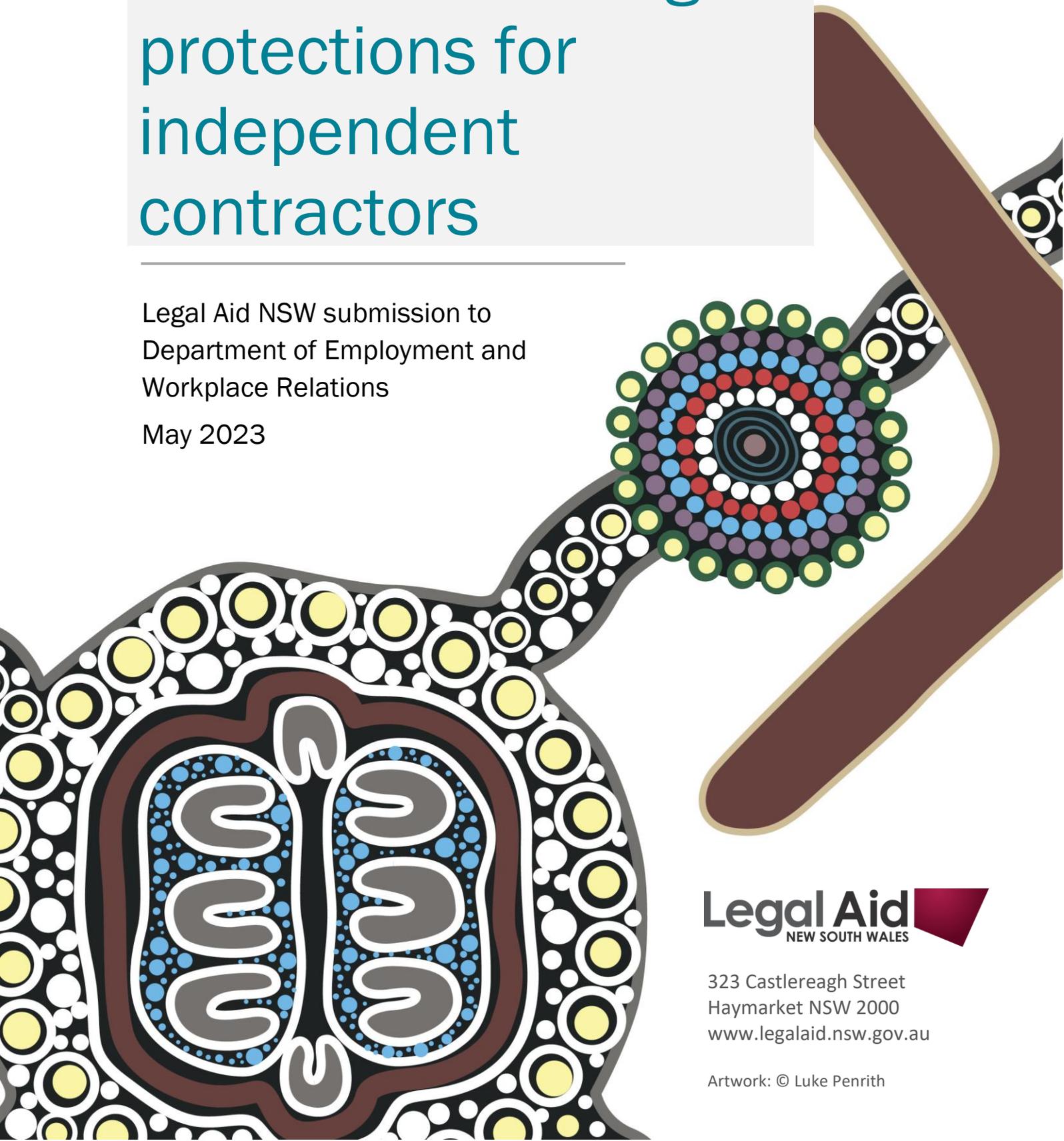


‘Employee-like’ forms of work and stronger protections for independent contractors

