Attachment A

EMPLOYEE-LIKE FORMS OF WORK AND STRONGER PROTECTIONS FOR INDEPENDENT CONTRACTORS

Contents

We confirm that all case studies used in this submission have been provided with our client's consent and names of individuals and businesses have been changed to protect their identities.

A. Executive summary

We welcome the Government's proposal to remedy the 'loophole' in Australia's workplace relations law which affords significantly fewer rights and entitlements to independent contractors vis-à-vis their employee counterparts.

However, we have concerns about the proposal to create a third category of 'employee-like' worker (**ELW**), with distinct rights and protections, rather than to extend existing employee protections and entitlements to that class of workers.

In particular, we are concerned that the proposed new jurisdiction of the FWC may result in:

1. Increased complexity and uncertainty, added to an already confusing and complex workplace relations system;
2. Incentives for businesses to further erode existing employee entitlements;
3. A time-consuming and resource-intensive process that will achieve substantially the same results as expanding the definition of 'employee'.

We consider that a legislated definition of "employee" which is properly reflective of modern working arrangements will be a simpler, clearer and more cost-effective way of ensuring that minimum entitlements and protections for the workers that need it the most.

Otherwise, the Government will need to ensure there are appropriate safeguards in place to avoid unintended consequences for both businesses and workers such as:

- layers of legal uncertainty and the burden of understand and complying three complex and distinct systems of workplace relations regulation;
- the creation of a class of contractors who are *more* vulnerable than employees due to having limited bargaining power, but also little-to-no minimum rights and protections;
- the erosion of existing employee protections by incentivising companies to continue to bypass employment models in favour of a third-category of worker with sub-standard rights and protections.

Our recommendations to this effect are set out in the sections below, but we note in particular that expanding the jurisdiction of the FWC to resolve and determine disputes regarding unfair contracts and unfair termination of services contracts will be crucial in this regard.

B. Summary of recommendations

Any reforms must be reviewed and evaluated	
1.	To ensure that any reforms targeted at strengthening the minimum standards and conditions for independent contractors are fit for purpose, the Government should implement a rigorous monitoring and evaluation framework to measure the effectiveness of the reforms and conduct a four-year review of all relevant legislation amendments.
Minimum standards for employee-like forms of work	
2.	Rather than create a new jurisdiction and set of minimum standards for employee-like workers, the Government should introduce a legal definition into the *Fair Work Act 2009* which is extended to include employee-like workers. Such a definition should focus on a central questions of whether a worker: - has control over the work they do; - has control over their working conditions; and - is genuinely carrying on a business or commercial enterprise of their *own*.
3.	The scope of workers to be covered by the Fair Work Commission's employee-like worker jurisdiction must be defined by reference to the circumstances and (lack of) bargaining power of the worker, rather than the method of engagement. The jurisdiction should be defined by reference to a "*worker* who does work for the benefit of a person or an *entity* regardless of the legal relationship between the worker and the entity". In addition, in defining the scope of the ELW jurisdiction, the Government could be guided by the following:

	a) The definition of 'employee' under Superannuation laws; and/or b) The common law multi-factorial test for distinguishing between employees and independent contractors.
4.	The Government must ensure that the Fair Work Commission is appropriately resourced to materially expand its functions, without compromising its ability to perform its existing functions.
5.	Ensure that community legal centres (**CLCs**) are appropriately funded to assist the likely increase in demand for legal services as a result of the reforms
6.	Insert a statutory definition of 'employee' in the *Fair Work Act 2009* to ensure that the delineation between employees and independent contractors (whether 'employee-like workers' or otherwise) is clear to businesses and workers alike.
7.	To ensure that workers and businesses understand the regulatory framework that governs their engagement, the FWC should be given the power to make determinations about whether workers are employees, ELWs or independent contractors, and the relevant law or industrial instrument which applies to a particular arrangement.
8.	In order to close important legal loopholes and adequately protect workers with insufficient bargaining power, the FW Act must set out that the FWC's key objective for standard setting is to ensure that all workers, regardless of their characterisation as an employee or an independent contractor, have access to minimum rights and protections.
9.	In order to ensure that minimum standards are truly reflective of the employee-like nature of work, they must include (at a minimum): • Minimum rates of pay • Concepts of 'work time' and the kinds of activities which attract compensation • Payment times • Workplace conditions, such as leave, rest breaks and hours of work • Treatment of business costs, including vehicles and maintenance, licences, etc • The provision of insurance • Record keeping • Training and skill development • Dispute resolution • Processes for fair termination. • Clear obligations on principals/businesses to pay superannuation • Processes for fair termination of service contracts
10.	To avoid incentivising workforce arrangements that avoid an employment relationship, the minimum standards should be no less favourable than the award that would otherwise apply if the worker were considered an employee.
11.	In order to protect ELWs against adverse action and discrimination, the Government should amend the FW Act as follows: • section 341 of the FW Act should be amended so as to include minimum standards for ELWs within the meaning of a workplace instrument in the definition of 'workplace right'; • section 351 of the FW Act should be amended so as to extend the protection against discrimination to ELWs.
12.	In order to assist ELWs to navigate their taxation obligations, amend Division 10 of Schedule 1 to the Taxation Administration Act 1953 (Cth) to require corporate entities engaging an ELW to make PAYG withholding payments in relation to payments made to ELWs.
13.	To the extent possible, the process for making minimum standards should be identical to the FWC's modern award process to enable certainty for businesses, workers and the FWC.
14.	To ensure that ELWs are able to enforce their rights under relevant minimum standards, the FW Act should include a civil remedy provision prohibiting the contravention of the terms of minimum standards, with penalties for breach of the provision.
15.	The FWC should have the jurisdiction to resolve disputes for ELW: - in relation to the application of terms contained in minimum standards; - arising under dispute resolution terms contained in minimum standards; and - regarding the unfair termination of ELW work arrangements.
Unfair contract terms	
16.	The Government must extend the FWC's unfair contracts jurisdiction to <u>all</u> independent contractors to close existing legal loopholes and ensure that vulnerable workers are not left behind.

17.	To remove incentives for businesses to engage independent contractors to avoid employee protections and entitlements, the FWC should be given the jurisdiction to deal with and arbitrate disputes regarding: - unfair contract terms; and - unfair termination of services contracts.
18.	The FWC should offer conciliation conferences, mediation and arbitration to independent contractors, to provide access to low-cost and timely resolution of their disputes.
19.	Provide greater funding or tenders to CLCs to allow for community lawyers to provide increased assistance for dispute resolution for clients.

C. Any reforms must be reviewed and evaluated

Recommendation 1: To ensure that any reforms targeted at strengthening the minimum standards and conditions for independent contractors are fit for purpose, the Government should implement a rigorous monitoring and evaluation framework to measure the effectiveness of the reforms and conduct a four-year review of all relevant legislation amendments.

