"… It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance."

Australian High Court February 2022

On the employment vs self-employment relationship.

The federal government's agenda to create 'employee-like' legislation will create uncertainty where certainty currently exists as secured by the High Court.

Self-Employed Australia's position is that

The Parliament should not create uncertainty where the High Court has sought to create certainty.

The 'employee-like' proposal will harm rather than help independent contractors. Other forms of protection are available.

This submission responds to the Department of Employment and Workplace Relations' Consultation paper (Issued 13 April 2023)
'Employee-like' forms of work and stronger protections for independent contractors

This submission date : 12 May 2023

Contents

Section One:
Overview and Summary

1. Overview

The Department of Employment and Workplace Relations (DEWR) is having to undertake an impossible task in its Consultation Paper.

It attempts to reconcile the government's agenda (to create a legislated 'employee-like' status) with the fundamental legal and operational truths that underpin the system of commercial transactions critical to a well-functioning society.

If implemented, the agenda will result in major commercial uncertainty, risk and harm. The consequences, intended or unintended, will most adversely affect self-employed, small business people, but will permeate more broadly throughout society. The agenda may be well-intentioned, but it is critically flawed in its method.

The essential 'problem' is that there is a fundamental legal and behavioural divide between the commercial contract and the employment contract.

- The employment contract gives the employer the 'right to control' the employee.
- The commercial contract does not involve 'control', but is a contract of mutual agreement based on offer and acceptance.

The 'employee-like' agenda seeks to sandwich something in between the two. That is, it seeks to create a legislative status where, on vague and unspecified criteria, a new form of legislated contract is to be invented. In short, a contract where there is no 'control' (the commercial contact) is to be treated as a 'control' contract (the employment contract).

- The International Labour Organisation has clearly rejected such an invention.
- The Australian High Court has arguably rejected such an invention.

On any assessment, the 'employee-like' agenda radically breaks the fundamental, core, legal and commercial bed-rock of society. This is not a simple 'tweaking' of the law.

The argued justification for the move is that some self-employed people need 'protections' currently afforded to employees. This is a poor argument because:

- Self-employed, small business independent contractors already have 'protections' delivered through the regulatory system under commercial law. These systems can be enhanced.

The reverse of 'employee-like': 'independent contractor-like' – both wrong
If the 'employee-like' concept were to be legislated, so too should the reverse concept – the concept of 'independent contractor-like'. That is, that there are employees who are really 'independent contractor-like'. Both concepts may find bodies of reasoning in sociological, academic musings, but neither is legitimate as a legal instrument.

In this respect the High Court has stated:

> "The employment relationship with which the common law is concerned must be a *legal* relationship. It is not a social or psychological concept like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties."
> High Court of Australia : Case P5/2021 CFMEU v Personnel ; Judgment February 2022 - Page 22

2. Summary

The implementation of the 'employee-like' agenda, as explained in the DEWR paper, will require a series of steps.

1) Create legislation that determines that ALL self-employed, independent contractors are 'employee-like', or potentially 'employee-like'.
2) Take that legislative structure and narrow it down to the government's declared intention to cover only gig workers or only some gig workers. This will need to occur by:
   a) Creating a specific definition of gig work;
   b) Creating exhaustive lists of persons or job types that are *not* to be covered by the measures;
   c) Creating specific processes to ensure that when independent contractors who were never really intended to be included in the measures are nonetheless included, that these persons can be excluded.
3) Create required amendments to considerable other legislation to ensure that where the 'employee-like' measures interfere and conflict with other legislation and regulation (for example, competition law) that the conflicts are resolved.

But the basic fact is that once legislation is created to treat a commercial contract (contract *for* services) as if it were an employment contract (contract *of* service) a core, primary legal and public policy threshold is crossed.

The immediate implications are as follows:

High Court: Conflict
The provisions will be in direct conflict with the rulings of the High Court in *Personnel* that there is not, and cannot be, a type of contract that sits between the employment and the commercial contract. 'Employee-like' laws would attempt to do what the High Court has ruled cannot be done—that is, take a psychological or sociological concept and treat it as law.

ILO Obligations: Breach
The provisions will immediately breach Australia's obligations (settled in 2006) to ensure that employment law and regulations do not interfere with commercial contracts.

Competition law: Conflict
The provisions will immediately set up a clash between competition law and employment regulation. Specifically, the ACCC and the FWC will both be required to regulate commercial contracts that have been declared 'employee-like', but each with different and opposing public policy objectives. The ACCC to prevent collusion over pricing and ensure competition. The FWC to facilitate price collusion thereby creating the circumstances for anti-competitive behaviour.

These three items represent the major 'big picture problems' of the 'employee-like' agenda. The consequences of the agenda, intended or unintended, will lead to major conflict in long-established public policy settings which can be assured to engender uncertainty on a significant scale.

The adverse consequences are not restricted to these 'big picture' issues but roll over to matters of quite specific detail. This submission endeavours to cover many of those smaller scale issues.

The absurd thing, however, is that the 'employee-like' agenda is entirely unnecessary because major advances have been made in protections for self-employed, independent contractors, more protections are in the pipeline and more can be created. Importantly, these protections exist and should exist in the commercial regulatory space, not the employment regulatory space.

Section Two:
Understanding the government's agenda

3. The DEWR Consultation Paper – Explanation

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 (FWC) 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

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.)

4. The DEWR Consultation Paper — SEA General Comment

The DEWR Consultation paper's attempt to bring some practical sense to the government's agenda is fatally flawed, not because of the effort by DEWR, but because the agenda itself is fatally flawed.

The commentary in this section looks at the fatal flaws in a general sense. Specific fatal flaws are considered in subsequent sections.

The agenda seeks to declare (by statute) something to be what is not and never can be. It seeks to do this, not by changing a definition but by treating that 'something' as if it is something else. That is, it seeks to treat people who earn their income through the commercial contract as if their income were through the employment contract.

