Artist Workers in Canada*

The Canadian *Status of the Artist Act*,<sup>101</sup> which came into force fully in 1995, was one of the first occupation-specific collective bargaining schemes for self-employed workers enacted anywhere in the world.<sup>102</sup> The Act applies at federal level to self-employed artists, defined as professional ‘independent contractors’.<sup>103</sup> This includes authors of artistic, dramatic, literary or musical works; performers; and those who contribute to the creation of performances.<sup>104</sup> The statute creates a collective bargaining system, with many of the features of mainstream collective bargaining, but with variations designed to accommodate the workers concerned and their particular needs. The distinctive features of these workers include: variation in individual market power between different artists; the seasonal (feast or famine) nature of the work; the wide range of parties with whom an artist may contract; and the distinction between the production of a product and the provision of a service.<sup>105</sup>

The statute applies to professional independent contractors as outlined above, including artists who contract through an incorporated entity or organisation.<sup>106</sup> This recognises the common practice of contracting through a third party and lifts the corporate veil to ensure that the interposition of a corporate structure does not obscure the real nature of the regulated exchange. The competition law problem has been dealt with through s 9(2) which deems covered workers to be employees for the purposes of the competition law exemption for employee collective bargaining.<sup>107</sup> Further, the

<sup>101</sup> SC 1992, c 33.

<sup>102</sup> The history of the passage of the *Status of the Artist Act* is set out in Cranford et al, above n 5, ch 4. There are also two earlier statutes in Quebec: *An Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and their Contracts with Promoters*, SQ 1988, c 69; *An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*, SQ 1987, c 72.

<sup>103</sup> *Status of the Artist Act* ss 5 (definition of ‘artist’), 6(2)(b).

<sup>104</sup> The concept of ‘author’ is defined under the *Status of the Artist Act* s 6(2)(b)(i) by reference to the creation of artistic works falling within the definition of the *Copyright Act*, RSC 1985, c C-42. This has had a limiting effect on coverage under the statute, as illustrated by the difficulties in asserting coverage experienced by freelance editors: see Cranford et al, above n 5, 138–42.

<sup>105</sup> For discussion of this sector, see Cranford et al, above n 5, ch 4; Elizabeth MacPherson, ‘Collective Bargaining for Independent Contractors: Is the *Status of the Artist Act* a Model For Other Industrial Sectors?’ (1999) 7 *Canadian Labour and Employment Law Journal* 355.

<sup>106</sup> *Status of the Artist Act* s 9(1).

<sup>107</sup> However, Cranford et al, above n 5, 149–50, argue that the exclusion of bargaining under the *Status of the Artist Act* from the *Competition Act*, RSC 1985, c C-34 may potentially be ineffective for some collective agreements as the *Competition Act* exclusion applies to services

statute only applies to independent contractors.<sup>108</sup> Employee artists remain covered by mainstream collective bargaining laws, even though they face many of the same difficulties in achieving collective agreement coverage as self-employed artists.

When the legislation was enacted, administration was vested in the Canadian Artists and Producers Professional Relations Tribunal ('CAPPRT'), made up of members with specific industry experience, something that had been a key requirement of members of the industry.<sup>109</sup> The CAPPRT operated for 18 years, until mid-2012 when it was dissolved.<sup>110</sup> Administration of the statute was transferred to the Canada Industrial Relations Board ('CIRB'),<sup>111</sup> the body responsible for the federal labour relations statute. It is, as yet, too early to reflect on the significance of this change.

