

SUBMISSION TO THE PRODUCTIVITY COMMISSION'S 5-YEAR PRODUCTIVITY INQUIRY: A MORE PRODUCTIVE LABOUR MARKET INTERIM REPORT ('INTERIM REPORT')

Per Capita

19 October 2022

'[I]f human life is to be used for the purpose of profit it must not be used to its degradation; that after all it is our duty, as far as we can, in view of the fact that human life is the most valuable asset of any country, to see that that life, if used for the purposes of gain, is not so employed that the health and vitality of the community are lowered'.¹

-Henry Higgins, Commonwealth Parliament, Conciliation and Arbitration Bill debate, 1904

Per Capita welcomes the opportunity to provide this submission to the Productivity Commission.

Per Capita has considered the *Interim Report* and makes its submission regarding part two of the report, effective workplace relations:

- creating more efficient enterprise bargaining; and
- regulating digital platform work.

The *Interim Report* 'attempts to take a productivity lens to some contemporary issues in workplace relations'.² Within the scope of this inquiry, the Commission was required to:

Prioritise and quantify the benefit of potential policy changes to improve Australian economic performance and the wellbeing of Australians by supporting greater productivity growth to set out a roadmap for reform.³

Our strong opinion is that Australia's economic performance and the productivity of enterprises does not necessarily guarantee the wellbeing of Australians. Nor do we believe that reform, based solely on what is *productivity-enhancing*, addresses the issues that this *Interim Report* elucidates.

The object of the *Fair Work Act 2009* (Cth) ('FWA') is to 'provide a balance framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians'.⁴ The primary concern of policy reform, should therefore, be grounded in fairness. It should not assume that gains for businesses will automatically translate to gains for workers. Its goal should be to create a system that promotes and encourages harmony and co-operation between industrial parties while providing mechanisms to resolve their competing interests in an equitable manner.⁵

Core elements

Australia's industrial relations system is a product of history.⁶ Whilst legislation has gone through periods of radical reform, every iteration of our system has contained a number of core elements. Per Capita submits that these core

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 14 April 1904, 1027 (Henry Higgins).

² Productivity Commission, *5-year Productivity Inquiry: A More Productive Labour Market*, (Interim Report, 13 October 2022) 34 ('*Interim Report*').

³ *Ibid* V [6].

⁴ *Fair Work Act 2009* (Cth) s 3 ('FWA').

⁵ Keith Hancock, *Committee of Review into Australian Industrial Relations Law and Systems* (Report, 1985, vol. 2, AGPS, Canberra) 14 ('*Hancock Report*').

⁶ *Ibid* 18.

elements are essential for the smooth functioning of the system and need to be considered, along with productivity gains, when designing reform.

Richard Naughton identifies the core elements of Australia's industrial relations system, as one which operates:

1. through an independent statutory tribunal, with compulsory powers;
2. in the public interest;
3. to protect the most vulnerable workers (including the low paid); and
4. with the necessarily privileged role of trade unions.⁷

These elements support what can be considered the paramount objective of Australia's industrial relations regime: fairness for all participants and the community at large.

The Jobs and Skills Summit (September 2022) brought together participants representing employers, employees and the community at large. This cooperative approach was the right, first step towards securing community confidence. The ability of participants to agree on several immediate actions means that the question at hand is no longer, *should the Act be reformed to provide better agreement making?*; but instead, *what reform would best achieve this?*

Creating more efficient enterprise bargaining

Productivity does not equal wage increases

The *Industrial Relations Reform Act 1993* ('IRR Act'), which promoted decentralised firm-based bargaining, initially aimed to move 100% of employees covered by federal awards onto enterprise agreements.⁸ The model promised improved productivity for enterprises, which, in turn, would guarantee sustainable real wage increases.⁹

It is not controversial to say that many of these goals have gone unrealised. Whilst productivity has steadily increased since 1993, neither real average weekly earnings or real average weekly ordinary time earnings have kept up.¹⁰ In 2021-2022 the Australian economy experienced the strongest year-on-year growth in ten years,¹¹ but growth and productivity have not translated into higher wages. Instead, these productivity gains have been pocketed as profits: the profit share of our national income has risen, whilst the wage share has dropped to a new low of 48.5%. In the last five years profits have grown three times faster than wages; last year they grew four times as much.¹² Clearly, improving productivity does not guarantee wage increases. History has shown that policy reform which seeks primarily to increase productivity inevitably puts business profits first and people last. Our national prosperity is not being fairly shared with everyday Australians and, in Phillip Lowe's words, 'slow wages growth is diminishing our sense of shared prosperity'.¹³