This is an illogical exercise. It does not accord with the law as recently enunciated by the High Court. It is a radical and unnecessary overturning of law. This paper explains why. In this section we respond to issues raised in the consultation paper.

A) No loophole. No 'cliff'

The reference to a 'loophole' is in fact an attempt to declare that there is something wrong with the standard, well accepted and solid law of contract in Australia. The 'argument' being put is that if people earn their income through the commercial contract, that this is somehow a 'loophole' that removes them from employment law. This in fact is no 'loophole'. It is law. The High Court says so. The International Labour Organisation says so.

The reference to 'falling off a cliff' suggests that people who earn their income through the commercial contract are somehow subject to harm. This is false. Earning an income by working through the commercial contract is not a harmful experience but rather a positive one, just as earning an income through the employment contract is a positive one.

In effect the 'loophole/cliff' language is a rejection of the legitimacy of the commercial contract as a (work) income-earning process. That is, it is a rejection of the legitimacy of the self-employed, independent contractor, small business status and of the people who enjoy this status. In this respect it could be seen as disrespectful and offensive toward such people.

B,C,D,E) Targeting

The paper says that the target is cohorts of workers who are 'employee-like'. This is a rejection of law as declared by the High Court. The Court makes it clear (Personnel ruling, February 2022) that a worker is either an employee (employment contract) or an independent contractor (commercial contract). The 'employee-like' concept seeks to do what the High Court says cannot and should not be done—that is, to take a social or psychological concept and treat it like a legal concept. (More detail on this below at Item 6.)

The paper then explains that the 'employee-like' concept is to be applied only to 'employee-like' people who work in a specific type of contractual set up, being a thing called 'gig' work. The trouble in translating this restrictive idea of 'gig' into legislative form is that there are many forms of 'gig.'

For example, pub bands perform 'gigs'. A 'gig' in the broad sense can be said to be any form of work that is isolated to one specific task that is agreed, executed and paid for Ride-share is called 'gig' because the task is to take a passenger from one point to another at a set price and, when done, the 'gig' is finished. Pub bands do the same only their 'gig' is to provide music/entertainment.

Identifying 'employee-like' 'gig' in legislative form is a near-impossible task and is certain to create confusion and uncertainty. This is so because it will be necessary to break from all forms of contractual certainty and 'invent' new contract law. This will lead to confusion because 'invented' definitions will almost certainly conflict with long-accepted definitions.

F, G) Consequences

The DEWR paper says that unintended consequences should be avoided. This should be done, the paper says, by having the FWC "…exercise it functions in a broad way but balanced by 'guardrails'…" The paper then asserts that the FWC should not intrude into commercial matters.

But the paper then contradicts these undertakings by listing specific things the FWC will seek to control, including rates of pay (price) and so on. Under employment law/contracts these specific items are industrial relations matters. But under self-employment/commercial law/contracts such matters are core commercial matters.

That undertaking—to have the FWC operate in a 'broad way'—is invalidated by the identification of the specifics (price control, etc). 'Guardrails' will not prevail because those specifics intrude into core commercial matters. When the specifics are revealed, the 'employee-like' agenda will amount to a takeover of commercial law regulation by industrial relations law regulation. The consequences of this are covered more fully in the section on competition law (Item 9 below).

H) Collective agreement making
The DEWR paper recognises that self-employed, small business people have access to collective agreement-making administered by the ACCC. This process has often been utilised by unions, for example, when representing groups of owner-drivers in the concrete delivery sector. The process has been made quite simple over recent years.

The proposal to grant collective agreement-making to the FWC conflicts with the existing ACCC processes. It will create a dual stream which is likely to create conflicting processes and outcomes which in turn will lead to major uncertainty.

Question: Does the government intend to close down the ACCC-sanctioned collective bargaining process and thereby deny self-employed small businesses access to this commercial process?

I) Unfair contract – dispute settling
The DEWR paper acknowledges that the ACCC already has power over unfair contract disputes. But the paper seems to make light of this by suggesting that the ACCC cannot intervene in individual unfair contract complaints. This is misleading. The ACCC is very active in taking action against unfair contracts and is set to become more active and effective when the 'beefed up' unfair contract laws take effect in November 2023.

The proposal for the FWC to take control of 'certain types' of unfair contracts (under commercial law) arguably usurps the powers of the ACCC and sets the circumstances for confusion, uncertainty and jurisdictional overlap. The same problems arise in this area as they do with collective agreement-making discussed above.

Questions:
- Does the government intend to change the definition of unfair contracts, to extend the definition of 'unfair' beyond the current balanced approach and to have 'fairness' coverage beyond standard form contracts?
- Would the definition extend to the price of a commercial contract?
- If such extensions (both of contract type and contract terms) are being envisaged, would this impact upon consumer unfair contracts?
- Is the intention to create two different definitions of 'unfair' under commercial law—one for consumers and another for small business?

- How would such inconsistency in definitions be managed and would this create political pressure for consumers to be granted the ability to argue that the retail price of a product (say, a carton of milk) was 'unfair'?

J) Lack of statistical facts

The consultation paper makes only a cursory reference to statistical analysis of the numbers and the profiles of the self-employed people who would be affected by the 'employee-like' agenda. The paper states that:

- Of the 13.7 million Australian workers, 11.7 million (84 per cent) are employees.
- Of the remaining 16 per cent, 1.1 million (8.3 per cent) are independent contractors.

The paper presents no further statistical analysis.

This lack of statistical analysis is most unhelpful because it means that, in devising policy (and legislation) to implement the government's agenda, policy-makers will be 'running blind' as to the numbers of people likely to be affected or how they profile and how they conduct their business of being self-employed.

In the next section we provide statistical analysis so that decision-making can be made within a sound evidential framework. In doing this we draw heavily on the Victorian government's 2020 report on its inquiry into the gig economy. From an informative statistical and profiling analysis, the Victorian report is probably the most authoritative available.