Legal Aid NSW submission to
Department of Employment and
Workplace Relations

May 2023



Legal Aid
NEW SOUTH WALES

323 Castlereagh Street
Haymarket NSW 2000
www.legalaid.nsw.gov.au

Artwork: © Luke Penrith

Acknowledgement	4
1. About Legal Aid NSW	5
2. Executive Summary	6
3. Discussion questions	8
Empowering the Fair Work Commission to set minimum standards for workers in 'employee-like' forms of work, including the gig economy	8
Q1. What is the best approach to defining the scope of the Fair Work Commission's new functions, taking into account the engagement of a worker through a platform as the primary factor?	8
Recommendation 1	9
Q2. What other factors should be considered?.....	9
Recommendation 2.....	9
Q3. What 'guardrails' should be set to guide the Fair Work Commission in exercising its functions?	10
Recommendation 3.....	10
Q4. What factors should in included in the Fair Work Commission's 'objective' for setting standards?	10
Recommendation 4.....	11
Q5. What kinds of minimum standards are needed and why?	11
Recommendation 5.....	12
Q6. How can the standard-setting process in the Fair Work Commission be designed to deliver efficient, reliable, sustainable, and fair outcomes?	13
Recommendation 6.....	13
Q7. How can the Fair Work Commission's processes reflect the character of employee-like workers and engage with them appropriately?.....	14
Recommendation 7.....	14
Q8. How can potential unintended negative impacts for workers, businesses, consumers and labour market be mitigated?	14
Recommendation 8.....	15
Q9. How could the Fair Work Commission's orders be enforced?.....	15
Recommendation 9.....	16
Q12.What disputes should the Fair Work Commission be able to help resolve? .	17

Q13.What remedies and roles could the Fair Work Commission have available to it to resolve disputes?.....	17
Recommendation 10.....	17
Improving avenues for workers to challenge unfair contractual terms	17
Q14.What workers should be covered by any new protections and why?	17
Recommendation 11.....	21
Q15.What kinds of disputes occur for independent contractors?	21
Recommendation 12.....	23

Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact

Name: Nikolai Haddad, Senior Solicitor,
Employment Law, Civil Law Division

Phone: (02) 9219 6317

Email:

Nikolai.Haddad@legalaid.nsw.gov.au

2. Executive Summary

In the 2021/2022 financial year, Legal Aid NSW lawyers provided 2,842 legal services in employment and discrimination law.

Legal Aid NSW supports an industrial relations system where workers engaged in 'employee-like' forms of work are treated as employees, and thereby enjoy the benefits of employment such as greater job security, better work health and safety, workers compensation insurance, superannuation and the entitlements of the National Employment Standards and Modern Awards.

Legal Aid NSW regards the expansion of the gig economy as part of a broader trend towards precarious forms of labour such as temporary work, independent contract work, sham contracting, labour hire arrangements and casualisation. Precarious work is generally insecure, can be low paid, and is typically characterised by the lack of important social benefits of permanent employment such as paid leave, regular and predictable work patterns, collective bargaining rights, training and career development opportunities and better work health and safety. The prevalence of precarious and insecure work leads to poor social and economic outcomes in health, housing and retirement savings.

The experience of Legal Aid NSW lawyers in providing legal services to workers in the gig economy and other forms of 'employee-like' work is that many such workers may not even know that they are not employees. Even if they are aware that they are not employees, most do not understand the legal implications of being engaged to work as contractors.

However, Legal Aid NSW also recognises that some workers may genuinely choose to work as independent contractors, which may provide them with greater autonomy about when they work, how they work and who they work for. Such arrangements can be beneficial to both workers and business, provided that such workers are safe, covered by insurance and receiving pay and conditions that are at least broadly equivalent to what they would have received as employees covered by the relevant Award for their industry.

Legal Aid NSW therefore views favourably proposals to provide new powers to the Fair Work Commission (FWC) to set minimum standards for workers in 'employee-like' forms of work, provided that such measures are taken within the context of an overall industrial relations policy that aims to bring as many workers as possible within the national employment system.

This may be achieved in part by ensuring that the minimum standards proposed are robust enough to reduce the incentive on businesses to engage workers in contracting and other insecure arrangements that avoid the tax, superannuation, insurance, industrial and other obligations of employment.

In this submission, we have provided responses to questions 1-9 and 12-16 as these questions concern matters that fall within our areas of expertise.

3. Discussion questions

Empowering the Fair Work Commission to set minimum standards for workers in 'employee-like' forms of work, including the gig economy

Q1. What is the best approach to defining the scope of the Fair Work Commission's new functions, taking into account the engagement of a worker through a platform as the primary factor?