Firm-only bargaining is too restrictive

Australia's firm-based bargaining system is on the brink of collapse. At the end of the June 2022 quarter, 11,053 agreements were current, covering 1,743,800 people.¹⁴ This represents only 12% of the total people employed in June 2022.¹⁵ While ABS data indicates that 35% of employees have their method of pay set by enterprise

⁷ Richard Naughton, *The Shaping of Labour Law Legislation: Underlying Element of Australia's Workplace Relations System* (LexisNexis 2020).

⁸ Paul Keating, 'Speech to the Institute of Directors Luncheon' (Speech, Australian Institute of Company Directors, 21 April 1993).

⁹ Ibid.

¹⁰ ACTU, *An Economy That Works for People* (Report, August 2022).

¹¹ Australian Bureau of Statistics, *Australian National Account: National Income, Expenditure and Product, June 2022* (Catalogue number 5206.0, 7 September 2022).

¹² Australian Bureau of Statistics, *Business Indicators, Australia, June 2022* (Catalogue number 5676.0, 5 September 2022).

¹³ Phillip Lowe, 'Address to Australian Industry Group' (Speech, Melbourne 13 June 2018).

¹⁴ Attorney-General's Department, *Trends in Federal Enterprise Bargaining* (Report, June 2022).

¹⁵ Australian Bureau of Statistics, *Labour Force, Australia, June 2022* (Catalogue number 6202.0, 14 July 2022).

agreements,¹⁶ the *Interim Report* correctly notes that most of these employees are on expired agreements.¹⁷ It is not possible to determine whether rates of pay for the entire 35% of employees have remained above the corresponding award minimums.

The *Interim Report* acknowledges that the cost and resource-intensive nature of bargaining can outweigh the benefits of flexibility that the system was intended to provide, an issue exacerbated for smaller firms or those operating close to award wages and conditions.¹⁸

Per Capita agrees that the FWA needs reform, but reform focused on productivity gains in the first instance, rather than in the *public interest*, subverts the objectives of the FWA and every Australian industrial relations legislation preceding it. Australia is a rich nation, but more and more Australians are struggling with the cost of living. Research conducted by University of New South Wales and the Australian Council of Social Services has found that more than three million Australians live below the poverty line: one in every eight people, including one in every six children.¹⁹

An argument for multi-enterprise bargaining reform

One way to increase bargaining is to permit employers and employees to bargain at the level which best suits their needs.

The traditional *centralised* system, which commenced with the *Conciliation and Arbitration Act 1904*, did not provide a formal legislative framework for collective bargaining. This did not occur until 90 years later. However, the traditional system had always been collective in nature: collective bargaining was a central feature. Workers and businesses could, and did, negotiate in the ways the best worked for them, whether that be at the enterprise, sector, industry or geographical level. It was extremely common for parties to negotiate at the firm-level, or with multiple businesses, to create *over-award agreements*. By the time the *IRR Act* was introduced in 1993, 80% of businesses employing 200-500 people had *over-award agreements*.²⁰ There was also considerable collective bargaining involved in reaching *Consent Awards* and *Arbitrated Awards*.²¹

Whilst the *Interim Report* cites evidence suggesting firm-level bargaining is associated with high productivity,²² data from the ILO shows how multi-employer bargaining can increase participation in agreement making because it is the most inclusive form of bargaining. It tends to be more inclusive of workers often excluded from bargaining provisions: vulnerable workers, migrant workers and those in small firms.²³ Benefits for businesses include savings on the costs and resources required for individual bargains.²⁴

Current provisions

Under the FWA there are three avenues for agreement making with multiple employers. Multi-enterprise agreements ('MEAs') can be made under the regular MEA stream²⁵ or the low-paid MEA stream,²⁶ and single interest employer authorisations can be sought by employers to allow multiple employers to make a single enterprise agreement ('SEA').²⁷

¹⁶ Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2021* (Catalogue number 6306.0, 19 January 2022).

¹⁷ *Interim Report* (n 2) 54.