5. Statistics – Who are likely to be affected

If the 'employee-like' agenda, as explained in the DEWR paper, is to be properly analysed, a first step should be to understand the likely numbers of self-employed people to be affected and how they profile. The 2020 Report of the Inquiry into the Victorian On-Demand Workforce is arguably the best and most reliable statistical data available on 'gig' work. This can be cross-referenced to the DEWR paper.

The most instructive statistic from the Victorian report is that:

- **only 0.19 per cent** of the Australian workforce use gig work for their **full-time income**. That equates to around 26,000 workers.

Further

- Approximately 7 per cent of the workforce (*around 960,000 people)* have done some form of gig work in any year.

What this shows is that, **overwhelmingly, 'gig' work is a 'top up' form of income.**
In other words, around 934,000 people do gig as 'odd job'-type work in addition to (say) their full-time job.

The question that arises from these data is just how many people does the federal government's agenda seek to target? As explained in the DEWR paper, the government wishes to create new law being a commercial contract type called 'employee-like'.

As a concept this arguably would impact all of the 2.3 million people who are self-employed. This would presumably target the 1.2 million independent contractors plus the 1.1 million who are self-employed but employ others. The reality is that there is not sufficient information or analysis in the DEWR paper to be certain of the scope of the planned measure.

The Victorian report cites Australian Workforce status as follows (Fig 1, page 17)

Full-time	49.5 per cent
Casual	20.2 per cent
Part-time	13.1 per cent
Self-employed who employ others	9.1 per cent
Independent contractors	8.1 per cent

Question: is the federal government intending to cover all 17.2 per cent of self-employed people?

It seems the answer is 'no' but we cannot be certain. The DEWR paper states that the intent is to target gig workers and then only certain types of gig workers. The DEWR 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)

This narrows down the number considerably to (a) include only independent contractors but (b) exclude those who earn income through sharing accommodation (etc.) and/or those who earn income through 'advertising platforms' that don't manage payments.

This means that any policy and legislation need to exclude those self-employed people who earn their commercial income through 'gig' platforms that offer these services but exclude others. Who, then, is left being targeted by the 'employee-like' agenda?

This leads to consideration of job/work types. The Victorian report identifies the type of work performed by workers doing gig work (expressed as percentages) (page 34). What the DEWR needs to do is to enquire and discover which gig work types are intended to be covered by the new law.

Type of digital platform work		**%**	**Yes? No?**
Transport and food delivery	Taxi services; food delivery; package delivery or goods delivery	18.6	
Professional services	Accounting; consulting; financial planning; legal services; human resources; project management	16.9	
Odd jobs and maintenance	Running errands; general maintenance; removalist work	11.5	
Writing and translation	Academic writing article writing; copy writing; creative writing; technical writing; translation	9.0	
Clerical and data entry	Customer service; data entry; transcription tech support; web research; virtual assistant	7.8	

Creative and multimedia	Animation; architecture; audio; logo design; and multimedia photography; presentations; voice overs; video	7.7	
Software development and technology	Data science; game development; app, and technology software or web development; server maintenance; web scraping	7.2	
Carer	Aged or disability care; pet care; pet services; babysitting; nanny services	7.0	
Skilled trades work	Carpentry; plumbing; electrical work	5.8	
Sales and marketing support	Social media; marketing; ad posting; lead generation; search engine optimisation; telemarketing	5.0	
Education	Tutoring; teaching; mentoring; online coaching	1.2	
Personal services	Sport / fitness coaching; massage; adult entertainment; tattoo and piercing	0.9	

Understanding just which self-employed people are to be targeted by 'employee-like' agenda is critical to providing proper feedback to the DEWR consultation paper. Without such analysis, policy and subsequent legislation will be created 'blind'.

The questions that need to be answered relate to which workers, as profiled, are to be included or excluded from the 'employee-like' agenda.

For example, will the following be included or excluded?:

- The 9.1 per cent of people who are self-employed but employ others?
- The 8.1 per cent of self-employed people who are independent contractors?
- The 0.19 per cent of people who earn their income full-time through gig work?
- The 6.81 per cent of people who only use gig work as top-up income?
- The categories of workers listed in the Table above?

A dilemma

Here is a major policy dilemma!

- The government's agenda is to create 'employee-like' legislation. That is, to invent a new (legislated) contract type where a commercial contract is to be treated as an employment contract.

But

- The government has also committed (as explained in the DEWR paper) that the reach of this new contract type is to be restricted and is not to interfere in commercial matters.

Further

- The analysis above provides a breakdown of the job/work types and profiles that people engage in when undertaking gig work.

For the policy (as explained by DEWR) to work it needs to be specific as to which people are to be included in the measure and which are not. The policy (and legislation) need to be highly specific so that people who are not intended to be included in the measure do not find themselves included in the measure for no good reason. Good policy and good law creates certainty.

Section Three:

The 'Big Picture' Consequential Problems

6. The legal issue of contract – The High Court declares

We (SEA) say that the government's agenda for 'employee-like' has set DEWR and legislative drafting an impossible task if the law of contract is to have stability and certainty in Australia.

There is a simple fact of law that draws a complete distinction between the employment contract and the commercial contract.

That split is determined by common law. The spilt means that:

- Employees are regulated through employment/industrial relations legislation.
- Commercial transactions are regulated through competition, consumer and related legislation.

Further

- there is no contract type that sits in between the two. The divide is absolute.

And

- self-employed people (independent contractors) are workers who earn their income through the commercial contract.

Consequently

- there is no such thing as an independent contractor who is a 'little bit' an employee.

The High Court of Australia has affirmed this as recently as February 2022 in what is arguably the most important legal ruling on this issue in at least 50 years.

In the Judgment on *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 *9 February 2022* P5/2021, the High Court made several critical statements that have a bearing on the issues raised by the DEWR paper.

In that decision the High Court unanimously affirmed that the distinction between an employee and an independent (self-employed) contractor is clear and well established.