Legal Aid NSW believes that the Fair Work Commission's (**FWC**) new functions for 'employee-like' work should not be restricted to workers engaged through digital platforms. Whilst we support measures to set minimum standards for workers in the gig economy, Legal Aid NSW is concerned that many workers in precarious 'employee-like' forms of work who are vulnerable to exploitation may be excluded from the minimum protections proposed simply because they were not engaged through a digital platform.

However, if the FWC's new functions are to be limited to workers engaged through a digital platform, Legal Aid NSW recommends that workers engaged through both vertical on-demand platforms and horizontal marketplace platforms should be covered within the scope of the functions.

Horizontal marketplace platforms include 'crowdwork' platforms, which are typically described as providing a digital marketplace for users to advertise for hired help to perform discrete time-limited tasks in which labour providers bid for the work. The platforms typically take no responsibility for the agreed fee for the work, though they may facilitate payments from hirers to workers.

Although horizontal marketplace platforms appear to be operating on a more arm's length model than on-demand platforms, Legal Aid NSW considers that there are some aspects of the 'crowdwork' model that suggest a level of control that is more 'employee-like' than is at first apparent. For example, such platforms typically:

- charge a work fee that is built into the cost agreed between job-posters and workers
- maintain ratings systems that operates as a work performance measure and can impact the ability of workers to get work
- have the right to block and remove workers from the platform
- provide mediation and arbitration services
- restrict workers from secondary outsourcing of a task, or having the work partially performed by another contractor, and
- provide public liability insurance for workers.

Recommendation 1

- a) The extended minimum standards should apply to both vertical on-demand platforms and horizontal market platforms.

Q2. What other factors should be considered?

In addition to an approach that takes into account engagement of the worker through a digital platform as the primary factor, Legal Aid NSW believes that other factors should be used in framing the new jurisdiction so that as many people as possible in ‘employee-like’ forms of work should enjoy the benefits and protections of the minimum standards.

Legal Aid NSW employment lawyers regularly provide legal services to people to workers vulnerable to exploitation who have been engaged in ‘employee-like’ work after making contact with businesses on social media applications like Facebook, WhatsApp, WeChat and others. Despite having ABNs, many of these workers did not know that they were not employees or did not understand the implications of being engaged as independent contractors. In our experience, such workers rarely have workers compensation insurance, pay themselves superannuation, and in some cases are paid less than the minimum wage.

Such workers would benefit from minimum standards that apply to all workers in ‘employee-like’ work and the Fair Work Commissions new functions and reduce the incentives on business to adopt such models in order to undercut wages and entitlements of employees.

Legal Aid NSW recommends that in addition to engagement through digital platforms, the scope of the Fair Work Commissions new functions should include all work performed under arrangements that resemble employment. Factors that could be considered in determining whether such workers are in an arrangement that resembles employment include:

- whether the services provided by the worker are primarily for labour
- whether the worker is genuinely free from the control and direction of the hirer in the performance of work, in both substance and according to the terms of the contract for the performance of work, and
- whether the work provided by the worker is of the same nature as the hiring business provides to its customers.

Recommendation 2

- a) The minimum standards for workers in ‘employee-like’ forms of work should be extended to workers who are not engaged through a digital platform.

Q3. What 'guardrails' should be set to guide the Fair Work Commission in exercising its functions?

Legal Aid NSW supports the idea of prescribed legislative objectives that would guide the Fair Work Commission in making its decisions, in a broadly similar way to the modern awards objective.

Legal Aid NSW believes that legislation and subordinate legislation can be an effective measure to set guardrails on the jurisdiction of the Fair Work Commission to exercise its functions in setting and resolving disputes about minimum standards for workers engaged in employee-like work.

Legislation and subordinate legislation could set out the scope of the functions of the FWC, define key terms and set out which workers and business models are covered. It could also set out procedural rules for the making of standards and agreements, dispute resolution processes and the making of orders.

Legal Aid NSW also recommends that any process and procedures of the FWC in exercising its functions should be informal, flexible, and user-friendly. The FWC should be resourced to provide plain language resources for self-represented litigants and other measures to make the FWC more culturally safe and accessible to workers, particularly workers with disabilities, Aboriginal and Torres Strait Islander workers, migrant workers and workers who need an interpreter or where English is not their first language.

