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Defining Employment and Work Relationships under the Fair Work Act

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Professor Joellen Munton is a leading expert in labour law. She has a particular interest in how working conditions can be improved for people working in new and emerging forms of work, such as on-demand work in the so-called 'gig economy'. Joellen has an extensive track-record in doctrinal scholarship in the field of employment contract law and labour law more generally. In recent years, she has engaged in reform-oriented legal research to better align labour law with society's changing needs. Joellen has also recently written on the impact of COVID-19 on workplace regulation, and on religious freedoms and job security. She is a fellow of the Australian Academy of Law and is currently the Vice-President (Academic) of the Australian Institute of Employment Rights.

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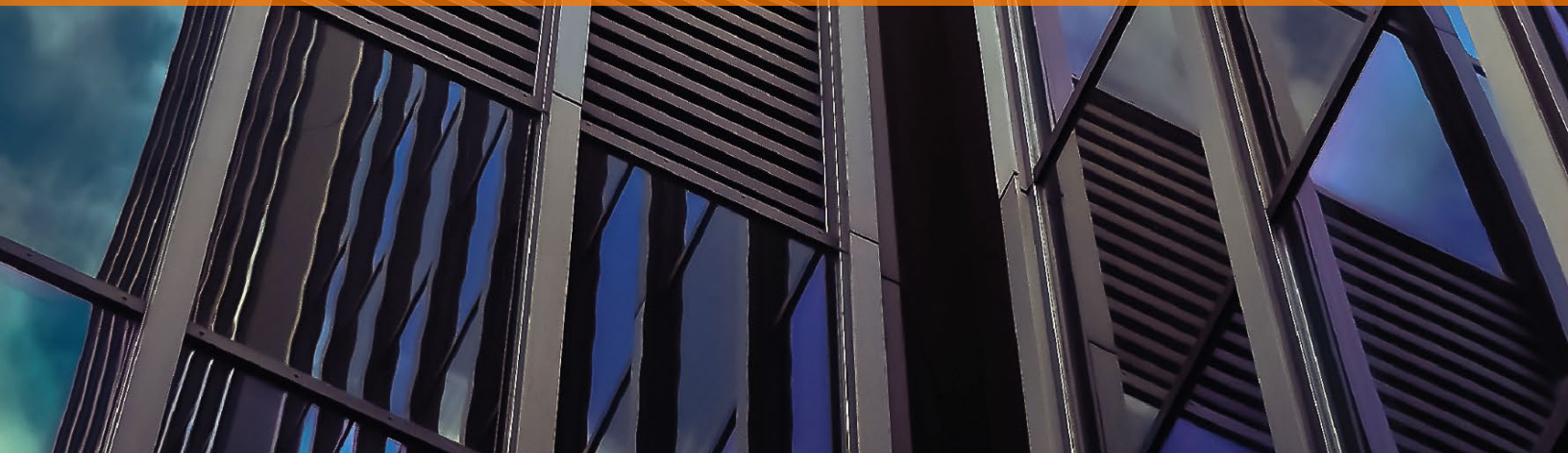

'Employment' as a type of contract

The challenges posed by the current absence of any definition of 'employment' in the *Fair Work Act 2009* (Cth) are well-known. The Act relies on the common law to define which workers enjoy the benefit of coverage by most of its provisions. A majority of the High Court of Australia (HCA) has recently determined that the classification of a worker's status under the common law will depend upon the terms of a written contract.[1] Although the HCA majority conceded some qualifications to this proposition (such as when a written contract is proven to be a 'sham', or has been varied) these exceptions hardly warrant consideration given how easily an employer can produce a written contract containing terms designed to ensure that the agreement will not fall within the common law definition of employment.