The High Court said that it is essential that there is legal certainty on this:

> …. It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance. Especially is this so where the parties have taken legitimate steps to avoid uncertainty in their relationship. The parties' legitimate freedom to agree upon the rights and duties which constitute their relationship should not be misunderstood. (at 58)

Moreover, such certainty is established:

> Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract. (at 59)

The Court said that that certainty cannot be changed, modified or revisited based on social or psychological concepts because such concepts are not law:

> The employment relationship with which the common law is concerned must be a *legal* relationship. It is not a social or psychological concept like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties.
>
> By contrast, there is nothing of concern to the law that would require treating the relationship between the parties as affected by circumstances, facts, or occurrences that otherwise have no bearing upon legal rights. (at 22)

In pursuing the 'employee-like' concept as explained in the DEWR paper, the proposed policy stands in direct conflict with legal reality as explained by the High Court. That is, the government's policy invites a clash with the legal facts of common law. At common law there is nothing in-between an employment contract and a commercial contract. Consumer law, competition law, and industrial relations law have been developed since federation, at least, on this clear, simple distinction. This is the law, and this is common sense.

But. There is no 'law' that says a parliament cannot declare something to be what it is not. Common sense is not a 'law'. To take a hypothetically stupid example, a parliament could declare that the sun rises in the north and sets in the south. There is nothing to stop such a legislative declaration except common sense.

7. The history of the 'employee-like' concept

It is worth understanding how we have reached the point where something can be declared to be what it is not. That is, that an independent contractor can be a 'little bit an employee' and therefore treated as an employee.

The idea of creating a third category of worker has been around since the 1960s. It was initiated by a Professor Arthurs of Canada in his 1965 thesis *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*. Arthurs' thesis was based on a study of self-employed fisherman working off the east coast of Canada who had only one cannery where they could effectively sell their catch. Arthurs argued that although the fisherman were operating as small business people, they were nonetheless 'dependent'.

Arthurs' idea of 'dependent contractors' has found currency, favour and promotion amongst many labour law academics and has been translated into some legislative forms globally (for example, in Quebec, Canada.) This happened in the United Kingdom from around the mid-1980s with the introduction of the *Wages Act 1986*. More significantly for this discussion was the UK *Employment Rights Act 1996*.

The term 'worker' is defined by section 230(3) of the UK *Employment Rights Act 1996*. It creates a statutory definition of 'workers' that sits outside the common law. It defines this 'other worker' as an individual working under,

> "…any other contract, … 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; and any reference to a worker's contract shall be construed accordingly."

This UK-specific non-common law statute definition has remained somewhat 'asleep' until an 'Uber' decision of the London Employment Tribunal (2016) declared Uber drivers to be subject to the *Employment Rights Act*. This was confirmed by the UK's highest court in February 2021.

The Uber decision in the UK has created a good deal of animated commentary suggesting that the definition of independent contracting has changed. In fact, the Uber decision is specific to the UK statute. It is not common law. It effectively declares that someone who is an independent contractor can also be a 'little bit' an employee.

What needs to be understood is that both the Quebec and the UK statutes were created before the International Labour Organisation (ILO) settled the matter of 'employment status' in 2003 and 2006. (This is explained below.) Both the Quebec and UK laws would now be out of step with, and in breach of, the ILO determinations on this matter. It is understandable that such statutes continue to exist because once statutes are in place, particularly ones that are somewhat under-utilised, there is little impetus to repeal them.

[As an aside it should be noted that, since 2015, the number of UK self-employed independent contractors has dropped from about 15 per cent of the workforce to around 12 per cent. This aligns with the application of the UK laws in the Uber case. From this it can be speculated that if there is an intention to harm, even destroy self-employment, then treating self-employed people as if they were employees is a destructive route to follow.]

In short, the Quebec and UK laws were created without their full implications being understood and before consideration of the 'employment versus contractor' matter had been fully explored and decided by the ILO.

It is entirely another matter, amounting to bad policy, to pursue this agenda now, as in Australia, when the matter has been fully canvassed, settled and rejected by the ILO.

We surmise that a one-line comment in the Australian High Court ruling discussed above (Personnel v CFMEU Feb 2022) is a reference to the UK Uber decision. The High Court said:

> "In the United Kingdom, the common law distinction seems of late largely to have been abandoned." (at paragraph 97)

And this concept of 'dependent contractor' has had considerable currency amongst Australian labour academics. One of the more prominent academics in this field proposed in a Senate Select Committee on Job Security in 2021 that there should be a move to:

- clarifying or expanding definitions of 'employment' to capture the relationship between a digital intermediary and its workers;
- creating a new category of 'independent worker' to define new rights and protections tied explicitly to the circumstances of gig workers.

This is a derivation of the 'dependent contractor' thesis expressed in the DEWR paper as 'employee-like.'

8. The International Labour Organisation (ILO) rejects the concept

The ILO (a division of the United Nations) is the peak global body that considers and makes statements of principle on labour policy to guide national law. From 1996 the ILO had been engaged in protracted debate on the 'problem of the employment relationship'. That is, it was struggling to come to terms with the conceptual challenge to employment/labour law by the apparent rise of the independent contractor. That is, where do workers (who are both worker and boss in one) fit into labour regulation that is predicated on the exclusive assumption that that the worker and boss are separate and institutionally predetermined to be in conflict.

In 2003, after considerable debate, at the ILO's peak global forum on the issue, resolved the definition of 'worker' as follows.

> *The **term employee** is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship.*
> *The **term worker** is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee.*
> ***Self-employment** and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.*
> Report of the Committee on the Employment Relationship (page 52)

Then again, in 2006, the ILO Recommended that:

> "National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships…" (page 77, Item 8)

The effect of the 2006 Recommendation and the 2003 Conclusion is that the ILO affirms that self-employment operates within commercial legal contracts. This is entirely consistent with the subsequent Australian High Court ruling of 2022.

Following the 2006 ILO Recommendation, the Federal Parliament passed and enacted the *Independent Contractors Act* 2006 that locks in under statute the common law definition of self-employment. This Australian Act conforms with, and is in accord with, the ILO obligations of 2003 and 2006.