We recognise that the Government's commitment to strengthen the rights and protections for independent contractors is an extremely complex undertaking and requires the balancing of many competing interests and considerations.

It is therefore imperative that the reforms (in whatever shape they end up taking) are subject to review and rigorous monitoring and evaluation to ensure these reforms result improved outcomes for these workers and to protect against (or be able to correct) any intended consequences for workers.

In our view, a four-year review of any legislative amendments will allow sufficient time to understand the practical implications of the reforms.

D. Minimum standards for employee-like forms of work

1. A neater approach to protecting employee-like workers (ELWs)

Recommendation 2: Rather than create a new jurisdiction and set of minimum standards for employee-like workers, the Government should introduce a legal definition into the *Fair Work Act 2009* which is extended to include employee-like workers.

Such a definition should focus on a central questions of whether a worker:
- has control over the work they do;
- has control over their working conditions; and
- is genuinely carrying on a business or commercial enterprise of their *own*.

Our primary position is that if the Government is prepared to recognise that there is a class of independent contractors engaged in employee-like work, those workers should be treated as employees.

Rather than undertaking the costly and time-consuming process of establishing a new jurisdiction for the FWC, and creating a series of industry specific minimum standards which are proposed to be substantially the same as modern awards, we propose that the Government include a definition of employee in the *Fair Work Act 2009* (Cth) (**FW Act**) which goes to the heart of the reality of an employment relationship. In doing so, the definition would apply to workers who are employee-like, in that they:

- do not have true autonomy over their work or working arrangements; and
- are not genuinely running their *own* businesses.

We consider this approach is the most favourable, noting that:

- historical understandings of the difference between independent contractors and employees are out-of-date and need revising;

- the current common law test for distinguishing between employees and independent contractors offers little clarity or certainty to either workers or the businesses that engage them;
- the new jurisdiction will add increased complexity and uncertainty to the workplace relationship system;
- the new jurisdiction may cause an unintended financial burden on businesses who engage ELWs;
- the process proposed will be extremely resource-intensive, time consuming and will achieve substantially the same results as a widening of the definition of 'employee';
- a new jurisdiction and series of minimum standards for ELWs is likely to cause confusion among businesses and workers alike about workers' rights and entitlements; and
- businesses can be adequately protected through transitional arrangements.

1.1 Historical understandings of the difference between independent contractors and employees are out-of-date

As highlighted in the consultation paper, there are classes of independent contractors who are 'largely dependent on a single business for ongoing work or engaged under standard form contracts over which there is little scope for negotiation'. Indeed, for the majority of our clients who are engaged as independent contractors, the following statement made by the Government in its consultation paper is rarely, *if ever,* true:

> *[Independent contractors] may have more autonomy to choose when they work, the rates they charge and the conditions they work under, while also taking responsibility for things like the purchase and maintenance of equipment, insurance and meeting their legal obligations as a small business.*

This problem is not a new one. In a Westjustice survey conducted almost ten years ago, community workers highlighted the following common problems for members of newly arrived and refugee communities:[1]

> *"Client was told they would only hire him if he had an ABN."*

> *"Clients don't know their rights and what they should be paid. They are taking jobs and using ABNs without knowing what that means."*

> *"A lot of clients are told by employers they have to obtain ABNs even though it's not appropriate for the work they are doing."*

Our clients still tell us the same problems today. In our experience, these workers are 'employee-like workers' (**ELWs**) in that they are in substantially the same position as employees vis-à-vis their principals.

Flexibility has been upheld has the key benefit for independent contractors choosing to do platform work, for example the Australian Industry Group's Submission to the Senate Select Committee on Job Security highlighted that workers have 'the flexibility to work around study, family commitments and other paid employment'.[2]

Whilst some ELWs may enjoy the perks of independent contractor status insofar as it provides them with flexibility, at present, those workers for whom flexibility is a priority are required to sacrifice minimum wages and protections to gain the flexibility for the working arrangements that they desire. In addition, the requirement for flexibility is often coupled with other indicators of vulnerability or disadvantage, such as – in the circumstances outlined by Ai Group – being a student or international student (many of whom, in our experience are unaware of their rights and entitlements or having pressure to maintain strict visa conditions while working), having caring responsibilities and/or being in other forms of low-paid work that requires a supplementary source of income. The lack of

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[1] Catherine (Dow) Hemingway, 'Employment is the Heart of Successful Settlement: Overview of Preliminary Findings' (Preliminary Report, Footscray Community Legal Centre, February 2014), 12
[2] Senate Select Committee on Job Security, p 135.

bargaining power held by workers in these arrangements means that in practical reality the precarious and dependent nature of their engagement is much more akin to casual employment than it is to a true 'independent' contracting arrangement.

For other contractors, such as our cleaning and sales clients, the flexibility afforded by their arrangements is dubious at best and is more properly seen as an unequal commercial arrangement that favours the Principal.

The reliance on this out-dated concept of what it means to be an independent contractor allows businesses to gain an unfair market advantage by denying vulnerable workers the minimum entitlements and protections they would receive if engaged as an employee, but offers few, if any, benefits to workers other than the flexibility that they might otherwise utilise from casual employment.

CASE STUDY – BLANCA

Blanca came to Australia as an international student to study English. Blanca was engaged as an independent contractor by a food delivery company. Her pay would vary depending on the delivery, usually ranging from $6 to $8 per delivery.
One day when Blanca was making a delivery her bike was hit by a car. She was taken to hospital and required surgery for her injuries. The Transport Accident Commission (TAC) paid for Blanca's medical costs. However, she was subsequently unable to work due to her injuries. Because Blanca was engaged as an independent contractor, it was unclear whether she would be able to access compensation through the WorkCover scheme.
WEstjustice referred Blanca to a no-win no-fee personal injury firm for further advice and assistance. Ultimately, Blanca was required to pursue compensation through the TAC and her independent contractor status prevented her from accessing compensation for lost wages through WorkCover.

A legislated definition of employee that focuses on the question of whether or not a worker has control over the work they do and their working conditions, and who is carrying on a genuine business or commercial enterprise of their *own* will:

- ensure there are vital protections and minimum standards for the workers who need it the most;
- preserve the status quo for existing independent contractors, such as plumbers, electricians, freelancers and certain truck drivers who have no desire to be employees;[3] and
- level the playing field for businesses who rightfully engage their workers as employees.

1.2 The current common law test provides little clarity for businesses or workers and incentivises the erosion of employee entitlements

While the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2 (**the High Court Decisions**) confirmed the principles for determining whether a worker should be properly considered an employee or an independent contractor; the decision focusses exclusively on the rights and obligations in the contract between the parties. This means that these decisions provide clarity only where:

a) there is a written contract, and
b) the terms of the contract are a true reflection of the rights and obligations between the parties.