The collective bargaining scheme implemented by the statute differs from mainstream collective bargaining relations statutes in Canada in a number of important respects. Instead of requiring majority support in a bargaining unit to gain recognition rights, certification for bargaining purposes may be granted where the scope of the sector that the association seeks to represent is suitable for bargaining, and the artists' association is the organisation most representative of the artists in that sector.<sup>112</sup> Sector determination is based on the common interests of the artists, the history of professional relations in the sector and geographic or linguistic criteria.<sup>113</sup> The CAPPRT had shown a preference for the determination of craft-based sectors (although it is unclear what approach the CIRB will take).<sup>114</sup> The important question is 'most representative' and this is determined by the size of the sector, the density of membership held by the association, and any competing applications for certification.<sup>115</sup> While labour engagers may be heard before the administering authority with respect to sector determination, only artists can, as of right, challenge certification of an association on the basis of representativeness.<sup>116</sup>

rather than products, and the *Status of the Artist Act* deals with some artists as producers of copyrightable products rather than as suppliers of services.

<sup>108</sup> *Status of the Artist Act* s 6(2)(b).

<sup>109</sup> MacPherson, above n 105, 361.

<sup>110</sup> *Jobs, Growth and Long Term Prosperity Act*, SC 2012, c 19, div 39.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Status of the Artist Act* s 9(1).

<sup>113</sup> *Ibid* s 26(1).

<sup>114</sup> MacPherson, above n 105, 363.

<sup>115</sup> *Ibid* 365.

<sup>116</sup> *Status of the Artist Act* ss 26(2), 27(2).

Certification under the *Status of the Artist Act* gives the certified association the exclusive authority to bargain with engagers on behalf of artists in the sector and create collective agreements.<sup>117</sup> For the purposes of bargaining for an agreement, the statute permits the use of pressure tactics akin to strike action, and contains provisions dealing with unfair labour practices.<sup>118</sup> Agreements, once created, are called ‘scale’ agreements and operate only as minimum standards.<sup>119</sup> Individual artists, who may hold greater bargaining power, are free to negotiate above the agreement. This is unusual in Canada where collective agreements generally do not permit individual deviation. MacPherson notes that

[t]he effect of the legislation’s minimal intrusion into the labour market is to create an underlying safety net for the majority of working artists and to eliminate the worst forms of ‘competition to the bottom’ that occur when work is scarce.<sup>120</sup>

Another important feature is that the statute allows for the creation of associations of engagers (‘producer associations’).<sup>121</sup> Artist associations may negotiate with a collective of engagers in order to achieve broad sector coverage for their collective agreements. However, it appears that such engager associations have not materialised in practice, leaving artist associations with the difficult work of locating and negotiating with engagers individually.<sup>122</sup>

## 2 *Home Childcare Workers in Quebec*

Unlike the Canadian *Status of the Artist Act* which was designed to provide for a group of self-employed workers whose status was relatively uncontroversial, the Quebec *Home Childcare Providers Act*<sup>123</sup> establishes a sector-based collective bargaining scheme for home childcare providers who are specifically excluded from mainstream collective bargaining law. The history behind

<sup>117</sup> Ibid s 28(5).

<sup>118</sup> Ibid ss 46–54.

<sup>119</sup> Ibid s 33(4).

<sup>120</sup> MacPherson, above n 105, 369. See also Cranford et al, above n 5, 168–9.

<sup>121</sup> *Status of the Artist Act* s 24.

<sup>122</sup> Cranford et al, above n 5, 170; MacPherson, above n 105, 386.

<sup>123</sup> *An Act Respecting the Representation of Certain Home Childcare Providers and the Negotiation Process for Their Group Agreements*, RSQ 2009, c R-24.0.1.

the passage of the statute is complex.<sup>124</sup> Home childcare workers in Quebec won the right to engage in mainstream collective bargaining by achieving recognition of their status as ‘employees’ of not-for-profit early childhood centres. However, the National Assembly (the Parliament of Quebec), apparently anxious to maintain a cap on the cost of the subsidy paid for each childcare place in Quebec, passed legislation deeming the home childcare workers to be self-employed, effectively denying them the right to collectively bargain.<sup>125</sup> This was challenged before the Quebec Superior Court and was found to be unconstitutional as contrary to the *Canadian Charter of Rights and Freedoms* as it denied freedom of association rights to the affected workers.<sup>126</sup> In response, the National Assembly passed the *Home Childcare Providers Act* establishing a collective bargaining scheme for the sector. However, it did not change the status of these workers as self-employed.