¹⁸ *Ibid* 53.

¹⁹ University of New South Wales and the Australian Council of Social Services, *Poverty in Australia 2022: A Snapshot* (Report, October 2022).

²⁰ Mark Short, Alison Preston and David Peetz, *The Spread and Impact of Workplace Bargaining: Evidence from the Workplace Bargaining Research Project* (1993) 4-6.

²¹ *Commonwealth Conciliation and Arbitration Act 1904* (Cth) ss 23, 24(1), 24(3). See, also, Breen Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24(3) *Melbourne University Law Review* 839; Tom Roberts 'Sector- wide bargaining: problems and prospects in the Australian case' (2021) 3 (13) *Labour & Industry: a Journal of the Social and Economic Relations of Work* 217.

²² *Interim Report* (n 2) 54.

²³ International Labour Office, *Labour Relations and Collective Bargaining* (Issue Brief, No 1, February 2017).

²⁴ *Ibid*.

²⁵ FWA (n 4) s 172(3).

²⁶ *Ibid* pt 2-4, div 9.

²⁷ *Ibid* ss 248-252.

The FWA repealed strict requirements for the making of MEAs under the *Workplace Relations Amendment (Work Choices) Act 2005*. Previously *multiple-business agreements* were allowed to be made but required authorisation from the Workplace Authority on application from an employer.²⁸

Now, under the FWA, employees and employers who genuinely wish to bargain on a multi-employer basis are free to do so. However, there are very few MEAs currently in place: only 51 at the end of the June quarter covering just 50,500 workers.²⁹

This is likely due to the restrictions on the parties negotiating MEAs. These include that:

- the stream is entirely voluntary;
- protected action is not available;
- bargaining orders are not available;
- scope orders and majority support orders are not available;
- good faith requirements are applicable to MEAs but there is no mechanism to enforce them; and
- the FWC must not approve an agreement unless it is satisfied it was genuinely agreed to by each employer.

Whilst bargaining representatives who are negotiating both SEAs and MEAs must meet the good faith bargaining requirements,³⁰ apart from in the low-paid bargaining stream, a bargaining representative for a MEA cannot make an application for a bargaining order where there is a breach of good faith bargaining.³¹

This means there is no support available from the Fair Work Commission ('FWC') where parties are not meeting these good-faith requirements. The core element of a statutory tribunal with compulsory powers is omitted from these provisions.

Workers are prohibited from taking protected industrial action in relation to an MEA,³² meaning they have no final lever to rely on in negotiations. The right to strike is recognised by the ILO as an intrinsic corollary of the right to organise, protected under art 11 of the *Freedom of Association and Protection of the Right to Organise Convention 1948* (No 87), which Australia ratified in 1973. It is also provided for at article 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights*, ratified by Australia in 1975.

There is no compelling evidence to our knowledge that multi-employer bargaining under the FWA has a negative effect on productivity or on the national economy. To allow MEAs to be more accessible, and hence agreement making to be more inclusive, assistance from the FWC should be the same as that provided for in the SEA stream. This should include:

- an ability to compel employers to bargain using a majority support petition;
- the availability of bargaining orders (under the FWC's compulsory powers); and
- the availability of protected industrial action to allow workers to defend their social and economic rights.

²⁸ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ss 96E-96F.

²⁹ Attorney-General's Department, *Trends in Federal Enterprise Bargaining* (Report, June 2022).

³⁰ FWA (n 4) s 228.

³¹ *ibid* s 231(3).

³² *ibid* s 413(2).

Low paid MEA stream

As explained in the Fair Work Bill's explanatory memorandum, whilst 'enterprise level bargaining has been a central feature of workplace relations since the early 1990s...over that time not all employers and employees have participated in enterprise bargaining'.³³ The reasons why workers in low-paid sectors have been excluded from participation in enterprise bargaining was suggested to be because they:

- may lack the skills and power to successfully negotiate at single enterprise levels; or
- because their employers lacked the time, skills and resources to negotiate with their employees.³⁴

This issue was recognised by the enactment of the FWA providing for a low-paid MEA stream.

Representatives (unions or employer representatives) are able to apply on behalf of employees or employers for a low paid authorisation, placing them in a special list which would provide access to special support from the FWC.