Recommendation 3

- a) There should be legislative 'guardrails' that set out:
 - i. the scope of the FWC's functions in relation to 'employee-like' forms of work
 - ii. definitions of key terms
 - iii. which workers and business models are covered by the FWC's powers
 - iv. the procedural rules for the making of standards and agreements
 - v. the dispute resolution processes available to parties, and
 - vi. the process for making orders.

- b) The FWC's exercise of its functions should be informal, flexible and user-friendly.

Q4. What factors should be included in the Fair Work Commission's 'objective' for setting standards?

In addition to the factors proposed in the consultation paper, Legal Aid NSW believes that the following factors should be included in the FWC's objectives for making decisions:

- the need for workers to earn a living wage

- the need for workers to be able to work in a safe and healthy manner, and
- the need for workers to have job security.

Recommendation 4

- a) The proposed factors to guide the FWC in its decision making around setting standards should be expanded to better account for the working conditions, health and wellbeing of workers.

Q5. What kinds of minimum standards are needed and why?

Legal Aid NSW supports robust minimum standards for workers in ‘employee-like’ forms of work. We support the FWC having the power to make minimum standards in respect of all the matters listed in the consultation paper, plus the additional matters that are listed below. We believe the FWC having powers with respect to these matters is necessary to achieve the following outcomes:

- Improve the wages, conditions and work health and safety of workers, particularly workers vulnerable to exploitation.
- Improve the training, career development and retirement savings of workers.
- Reduce the incentive on businesses to engage workers in ‘employee-like’ forms of work as opposed to employment.
- Promote fairer competition between businesses in the same industry that engage employees and those that engage workers in ‘employee-like’ forms of work.

Legal Aid NSW believes the following minimum standards are needed to support these objectives:

Minimum rates of pay	So that workers are paid a living wage and do not have to work excessive hours or take risks in order to make enough money to survive
Defining what constitutes work time	So that workers are fairly paid for all the time it takes to do a job
Working conditions such as leave and rest breaks	To promote better work, health and safety
Considering costs of workers in carrying out the work	So that costs of workers such as vehicle maintenance and depreciation, phone bills, insurances, licences are factored into working out whether they are fairly paid for the work they do

Record keeping	To ensure transparency and reduce the risk of noncompliance with minimum standards
Transparency about allocation of work and the algorithms used to rank and assess workers	So that workers are better informed about how they obtain work and how their performance is assessed
Consultation with workers about operational changes	So that workers are consulted about changes that affect them in a way similar to the model consultation clauses in Modern Awards
Job security	To avoid arbitrary termination of contracts
Work, health and safety	To promote safer work practices to protect workers and the general public
Dispute resolution	To promote fairer resolution of disputes between workers and businesses around pay, performance, work conditions and termination of contracts.
Superannuation contributions	To ensure that workers in employee-like forms of work are able to save for their retirement in the same way as employees.
Training and skill development	To promote career progression of workers
Insurance	So that workers are appropriately covered against the risk of injury and death whilst performing their work

Recommendation 5

- a) The FWC should have the power to set minimum standards around:
- i. minimum rates of pay
 - ii. the definition of 'work time'
 - iii. working conditions
 - iv. the costs to workers in carrying out their work
 - v. record keeping requirements
 - vi. transparency requirements regarding the allocation and assessment of work
 - vii. requirements to consult with workers about operational changes
 - viii. job security
 - ix. work, health and safety
 - x. dispute resolutions processes
 - xi. superannuation contributions
 - xii. training and skill development, and

xiii. insurance.

Q6. How can the standard-setting process in the Fair Work Commission be designed to deliver efficient, reliable, sustainable, and fair outcomes?

Legal Aid NSW support a standard setting process in the FWC that is designed to deliver efficient, reliable, sustainable, and fair outcomes.

The FWC is well placed to utilise its existing resources and experiences in setting and amending modern awards to oversee the process of setting minimum standards for 'employee-like work'. However, Legal Aid NSW believe that the FWC will need additional resources to accommodate the differences between standard setting in the modern award context and the proposed standard setting for 'employee-like' work.

This may be achieved by the following measures:

- Adopting a process that empowers workers engaged in 'employee-like' work to bargain collectively in relation to setting standards, if they are unable to be represented by a Union.
- Making the standard setting process user friendly and designed for workers who are engaged in 'employee-like' work to participate in individually or as a group.
- Inviting all stakeholders, including relevant unions, to contribute to the standard setting process.
- Ensuring that the FWC can conduct research and inform itself of facts in setting minimum standards.
- Ensuring that the FWC publishes draft orders and preliminary decisions and consults with relevant parties and stakeholders before final standards are set.