The workers concerned could have been covered by the Quebec *Labour Code*<sup>127</sup> but instead the National Assembly deliberately maintained separate coverage. As a sector, home childcare workers face particular obstacles to collective bargaining. The target of bargaining is not the parents of the children being cared for, but the government authority that establishes the amount of subsidy paid for childcare places and imposes extensive regulation on the industry. The geographic and ‘domestic’ isolation of these workers makes them particularly difficult to organise.<sup>128</sup> Similar problems exist in

<sup>124</sup> For discussion, see Stephanie Bernstein, ‘Sector-Based Collective Bargaining Regimes and Gender Segregation: A Case Study of Self-Employed Home Childcare Workers in Quebec’ in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 213; Stephanie Bernstein, ‘The Regulation of Paid Care Work in the Home in Quebec: From the Hearth to the Global Marketplace’ in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norm* (Hart Publishing, 2006) 223.

<sup>125</sup> Bill 8, *An Act to Amend the Act Respecting Childcare Centres and Childcare Services*, 1<sup>st</sup> Sess, 37<sup>th</sup> Leg, Quebec, 2003.

<sup>126</sup> *Confédération des syndicats nationaux v Québec (Procureur général)* [2008] QCCS 5076 (31 October 2008) [314].

<sup>127</sup> RSQ, c C-27.

<sup>128</sup> See, eg, the discussion of homework in Stephanie Bernstein, Katherine Lippel and Lucie Lamarche, ‘Women and Homework: The Canadian Legislative Framework’ (Research Paper, Status of Women Canada, March 2001). The problems are similar to those that exist with respect to the regulation of domestic workers and are exacerbated by the historical reluctance of law to intrude on spaces, like domestic homes, characterised as ‘private’: see Adelle Blackett, ‘Introduction: Regulating Decent Work for Domestic Workers’ (2011) 23 *Canadian Journal of Women and the Law* 1; Einat Albin, ‘From “Domestic Servant” to “Domestic Worker”’ in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 231, 241.

Australia, where home childcare workers have been found to be ‘licensees’ of the councils that regulate home childcare (not employees).<sup>129</sup>

The *Home Childcare Providers Act* implements a mainstream collective bargaining framework with modifications tailored to the nature of the sector as one in which the terms and conditions of engagement are effectively set by the regulator. Overall, the model implemented is a far more traditional one than that implemented for artists. An association may apply to the Quebec Labour Board for recognition rights for a particular ‘territory’ if it can establish absolute majority membership in that territory.<sup>130</sup> Once certified, an association has exclusive representation rights in the territory, all home childcare workers in the territory pay dues to the association, and any resultant agreement extends across the territory.<sup>131</sup> Negotiation occurs directly with the relevant Quebec Government Minister over matters including, but not limited to, the amount of the government subsidy, leave and holidays.<sup>132</sup> There are good faith bargaining obligations, coercive action is permitted and there are protections against unfair labour practices.<sup>133</sup>

Separate and more tailored regulation may achieve better bargaining outcomes for home childcare workers. However, this statute closely mirrors mainstream collective bargaining and the advantages for these workers in having a minimally tailored regime may be outweighed in practice by the disadvantages. The effect of their being deemed to be ‘independent contractors’ is to remove the general protective safety net of minimum standards and labour protections.<sup>134</sup> In consequence, their starting position in collective bargaining is disadvantaged compared to where they would have been had they remained as employees, and they are denied a range of other benefits that would be otherwise applicable.<sup>135</sup> However, the sector specific statute does avoid difficult issues around bargaining unit determination, using the concept of a territory instead.

<sup>129</sup> *Re Municipal Association of Victoria* [1991] 4 CAR 35, 48–9.

<sup>130</sup> *Home Childcare Providers Act* ss 3, 13.

<sup>131</sup> *Ibid* ss 18–19, 35.

<sup>132</sup> *Ibid* s 30–1.