All of the signals in recent case law, from the courts and the Fair Work Commission, suggest that the problems created by the common law approach – particularly for vulnerable workers who have no realistic choice *but* to accept the written terms of engagement offered by the hirer – can only be addressed by Parliament.[2] A majority of the HCA claims that the courts' constitutional role is limited to identifying only the legally binding obligations of the parties to a relationship. Without clear statutory direction, courts are left to work with the principles of commercial contract law in identifying when a work agreement creates an employment relationship.

Even before the HCA narrowed the scope of inquiry to the legally binding terms of a contract, the common law definition of employment had been criticised as an unsatisfactory tool for distinguishing those workers who should enjoy statutory labour law protections from those who should fend for themselves as 'independent contractors'. The definition, and the way it has been applied by various courts and tribunals, has been criticised as too indeterminate by many commentators, for some time now. The way that the definition has facilitated regulatory avoidance by the labour hire industry adopting 'Odco' arrangements is well understood. There is no need here to rehearse the arguments thoroughly canvased in Professor Andrew Stewart's 2002 article on this subject.[3] The question now is 'what can, and (perhaps more importantly) *should* be done about this?'

The challenge of on-demand 'gig' work

We now have the additional challenge of the engagement of labour through digital platforms. When should workers engaged 'on demand' through these channels enjoy the benefits (or suffer the restraints) that come with *Fair Work Act* coverage? We need to be mindful that coverage by the whole of the *Fair Work Act* would include, among other benefits, coverage by the current system of modern awards, including their provisions on minimum shifts and ordinary hours of work. As Professors Stewart and McCrystal have noted, 'it is hard to imagine the elaborate system of base wage rates, pay loadings and controls on working hours established by the award system being extended to the genuinely self-employed'.[4] Whether or not on-demand workers are 'genuinely self-employed', many embrace the flexibility of setting their own working hours without award constraints (or at least, that is the view robustly argued by apologists for the platforms). So the challenge we face in 2022 is somewhat more complex than it was, even in 2002. How do we establish a definition (or perhaps set of definitions, each applicable to a particular division of the Act) to ensure that the protections provided by the *Fair Work Act* are accessible by all of those workers who

[1] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 ('*Personnel Contracting*'); *ZG Operations Pty Ltd v Jamsek* [2022] HCA 2 ('*Jamsek*'), and *Workpac Pty Ltd v Rossato* [2021] HCA 23.
[2] See for example *Nawaz v Rasier Pacific Pty Ltd T/A Uber BV* [2022] FWC 1189, [243] (Hampton C).
[3] See A Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15(3) *Australian Journal of Labour Law* 1.
[4] A Stewart and S McCrystal 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4, 12.

ought to enjoy them? The challenge of proposing appropriate definitions is complicated by the lack of any real consensus about whether these supposedly 'new' kinds of work should be covered by certain statutory entitlements.

Some proposals

We need to be mindful that any new coverage provisions need to provide predictive certainty for both workers and employers so that they know their rights and obligations from the outset. It took six years of breathtakingly expensive litigation for the builders' labourer in *Personnel Contracting* to establish that he was, in fact, entitled to a few months of the minimum wage as a casual employee. No doubt the labour hire industry is still dealing with the fall-out from discovering, very belatedly, that the arrangements endorsed by appellate level decisions in the past have misclassified many thousands of workers.[5] A legal system that produces such an outcome is justifiably criticised as inefficient and ineffective.

We might approach the problem in stages:

The first step – proposing the most minimal change – would be to address the HCA majority's restrictive approach to defining employment by reference only to contract documents. This first step would be to propose a statutory definition that allows consideration of the 'totality of the relationship' in the characterisation exercise. This minimal step would not expand the common law definition, but it would allow courts and tribunals to take account of the reality of working relationships in deciding the worker's status, and would thus remove some of the risk created by standard form contracting designed to mask the true nature of a working relationship.

The second step would be to seek to improve upon the common law definition of employment, by ironing out of the present 'multi-factorial' definition some of the indicia that have been apt to lead to perverse conclusions – notably the factors dealing with the provision of tools and vehicles, contracting through incorporated entities, and notional entitlements to sub-contract work, and Professor Stewart's 2002 article provides a useful template for that task. Taking this second step would ensure that a wider group of workers who are presently excluded from coverage are brought under the protections of the *Fair Work Act*.