The reality is that, for the majority of our clients who are engaged as independent contractors:

- There is no written contract; or
- If there is a contract, the contract does not reflect the rights, obligations or expectations in the working arrangement and is in fact used as a tool to obscure the existence of a sham contracting arrangement.

[3] See e.g. the concerns raised by AI Group in Senate Select Committee on Job Security, *The Job Insecurity Report,* February 2022, p 136

We also note that the High Court Decisions are predicated on the assumption that workers understand the distinction between employees and independent contractors and are making a fully informed decision when they agree to a perform work as an independent contractor. As noted at 1.1, and in the case studies below, for many workers this is not the case. Many of our clients accept contracts such as this because they need income are not aware of their workplace rights and/or are told by unscrupulous employers that this is simply how Australian businesses work, and so do not understand the implications of the contract they have signed.

CASE STUDY: JOSE

Jose, an international student, was engaged by a cleaning company (CleanCo) as an independent contractor to clean office buildings in Melbourne's CBD. All of CleanCo's other cleaners were migrant workers.

At the time of his engagement, he was told to get an ABN and instructed that he would be cleaning as a 'subcontractor'. Jose was new to Australia and didn't know what an ABN was, or the difference between a contractor and an employee.

Jose signed a 'subcontractor' agreement which clearly stated that he was an independent contractor, and which set rights and obligations indicating a genuine contracting arrangement (such as the right to determine the rate of pay, the right to determine when the work was done and the right to engage employees to assist with the work). However, after signing the contract, his 'manager' at CleanCo made Jose aware of a series of additional practical obligations which were not contained in the contract. This included requiring Jose to do the following: wear a company uniform; record his work hours and movements via GPS location through an app and take a 'selfie' at the beginning of each shift to prove he attended work. Despite what was written in his contract, he was not in practice allowed to engage employees to perform his work and had to 'swap shifts' with another worker if unable to attend. He was also paid an hourly rate of $17 per hour, which set by the company on a 'take it or leave it' basis.

Prior the High Court Decisions, Westjustice assisted Jose to claim underpayments from CleanCo on the basis that he was in fact an employee and not a contractor. Because the multifactorial test (which applied at the time) clearly pointed to an employment relationship between Jose and CleanCo; Westjustice's advocacy helped Jose to recover his unpaid wages and resulted in all contractors working for CleanCo being employed as part time workers by the company who subcontracted its cleaning services to CleanCo.

However, had the High Court Decisions already been handed down at the time, Jose's characterisation would not have been so clear and Westjustice may not have been so successful in its advocacy.

The High Court decisions place workers who do not understand their workplace rights, and who are not genuinely carrying on a business, in an unduly vulnerable position vis-à-vis businesses who stand to profit from characterising those workers as independent contractors.

Some commentators argue that the sham contracting provisions and the civil penalties they attract serve as a 'major deterrent to unlawful behaviour'.[4] However, our experience has shown that the High Court Decisions instead provide tacit approval to businesses to outsource many employee-like roles and functions to contractors in order to gain a market advantage by avoiding paying minimum entitlements. Many of the businesses that employ our clients take up this opportunity, heedless of the risk of falling foul of the sham contracting provisions.

CASE STUDY: PAOLA

Paola, a newly arrived international student, was engaged to work as Concierge, providing receptionist services for a set of serviced apartments in the city. At the time of being offered the job, she was told to obtain an ABN. She asked for a written contract but was never provided one.

Paola worked set shifts at the instruction of her 'principal' and was given prepopulated invoices to send to the company for lump sum amounts (which represented less than her entitlements under the Hospitality Industry Award). Paola told us that there were a number of other international students also engaged to work under this arrangement.

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[4] Senate Select Committee on Job Security, *The Job Insecurity Report,* February 22, p 137 (Ai Group, Submission 77.4, p. 10).

Paola was dismissed after 3 weeks of work and was told by colleagues that the company 'didn't want any more Spanish speakers'.
Westjustice assisted Paola to send a letter of demand to the company alleging that she was an employee and demanding the company pay her entitlements under the Award. The company has failed to respond, and Paola is reticent to commence legal proceedings given the quantum of her claim is only $500.

CASE STUDY: JASON

While he was studying, Jason completed an unpaid internship with the IT team of a large organisation in the health industry. Towards the end of that internship, he asked his supervisors if there was any paid work available and he was directed to contact an individual who turned out to be a labour hire supplier. Jason was asked to provide his tax file number and superannuation details, along with other information. He was also asked to sign some paperwork, which later transpired to be an independent contractor agreement. Pursuant to this agreement, he was to be paid an hourly rate which was inclusive of superannuation. Jason instructed JobWatch that the rest of the workers in his team were employed directly by the host employer and he knew that his pay rate was significantly lower than theirs, for the same or substantially similar work.

In addition, the multi-factorial test requires a difficult process of weighing the factors for and against an employment relationship that gives little certainty to either party about the true characterisation of a worker.

CASE STUDY: SEBASTIAN

Sebastian was engaged as an independent contractor to provide software engineering services to a marketing company, PR Co. At the time of his engagement, no written contract was entered into and he was instructed to obtain an ABN and invoice PR Co for payment. Sebastian did not understand the difference between an independent contractor and an employee, and assumed he was engaged in an employment arrangement. For the entirety of his engagement, Sebastian performed work solely for PR Co and did not carry on his own business. Because Sebastian was an international student with working restrictions on his visa, he was permitted by PR Co to 'subcontract' his duties to another Software Engineer. PR Co paid him for this work, and Sebastian passed on payment to his subcontractor. Sebastian was able to choose when to work, but in all other respects, PR Co exercised substantial control over the work performed. When Sebastian pushed back on the demands being made of him and reminded PR Co of his visa limitations, his contract was terminated. Westjustice assisted Sebastian to lodge a general protections claim involving dismissal. At the conciliation both parties agreed that the true nature of Sebastian's engagement was not clear, and settled the claim largely based on the unpredictability of the outcome of a court decision.

In these circumstances employers and workers alike would benefit from a simple but clear definition of employee in the FW Act which reflects the true nature of the working arrangement.

1.3 A new jurisdiction will increase complexity and uncertainty for workers and businesses

We note that a large proportion of independent contractors who are likely to fall within the new definition of ELWs (for example, gig workers) are young people and migrant workers. This was highlighted the Report of the Inquiry into the Victorian On Demand Workforce,[5] and is reflected in our Centres' client data.

There is ample research to show that these workers have little awareness of their workplace rights and responsibilities.[6] Many of our clients have a limited understanding of the various industrial instruments that may or may not apply to their employment and many are unaware that employees are entitled to standards such as a minimum wage.