<sup>133</sup> *Ibid* ss 37, 49–57.

<sup>134</sup> See Bernstein, ‘Sector-Based Collective Bargaining Regimes and Gender Segregation’, above n 124, 228–9.

<sup>135</sup> *Ibid*.

### 3 Australian Road Transport Sector

The third collective bargaining regime applies to road transport drivers in Australia. The Australian road transport industry is one in which self-employed and employee workers compete for work at the bottom of highly developed supply chains.<sup>136</sup> Purchasers at the top of supply chains wield significant market power, exerting downwards pressure on prices and compressing wages in the industry. This has driven a variety of unsafe practices in the industry, including unsustainable working hours as workers struggle to make a living and margins grow tighter.<sup>137</sup> Collective bargaining is one component of a broader legislative scheme implemented in the *Road Safety Remuneration Act 2012* (Cth) to improve safety in the industry for both workers and other road users.<sup>138</sup> It is relatively new legislation and its efficacy is untested. Further, the Coalition Government has commissioned a review to determine whether the Act represents an effective means of addressing safety concerns in the industry.<sup>139</sup> However, even if the Act proves to be short lived, it provides a distinct example of an industry based collective bargaining regime for the purposes of this discussion.

There are two important elements of the *Road Safety Remuneration Act 2012* (Cth). First, it provides for the establishment of minimum ‘safe rates’ of remuneration for all road transport drivers — both employee and self-employed — operating within the jurisdictional reach of the statute.<sup>140</sup> This has the effect of eliminating the competitive advantage transport companies can obtain by offering work to owner drivers at rates that provide lower ‘wages’ than a comparable employee would receive under applicable labour law safety nets. Second, the statute allows for the negotiation of collective agreements between self-employed road transport drivers and a hirer or

<sup>136</sup> See Michael Quinlan and Lance Wright, *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission* (Report, National Transport Commission, October 2008) 10 [6].

<sup>137</sup> *Ibid* 40 [78].

<sup>138</sup> The history behind the passage of the *Road Safety Remuneration Act 2012* (Cth) is set out in Brendan Johnson, ‘Developing Legislative Protection for Owner Drivers in Australia: The Long Road to Regulatory Best Practice’ in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 121. There is also a lengthy history of regulating for minimum standards and collective bargaining by short haul truck drivers in NSW: see Johnstone et al, above n 12, 148.

<sup>139</sup> Eric Abetz, ‘Review of the Road Safety Remuneration System’ (Media Release, 20 November 2013).

<sup>140</sup> *Road Safety Remuneration Act 2012* (Cth) s 27.

potential hirer of those drivers with respect to remuneration and related conditions.<sup>141</sup>

There are a number of features of collective bargaining in the *Road Safety Remuneration Act 2012* (Cth) that make it distinct from the two models previously discussed. Administration has been vested in a specially created tribunal, the Road Safety Remuneration Tribunal, an independent body composed of members of the Fair Work Commission and industry specialists.<sup>142</sup> Collective agreements may only be made where a minimum remuneration determination that applies to the workers concerned is in effect.<sup>143</sup> Collective agreements must be negotiated against a pre-existing wages safety net and cannot disadvantage the workers concerned.<sup>144</sup> Conduct in pursuit of an agreement, and agreements themselves, are exempt from the anti-competitive conduct prohibitions under the competition statute.<sup>145</sup> This avoids the problem identified earlier with respect to deemed employees under the *FW Act*. However, the exemption does not extend to collective boycotts.<sup>146</sup> As such, the Act does not permit the use of coercive pressure by collectives of road transport drivers to support their claims for a collective agreement. Collective agreements must be approved by the Tribunal. The Tribunal may have regard to whether the benefit of approving the agreement will outweigh the detriment to the public caused by any lessening of competition that would result or be likely to result from approving the agreement.<sup>147</sup> Thus, a tribunal created in a labour law context, comprised of labour commissioners and industry specialists, has been asked to apply a competition style test to determine if a collective agreement reached between a group of workers and an engager is in the public interest. As yet, no collective agreements have been made or approved. However if the Act is retained, it will be instructive to see the extent to which the Tribunal's approach differs from the approach adopted by the ACCC. Will the Tribunal produce a different conception of public interest than that developed by competition regulators, or will it be influenced or stymied by deference to the ACCC approach?