The proposal explained in this DEWR paper would effectively abandon common law as the test for self-employment by creating a 'third way' and would breach the ILO obligations to which Australia has committed.

9. Conflict with Competition law – Price fixing and collusion

The DEWR paper makes no mention of the implications of the 'employee-like' agenda for competition law. Yet the ramifications of having industrial relations law intrude into competition law and regulation are enormous. It is a great surprise and concern that the DEWR paper has not canvassed this and has not sought explicit input on this.

The reason that this issue is of such profound importance stems from the basic thesis we have been covering in this submission—namely, the sharp difference between the commercial contract and the employment contract. The two contracts have totally different functions.

As an overview

- At the heart of competition law is the prevention of collusive price-fixing of goods and services.
- At the heart of employment/industrial relations law is a system of sanctioned, legal price-fixing (of wages).

That is, on the one hand:

- *Employment = Price setting/fixing:* The regulation of employment contracts involves price-setting. That is, employment laws, regulations and the oversight regulator (FWC) determine and set prices (wages) for employees. The process is highly complex, highly detailed and has major impact on commercial operations. The process is a form of collusion, but it is perfectly legal, sanctioned and carried out for the best of social and economic intentions.

But, in stark comparison:

- *Commercial = Outlaws price setting/fixing*: Fundamental to the operation of Australia's free-market economy/society is the fact that price-fixing, and collusion to fix the price of goods and services is illegal and even subject to criminal sanctions. The ACCC is charged with policing this. The outlawing of price-fixing/collusion is done to protect consumers from exploitation.

  Significantly, competition laws include a specific provision that prevents the ACCC from interfering in employment contracts and the price-setting/fixing that occurs as a normal course of events in industrial relations (employment) matters. This restriction on the ACCC is imposed even though there have been glaring examples where the industrial relations system has been used to mask collusive commercial price-fixing, and the manipulation and rorting of competition.

The ACCC is restricted as follows

Section 51(2)(a) of the Competition and Consumer Act 2010, (CCA) says:

> (2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:
>
> (a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract,

> arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

This potential for the rorting of competition law under the guise of industrial relations agreements is not some theory. It has raised the concern of the ACCC in the past.

In 2015, then ACCC Chair Rod Simms gave a major speech on the issue highlighting specific cases where it could be argued that under the mask of an industrial relations agreement a business had colluded with unions to create agreements that would damage competitors. Rod Simms mentioned several cases but one case stood out. That case was the transport company, Toll, who had been exposed as entering an industrial agreement with the Transport Workers Union on the condition that the TWU would conduct aggressive action against named competitors of Toll with the intention of harming the competitors. The effect of such action would be to harm competition. In his speech Rod Simms explained the limitations on the ACCC to stop such arguably anti-competitive behaviour.

The Simms speech is of major importance. We believe it should be studied in relation to the 'employee-like' agenda if the competition implications of the 'employee-like' agenda are to be understood.

Rod Simms said of the Toll case:

> Unions have been given a clear role under the law to represent their members and take action seeking improved wages and conditions. However, this does not give them or businesses cooperating with them a licence to seek to regulate markets. They could take themselves outside the above exemptions if they seek to determine which firms may operate within markets, what prices they can charge or how bids for work will be determined.
> In a market economy it should be the market that sets prices and determines who participates and who wins work, not unions or businesses. (page 3)

Using the Toll example (and others) Rod Simms commented on the ACCC's jurisdiction saying:

> The effect of this IR carve out is that the ACCC does not have jurisdiction to deal with agreements, or aspects of agreements, that relate to employment conditions. (Page 4)

As a matter of law the FWC is currently restricted to employment matters, that is those matters pertaining to contracts of services. The FWC does not currently have jurisdiction over contracts for services. Likewise the ACCC does not have jurisdiction over contracts of service, as explained above.

The 'employee-like' agenda is a measure that will 'explode' this sharp and necessary competition *vs* employment regulatory divide. It is a huge leap.

When this sharp distinction between the regime to outlaw price-fixing and the regime to sanction price-fixing is understood, the 'employee-like' agenda is seen in a disturbing light.

That is, the implementation of the 'employee-like' agenda involves the setting and fixing of commercial prices in a way that is illegal under competition law.

This is demonstrated in the DEWR paper which states that the FWC would determine (pages 12–13) commercial contract prices by:

(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, (vehicles, maintenance, insurances, licences etc)

All of these are price-setting items applied to the commercial contracts of self-employed, small business, independent contractors.

There is no way that this issue can be avoided or ignored. This 'employee-like' agenda is a threshold step of profound regulatory and historical significance. As such, it must be studied, understood and have its full ramifications put on the table. This is not some mild tweaking of existing law.

Section Four
The practical Problem

10. The practical problem

The problems and consequences of the 'employee-like' agenda can be better understood by considering a practical example.

The DEWR paper has said that the FWC is to have broad powers with safeguards and 'guardrails' but does not suggest what these could be. But 'guardrails' look irrelevant when the paper clearly states that the FWC would be involved in:

(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, (vehicles, maintenance, insurances, licences etc)

Clearly, this is not a 'broad' function with 'guardrails' but is instead highly detailed and specific. What 'guardrails' could be put in place is nigh impossible to imagine given the specificity of the issues listed above.

Further, the DEWR paper does not specify which class of self-employed people are to be covered by the measure, although it has at least identified gig workers in the transport sector, in other words, ride-share.

We can, therefore, look at ride-share and consider that as an example of the implementation of the 'employee-like' agenda.

The ride-share example
Ride-share involves three parties with three different contracts.
The system operates as follows.

- A customer (you/me) notifies the platform on a mobile app that he or she wishes to travel from A to B.
- The platform offers the customer price options.
- The customer accepts a service with a price.

The contract established between the platform and the customer has the basic elements of a commercial contract namely 'offer and acceptance with consideration' (consideration in this instance means money).

- The platform then advertises the job/gig at a price (different to the price offered to the customer) to drivers in the area of the customer.
- A driver accepts the job/gig, picks up the customer and delivers the customer.