A third and final step would be to acknowledge that in the case of some kinds of work, a definition of employment that continues to centre on the question of control – and especially on who fixes working hours – will always exclude some workers who nevertheless need particular protections. As Professors Stewart and McCrystal conceded, there will still be some workers who are 'genuinely self-employed'.[6] Even workers who enjoy sufficient autonomy in choosing their working hours to warrant exclusion from the National Employment Standards and the modern award system have a need for certain basic protections. Small business operators should still be entitled to contest the capricious termination of their work contracts. It is notable that the cases in which rideshare drivers have challenged their status have not concerned award coverage, but have involved unfair dismissal claims.[7] Self-employed workers should also have access to a mechanism for negotiating collective agreements, especially in the case of contractors working under the same terms and conditions for a single enterprise. Finally, rates of remuneration for contractors

[5] In *Personnel Contracting* above n1, [86], Kiefel CJ, Keane and Edelman JJ held that the Western Australian Court of Appeal's decision in *Personnel Contracting Pty Ltd v Construction Forestry Mining and Energy Union of Workers* (2004) 141 IR 31 was 'wrongly decided', and the reasoning in *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 was infected by error.

[6] Above n4.

[7] See *Kaseris v Rasier Pacific VOF* [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807; *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/as Uber Eats* [2020] FWCFB 1698; *Nawaz v Rasier Pacific Pty Ltd t/as Uber BV* [2022] FWC 1189. Exceptional cases have found that the specific terms of a contract create an employment relationship: see *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, where the employer subsequently left the jurisdiction, and *Franco v Deliveroo*, [2021] FWC 2818, which at the time of writing was under appeal.

should be underpinned by some statutory minimum.[8] This third step should not be mistaken as a claim for a third classification of worker. It is a claim that even where the present binary classification between employees and contractors is maintained, workers who are not employees, and who are genuinely self-employed, should not be excluded from some basic protections, such as unfair contract termination protection and access to collective bargaining rights. A new subdivision to Part 2-6 of the Act might be created to enable the Fair Work Commission to determine minimum rates for non-employed on-demand workers.

Step one: Allow recourse to the 'totality of the relationship'

The HCA majority's decision that the classification of a worker must depend only upon the express terms of a written contract needs to be overruled by statute. Notwithstanding the concern that any consideration of the 'totality of the relationship' might engage the court in too complex a forensic task,[9] it must be the case that the actual performance of a work agreement should determine the status of the worker. A minority of the HCA (Gageler and Gleeson JJ), and the chief justice of the Federal Court (Allsop CJ), accepted this view, and it is a view consistent with authority in the United Kingdom.[10] In *Personnel Contracting*, Gageler and Gleeson JJ said: 'Focusing exclusively on the terms of the contract loses sight of the purpose for which the characterisation is undertaken. That purpose is to characterise the relationship.'[11] As to the 'relationship', they cited Allsop CJ in the Federal Court, who said:

'The relationship is founded on, but not defined by, the contract's terms. Hence the importance of standing back and examining the detail *as a whole* ... This perspective is essential to view the circumstances as a practical matter ... This perspective and proper approach to the characterisation of the whole is likely to be distorted, not advanced, by an overly weighted importance being given to emphatic language crafted by lawyers in the interests of the dominant contracting party. The distortion will likely see formal legalism of the chosen language of such party supplant a practical and intuitively sound assessment of the whole of a relationship by reference to the elements of the informing conceptions.'[12]

Gageler and Gleeson JJ also said that the true character of an employment relationship might easily be disguised where the hirer uses 'a standard form written contract couched in language that might arguably have been chosen by the putative employer to dress up the relationship to be established and maintained as something somewhat different from what it might turn out to be.'[13]

So at the minimum, the *Fair Work Act* needs to adopt the Gageler and Gleeson JJ approach to characterisation of an employment relationship, even if it is decided that the current multiple indicia approach to characterising employment remains appropriate in determining which workers should enjoy the benefits of the NES and the modern award system.