<sup>141</sup> For an overview of the legislation, see Michael Rawling and Sarah Kaine, 'Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers' (2012) 25 *Australian Journal of Labour Law* 237.

<sup>142</sup> *Road Safety Remuneration Act 2012* (Cth) pt 6.

<sup>143</sup> *Ibid* s 34(a).

<sup>144</sup> *Ibid* s 34(b).

<sup>145</sup> *Ibid* s 37A.

<sup>146</sup> *Ibid* s 37A(4)(b).

<sup>147</sup> *Ibid* s 32A(2).

The structure adopted in the *Road Safety Remuneration Act 2012* (Cth) involves a particular choice concerning appropriate forms of regulation for the workers concerned. Self-employed workers in the road transport industry are easily categorised as dependent contractors who, due to their precarious positions operating within highly competitive supply chains, are almost indistinguishable from employee road transport drivers. The fact that they own their own transport may be illusory, as their 'ownership' is often facilitated through lease financing schemes provided by the business which is engaging them to do the work.<sup>148</sup> They are a group of workers for whom a strong argument for the use of a deeming provision similar to that used in Canada could be made, providing these workers with access to standard labour law protections. Instead, a distinction has been maintained by subjecting the collective arrangements of these workers to a competition-style public interest test (suggesting that there are times when collective bargaining by these workers could be too anti-competitive), while the collective arrangements of employee road transport drivers are spared this assessment. It also means that self-employed road transport drivers are denied the collective power that may be gained by bargaining as a collective with their employed colleagues. Perhaps this reflects the lingering myth of the 'entrepreneurial' nature of these workers?

The three industry or occupation specific models discussed demonstrate that there are particular advantages to establishing such collective bargaining regimes for self-employed workers. In starting from scratch, regulators are able to design collective bargaining regimes tailored to the needs of the workers concerned, taking into account their vulnerabilities and contract arrangements. This facilitates innovation in regulatory design and helps avoid the limitations inherent in mainstream collective bargaining models. However, where such schemes are limited to self-employed workers rather than applying to all workers in an industry or occupation, they may perpetuate the often artificial separation of workers into different classes, with a consequent dilution of potential collective strength. It may also serve to bolster the continuation of separate regulatory approaches based on contractual form, rather than facilitating the regulation of work and those who perform it in a more consistent manner. Further, the enactment of a separate collective bargaining regime may mean that self-employed workers continue to work without a safety net of minimum working conditions.

<sup>148</sup> See, eg, *Keldote Pty Ltd v Riteway Transport Pty Ltd* (2008) 176 IR 316.

#### IV HOW DO WE REGULATE COLLECTIVE BARGAINING FOR SELF-EMPLOYED WORKERS?

As noted at the beginning of this article, Cranford, Fudge, Tucker and Vosko have emphasised the diverse nature of the self-employed workforce and the need for the law to ‘support a variety of collective representation and bargaining schemes.’<sup>149</sup> The experiences in Australia and Canada outlined in this article show three predominant approaches to providing access to collective bargaining for self-employed workers:

- 1 Provisions in mainstream collective bargaining statutes that permit their application to some self-employed workers;
- 2 Provisions in other statutes that permit self-employed workers to engage in collective action that would otherwise be unlawful; and
- 3 Industry or occupation specific collective bargaining regimes for self-employed workers.

What does the variety of approaches adopted in Australia and Canada reveal about the challenge of creating workable collective bargaining models for self-employed workers? Most of the schemes discussed, with the notable exception of the *Status of the Artist Act*, were not designed primarily to facilitate access to collective bargaining for self-employed workers but rather came about due to some other reason. However, they provide useful examples of the different forms that collective bargaining for self-employed workers may take and lessons for the future design of regulatory schemes.