The contract established between the platform and the driver has the basic elements of a commercial contract namely 'offer and acceptance with consideration.'

- The customer pays the platform;
- The platform pays the driver;
- The platform retains an amount to cover the cost of its services.

The transactions are completed.

For the purposes of the 'employee-like' agenda, according to the DEWR paper, the FWC is to be given authority to interfere in, and exert control over, the commercial contract between the driver and the platform.

Let's say that the

- customer pays the platform $45;
- platform pays the driver $40.

The FWC is be given the power to interfere in and have some form of control over the setting and management of the $40 payment. That is, the FWC will have the task of determining:

(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, (vehicles, maintenance, insurances, licences etc)

Let's take just one scenario from within that extensive list—namely, the proposal that the FWC should determine that the driver is entitled to holiday pay (an employee/industrial relations concept). How will this work?

- Presumably the FWC is going to have to determine that a percentage of the $40 must be attributed to holiday pay. Let us suppose the FWC says this should be 50c.

- Will the platform be required to deduct the 50c from the $40 paid to the driver? or
- Will the platform be required to add 50c to the $45 charged to the customer?
- Where will this 50c be parked? Will the platform be required to establish an account for the driver where the 50c is to be stored?
- We know that the vast bulk of gig workers, in this instance drivers, only work part-time using the income as 'top up' income. If the driver is employed in another job, say, as a full-time hospitality employee, will the 50c be required to be paid to their employer? or
- Will the government require that a national fund be set up (controlled by a union perhaps such as occurs in the construction sector) where the 50c is deposited?
- How and when will the driver access the 50c?
- Will the driver be able to decide that they want the 50c the day after they have completed the gig because they have decided to have a 'holiday'? or
- Would the platform or the national 'gig holiday fund' determine when the driver is entitled to take the 50c? Would 'employee-like' laws determine when the driver takes a 'holiday' or would that be the driver's decision?
- If the driver decides to take a holiday (however defined), under the 'employee-like' rules would the FWC be able to withhold the 50c from the driver?
- What, then, is the meaning of 'holiday'? Is a special meaning of 'holiday' to be created only for ride-share drivers? If so, does that mean that ride-share drivers are not really 'employee-like'?

The list of questions can go on and on. And each of these questions needs to be addressed and answered if the 'employee-like' agenda is to be translated into legislative form. And it would be dishonest if legislation were enacted which left these issues of substance to the FWC to determine. That would be a recipe for confusion and most likely result in the denial of income (the holiday pay) for considerable periods of time. Policy and legislation must answer these issues, otherwise scenarios will be set up in which gig drivers will be harmed.

Further, a massive range of questions can, and should be asked for all the other areas that the FWC is to be given power to interfere in and control.

As another example, the FWC is to be involved in the setting of the prices (minimum rates of pay). (In our example, this is the setting of the $40 payment.) In doing so, the FWC is not just setting the price paid to the driver but also, in a very direct way (possibly) determining the price to the customer. That is, what the driver currently receives is a function of what the customer pays. Think on this further.

When a customer steps into the car of a ride-share driver it needs to be clarified if the driver and the customer have a direct commercial contract. The platform has advertised services and organised a two-way offer and acceptance of contract/s. What then of competition law and price fixing? Under 'employee-like' regulations, would the FWC effectively be determining the price of a consumer's contract through the control of the commercial price paid to the driver? What of consumer rights in this respect?

If the FWC is to determine, or be involved in, the commercial price paid to the driver, based (presumably) on what is 'fair', how is 'fair' to be decided? The way ride-share operates is

that prices from A to B are never static. They vary according to the platform's assessment of traffic conditions, customer demand (which fluctuates wildly), the numbers of drivers available and so on. The platforms have high-tech algorithms that undertake such calculations orientated toward ensuring that the process is sufficiently attractive to have drivers who want to transport customers at any time. It's a highly sophisticated process of having supply match demand. Will the FWC now seek to interfere in, oversee and have control over those algorithms?

Section Five
'Employee-like' unnecessary because protections are already in place

Underpinning the government's agenda (as reflected in the DEWR paper) is the idea that workers are only protected if they are employees subject to employee, industrial relations (FWC) regulation. Further, that non-employees such as self-employed independent contractors are not 'protected'. This is false. The falsehood is proven when one considers policy, legislative and regulatory developments, since 2006 at least, that provide protections for self-employed, independent contractors.

The fact is that the 'employee-like' agenda is entirely unnecessary because the protections (explained below) for **all** self-employed, independent contractors are already in place, are robust, but can and are being improved. But the protections are provided through commercial law regulation not employee law regulation. This is the difference.

In this section we explain the specific protections already in place for self-employed, independent contractors and how they can be improved.

11. Protections – ILO sets the obligations

Earlier in this submission (Item 8) we outlined the declarations made by the International Labour Organisation (ILO) in mid-2006 on the 'Employment Relationship'.

As explained, the ILO declared that:

- 'Worker' is a general term.
- 'Employee' refers to a worker in an employment relationship (contract).

And that

- ***Self-employment*** *and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.*

Further, the ILO declared that:

> National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships…"

Not long after these ILO declarations were enunciated, Australia became a signatory to them thus creating an obligation on Australia to adhere to and implement them.

'Employee-like' breaches Australia's ILO obligation
What is important to understand is that that the government's 'employee-like' agenda puts Australia in breach of its ILO obligation that employment regulation should *"…not interfere with true civil and commercial relationships."*

This is exactly what the 'employee-like' agenda does. It interferes with true civil and commercial relationships.

12. Sham contracting laws Australia

A key aspect of the ILO's 2006 declaration was that measures against sham contracting should be implemented. That is, the ILO recognised that unscrupulous people could and do seek to declare that a party is an independent contractor when in fact they are an employee. They do this to avoid obligations to their employees.