How might that be achieved? A new provision might be added to the section 12 definition of *employee,* which states:

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[8] For a detailed argument of this thesis in the context of road transport work, see M Rawling and J Riley Munton 'Constraining the Uber-Powerful Digital Platforms: A Proposal for a New Form of Regulation of On-Demand Road Transport Work' (2022) 45(1) *UNSWLJ* 7.
[9] See *Personnel Contracting*, above n1, [59] (Kiefel CJ, Keene and Edelman JJ).
[10] See *Autoclenz Ltd v Belcher* [2011] UKSC 41, allowing the practical reality of a relationship to determine employment status; and *Uber BV et al v Aslam et al* [2021] UKSC 5, allowing regard to the economic reality of the relationship to determine 'worker' status under the *Employment Rights Act 1996* (UK) s 230(3).
[11] *Personnel Contracting*, above n1, [130].
[12] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122; (2020) 279 FCR 631 at 639-640, [21].

[13] *Personnel Contracting* above n1, [132].

'In determining whether a person is an employee for the purposes of the Division in which the definition of *employee* occurs, regard the practical reality of the relationship between the putative employer and that person in preference to the formal terms of any contract documentation created by the parties.'

Others may offer more felicitous drafting of this qualification.

Step Two: A broader definition of employment

Step One is a minimal solution, that would preclude the risk of characterisations based on disingenuous contract documentation. But it would not ensure that in all cases the most vulnerable of workers were included in *Fair Work Act* coverage. The *Jamsek* decision[14] demonstrates that it is still a straightforward matter for a hirer to insist on arrangements that cast workers as contractors, notwithstanding the economic reality of the working relationship. An excellent starting point for widening the definition of employment to capture economically dependent relationships is provided by Professor Stewart's extensive 'Proposed Redefinition' of employment in his 2002 article.[15] Professor Stewart's comprehensive proposal specifically addresses the practices of the labour hire industry. It is reproduced here (citations omitted) with some annotations of my own in square brackets.

(1) A person (the worker) who contracts to supply their labour to another is to be presumed to do so as an employee, unless it can be shown that the other party is a client or customer of a business genuinely carried on by the worker.

[This provides for a presumption of employment in a labour supply contract, unless this can rebutted by the hirer proving that the hirer is a 'client or customer' of a business genuinely carried on by the worker. This would capture those contracts that are expressed as labour supply contracts (so would capture standard labour engagements), but may allow contracts similar to the typical Uber contract to escape. The Rasier Pacific Pty Ltd contract with rideshare drivers describes the relationship of Uber and the driver as one in which Uber provides 'lead generation services', to allow the driver to find customers.[16] In the United Kingdom, this characterisation of the contract has been rejected, and drivers have been found to be 'workers' providing services to Uber in its business, but this is because the Supreme Court has been prepared to look past the written terms of contracts to the economic reality of the relationship created by an agreement.[17] We would need to make a policy decision. Do we think that engagement of workers through on demand platforms should be captured by a new definition? It will not be only Uber drivers and food delivery riders who are affected by such a decision. Many workers in home care, including providing services in the National Disability Income Support system, are connected to service recipients by platforms (such as Mabel). If we do believe that these kinds of engagements should also be captured, perhaps the wording of Provision (1) needs some amendment. Here is a suggestion:

'Where a worker provides services to a hirer or on behalf of a hirer to the hirer's clients or customers, the worker shall be presumed to be an employee of the hirer, unless the worker is operating their own independent business and has entered into a direct contractual relationship with the client or customer.'