During the *Inquiry into the Fair Work Bill 2008*, low paid bargaining provisions attracted strong criticism from employer organisations. The Australian Industry Group submitted that:

*The low paid bargaining stream, which would have the effect of reintroducing compulsory arbitration, would undermine Australia's enterprise bargaining system and add a further layer of arbitrated employment conditions above the safety net.*³⁵

This misunderstands the provisions in the FWA. Compulsory arbitration is not allowed under this stream, unless parties agree to arbitration.³⁶

However, since the passage of the FWA, there has only been one successful authorisation for the low-paid stream, where a low-paid authorisation was granted in respect to workers in the aged care industry.³⁷ There have only been two other applications for the low-paid stream. Both have failed.³⁸

This is likely due to the very high bar required to obtain a low-paid authorisation. When granting an authorisation the FWC must consider a long list of matters when deciding whether to grant authorization.³⁹

In May and June 2010 United Voice (UV) and the Australian Workers' Union - Queensland Branch (AWUQ) (joint applicants), lodged, and were successful in obtaining, a low-paid authorisation, but this authorisation excluded large proportions of the industry UV was seeking to cover. This decision, and the lack of other successful applications, exposes a fundamental flaw in the low-paid MEA provision: its inability to protect vulnerable workers.

Following this decision, UV National Secretary, Louise Tarrant, said that the decision showed how the stream was an ineffective mechanism to lift workers out of low pay, and called on the government to amend the legislation or come up with other solutions to 'ensure there is fairness for low-paid Australian workers'.⁴⁰

The scheme takes into account the public interest, but the high bar means authorisations can't be made even if they meet the public interest test. An amendment which changes the matters the FWC 'must' consider, to matters they 'may' consider, may allow more workers to access this stream.

³³ Explanatory Memorandum, Fair Work Bill 2008 (Cth) [170].

³⁴ Ibid.

³⁵ The Senate standing Committee on Education Employment and Workplace Relations, Parliament of Australia, *Inquiry into the Fair Work Bill 2008 [provisions]* (Report, February 2009) 146.

³⁶ FWA (n 4) ss 246(1)-(2), 595(3).

³⁷ *United Voice and the Australian Workers' Union of Employees, Queensland* [2011] FWAFB 2633 (Aged Care case).

³⁸ *Re United Voice* [2014] FWC 6441 (security industry); *Australian Nursing Federation v IPN Medical Centres Pty Limited and Ors* [2013] FWC 511 (Watson VP, 17 June 2013).

³⁹ FWA (n 4) 243.

⁴⁰ Rae Cooper, 'Low-paid Care Work, Bargaining and Employee Voice in Australia' in Alan Bogg and Tonia Novitz (ed), *Voice at Work* (Oxford University Press, 2014) 55, 64, citing United Voice, 'Press release: Low-paid Bargaining Stream' (United Voice National Office, 29 July 2011)

Regulating digital platform work

A primary object of the FWA was the inclusion of 'a fair and comprehensive safety net of minimum employment conditions that cannot be stripped away'.⁴¹ This is achieved through the National Employment Standards ('NES') and Modern Awards. There are now serious questions as to whether our workplace laws have kept pace with the rise in non-standard forms of work.

Gig economy workers are exactly the workers who most require the FWA's *safety net*, but often these workers are classified in such a way as to deny them access to the basic rights and conditions that the *safety net* exists to provide. This is not a new strategy to reduce worker's rights, and recommendations of measures to protect these workers have been made to the Australian Government in several reports and inquiries dating back to the 1985 *Hancock Report*.⁴² Today the problem still exists but has been exacerbated by developments in technology.

What kinds of workers need protection?

Self-employed workers

There are many reasons why self-employed workers would not want to be classified as employees, and instead be free from the confines of the employee-employer relationship (eg. the duty to follow lawful and reasonable orders,⁴³ implied duties of loyalty and control over intellectual property.⁴⁴)

However, Per Capita rejects the *Interim Report's* assertion that categorising platform workers as employees would remove key benefits to both efficiency and flexibility for workers.⁴⁵ There is no substantive survey or research, to our knowledge, which indicates that platform workers do not wish to have the same protections that are available to other Australian employees. The main benefits in not categorising platform workers as employees would be for the platform firms who wish to reduce their liability, not the workers.