Australia was arguably the first jurisdiction in the world to move to implement this ILO obligation. In late-2006, the *Fair Work Act* was amended (at the same time that the *Independent Contractors Act* was established) to create sham contracting laws which complied with the ILO obligations. It is probable that Australia is one of the few jurisdictions in the world to have moved on implementing this.

The Fair Work Act 2009 Section 357 states

> **Misrepresenting employment as independent contracting arrangement**
> (1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.
> Note: This subsection is a civil remedy provision (see Part 4-1).
> (2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:
> (a) did not know; and
> (b) was not reckless as to whether;
> the contract was a contract of employment rather than a contract for services.

The Fair Work Ombudsman (FWO) is responsible for policing the sham contracting laws and explains the law in lay language.

> Sham contracting is illegal under the Fair Work Act 2009. It's illegal to:
> - knowingly or 'recklessly' represent to an employee they are an independent contractor when they aren't (it may be 'reckless' if the employer reasonably should have known that the worker was an employee).

The FWO has a priority to investigate and prosecute sham contracting and, as an example, reports that in 2020-21 the FWO "…completed 342 disputes relating to sham contracting and misclassification. The unit recovered $129,917 for 54 employees."

Further, in relation to the government's 'employee-like' agenda focusing on the gig economy, the Fair Work Ombudsman already has a focus on the prevention of sham contracting in the gig economy.

When investigating and prosecuting for sham contracting the FWO's approach is to study the contractual arrangements to determine if the arrangement/s constitute an employment contract or a commercial (independent contractor) contract. The process is (and has to be) entirely in accord with the law, now clarified and made certain by the High Court ruling in *Personnel* (February 2022) discussed earlier. (See Item 6)

The importance of the sham contracting laws and their enforcement is that they protect workers from being intentionally or inadvertently classified incorrectly as independent contractors. This is a key worker protection.

13. Minimum pay: Independent Contractors Act

The *Independent Contractors Act* (2006) was created at the same time that the sham contracting laws were introduced. The Act has two important design features that provide protections for self-employed, independent contractors.

The Act

a) *Secures the statute definition of independent contractors as being that at common law*. That is, it aligns the statute with the established common law—namely, that a self-employed, independent contractor earns their income through the commercial contract. Further with the High Court ruling in *Personnel* (discussed above) the determination of the process of investigation and the determination has been entirely clarified.

b) *Protects against underpayment*. Independent contractors are not subject to industrial awards. But the unfair contract provisions of *the Independent Contractors Act* 2006 contain a broad provision that protects independent contractors from being paid less than an employee. The Act states:
(1) In reviewing a services contract in relation to which an application has been made under subsection 12(1), the Court may have regard to:
(c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work;
(Section 3 Item 15 in the Act)

The DEWR paper seems to make light of this protection from underpayment, saying that the provision has been rarely used. This is misleading The fact is that the provision has been used. The view of some people—that perhaps the protection provision has not been used as much as they would like it to be used—amounts to bad public policy analysis.

The task in applying this protection provision is to consider an independent contractor's contract and assess whether the pay is less than what they would have received compared with an employee doing the same or 'like' work.

The common law process follows a similar path. Under common law assessments, if an alleged independent contractor (worker) is receiving lower remuneration than they would as a 'like' employee, the court reasons that the worker has most likely not consented in a fully informed way to be an independent contractor. Consent in the common laws process is a critical factor in determining employment or independent contracting. In fact, in the High Court *Personnel* case, the worker (a labourer) was demonstrably being paid less than employed labourers doing similar work.

There is an argument that the provision could/should have a cheaper and faster process for determination—for example, by making use of Small Business Ombudsman/Commissioners. Currently the process through the courts can be expensive and slow. But given that the person is a self-employed, independent contractor, the process must be through the commercial avenues NOT through industrial relations processes. Jurisdictions in this area should not be mixed or confused as to do so would invite great uncertainty.

14. ***Unfair contract laws Australia***

Australia's unfair contract laws are a significant and vital protection for self-employed, independent contractors.

Self-Employed Australia is proud of the fact that we played a major role in having the laws secured for small business. SEA began its campaign for these laws in 2010. The law was finally created and passed in 2015, and took effect in 2016. The passing of the laws was supported across the party-political divide.

The ACCC is responsible for the policing and enforcement of the laws. The first iteration of the laws, however, only enabled unfair contract provisions to be declared 'null and void' by a court. In prosecuting businesses, the ACCC became frustrated by the fact that even though it was having prosecutorial success, companies continued to ignore the laws. It is due to the great efforts of the ACCC, particularly the ACCC's then chair Rod Simms, that the deficiencies in the Act were given considerable coverage.

In late 2022, one of the first pieces of legislation to be pushed through the parliament by the new Albanese government were the 'beefed up' unfair contract laws. The laws now impose substantial penalties for companies and individuals that breach the laws and they effectively outlaw unfair contract terms. The new legislation comes into effect in November 2023.

A summary of the 'beefed up' laws, with the major improvements noted, is as follows:
The laws

- Apply to consumers and small business.
- *Expand the definition of small business*. Will now apply to businesses up to 100 full- or part-time employees (excludes casuals) or less than $10m in turnover. Currently only 20 employees.
- *Do not limit the value of the contract* (currently restricted to contracts up to $300K).
- *Accept that a 'standard form'* contract is one if the contract has been used before.

- Acknowledge that if *minor changes* have been made to a contract in negotiations this does not stop the contract being 'standard form.'
- *Impose fines* for breaches (up to $2.5m for individuals; $50m for corporations). There are currently no fines.
- *Make it clear that a person breaches* the law if they propose to or seek to apply an unfair clause.
- *Ensure that multiple* unfair clauses create multiple breaches.

Court orders: (This will close many loopholes in the current laws)

- If a clause has been declared unfair by a court, all similar clauses in other contracts are taken to be unfair. A party must disprove the unfairness if they want to use the clause.
- An order can be made to stop loss or damage from an unfair clause. Loss does not have to be proven, it only needs to be shown that loss *may* occur. Such an order can apply to a 'class of persons' to stop loss.
- An order can be made to stop someone from engaging in contracts with unfair clause/s. A public warning can be issued about such a person.
- Persons can be disqualified from 'managing a corporation' due to the use of unfair clauses.