Recommendation 6

- a) The FWC should adopt a process that empowers workers engaged in 'employee-like' work to bargain collectively.
- b) The FWC should ensure the standard setting process is user friendly.
- c) The FWC should invite all stakeholders, including relevant unions, to contribute to the standard setting process.
- d) The FWC should publish draft orders and preliminary decisions and consult with relevant parties and stakeholders before final standards are set.

Q7. How can the Fair Work Commission's processes reflect the character of employee-like workers and engage with them appropriately?

Legal Aid NSW lawyers regularly provide legal services to workers engaged in 'employee-like' work who are vulnerable to exploitation. Many such workers are young, not members of a union, low paid, work long hours, and/or require an interpreter or speak English as a second language.

In our experience, such workers face significant barriers in engaging with legal process to enforce their rights. Accordingly, the FWC's processes should be as informal, flexible, and accessible as possible to reflect the character of 'employee-like' work and engage with these workers appropriately.

Legal Aid NSW also believe that the legal assistance sector should be appropriately funded to assist workers in 'employee-like' work to engage in the FWC's dispute resolution processes in relation to the application and enforcement of minimum standards.

Whilst the FWC can and should take measures to assist 'employee-like' workers to represent themselves and advocate for their interests, in our experience even the most user-friendly forums can be inaccessible to workers who are vulnerable to exploitation. Given adequate funding, the legal assistance sector is well positioned to assist such workers to engage with the FWC minimum standards process, through providing timely legal advice, minor assistance, and representation services.

Recommendation 7

- a) The legal assistance sector should be appropriately funded to assist people in 'employee-like' work to engage in the FWC's dispute resolution processes.
- b) The FWC's processes should be as informal, flexible and accessible as possible to reflect the character of 'employee-like' work and engage with these workers appropriately.

Q8. How can potential unintended negative impacts for workers, businesses, consumers and labour market be mitigated?

The FWC can mitigate potential unintended negative impacts for workers, businesses, consumers, and the labour market by involving stakeholders in all stages of the standard setting process and engaging in regular reviews of minimum standards.

Legal Aid NSW also believe that workers and other relevant parties should be able to apply to the FWC to vary or revoke minimum standards orders in case unintended negative impacts arise after the making of an order. The process for making such an

application should be user friendly and accessible. Workers who are vulnerable to exploitation should have access to legal support services to help them apply to vary or revoke a minimum standards order.

Recommendation 8

- a) Workers and other relevant parties should be able to apply to the FWC to vary or revoke minimum standards orders.
- b) Workers who are vulnerable to exploitation should have access to legal support services to help them apply to vary or revoke a minimum standards order.

Q9. How could the Fair Work Commission's orders be enforced?

Legal Aid NSW regard enforcement of orders as critical to the successful implementation of the FWC's proposed minimum standards functions for workers engaged in 'employee-like work'. If workers are easily able to enforce FWC orders, they will be better positioned to access their rights and ensure compliance of businesses with the minimum standards.

The experience of Legal Aid NSW lawyers indicates significant barriers facing employees who seek to enforce orders of the FWC. This is due in part to the following factors:

- The cumbersome and multi-jurisdictional process of enforcing orders. If an employee obtains an order from the FWC and the respondent does not comply with the order, the employee must commence proceedings in the Federal Circuit and Family Court of Australia (**FCFCOA**) or the Federal Court of Australia (**FCA**) for contravention of a civil penalty provision and then, if the Court makes such an order, commence separate proceedings for the enforcement of that order.
- The highly technical and procedural requirements of enforcing orders through various means such as examination orders, writs for the levy of property, garnishee orders and bankruptcy or insolvency processes.
- The lack of capacity of the Fair Work Ombudsman (FWO) to enforce orders on behalf of employees.
- The prohibitive expenses involved in enforcing orders particularly if the employee has to pay for legal representation.
- The lack of plain language guides and forms for self-represented litigants seeking to enforce orders in the FCFCOA or FCA. The FCFCOA and FCA do not have their own forms for enforcement of orders. For example, an employee seeking to enforce an order by applying for a writ for the levy of property in the FCFCOA will have to file an FCFCOA Application in a Case form, an affidavit and a NSW Uniform Civil Procedure Rules (UCPR) Form 66 Writ for the Levy of Property. The number of forms

and the use of forms from another jurisdiction is extremely complex and makes enforcement of orders inaccessible to most people, especially workers vulnerable to exploitation.