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[5] See, e.g. *Report of the Inquiry into the Victorian On-Demand Workforce,* p 43
[6] See Catherine Hemingway, *Not Just Work Report*, (Westjustice) November 2016; Francesca Lai, *Ignorance is NOT Bliss report*, (Westjustice) September 2021; Bassina Farbenblum and Laurie Berg, *International Students and Wage Theft in Australia*, June 2020.

Similarly, many of our clients' employers – particularly those who come from a migrant background themselves, have a poor understanding of modern awards and how they govern their businesses.

Adding a new jurisdiction which incorporates additional minimum standards, when the existing framework is already complex and uncertain, will be counter-productive to the Government's guiding principle set out in the consultation paper that "the standard-setting framework should be accessible… and offer a high degree of certainty to affected parties."

1.4 A new jurisdiction may be a costly burden for businesses

Noting our comments at 1.3, we believe that a likely unintended consequence of this new jurisdiction will be a significant burden on businesses to determine a) the proper characterisation of the independent contractors they engage, and b) the appropriate industrial instrument or legislation which governs the engagement.

Businesses without human resources departments will likely need to engage lawyers to be certain of, and comply with, their legal obligations – which is likely to be a significant cost to many small businesses.

On the other hand, there is a wealth of resources and support available to employers to assist them to comply with their obligations under Australian employment laws, including for example the Fair Work Ombudsman factsheets and small business line.

1.5 A resource and time-intensive process for substantially the same result

The Government is proposing that the FWC create minimum standards for ELWs in particular industries by following similar processes to those it takes in setting and reviewing modern awards. As the Government will be aware, this is likely to be a significantly resource intensive process and creating ELW standards for targeted industries rather than a comprehensive framework that applies to all ELWs will be confusing in the short term while ELW and business transition to the new jurisdiction.

In addition, the proposed content of the ELW minimum standards is intended to closely align with the content of the modern awards.

In those circumstances, the new jurisdiction will place ELWs in the same position as employees – the main differences being the name given to this class of workers and the title of the industrial instruments which apply to them.

This being the case, where query whether it the proposed new jurisdiction is the most cost-effective solution to providing minimum standards to ELWs.

1.6 Businesses' interests can be protected through transitional arrangements

We acknowledge that the expansion of a definition of employee, and an ELW jurisdiction alike will be considered by businesses to be costly and burdensome, noting that many of them have enjoyed largely unfettered discretion in how they structure their workforce and the amount they pay their workers.

For example, the Senate Select Committee on Job Security heard evidence that engaging delivery workers as employees would cost platforms 'up to twice as much'.[7] However, as we note below – we caution against prioritising the needs and interests of businesses whose viability is predicated on paying workers below-minimum wages.

We acknowledge that businesses such as platform providers will need adequate time to organise their affairs and structure their workforce in such a way as to comply with any minimum standards (employee entitlements or otherwise) that are provided to contractors. However, we note that transitional provisions in legislation could provide adequate opportunity for businesses to do so.

[7] Senate Select Committee on Job Security, *Job Insecurity Report,* p 138.

2. Protections against the erosion of employee entitlements

If the Government is unwilling to legislate an expanded definition of 'employee', we caution that many safeguards will need to be implemented to ensure that the new ELW jurisdiction does not:

- create a class of extremely vulnerable 'dependent' contractors who have limited bargaining power, but no minimum rights and protections;
- create uncertainty for both workers and employees about the proper characterisation of working arrangements;
- erode existing employee protections by incentivising companies to continue to bypass employment models in favour of a third-category of worker with sub-standard rights and protections.

2.1 Defining the scope of the Fair Work Commission's functions in regulating/regulation employee-like forms of work

Recommendation 3: The scope of workers to be covered by the Fair Work Commission's employee-like worker jurisdiction must be defined by reference to the circumstances and (lack of) bargaining power of the worker, rather than the method of engagement.
The jurisdiction should be defined by reference to a "*worker* who does work for the benefit of a person or an *entity* regardless of the legal relationship between the worker and the entity".
In addition, in defining the scope of the ELW jurisdiction, the Government could be guided by the following:

c) The definition of 'employee' under Superannuation laws; and/or
d) The common law multi-factorial test for distinguishing between employees and independent contractors.

If the Government is not prepared to legislate an extended definition of employee in the manner recommended above, we caution strongly against a piecemeal approach to strengthening protections for ELWs by confining the scope of the jurisdiction to gig workers.

As set out in section 1.1 above, the majority of our independent contractor clients are rarely able to determine their own rates of pay, their conditions of work or how they work. As acknowledged by the consultation paper - this is particularly the case for many gig workers, such as ride-share drivers and food delivery workers. However, the key feature which makes these more akin to employees is the lack of autonomy over the pay or working conditions, rather than the fact of being engaged through the app.

In addition to gig-workers, we have also provided assistance to cleaners, door-to-door salespeople, construction workers, mail delivery drivers and content creators who are not engaged via digital platforms, but are nonetheless in working relationships described as independent contractors, and in dire need of minimum rights and protections.

In order to ensure that Australia's workplace relations system is truly reflective of modern working arrangements for independent contractors, the scope of coverage for the ELW jurisdiction must primarily be determined having regard to the autonomy of the independent contractor, rather than by the manner in which they are engaged to work (i.e. via an app, or otherwise). Accordingly, where a worker is engaged in an arrangement *the true nature of which* is reflective of an employment relationship, they should be covered by the FWC's ELW jurisdiction.

To help guide the FWC in determining whether a worker is engaged in 'employee-like work', we recommend that the FW Act define the scope of coverage, having regard to the following:

- **Contracts wholly or principally for the labour of a person:** We note that superannuation legislation recognises a broader category of worker as 'employees' for the purposes of legislation where they are 'engaged under a contract that is wholly or principally for their labour'. This is in contrast to whether a person is engaged in a contract for the provision of services. In our view this framework could act as useful threshold requirement for determining whether a worker should be considered.

- **The multifactor test:** The multifactorial test first established in *Hollis v Vabu Pty Ltd* (2001) HCA 44 for determining the existence of an employment relationship has been followed by

courts for two decades to determine whether a worker is an employee or an independent contractor. Although we have reservations about the utility of this test in determining whether or not a worker is an employee, the indicia are nonetheless useful for demonstrating whether a work arrangement can be considered 'employee-like', with well-established case law providing guidance on the interpretation of the test.

- **Labour hire arrangements should not be excluded:** The FWC's ELW jurisdiction must be "future proofed" against any other artificial arrangement that might be devised. We suggest wording could be included along the lines of "a worker who does work for the benefit of an entity regardless of the legal relationship between the worker and the entity".