The intention of including the words 'or on behalf of a hirer to the hirer's clients or customers' is to capture platform enabled work, where the worker performs services for a client who has entered into a contract with the platform,

[14] Above n1.
[15] Stewart, above n3, 36-7.
[16] See Attachment A, Rasier Pacific Pty Ltd Uber BV Services Agreement, 1 December 2017, cl 1, appended to *Nawaz v Rasier Pacific* [2022] FWC 1189.
[17] See *Uber BV et al v Aslam et al* [2021] UKSC 5.

such that the platform receives payment directly from the client before passing on a portion of the payment to the worker. This would leave room for the exclusion of workers who do operate their own businesses, and genuinely use the platforms as a 'lead generation service' to find their own clients.]

(2) A contract is not to be regarded as one other than for the supply of labour merely because:

(a) the contract permits the work in question to be delegated or subcontracted to others; or

(b) the contract is also for the supply of the use of an asset or for the production of goods for sale.

[This would allow a court or tribunal to disregard contractual rights to delegate work, where those rights cannot or will not be exercised for practical reasons, such as because the worker can only delegate to a person already engaged by the hirer. This kind of 'delegation' is better described as 'shift swapping'. Likewise, a contract which casts the burden of ownership and maintenance of a vehicle upon the worker in order to do the work ought not, *for that reason only*, be treated as an independent contract. The fact that the worker is required to cover what are really business expenses ought not to deny the worker employment status, all other matters pointing towards employment.

A matter that is not included in this clause, but is covered by a later clause (6) (below), is that the contract requires the worker to provide an Australian Business Number (ABN), or to contract through an incorporated entity. Clause (6) of Professor Stewart's proposal addresses this by stating that engagements made through other 'entities' or 'intermediaries' ought to be treated as direct employment, when the intermediary does not operate a genuine business of its own. It may be more transparent to include that qualification in this clause (2), by adding a further sub-clause (c): 'the contract requires the person supplying labour to provide an ABN, or to contract through an incorporated entity'. This would provide permission for a court or tribunal to look through the kinds of arrangements in cases such as *ACE Insurance v Trifunovski*,[18] where it was ultimately held that the contract was really with the workers, who directed payment to be received by a company.]

(3) In determining whether a worker is genuinely carrying on a business, regard should be had to the following factors:
(a) the extent of the control exercised over the worker by the other party;
(b) the extent to which the worker is integrated into, or represented to the public as part of, the other party's business or organisation;
(c) the degree to which the worker is or is not economically dependent on the other party;
(d) whether the worker actually engages others to assist in providing the relevant labour;
(e) whether the worker has business premises (in the sense used in the personal services income legislation); and
(f) whether the worker has performed work for two or more unrelated clients in the past year, as a result of the worker advertising their services to the public.

[Professor Stewart's list comprehensively captures the indicia from the multiple indicia or multifactorial test, without including those elements often (in my view improperly) included by tribunals, such as decisions about taxation arrangements, and the provision of insurances. These factors are properly considered as consequences of characterisation as employment, not contributing factors. In order to be doubly sure that a tribunal did not consider those factors, an additional clause (3A) might be added to state: 'Courts and tribunals are not to have regard to any arrangements the parties have made between themselves in respect of the payment of workers' compensation insurance, 'Pay As You Earn' income tax, superannuation contributions, or payroll taxes.]

[18] (2013) 209 FCR 146; [2013] FCAFC 3.

(4) Courts are to have regard for this purpose to:
   (a) the practical reality of each relationship, and not merely the formally agreed terms; and
   (b) the objects of the statutory provisions in respect to which it is necessary to determine the issue of employment status.

[Note that the minimalist Step One proposal above would be unnecessary were this provision to be adopted in a widened definition of employment for the whole Act.]

(5) An employment agency which contracts to supply the labour of a person (the worker) to another party (the client) is to be deemed to be that person's employer, except where this results in a direct contract between the worker and the client.

