

Labor's Attack on the Right to be Self-Employed—Part 1

The 'employee-like' agenda

The [DEWR Consultation Paper](#) – Summary

7 May 2023

The Department of Employment and Workplace Relations (DEWR) has been given the task of putting policy 'flesh on the bones' of the Federal government's agenda to regulate 'employee-like' forms of work under industrial relations regulation. The government's intention is for the [Fair Work Commission](#) to have regulatory control over contracts that *some* self-employed, independent contractors use in the earning of their incomes.

A) *Loophole*

The paper references the Minister for Employment and Workplace Relations asserting that there is a "loophole" in industrial relations legislation such that self-employed independent contractors are "falling off a cliff". (page 6) The paper says that such 'loopholes' are created where these workers are "not exhibiting all of the characteristics which are traditionally associated with independent contracting..." (page 9)

B) *Who is targeted?*

The paper states that the government wants to have the Fair Work Commission set minimum standards for "defined cohorts of workers in 'employee-like' forms of work"... "Specifically..." where jobs are at "... a cheaper rate than an employee."

In one respect the paper is somewhat vague in specifically identifying which self-employed, independent contractors are to be roped into industrial relations regulation. But it then states that it is gig workers who will be targeted. However, there is considerable vagueness about specifically which gig-type, independent contractor workers are targeted.

C) *Owner-Drivers*

The paper is specific about imposing employee-like regulation on owner-driver, self-employed, independent contractors. (page 19)

D) *Who is out?*

The paper states that "...the sharing economy – the sharing of accommodation, cars or tools, etc. – is not intended to be within the scope of this measure..." and "Platforms that merely advertise services or products without the need to register to facilitate payments are ... not considered to be part of the gig economy." (page 10)

E) *Gig benefits*

The paper accepts that the gig economy has good outcomes where it "offers a range of benefits ..." that have benefited "thousands of workers who can now earn extra income..." (page 9)

F) *Unintended consequences*

The paper states that in seeking to implement the government's agenda the consultation paper refers to 'guiding principles'. (Box 2, page 8) One of those principles is to "mitigate ... unintended consequences for workers..."

The paper proposes that unintended consequences could (presumably) be avoided if "The Fair Work Commission could be empowered to exercise its functions in a broad way but balanced by 'guardrails' ... set by the Australian Parliament ... avoiding a highly prescriptive or technical approach." (page 11)

G) *Broad versus Prescriptive Regulation*

The paper argues for broad functions, but then reverses this position in detailing prescriptive interference in contracts.

The paper states the "Fair Work Commission would likely set minimum standards ... limited to work-related matters and not commercial matters..." (page 12)

The paper then proceeds (pages 12–13) to specify (commercial) contract requirements that the FWC would impose. These include:

- (a) setting minimum rates of pay
- (b) imposing concepts of 'work' time
- (c) determining payment times
- (d) stipulating portable leave, breaks, etc
- (e) record-keeping requirements
- (f) training and skill development
- (g) dispute resolution
- (h) treatment of business costs, including vehicles and maintenance, insurances, licences

H) *Collective Agreement making*

The paper states that the FWC would have power to create collective agreements (pages 13–14) even though it recognises that such collective agreement-making for self-employed, independent contractors already exists through the ACCC.

"... the Competition and Consumer Act 2012 (Consumer and Consumer Act) allows groups of small businesses to bargain with a single larger business after notifying the ACCC." (page 15)

I) *Unfair contracts – Disputes*

The paper says that the government has indicated that it may give the FWC the power to deal with unfair contract disputes for "certain classes of independent contractors". (page 17)

Yet the paper also recognises that unfair contract jurisdictions already exist under:

- (a) The *Independent Contractors Act 2006* (covering any independent contractor's contract)
 - (b) Australian Consumer Law (for standard form contracts)
- and
- (c) Dispute resolution procedures that already exist in state jurisdictions (Small Business Commissioners, etc.)