2.2 Guardrails for the establishment of a new jurisdiction

2.2.1 Appropriate resourcing the Fair Work Commission

Recommendation 4: The Government must ensure that the Fair Work Commission is appropriately resourced to materially expand its functions, without compromising its ability to perform its existing functions.

We welcome the proposal to introduce a new jurisdiction into the ambit of FWC's functions. However, given the likely breadth of this new jurisdiction and the amount of work that will likely be required in setting minimum standards for employee-like workers (**ELWs**), we highlight the importance of enhancing the resources and capacity of the FWC to expand its functions and jurisdiction to extend to employee-like forms of work.

As it currently stands, our clients have had to wait upwards of 10-12 months for a final hearing for their unfair dismissal applications.

In this regard, while we agree that the making of a work plan to help prioritise the FWC's work will be both useful and necessary; this alone will be insufficient to ensure that its existing functions are not prejudiced.

2.2.2 Funding for free legal assistance for workers

Recommendation 5: Ensure that community legal centres (**CLCs**) are appropriately funded to assist the likely increase in demand for legal services as a result of the reforms.

As outlined at 1.3 above, the introduction of a new jurisdiction which establishes a new category of worker will add significant complexity for workers in determining their rights and protections, noting that many workers engaged in platform work, such as young people and migrant workers, already face significant barriers to understanding their workplace rights and entitlements.

If the jurisdiction of the FWC is expanded, there must be a focus on ensuring that ELWs have the ability to access legal advice and education to understand their rights under the new jurisdiction.

Given financial, language and other barriers faced by ELWs such as gig-workers, further funding needs to be provided to a specialised government agency and/or Community Legal Centres to provide such advice and representation.

Community legal centres address a critical service gap for workers who: are not yet in a union (or who do not make enough income for a union to be an economically viable option); cannot afford a private lawyer; and who are not able to understand or enforce their rights without support.[8]

Mainstream agencies are largely inaccessible to these types of workers and community organisations are underfunded and overloaded.

[8] See Westjustice, JobWatch Sprinvale Monash Legal Service, *Further Submission: Report of the Inquiry into the Victorian On-Demand Workforce*

2.2.3 A legislated definition of 'employee' in the Fair Work Act 2009 (FW Act)

Recommendation 6: Insert a statutory definition of 'employee' in the *Fair Work Act 2009* to ensure that the delineation between employees and independent contractors (whether 'employee-like workers' or otherwise) is clear to businesses and workers alike.

For the reasons set out in sections 1.1 to 1.3 above, the need to define 'employee' in the FW Act will be one of the most fundamental 'guardrails' to provide certainty to employees, employers, ELWs, and principals/platform providers engaging employee-type workers about which jurisdiction and minimum standards are likely to apply.

Although the consultation paper states that the Fair Work Commission (**FWC**) is limited in its ability to make decisions about the status of a worker as an employee, this function is not new to the FWC, who have historically been required to make this assessment when determining, for example, whether a worker is eligible to make an unfair dismissal claim (see e.g. *Chambers; O'Brien v Broadway Homes Pty Ltd* [2022] FWC).

Empowering the FWC to set minimum standards for and regulate disputes in relation to employee-like work will *necessarily* require the FWC to determine whether a worker is an employee, or an 'employee-like worker' (**ELW**) for the purposes of determining:

- which jurisdiction and/or industrial instrument applies in the course of arbitrating disputes; and
- the appropriate coverage of relevant minimum standards.

Implementing a regulatory regime for ELWs, without first legislating a definition of 'employee' will add additional ambiguity to the already-fraught question of whether a worker is an employee or an independent contractor.

2.2.4 FWC determinations about worker categorisation

Recommendation 7: To ensure that workers and businesses understand the regulatory framework that governs their engagement, the FWC should be given the power to make determinations about whether workers are employees, ELWs or independent contractors, and the relevant law or industrial instrument which applies to a particular arrangement.

Given the complexity and uncertainty that may be caused by a new category of worker and a new jurisdiction of minimum standards, it will be important to ensure that workers and businesses have access to a quick and cost-free or low-cost avenue to provide clarity on the laws and instruments that apply to their engagement. This will help workers to understand their rights and protections, and will assist businesses to comply with their legal obligations.

By way of example, the ATO provides guidance and certainty to taxpayers about how provisions of tax law apply through their various rulings (e.g. public rulings, private rulings, product rulings and class rulings). Such rulings can be sought on application by a party to who the tax law might apply.

Similar to ATO rulings, FWC determinations could be made in respect of individuals, workplaces or classes of workers, and could be made on application by an interested party or on the FWC's own motion. Rather than requiring an oral hearing, the FWC could receive submissions from interested parties and make determinations on the papers.

As noted in 2.2.3 above, determining questions or whether or not a worker is an employee or an independent contractor is not new to the FWC.

2.2.5 Objectives for standard setting which prioritise worker rights and protections

Recommendation 8: In order to close important legal loopholes and adequately protect workers with insufficient bargaining power, the FW Act must set out that the FWC's key objective for standard setting is to ensure that all workers, regardless of their characterisation as an employee or an independent contractor, have access to minimum rights and protections.

The fact that the rights of workers "fall off a cliff' if they fail to meet the definition of employee is precisely what leaves those workers so vulnerable to exploitation, and this should therefore be the primary objective of the FWC's new jurisdiction.

In terms of other factors to be included in the FWC's for standard setting, we are generally in favour of the factors proposed by the consultation paper. However, we propose the following amendments to ensure that the reality of the working arrangements for many ELW is captured.

- be tailored to the needs of specific sectors or industries?
- be fair, relevant, proportionate, sustainable, responsive <u>having regard to employee conditions for the same or similar forms of work</u>
- reflect <u>the reality</u> of workers' independence and desire for flexible working arrangements
- take into account the needs of workers
- promote innovation, productivity and competition
- ~~mitigate~~ <u>take into account potential</u> negative impacts on businesses, their viability and unique business models
- avoid as far as possible unintended consequences on workers, consumers and the labour market
- <u>avoid inconsistency with modern awards that cover employees doing the same or similar work</u>
- be accessible, transparent and offer high degree of certainty to all parties

As set out above, the reality is that many independent contractors (those engaged in gig work in particular) cannot truly said to be independent or genuinely running their own business. This also seems to be one of the key rationales for recognising 'employee-like' forms of work. It is therefore important that this is highlighted in the FWC's objectives.

In addition, as we have seen with many businesses who provide platforms for gig-work through their 'unique business models' have prioritised providing low-cost services to consumers by taking advantage of the lack of minimum pay rates, conditions or protections enjoyed by their workers.

While we understand that the Government is interested in ensuring that competition, innovation and business viability is preserved, we submit that if businesses who are unable to remain viable if required to pay their workers at least minimum wage, the interests of those businesses should not be prioritised.