Orders can be made within six years of a clause being declared to be unfair.

15. Collective bargaining

The DEWR paper flags the suggestion that collective bargaining is to be made available for those declared to be 'employee-like'. And this collective bargaining is to be conducted by the FWC. The DEWR paper recognises that this creates an immediate conflict with the collective bargaining processes available through the ACCC for self-employed, independent contractor, small business people.

Remember that even for people declared to be 'employee-like', the government's agenda holds that these 'employee-like' people are still self-employed, independent contractors working under commercial contracts. They are not employees. That is, if the FWC does conduct collective bargaining for self-employed people it will lead to a regime where industrial relations negotiations have control over the processes of commercial contract-setting and pricing. The clash with competition laws and the powers of the ACCC to protect competition is glaring.

This is not, as we have stated earlier in this submission, a mere 'tweaking' of the law. It is a major break with Australian competition law, law that is designed to protect competition and prevent price manipulation and collusion.

We have mentioned in Item 9 on competition law the case of the collusive behaviour between the transport company Toll and the Transport Workers Union to harm Toll's competitors and the comments by then ACCC Chair Rod Simms on this matter. The Toll case shows that under industrial relations law and its associated arrangements there is

opportunity for parties to act collusively by manipulating competition and commercial prices.

The very nature and intent of industrial relations law is to sanction and make legal, collusive behaviour to set *employment* prices. There is no power and should be no power for industrial relations law to sanction and make legal collusive behaviour to set *commercial* prices. But this is precisely what the 'employee-like' agenda will do.

Again, we state that this is a monumental leap in law and public policy. It can only be speculated as to whether the government intends for this to occur or whether the consequences have been thought through. If DEWR is looking to understand 'unintended' consequences of the 'employee-alike' agenda, this stands out as a big one.

Further, it is entirely unnecessary. The ACCC already has a collective bargaining process available for self-employed, independent contractor, small business people The process is comparatively straightforward and simple.
Here are the ACCC's:

- collective bargaining overview
- the small business exemption process
- the list of some 60 plus collective bargaining processes currently underway.

The ACCC has an oversight role to ensure that the collective bargaining does not breach competition law. This process is well tried and tested and is not onerous.

By setting up commercial collective bargaining under the FWC , the 'employee-like' agenda will create an immediate clash in policy intent, legal requirements and processes between the ACCC and the FWC. This is something destined to lead to uncertainty, complexity, legal dispute and challenge. This is an agenda item that should not proceed.

16. Dispute Resolution and Unfair contracts disputes

The government's 'employee-like' agenda, as explained by DEWR, also envisages the FWC's having the power to handle disputes for people declared to be 'employee-like'. For all the reasons explained above with collective bargaining and competition law, this is bad policy. Again, the policy will allow the FWC to intrude itself into, oversee and make decisions upon commercial contract disputes. Again, this is a policy shift with enormous implications.

Presumably, the idea is to give 'employee-like' independent contractors access to cheap and quick dispute resolution. However, we challenge the claim that dispute resolution through the FWC is either easy or cheap. Industrial relations law is complex, rarefied and requires the engagement of specialist lawyers. For people who earn their income through the commercial contract, employment-dispute processes are ultra-confusing.

We do, however, agree that quick, cheap dispute-resolution for self-employed, independent contractor small business people is a high priority. Court processes can be slow and

expensive, with the expense often exceeding the value of the dispute. But over the last 15–20 years there have been significant strides forward.

Most important among these has been the creation of the state and federal small business Commissioners/Ombudsman. The Commissioners have a primary role in facilitating dispute resolution for self-employed people. Arguably, these functions are unique in the world. For the most part the Commissioners operate as mediators. The processes are similar to consumer small claims processes. Success rates on resolution are reported as high. Most commercial disputes can ordinarily be resolved through people sitting down and talking with mediators who are skilled at guiding disputes to resolution.

However, where disputes are not resolved, the processes through the courts can be expected to be expensive and drawn out. There is a pressing need for improved, comparatively simple commercial dispute-resolution. We strongly recommend consultation with the state small business Commissioners and the federal small business Ombudsman for their views and guidance on how mediation can be enhanced with better forms of dispute determination.

On this issue the DEWR paper includes the suggestion that the FWC should have dispute-resolution powers over unfair contracts. We read into this an implied criticism of the powers and activities of the ACCC on the enforcement of fair contract laws. Specifically, the DEWR paper reports that the ACCC cannot intervene in individual fair contract disputes. This is a half-truth which, in our view, is misleading.

The ACCC reports that it has around 500,000 complaints (consumer, small business, etc.) registered with it each year. Individual unfair contract complaints are not ignored by the ACCC as might be inferred from the DEWR paper. Quite normally, where there is one complaint about a business using unfair contracts there will likely be many other complaints given that the law covers standard form contracts. When the ACCC detects a pattern it will approach the business and investigate the contracts. If necessary, prosecution will occur. The ACCC has achieved some high-profile prosecutions. But its powers have been limited. Further, the ACCC has a $30 million a year budget for prosecutions (all prosecutions) and must carefully allocate its budget spend.

In November this year (2023) the ‘beefed up’ unfair contract laws come into effect. The ACCC’s effectiveness has to date been limited to the restricted scope of the existing unfair contract law. The new legislation will dramatically change the influence of the ACCC when investigating unfair contracts and should result in vastly improved compliance.

There are two key conclusions to be drawn from this.

- Consideration of any changes to fair contract enforcement should not be contemplated until such time as the success (or otherwise) of the ‘beefed up’ unfair contract laws can be observed and assessed.
- Presumably the government has contemplated allocating a budget to the FWC as part of its proposal to give unfair contract oversight to the FWC. Any such budget should instead be allocated to the ACCC and be earmarked for unfair contract disputes. This will give much better ‘bang for the buck’ on enforcement.