Platform workers

Per Capita agrees with the *Interim Report* in their finding that digital platform work appears to be expanding, but data is limited.⁴⁶ For this reason it is hard to say with any certainty that workers prefer this type of work for its flexibility. There are still some conclusions we can make about the sector with the available data and literature.

'On demand' employment is not a new workplace phenomenon, what is new is the platform on which work is obtained, notably the emergence of digital platforms which source, sort, organise and deploy workers.⁴⁷

A helpful definition of gig economy workers is one provided in the December 2020 Actuaries Institute Green Paper, *The Rise of the Gig Economy and Its Impacts on the Australian Workforce*. It characterizes the gig economy as being inclusive of all the following elements:

- **On-demand**, meaning the worker provides on demand services;
- **Independent Contractor**, meaning the worker is classified not as an 'employee' but rather as being in a *contract for service* (although we think this classification is wrong for Australia); and
- **Digital Platform**, which mediates the transaction where consumers and workers interact.

⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11189 (Julia Gillard, Minister for Employment and Workplace Relations).

⁴² *Hancock Report* (n 5).

⁴³ *Adami v Maison De Luxe* (1924) 35 CLR 143.

⁴⁴ *Victoria University of Technology v Wilson* [2004] VSC 33.

⁴⁵ *Interim Report* (n 2) 85.

⁴⁶ *Ibid.* 66

⁴⁷ Victorian Government, *The Report of the Victorian Inquiry into the Victorian On-Demand Workforce*, (Report, June 2020) 11.

This definition includes workers engaged in digital platforms for transport, meal delivery and other services (Uber, Airtasker, Deliveroo and Foodora).

It excludes:

- sharing platforms like Airbnb or eBay, where there are no services provided by a worker;
- grocery and food delivery services which may involve a digital platform but where delivery workers are employed by that company (e.g. Coles online shopping); and
- self-employed contractors such as tradespeople where their work is not mediated through a digital platform.

This is very similar to the definition of ‘platform work’ defined in *The Report of the Victorian Inquiry into the Victorian On-Demand Workforce*, although this definition includes casual employees along with independent contractors.⁴⁸

Further categories of the ‘gig economy’

When considering what sort of work should be regarded as encompassing an employment relationship for the purpose of Australian legislation, Stewart and McCrystal contend that this is dependent on the type of platform and type of business. They further distinguish two broad groups:

1. The **intermediary or matching service** which essentially functions analogously to a newspaper or job advert. Here, the platform exerts very little control over the worker, instead helping to match them with an individual consumer, where the resulting work may constitute employment, but if this is the case, the employment relationship would be between the consumer organisation and the worker seeking work (eg Air Tasker).
2. The **vertically-integrated firm** which offers services to its clients and supplies the necessary labour. This captures firms like Uber or Foodora, where most of the litigation, local and international, has turned on the status of the worker.⁴⁹

Per Capita believes that an extending the definition of employee under the FWA to capture workers in the vertically integrated firms performing on-demand jobs is appropriate.

How many workers engage in gig work?

Measuring the participation of platform workers is difficult, due to insufficient data collection. The best available data to our knowledge is from a Victorian Government commissioned national survey: *Digital Platform Work in Australia- Prevalence, Nature and Impact* (‘National Platform Work Survey’) conducted by the University of Adelaide, Queensland University of Technology and University of Technology Sydney. Over 14,000 people responded and of them:

- 7.1% of respondents had participated in platform mediated work in the 12 months prior to the survey;
- 13.1 % had participated in platform mediated work at some point;
- 2.7% of those who participated in platform work earned all their income from platform work (showing that to many this is a secondary job); and
- more than a third were working across multiple platforms.⁵⁰

⁴⁸ Ibid.

⁴⁹ Andrew Stewart and Shae McCrystal, ‘Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?’ (2019) 32 *Australian Journal of Labour Law* 4, 9-10.

⁵⁰ Paula McDonald et al, *Digital Platform Work In Australia: Prevalence, Nature and Impact* (Report, November 2019) 5-10.

This is a significant increase compared to most previous research, which estimated the number to be less than 1% of the workforce.⁵¹ Results from this survey were released in 2019 prior to the COVID-19 pandemic. The number of workers in the gig economy has likely expanded since this survey was conducted.

Why do platform workers need special protections?