(6) Where:
   (a) an arrangement is made to supply the labour of a person (the worker) to another party (the ultimate employer) through a contract or chain of contracts involving another entity (the intermediary), and
   (b) it cannot be shown that the intermediary is genuinely carrying on a business in relation to that labour that is independent of the ultimate employer, on the basis of factors similar to those set out in (3) above,

the worker is to be deemed to be the employee of the ultimate employer.

[Provision (5) allows the continuation of labour hire arrangements, where the labour hire agency employs staff to hire out to hosts in an industry, but Provision (6) would capture stratagems such as the arrangement in *Damevski v Giudice*,[19] where a management consultant pretended to be a labour hirer. In that case, the host was the real employer. In *Damevski*, the worker had previously been an employee of the host in any event. Professor Stewart's proposal would appear to capture even arrangements where new employees are found and placed by introduction agencies who do not operate any genuine business of their own in the relevant industry. It also captures engagement through an entity created for that purpose by the employee themselves, as was noted above in the discussion of clause (2). For the reasons explained above, it would be valuable to explicitly capture such arrangements in a new sub-clause 2(c).]

Step Three: Access to some Fair Work protections for a wider range of workers, including genuine independent contractors

In the annotation above to the first provision of Professor Stewart's Redefinition, a rephrased provision was suggested to capture on demand workers engaged through the kinds of platforms that seek to characterise themselves as 'lead generators'. We can anticipate robust rejection of this suggestion from the platforms – and even possibly from some workers on these platforms – especially if this definition were applied to the current modern award system without the creation of a new suite of awards or award clauses specifically covering platform-based work. (Of course, creation of new awards tailored to the circumstances of this kind of work would also address this concern.) This Step Three proposal is an alternative means of addressing the particular needs of those gig workers who would remain outside of an extended definition of employment, and it would capture other small business independent contractors, who are largely dependent upon selling their labour for their livelihoods.

As noted above, three particular labour rights are valuable to all workers, whether or not they are employees. Most genuinely independent contractors with sufficient business acumen to operate their own businesses successfully rarely if ever need to access these rights, but contractors who operate in markets dominated by monopolistic buyers

[19] (2003) 133 FCR 438.

of their services can often find themselves subject to oppressive and exploitative conditions. There are some protections for such workers in Competition and Consumer law,[20] and in the unfair contracts provisions of the *Independent Contractors Act 2006* (Cth), but the mechanism for accessing these protections often makes enforcement of those rights impractical. It makes sense to bring small business regulation, at least for what we might call 'dependent' contractors, under the jurisdiction of the Fair Work Commission, at least in regard to the establishment of minimum rates, rights to collective bargaining, and protection from capricious contract termination.

To this end, the *Fair Work Act* might be amended to permit collective enterprise bargaining to include non-employed workers. Those expert in collective bargaining might consider how best to achieve an appropriate system of collective bargaining for contractors.

Likewise, the unfair dismissal provisions in Part 3-2 of the Act might be amended to permit non-employed workers to contest an unfair termination of their work contract. (Note that adverse action protections under Part 3-1 of the Act already apply broadly to 'persons'.)

Unfair dismissal protection

The means of achieving protection from unfair termination of work contracts for gig workers and others who are small businesses might be to add a second subsection to section 382, which states,

(1) 'A person is protected from unfair termination of their work contract with a hirer if, at the time of termination of the contract,

(a) the person has provided services to the hirer for at least the minimum contract period;

(b) the person has earned 80%[21] or more of their annual earnings from the work contract with the hirer; and

(c) the sum of the person's annual rate of earnings from all sources, excluding any sums for recovery of business expenses, is less than the high income threshold.'

As to the criteria that a Commissioner must consider in determining unfairness, I can see no reason for using different criteria from those applicable to employees. The considerations in section 387 are equally relevant when an on demand worker who has been reliant on a platform is suddenly 'blocked' from using the app for no justifiable reason. Likewise, I see no reason to deny such workers the remedies that are available to employees who have been unfairly dismissed. Reinstatement of the contract, or compensation in lieu of reinstatement, are equally appropriate remedies for gig workers, and other contractors who are largely dependent upon one hirer for their livelihood.