The primary issue in the design of any scheme of collective bargaining for self-employed workers is to determine who will be covered by the scheme and to identify the particular characteristics of the workers and their working arrangements. This problem raises the contentious question of which self-employed workers should be provided with access to collective bargaining and how to design regulation which separates out genuinely ‘entrepreneurial’ workers from those workers in need of protection.

There is general agreement amongst scholars that self-employed workers who most resemble standard employees — dependent contractors — should be treated like employees and provided with access to mainstream collective bargaining statutes. It is relatively straightforward to consider the contractual arrangements of such workers as a ‘sham’ or as an indication of avoidance of labour law protections. However, the discussion has demonstrated that

<sup>149</sup> Cranford et al, above n 5, 184.

deeming provisions in mainstream collective bargaining statutes are not necessarily the most appropriate way to regulate these workers. Deeming provisions may be strictly interpreted by labour tribunals applying a narrow construction of who should be given the benefit of the statute. Further, workers who are likely to be covered by deeming provisions may already face substantial obstacles to collective bargaining, which may not be overcome by access to a collective bargaining system designed for a different type of workplace. For example, the Australian system, which deems textile, clothing and footwear outworkers to be employees for the purposes of the *FW Act*, is likely to benefit these workers because of the extension of the minimum standards in the legislation, not through access to collective bargaining. Given that the low-paid bargaining stream has been almost ineffective in practice, the enterprise focused collective bargaining system enshrined in the Act will prove to be of limited value for workers who perform work in their own homes. In Canada, the deeming provisions in the mainstream collective bargaining statutes have proven to be useful in extending coverage of collective bargaining, but deemed workers face difficulties around recognition campaigns and bargaining unit determination — issues that are particularly difficult for atypical employees.<sup>150</sup> Further, they are not covered by separate minimum standards legislation, placing them at a disadvantage at the commencement of bargaining. Instead of deeming provisions, occupation or industry specific bargaining schemes may be a better regulatory choice, where the specific characteristics of the workers concerned may be taken into account in the design of the scheme.

Beyond the issue of dependent contractors lies a whole range of self-employed workers who are independent of one particular engager and who exist across a spectrum — from well-paid small entrepreneurial businesses to extremely vulnerable precarious workers, subjected to harsh contracting arrangements offered on a take-it-or-leave-it basis and who struggle to earn remuneration at an equivalent level to the minimum wage set for employees, and all those in between. The two questions that arise are whether or not regulation should distinguish between self-employed workers at all; and if regulation should separately identify them, how should they be distinguished. A glib response to the first question might be that genuinely entrepreneurial workers are probably those highly remunerated workers who show no interest in any form of collective engagement and as such, would self-select out of collective bargaining models. However, this may be an unsatisfactory basis

<sup>150</sup> See, eg, Cranford et al, above n 5.

upon which to regulate, particularly given the high stakes involved when exemptions from the application of competition regulation are proposed. Identification of genuinely entrepreneurial workers is probably a precondition to achieving any regulatory response at all. There are two potential approaches to identifying such workers that emerge from the models considered in this article — sector specific bargaining for minimum conditions, and identification of groups of workers appropriate for bargaining.

The regime established by the *Status of the Artist Act* is a useful illustration of achieving a collective bargaining framework for a group of disparate self-employed workers who occupy different positions in terms of individual bargaining power and economic status. In developing a collective bargaining model for these workers, the focus has been on establishing structures that facilitate bargaining for fair pay and conditions for the majority of workers in the sector, while allowing outliers to negotiate better deals for themselves above the conditions set within collective agreements. The focus is not on who should be allowed to bargain — everyone who falls under the statutory definition can be covered by a collective bargain — but those who can get a better deal are free to make it, individually (not collectively) on their own terms, exerting their own individual bargaining strength.