Platform workers are particularly vulnerable. The *National Platform Work Survey* found that young people (18-34) are working through digital platforms in higher proportions. Students are 1.3 times more likely to do platform work and there was a higher proportion in respondents who identified as living with a disability, temporary residents and those who spoke a language other than English at home.⁵²

Many of these workers are not aware of their workplace rights or their employment status. One third of platform workers did not know if the platform they worked under had a dispute resolution procedure, and a quarter of respondents reported that their main platform 'treats' them as employees.⁵³

What are the solutions?

The problem lies in how this FWA defines 'employee' and thus determines who is captured by the *safety net*. Quite typically for Australian legislation 'employee' is defined by reference to the common law.

The statutory definition of employee is located in Sections 12 and 13 of the FWA. Most disputes concerning the definition relate to access to the NES, general protections; or disputes under an industrial agreement; or the *safety net*.

Employee? What is the ordinary meaning?

For the last three decades, courts and tribunals have applied the multifactorial test from *Hollis v Vabu*⁵⁴ ('*Vabu*') which requires them to have regard to the 'totality of the relationship'. It is built on the previous 'control' and 'business integration' tests.⁵⁵

The High Court provided in *Vabu* (a case which concerned a courier rider found to be an employee) that:

[T]he relationship between the parties, for the purpose of this litigation, is to be found *not merely from these contractual terms*. The system, which was operated thereunder, and the work practices imposed by *Vabu* go to establishing "the totality of the relationship" between the parties.⁵⁶

The multifactorial test applied in *Vabu* has since been applied in many cases.

Litigation on the distinction between employee and independent contractor

Litigation has had varying outcomes depending on jurisdiction.

In Australia, in the cases of *Kaseris v Rasier Pacific VOP*⁵⁷ and *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/as Uber Eats*,⁵⁸ which concerned an uber driver and an uber eats food delivery driver, respectively, the FWC applied the multifactorial test and found neither relationship was that of employment. In both, the FWC held that the level and

⁵¹ Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28(3) The Economic and Labour Relations Review 420, 423.

⁵² McDonald (n 50) 5-10.

⁵³ Ibid.

⁵⁴ (2001) 207 CLR 21 ('*Vabu*').

⁵⁵ See, eg, *Zuijs v Wirth Bros* (1955); *Stevens v Brodribb Sawmilling* (1986).

⁵⁶ *Vabu* (n 54) 33 [24] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) (emphasis added).

⁵⁷ (2017) 272 IR 289; [2017] FWC 6610.

⁵⁸ [2019] FWC 5008.

degree of control is a significant factor affecting how a relationship ought to be characterised. However, it should be noted that in neither of these cases were the workers represented.

In stark contrast to *Kaseris and Gupta*, in 2021 in *Franco v Deliveroo Australia Pty Ltd*⁵⁹ (which concerned a food delivery rider claiming unfair dismissal pursuant to s 394 of the FWA), the commission found, applying the multifactorial test, that the relationship was one of employment owing to a number of factors, importantly, that Deliveroo exercises significant control over Mr Franco through data which provides them with metrics under which control of engagement and performance of work could be exercised.⁶⁰

There is little difference in the activities of Mr Franco and Ms Gupta. The significant difference in these cases is that Mr Franco was represented by the Transport Workers Union ('TWU'), the others were not. The TWU put the view that the contract of supply was a contract of adhesion, as it gave little room for Mr Franco to negotiate the terms.⁶¹ The FWC agreed that 'Deliveroo determined the terms unilaterally, and therefore any consideration of those terms needed to be cognisant of the circumstances under which the contracts were established'.⁶²

Unfortunately, any hopes that this would provide a test case to expand the reach of the existing legal framework, and to strengthen the level of protection for workers, was slashed by the 2022 High Court decisions in *CFMMEU v Personal Contracting Pty Ltd*⁶³ ('CFMMEU') and *ZG Operations Australia Pty Ltd v Jamsek*⁶⁴ ('Jamsek'). Along with *Workpac Pty Ltd v Rossato*⁶⁵ ('Rossato') in 2021.

These cases favoured and confirmed the orthodox approach that employment contracts are subject to the ordinary rules of interpreting contracts.