2.3 Content of minimum standards and protections for ELWs

2.3.1 Minimum standards must closely resemble Award provisions

Recommendation 9: In order to ensure that minimum standards are truly reflective of the employee-like nature of work, they must include (at a minimum):

- Minimum rates of pay
- Concepts of 'work time' and the kinds of activities which attract compensation
- Payment times
- Workplace conditions, such as leave, rest breaks and hours of work
- Treatment of business costs, including vehicles and maintenance, licences, etc
- The provision of insurance
- Record keeping
- Training and skill development
- Dispute resolution
- Processes for fair termination.
- Clear obligations on principals/businesses to pay superannuation
- Processes for fair termination of service contracts

Recommendation 10: To avoid incentivising workforce arrangements that avoid an employment relationship, the minimum standards should be no less favourable than the award that would otherwise apply if the worker were considered an employee.

In line with our comments above, the Government should be guided by the key principle that 'all workers should have access to minimum rights and protections' regardless of their characterisation.

In particular, we note the following:

- **Minimum rates of pay:** Our Centres routinely see workers engagement as independent contractors – whether in genuine contracting arrangements sham contracting arrangements – being paid less than the Award rate that would otherwise apply. The Government must not allow some businesses to gain an unfair market advantage by using contracting arrangements as a mechanism to bypass the payment of minimum wages. The minimum rates of pay under the minimum standards must be *no less favourable* than the minimum rates of pay under the relevant award for comparable types of work.

- **Superannuation:** In substantially all cases where our clients are engaged as independent contractors (including gig workers), they are engaged under a contract that is wholly or principally for their labour and therefore meet the definition of 'employee' for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (**SG Act**). However, due to a general understanding between the parties that our clients are engaged as an independent contractors, the principals and contractors alike are often unaware that superannuation obligations arise, and these clients are rarely ever provided with their superannuation entitlements.

  We note that if our definition is adopted, ELWs will likely meet the SG Act definition of 'employee'. Providing obligations on persons or business to pay superannuation to ELWs in accordance with SG Act will therefore help to clarify these superannuation obligations and entitlements for both ELWs and the businesses that engage them.

- **Insurance:** It is rarely an economically viable option for our clients to take out their own insurance, noting our comments above that they are frequently paid at rates that are substantially less than minimum wage. In addition, there are limited options for insurance for non-employee gig-workers, particularly food-delivery drivers, who are not eligible for workers compensation schemes. Due to the high-risk nature of this work, premiums are often exorbitant, and economically unviable given the low rates of pay earned by workers. In these circumstances, those of our clients who take up this work rarely have insurance in place and are left with no recourse for compensation if they are injured at work. This often leads to periods of unemployment which can have devastating effects on workers. We note that certain platform providers, such as Uber Eats, Deliveroo, DoorDash and Menulog have already signed up to the *National Food Delivery Platform Safety Principles* which are said to require signatories to provide provide 'free, automatic insurance protections that cover delivery workers for accidental injuries that arise while delivering on food delivery platforms'. Accordingly the requirement to provide insurance for the benefit of workers is unlikely to be considered controversial.

- **Dispute resolution and processes for fair termination of service contracts:** The Job Insecurity Report highlighted the needs of independent contractors for accessible and low cost dispute resolution, including in relation to the unfair 'de-platforming' of gig-workers, particularly those engaged by Uber.[9] This is reflective of the experiences of our clients, noting in particular that our gig-worker clients are provided with very limited avenues to ventilate their grievances, or to challenge decisions made by platforms relating to the suspension or de-activation of their accounts. Due to the lack of bargaining power of these workers, it is important that the minimum standards provide workers with the right to access compensation for unfair termination.

[9] Senate Select Committee on Job Security, *The Job Insecurity Report,* February 2022, 146-148.

CASE STUDY: PAVNEET

Pavneet, an international student, had been working as an Uber driver for three years. Within the period of a fortnight, he was the victim of racial discrimination and abuse on two occasions and then had his account deactivated with no recourse. On the first occasion, due to an issue with the app, Pavneet was directed to the wrong pickup location. Once the issue was corrected, the passenger, an intoxicated young man, verbally abused him and his family members with racial slurs and told him to 'go back to his country'. Pavneet declined to take the passenger and reported the issue to Uber the next morning but they did not take any action to assist, nor did they disclose the identity of the passenger to Pavneet. Pavneet later learned that the passenger made a complaint to Uber about him. The following weekend, Pavneet provided a lift to a woman late at night, who screamed at him for driving too slow in a 40km/h zone and accused him of trying to steal more money from her. In response to this behaviour, Pavneet pulled over and asked her to book another ride. She responded with racial slurs. Pavneet lodged a complaint with Uber the next morning, but hours later his account was deactivated, as the passenger also lodged a complaint against him. Once his account was deactivated, he found it extremely difficult to challenge the decision. Each communication he sent to Uber was handled by a different customer service officer, and ultimately Pavneet gave up on exploring options for recourse due to hopelessness about the outcomes.

2.4 Important additional rights and protections for ELWs

2.4.1 Protection from adverse action and discrimination

Recommendation 11: In order to protect ELWs against adverse action and discrimination, the Government should amend the FW Act as follows:

- section 341 of the FW Act should be amended so as to include minimum standards for ELWs within the meaning of a workplace instrument in the definition of 'workplace right'; and
- section 351 of the FW Act should be amended so as to extend the protection against discrimination to ELWs.

A common issue faced by our independent contractor clients is having their contracts terminated when they complain about, or attempt to negotiate higher rates of pay. This is one of many measures taken by businesses to keep the costs of labour low and is a key symptom of these workers' lack of bargaining power.

CASE STUDY: ANA

Ana was engaged as a cleaner pursuant to a written 'subcontracting' agreement. This agreement did not specify the rate of pay she would receive for her work. The head contractor told her she would be paid $17 per hour. When Ana complained about her rate of pay, the head contractor terminated her engagement. Westjustice assisted Ana to negotiate with the head contractor to receive compensation for the unlawful termination.

At present, the protections afforded to independent contractors from adverse action for exercising a workplace right are narrowly framed under the FW Act and extend only to rights arising under the *Registered Organisations Act,* the *Independent Contractors Act* and the FW Act.

If the meaning of 'workplace right' (and more specifically the definition of workplace instrument or workplace law) is not extended to capture the minimum standards, this will leave ELWs vulnerable to adverse action if they attempt to enforce their rights and entitlements under those minimum standards.

Similarly, due to their lack of bargaining power, it is important that ELW's enjoy the same protections against discrimination as their employee counterparts under section 351 of the FW Act.