Minimum rates of remuneration

It remains to consider the ticklish question of minimum rates of remuneration. This is perhaps the most complex problem to solve, for workers who, by definition, have no commitment to exclusive service of a particular hirer, and who are (in theory at least) selling the use of equipment and vehicles as well as labour to a hirer. Nevertheless, methods for determining fair contract rates have already been applied by the Industrial Relations Commission of New South Wales in exercising its jurisdiction to make contract determinations for transport workers under Chapter

[20] See for example the protections for franchisees under the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth) Sched 1, Franchising Code of Conduct, and the small business protections in the *Competition and Consumer Act 2010* (Cth) Sched 2 The Australian Consumer Law ss 20-28.

[21] This figure might be reconsidered. A threshold of 80% has been used in other contexts, for example, for determining genuine contractor status under income tax legislation, and workers' compensation legislation. See for example the Work Safe Victoria's Premium Guideline made under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 3(b) and Sched 1, cl 8.

6 of the *Industrial Relations Act 1996* (NSW). Also, the short-lived Road Safety Remuneration Tribunal was empowered to determine 'safe rates' for owner drivers in the transport industry.[22] The Fair Work Commission might be given a role in determining minimum rates of remuneration for on demand workers, and other small business contractors. This would not necessarily require the setting of minimum hourly rates of pay. It might be based on piece rates for the performance of certain tasks. We might look to the powers of the now repealed Road Safety Remuneration Tribunal, or the powers of the Industrial Relations Commission of New South Wales under Chapter 6, for models of how to provide for minimum rates of remuneration for contractors, to ensure that they are able to earn a decent income, taking into account the peculiarities of their work patterns.

If there is no appetite to confer a very broad power on the Fair Work Commission to oversee rates for a wide range of contractors, the provisions allowing rate setting might be limited to certain industries or certain kinds of work where workers are paid predominantly for their labour (for example, food delivery, cleaning, home services), much in the same way as the Fair Work Commission has powers to make low paid bargaining orders in certain industries.

One of the concerns sometimes raised about the introduction of labour rights for a class of contractors is that the availability of a separate categorisation of worker might encourage employers to adopt that category instead of continuing with employment. It seems that many hirers are already adopting strategies to avoid direct employment. It is entirely possible that the creation of minimum rates of pay and protection from capricious dismissal for non-employed workers will reduce the financial incentive that hirers presently have to engage workers as contractors. Remember that the builders' labourer in *Personnel Contracting* was paid only about 75% of what he would have earned under the appropriate award.[23] If a mandatory minimum rate had been set for contractors, would Personnel Contracting have had the same incentive to cast him as a contractor, rather than as a casual employee? If there is little to be saved by hiring staff as contractors, why would employers not take the benefits of exclusive service from their workers?

Conclusion

Establishing a statutory definition (or definitions) to deal with some of the coverage problems in the *Fair Work Act* will not be an easy task. There will be vigorous disagreement about the extent of the 'problem', and there is likely to be an outcry from the 'freedom' lobby, advocating for the liberty of workers to choose 'entrepreneurial' work rather than the yoke of servitude to an employer bound by restrictive employment practices. It remains to be seen what is politically achievable in the present environment. The three steps proposed above provide a starting point for constructive discussion.

[22] For an explanation of the role of the Road Safety Remuneration Tribunal see M Rawling and S Kaine, 'Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers' (2012) 25(3) *Australian Journal of Labour Law* 237. For a discussion of its abolition, see M Rawling, R Johnstone and I Nossar, 'Compromising Road Transport Regulation: the Abolition of the Road Safety Remuneration Tribunal' (2017) 39(3) *Sydney Law Review* 303.

[23] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631; [2020] FCAFC 122, [4] (Allsop CJ).