As provided in *CFMMEU*:

[W]here the terms of the parties' relationship are comprehensively committed to a written contract, the validity of which is not challenged as a sham nor the terms of which otherwise varied, waived or the subject of an estoppel, there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship'.⁶⁶

The result is that now, at common law, employment contracts are no longer subject to differential treatment because of disparity in bargaining power between the parties.⁶⁷

As provided in *Rossato*:

It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain. It has rightly been said that it is not a legitimate role for a court to force upon the words of the parties' bargain "a meaning which they cannot fairly bear [to] substitute for the bargain actually made one which the court believes could better have been made."⁶⁸

⁵⁹ [2021] FWC 2818.

⁶⁰ *Ibid* [122].

⁶¹ *Ibid* [40].

⁶² *Ibid* [120].

⁶³ [2022] HCA 1 ('CFMMEU')

⁶⁴ [2022] HCA 2 ('Jamsek')

⁶⁵ (2021) 392 ALR 39 ('Rossato')

⁶⁶ *CFMMEU* (n 63) [43] (Kiefel CJ, Keane and Edelman JJ).

⁶⁷ *Ibid* [59]; *Jamsek* (n 64) [6], [62]; *Rossato* (n 65) [62]-[63].

⁶⁸ *Rossato* [63], citing *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 388.

The consequences for Mr Franco

In response to these High Court decisions, in *Deliveroo Australia Pty Ltd v Franco*,⁶⁹ an appeal of Cambridge C's decision in *Franco v Deliveroo Australia Pty Ltd*, the Full Bench was compelled to find that the delivery rider was a contractor, not an employee.

In this case the express written agreement in between the parties was not disputed to be comprehensive.⁷⁰ But it should be noted that the Full Bench seemed reluctant in their finding, stating that 'plainly in our view, [there was] unfair treatment on the part of Deliveroo';⁷¹ there were 'realities [the court was] obliged to ignore';⁷² and had they been permitted to take into account the matters that the FWC did (under the now displaced multifactorial test) the court 'would have reached a different conclusion of this appeal'.⁷³

It is time to redefine

Even before this *contract is king* approach taken by the High Court, there had been regular calls for the definition of employee to be redefined.

One example of an expanded definition in Australian statute is the definition of worker in Section 7 of the model WHS laws.⁷⁴ This Act adopts 'a broad definition of 'worker' instead of 'employee' [for the purpose of recognizing] the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers'.⁷⁵

Why shouldn't other workplace rights, like those under the FWA, also be extended? The FWA already extends the meaning of employee to 'outworkers' in textile clothing and footwear, who are deemed to be employees for the purpose of certain provisions of the FWA even when they are not engaged under employment contracts.⁷⁶

Redefining 'employee' in industrial relations legislation has been proposed on a number of occasions. A definition which presumes a worker is an employee unless it can be proved otherwise was first formed by Stewart in 2002,⁷⁷ and supported by members of the ALP in 2005.⁷⁸

Prior to this, the *Hancock Report* devoted an entire section to 'quasi-employees'.⁷⁹ These are workers who are not 'genuine independent contractors or small businessmen' but rather they were:

*persons who make arrangements to avoid a bona fide employer/employee relationship by entering into a contract or sub-contract with an employer for the service of their labour only or for the service of their labour and equipment to that employer.*⁸⁰

The Committee's recommendation in the *Hancock Report* was that such workers 'should be subject to the Commission's authority and the definition of employee should encompass them'.⁸¹

Additionally, in 2018, the Select Committee on the Future of Work and Workers' Report made recommendations that the Australian Government make legislative amendments:

⁶⁹ [2022] FWCFB 156.

⁷⁰ Ibid [39].

⁷¹ Ibid [57].

⁷² Ibid [52]-[54].

⁷³ Ibid 54.

⁷⁴ *Work Health and Safety Act 2011* (Cth) s 7.

⁷⁵ Explanatory memorandum, Model Work Health and Safety Bill (Cth), 8.

⁷⁶ FWA (n 4) ss 789BA-789BC.

⁷⁷ Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235.

⁷⁸ House of Representatives Standing Committee on Employment, Workplace relations and Workforce Participation, Parliament of Australia, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements* (Report, August 2005).

⁷⁹ *Hancock Report* (n 5) 355-66

⁸⁰ Ibid 363.

⁸¹ Ibid.

that broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system (recommendation 10).⁸²

What would this definition provide for platform workers?