2.4.2 PAYG requirements for businesses engaging ELWs

Recommendation 12: In order to assist ELWs to navigate their taxation obligations, amend Division 10 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) to require corporate entities engaging an ELW to make PAYG withholding payments in relation to payments made to ELWs.

As set out in 1.1 and 1.3 above, the majority of workers who are likely to be considered ELWs are unaware of their rights and entitlements. In a similar vein, our experience shows that these workers have little understanding of the Australian Taxation framework and are not well-placed to manage or meet their tax liabilities as a lump-sum at the end of the financial year.

Including ELWs in the PAYG scheme will help ELWs to manage their tax liabilities and provide certainty to businesses about their tax obligations regardless of whether they are engaging employees or ELWs.

In addition, we consider that these amendments will enhance the ATO tax revenue streams by reducing the possibility of inadvertent tax avoidance by workers who do not adequately understand their tax obligations.

2.5 Implementation of employee-like standards

2.5.1 Process for making minimum standards

Recommendation 13: To the extent possible, the process for making minimum standards should be identical to the FWC's modern award process to enable certainty for businesses, workers and the FWC.

We agree with the Department that a process like the FWC's modern award process would allow the FWC to utilise its expertise in this area and create a sense of familiarity for the parties.

As is the case under the modern award process, organisations that are entitled to represent the interests of businesses or workers covered by the minimum standards should be eligible to apply to make, vary or revoke minimum standards. This will also ensure that minimum standards are tailored to the specific needs of different industries.

2.5.2 Enforcement of minimum standards

Recommendation 14: To ensure that ELWs are able to enforce their rights under relevant minimum standards, the FW Act should include a civil remedy provision prohibiting the contravention of the terms of minimum standards, with penalties for breach of the provision.

To ensure there are no incentives for businesses to contrive arrangement to avoid employment relationships, it is imperative that the consequences of failing to comply with minimum standards are the same as the consequences for contravening the terms of a modern award.

In order to achieve this:

- the Government should introduce a provision in the FW Act which prohibits businesses from failing to comply with minimum standards; and
- such provision should be a civil penalty provision.

We welcome the Government's proposal that the Fair Work Ombudsman could be primarily responsible education, compliance and enforcement of the minimum standards. This will be necessary to ensure that workers are supported in exercising their rights under the applicable minimum standards.

2.6 Dispute resolution offered by the FWC

Recommendation 15: The FWC should have the jurisdiction to resolve disputes for ELW:
- in relation to the application of terms contained in minimum standards;
- arising under dispute resolution terms contained in minimum standards; and
- regarding the unfair termination of ELW work arrangements.

As noted in the Job Insecurity Report and at 2.3.1 above, ELWs already face a number of challenges which result in disputes that require access to external dispute resolution processes, including platform suspension, complaints of discrimination or sexual harassment by customers or others in the workplace, or termination of their services contracts.

For gig-workers, there are limited avenues to engage directly with digital platforms to resolve issues of concern, resulting in unfair outcomes which can inhibit these workers from making legitimate legal claims.

***CASE STUDY**: **IRINI**:*
Irini, an international student, worked as a driver for Uber. Irini did not have her own car, so she rented one from a company that had a contract with the ride-share company. One weekend Irini received a late-night job to pick up a group of male passengers. When Irini arrived, the men were noticeably intoxicated. During the trip, one of the men tried to climb through the sunroof of the car, causing significant damage. Irini stopped the car and the man jumped out. All the other men, except for one, got out. The man that stayed sexually harassed Irini. He made unwanted advances and said words to the effect of 'do you want to kiss me?' which made Irini feel very uncomfortable. Irini reported the incident to the ride-share company. They refused to cover the full cost of fixing the car, leaving her with a considerable debt to pay. Instead, they offered her a small amount of money on the condition that she would make no further attempts to claim money from them. The company also refused to take any steps to identify the passengers who damaged the car and sexually harassed her and told her she must obtain this information through the police. In addition, although the ride-share company has terms of use which prohibit sexual harassment, Irini was not aware of the ride-share company taking any action to investigate the incident or penalise the passengers for their conduct. WEstjustice advised Irini that, unfortunately as a contractor, her rights against the company were uncertain. WEstjustice suggested that, alternatively, Irini could pursue the men responsible for damaging the car to pay for the repair, however, this would require identifying them. Irini contacted the police to try to identify the men, but after months heard no response. Ultimately Irini gave up on making a claim because the process of trying to identify the perpetrators was too hard.

In addition, for both gig-workers and independent contractors alike, the *Independent Contractors Act 2006* (Cth) offers very limited practical ability to raise disputes in relation to unfair contracts, noting that these claims require workers to have the requisite knowledge, capacity and appetite for litigation and the means to pay court costs.[10] This is rarely the case for our clients who are ELWs.

It is therefore key that the FWC's new jurisdiction provides access to the same avenues for quick and simple dispute resolution options, such as FWC conciliations and arbitrations, that are made available to employees under modern awards.

For the reasons outlined in 2.2.4 and 2.3.1, the FWC should be able to deal with disputes using its usual powers and make arbitrated determinations about:

- the application of minimum standards and the terms of those standards;
- matters arising under the dispute resolution clauses of the terms of minimum standards;
- the unfair termination of services contracts covered by the minimum standards, including by making awards of compensation to ELWs who have been unfairly terminated.

[10] See Senate Select Committee on Job Security, *First interim report: on-demand platform work in Australia*, June 2021, p. 115.

E. Unfair contract terms

We welcome the Government's proposal to expand the jurisdiction of the FWC to resolve disputes for independent contractors.

Noting our comments above regarding the dire need for minimum entitlements and protections for many classes of contractors, if the Government is not prepared to expand the definition of employee, nor extend the ELW protections beyond the gig economy – strengthening avenues for contractors to challenge unfair contract terms by expanding the jurisdiction of the Fair Work Act will be crucial to ensuring:

- the rights and interests of many vulnerable workers are not left behind; and
- incentives to engage vulnerable workers as independent contractors to avoid minimum employee protections are removed.

1. Background – common issues for independent contractors

From our Centres' perspective, there are a few disputes that occur often amongst our independent contractor clients. These include:

- Non-payment of invoices
- Sham contracting
- Unfair and unlawful termination
- Dispute over working conditions
- Non-payment of superannuation where otherwise entitled
- Other adverse action including dismissal without notice/right of reply/compensation.

We note that most clients we see who are facing these issues are from within the cleaning industry, construction industry (i.e., rendering, painting most commonly) or those working as a driver (both delivery and non-delivery drivers). We also observe that many clients who agree to engage in independent contractor work are recent migrants to Australia, have limited English and/or have experienced long periods of unemployment and desperate for work and a source of income. For many of our clients, it is the principal contractor who prompts our client to obtain an ABN (or in some cases, arranges an ABN for them). We have even observed instances where it is the principal who supplies our client with template invoices and the contract that labels them as an independent contractor. Our clients have often found it difficult to find work and so retaining a job is of paramount concern and they are not in a strong position to negotiate the terms of their engagement.