An approach like the one taken in the *Status of the Artist Act* is attractive because it avoids the need to single groups of workers out as being inappropriate for collective bargaining (for whatever reason) and ensures that all workers in a sector are able to participate in the determination of fair working conditions. However, if this approach was not preferred, an alternative would be a model involving an assessment of the suitability of collective bargaining for workers in a particular industry or occupation, or for a specific group of workers who wish to engage in collective bargaining. The utility of this approach would depend upon the rationale for including such an assessment. If the concern related to whether or not a particular bargaining structure was suitable for certain workers, the solution would lie in redesigning the bargaining structures or providing for sector specific bargaining, rather than setting up a mechanism to assess groups of workers. The most likely reason for this approach would be a concern that collective bargaining was unsuitable for genuinely entrepreneurial workers because it could give them too much power and allow them to engage in anti-competitive practices. If this is the concern, the authorisation process in Australian competition laws could provide a starting point for thinking about how to design such a test. The test as applied in Australia requires that the applicants for authorisation demonstrate public benefits that may flow from permitting collective bargaining which would otherwise be anti-competitive in effect. If the approach was

adapted to a labour law context, the concept of public benefit could be expressed to include considerations such as increased bargaining power, industrial harmony and equal pay for work of equal value. In such an environment, it is possible that the test could prove useful to exclude groups of self-employed workers who possess sufficient individual bargaining power to achieve fair and reasonable contractual terms without the necessity of collective action, while permitting other groups access to a collective bargaining scheme tailored to meet the circumstances of self-employed workers. However, the Australian experience demonstrates that this approach would need to be enacted within a framework which promoted collective bargaining, accepted the potential for coercive action and expressly permitted the creation of binding collective agreements. The body entrusted with administering the test would need to be carefully considered. In competition law, market power through collective strength is anathema, so any model should be based in a more sympathetic framework. Labour tribunals may be too aligned to the concept of 'employment' to develop a truly new approach. The regulation of road transport drivers in Australia by an independent specialist tribunal is a useful example, although it remains to be seen how the Tribunal will apply the public interest test it has been given.

Once issues of coverage are determined, the discussion in this article has shown that there are a range of other factors which need to be carefully considered in the regulatory design for any model of collective bargaining for self-employed workers. These include representation, coverage of collective agreements and any potential intersection with competition law. A model of majority support for recognition for the purposes of bargaining is ill-suited for workers who are geographically dispersed, subject to atypical contracting arrangements, or who work for a number of different engagers. This is well understood as it pertains to atypical workers in mainstream collective bargaining, and these difficulties are compounded for self-employed workers. Solutions like those in the *Status of the Artist Act* ('most representative') and the *Home Childcare Workers Act* (majority support in a territory) suggest that these issues may best be dealt with on an industry or occupational basis. In terms of coverage of collective agreements, particular issues arise as to whether an agreement will operate as the going rate for work covered by the agreement or if it will operate as a minimum standard only, which workers and engagers will be covered by an agreement, and whether an agreement can be extended to apply across an industry or occupation. Further, in any regulatory scheme, the role of competition law must be considered, particularly as to whether proposed bargaining will fall under any existing labour market exemptions and if not, what protections must be enacted.

A final issue raised by the discussion relates to access to collective bargaining for workers whose terms and conditions of engagement are substantially determined by a party who may not be in a direct contractual relationship with the worker concerned. This can be an issue for workers who labour at the base of supply chains, like the Australian examples of road transport drivers and textile, clothing and footwear outworkers. For these workers, the power exerted by purchasers at the top of the supply chain may be such that the labour engagers and labour providers at the bottom of the supply chain are left with almost no room to manoeuvre when it comes to pay and conditions. Another example is workers in industries where the price for labour is ultimately determined through government funding or government regulation, like home childcare workers. In these situations, to be effective, collective bargaining schemes must contain a mechanism to get the party with the power to the bargaining table. Without such a mechanism, collective bargaining may be meaningless as the relevant engagers of the labour may be powerless to provide improved pay and conditions. This will be particularly difficult in supply chain situations.