Platform workers under this broad definition would be able to access many of the protections in the FWA that make it a statute focused on protecting the most vulnerable workers.

This includes protection under the NES (which considering many would be deemed casual would not apply in its entirety), modern awards to provide a base minimum rate, and protections against unfair employer actions, such as unfair dismissal. It would also allow them to collectively bargain.

Ability to collectively bargain

The *Interim Report* contends that platforms workers who are classified as independent contractors could theoretically collectively bargain with platforms to determine binding pay rates and conditions.⁸³

We reject this assertion.

Pursuant to Section 45AF of the *Competition and Consumer Act 2010* (Cth)'s cartel provisions⁸⁴ (such as price fixing) is an offence. Those prohibitions do not apply where the cartel provision has been described in a collective bargaining notice given to the Australian Competition and Consumer Commission under Section 93AB(1A). However, such a notice is invalid pursuant to a 93AB(9) if it is given on behalf of a corporation by a trade union, officer of a trade union, or person acting on the direction of a trade union, essentially stripping these workers of their freedom of association rights if deemed to be contractors.

Our strong opinion is that protection of platform workers would be best achieved through redefining the meaning of employment. This would not stop genuinely self-employed workers from retaining their independent contractor status.

If the business model of these platforms relies on exploiting workers, as Per Capita submits they often do, these businesses should not be permitted to exist.

An intermediate category is not appropriate

Creating another classification to capture workers in the 'grey area' would, in our opinion, act merely as a Band-Aid, and cause more issues with defining the employment relationship between workers and firms.

An intermediate category has been used in jurisdictions overseas. Our opinion is that it has been unsuccessful.

In some Canadian jurisdictions an ability to collectively bargain has been extended to 'dependent contractors'. For example, under the *Labour Relations Act 1995* (Ont) s 1. In this act:

"dependent contractor" means 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 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.

This has given rise to extensive case law on the line between dependent and independent contractors, and only extends collective bargaining rights, not minimum standards. The result is that, even if such workers engage in collective

⁸² Select Committee on the Future of Work and Worker, Parliament of Australia, *Hope is Not a Strategy- Our Shared Responsibility for the Future of Work and Workers* (Report, February 2018).

⁸³ *Interim Report* (n 2) 81.

⁸⁴ *Competition and Consumer Act 2010* (Cth) s 45AD.

bargaining, they are not entitled to the 'safety net or minimum standards against which to bargain or set a benchmark.'⁸⁵

Italy has an intermediate category of 'para-subordinate' workers, created in 1973. This has been viewed as a 'discounted alternative'⁸⁶ which has decreased rights of workers who would, but for this definition, be classified as employees.⁸⁷

In Spain the intermediate category is called TRADE. To fall within this category workers are required to derive at least 75% of their income for services provided to a single client.⁸⁸ As shown by the *National Platform Work Survey*, this is not the norm in Australia.

In the UK, Section 230(3) of the *Employment Rights Act 1996* (UK) defines a worker, to distinguish it from an employee, as:

an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

Stewart notes that in the leading case of *Byrne Brothers (Formwork) Ltd v Baird*,⁸⁹ the same logic used to conclude that the plaintiffs were workers could have been used to conclude they were employees⁹⁰

The application of this definition implies that such workers are not entitled to the same protections as employees. Its starting assumption is that they are not employees. Creating protection on the assumption that platform workers are not genuine workers does not fix the problem; in fact it may instead open genuine employees to disputes about their employment status.

The High Court may say *contract is king*, but in truth, Parliament is king: problems facing platform workers can be fixed by legislation. With the ability to negotiate collective agreements pursuant to the FWA, additional flexible working arrangement for 'aspects of the platform preferred by workers' can be sought.⁹¹

⁸⁵ Stewart (n 49) 17; see also Shae McCrystal, 'Collective Bargaining Beyond the Boundaries of Employment: A Comparative Analysis' (2014) 37 MULR 662 at 675.

⁸⁶ Miriam Cherry and Antonio Aloisi "'Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66(3) *American University Law Review* 635, 666.

⁸⁷ *Ibid.*

⁸⁸ Cherry (86) 660.

⁸⁹ [2002] ICR 667.

⁹⁰ Stewart (n 49) 19.

⁹¹ *Interim Report* (n 2) 71.