CASE STUDY: SAM

Sam worked as a truck driver for LogisticsCo. He is culturally and linguistically diverse, and on a student visa. Sam picked up work with LogisticsCo for 3 years after suffering a workplace injury and desperate for work. LogisticsCo owned the truck, and verbally offered to not only pay wages, but to reimburse Sam for fuel costs. Sam was owed 23 weeks of wages, and he was not reimbursed for fuel as discussed. When he raised this with LogisticsCo, Sam was essentially coerced to continue working, with Sam being told LogisticsCo would 'clear the amount' if he worked for another 3-4 months, after Sam raised the issue with LogisticsCo. Sam is still owed over $21,000 in unpaid work and fuel entitlements.

2. Scope of the new jurisdiction

Recommendation 16: The Government must extend the FWC's unfair contracts jurisdiction to all independent contractors to close existing legal loopholes and ensure that vulnerable workers are not left behind.

We assist contractors engaged in many different industries who are subject to unfair contracts, even when they are not engaged in employee-like work. However, given the majority of our clients are from culturally and linguistically diverse backgrounds, are low-income earners and have a limited understanding of their rights and protections, they are rarely, if ever, able to avail themselves of the protections against unfair contracts offered by the *Independent Contractors Act 2006* or the Australian Consumer Law (**ACL**).

Given the rights of workers 'fall off a cliff' if they fail to meet the definition of employee, we are of the view that the proposed protections must be made available to **all independent contractors.** This will help to plug any legal loopholes that may remain after the establishment of an ELW jurisdiction.

This proposed jurisdiction will be an important safety net for workers who may not be captured by ELW minimum standards but nonetheless lack the bargaining power to negotiate contracts which sufficiently protect their interests.

For this reason, we caution against restricting which classes of contractors will be covered by the proposed unfair contracts protections. In our view, such a jurisdiction will not be unduly expansive in practice, noting that genuine independent contractors who have the capacity to protect their own interests when negotiating contracts will not need to avail themselves of the new protections.

Should the Government insist on restrictions to the unfair contracts jurisdiction, we would suggest this jurisdiction is targeted at low-leveraged contractors who have limited bargaining power to dictate the terms of their services contracts, and that the legislated parameters of the jurisdiction are flexible and robust to adapt to accommodate to new forms of work over time, and the constant evolution of the modern workplace and ways in which people can obtain work.

At a minimum, we would recommend that any reforms should be broad enough to capture the most prevalent industries for our contractor clients who are currently subject to unfair contracts including:

- the cleaning industry;
- the construction industry
- the road transport industry; and
- the childcare and domestic work industry .

3. New FWC powers to disincentivise exploitation

Recommendation 17: To remove incentives for businesses to engage independent contractors to avoid employee protections and entitlements, the FWC should be given the jurisdiction to deal with and arbitrate disputes regarding:
- unfair contract terms; and
- unfair termination of services contracts.

We welcome the Government's proposal regarding the scope of the FWC's power to consider and determine disputes regarding services contracts. The introduction of this jurisdiction is an important opportunity for the Government to 'level the playing field' for businesses by disincentivising independent contracting arrangements as a means of avoid employee entitlements.

- As set out in section 2.3.1 above, our contractor clients are routinely paid less than minimum wage, or the applicable award. We suggest that terms in contracts for services should be presumptively "unfair" if they result in pay lower than equivalent employment minimums. At the very least, it should be no less than minimum wage.
- In addition, as we set out in section 2.3.1, 2.4.1 and 2.6 our clients also experience termination of their services contracts for unfair or discriminatory reasons with little rights of recourse. New FWC powers to resolve disputes regarding to services contracts should be accompanied by a protection against unfair termination for independent contractors.

We consider these protections would effectively remove the perceived advantage of engaging people as contractors, particularly in borderline/sham situations.

This would also ensure that worker's claims are not prejudiced by their inability to determine the characterisation of their engagement. For many of our clients – who are engaged in sham or 'dubious' contracting arrangements – they risk having their claims dismissed for want of jurisdiction if a judge or tribunal member does not agree with their alleged characterisation of employment. The prospective of having to re-file a claim in a different jurisdiction can be a major barrier to our clients willingness to litigate.

Under this proposed expanded jurisdiction of the FWC, a worker could bring a claim as an employee, or independent contractor in the alternative, and be sure that their claim would be resolved regardless of their characterisation.

4. Methods of dispute resolution

Recommendation 18: The FWC should offer conciliation conferences, mediation and arbitration to independent contractors, to provide access to low-cost and timely resolution of their disputes.

We agree that independent contractors are in great need of low-cost and accessible dispute resolution processes. As highlighted by the consultation paper – the biggest failings of the *Independent Contractors Act 2006* and the ACL is that they require workers to lodge court proceedings and offer little formal avenues to settle claims prior to hearing.

Many of our clients are low-income earners and/or have relatively low quantum claims and are therefore hesitant to pursue matters further when there is a risk of costs outweighing their claims.

Further, many of our clients are on temporary visas, and wait times for VCAT or the courts dissuade them from pursuing further action in fear that their matter will not be dealt with in a timely fashion. Alternate dispute resolution would accommodate many of these concerns. Our clients are in significant need of a cost effective and timely dispute resolution method, which can be achieved through alternate dispute resolution.

In our experience, the use of alternative dispute resolution for employment disputes broadly has garnered success for our clients, both in terms of settlement outcomes as well as the cheaper and faster resolution of their matter, and could be adapted for the resolution of unfair contract terms:

CASE STUDY: SALLY

Sally was dismissed after she had a pregnancy complication which resulted in her being admitted to hospital. Sally was extremely vulnerable and having this baby on her own. When the other side served their defense to the matter on Sally, Sally ended up in hospital with risk of giving birth at 24 weeks due to the stress. The matter was referred to conciliation.
SMLS assisted Sally to settle the matter for a reasonable amount of compensation, and help Sally avoid the further stress that would have been caused by litigation.

Recommendation 19: Provide greater funding or tenders to CLCs to allow for community lawyers to provide increased assistance for dispute resolution for clients.

To this, we also note the importance of access to legal representation, particularly for those who may be culturally and linguistically diverse, or otherwise unable to self-represent. We propose a greater investment in CLCs to allow for community-based lawyers to provide greater assistance to clients who wish to engage with alternative dispute resolution, to encourage matters resolving outside of court. Having an advocate available in the dispute resolution process also promotes efficiency in the administration of justice.

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