In September 2020, Legal Aid NSW partnered with Justice Connect and Redfern Legal Centre to produce [a guide](#) for self-represented litigants seeking to enforce FCFCOA orders in order to address this unmet need. However, due to the complexity of the process and the lack of dedicated resources in the FCFCOA, the process of enforcement remains inaccessible to most workers who do not have legal representation.

Legal Aid NSW propose the following measures to assist workers to enforce FWC orders:

- Build the capacity of the FWO to enforce orders on behalf of workers as a key function of its work.
- Increase funding to the legal assistance sector to advise, assist and represent workers engaged in 'employee-like' work to enforce FWC orders.
- Introduce legislative reform to give workers the option of being able to register an order of the FWC in the FCFCOA or FCA for enforcement. Workers should still have the option of commencing separate proceedings in the FCFCOA or FCA for contravention of a civil remedy provision if they wish to also apply for an order that a pecuniary penalty order be imposed in addition to an order for compensation.
- Resource the FCFCOA and FCA to produce plain language, user friendly forms and guides to enable self-represented workers and employees to enforce FWC orders.

Recommendation 9

- a) The following measures should be implemented to assist workers to enforce FWC orders:
- i. Increasing the capacity of the FWO to enforce orders on behalf of workers
 - ii. Appropriately funding the legal assistance sector to assist workers engaged in 'employee-like' work in enforcing FWC orders
 - iii. Introducing legislative reform to give workers the option of registering a FWC order in the FCFCOA or FCA for enforcement, and
 - iv. Resourcing the FCFOA and FCA to produce forms and guides that can be understood by self-represented litigants.

Q12. What disputes should the Fair Work Commission be able to help resolve?

Q13. What remedies and roles could the Fair Work Commission have available to it to resolve disputes?

The FWC should be given robust powers to help resolve disputes about the coverage and application of minimum standards orders.

In particular, the FWC should be given the power to arbitrate disputes about pay and conditions for workers under the minimum standards. If workers in 'employee-like' forms of work are entitled to conditions like minimum rates of pay, leave, breaks, superannuation and unfair dismissal protection this would greatly reduce the economic incentive on businesses to misclassify workers as independent contractors.

This is not a new concept in Australia. Until its abolition in April 2016 the Road Safety Remuneration Tribunal was responsible for setting minimum pay rates and other entitlements for owner drivers and had provisions for hirers and supply chain participants to audit supply chain contracts.¹

Recommendation 10

- a) The FWC should be given powers to arbitrate disputes about pay and conditions for workers under the minimum standards.

Improving avenues for workers to challenge unfair contractual terms

Q14. What workers should be covered by any new protections and why?

Extension of the jurisdiction of the FWC

Legal Aid NSW welcome the Federal Government's proposal to extend the FWC's jurisdiction to enable workers to challenge unfair contract terms. We regularly assist vulnerable workers across various industries in NSW that have entered into contracts that contain unfair or harsh terms, or where the contracts are purely verbal, and the terms are difficult to determine.

Some of our clients who are most vulnerable to exploitation are migrant workers or workers with low levels of literacy and/or ability to speak English. They are typically

¹ Maurice Blackburn, Submission to Victorian Government, Inquiry into the Victorian On-Demand Workforce (20 February 2019) 10.

engaged in low-skilled, low-paid work in the cleaning, disability, aged care, security, parcel delivery and other service industries.

Many of these clients are engaged and paid as independent contractors. These workers receive a base rate of pay which is often lower than the comparable amount an employee would be paid under a relevant Modern Award to perform the same work. They are responsible for reporting their own tax and are often not paid any superannuation.

Some of these clients are engaged directly by a business, whereas others are engaged via an online platform. Many clients are engaged to perform work for only one business and often work the equivalent of full-time hours (38 hours per week) for the business. Some work more than 38 hours per week but are not entitled to any overtime rates as they are not employees.

Overall, these workers are treated like employees but are instead engaged as contractors. They are missing out on the financial benefits and legal protections that employees enjoy and are engaging in less safe and less secure forms of work. They are at a particular disadvantage compared to employees when they are seeking to resolve a work-related dispute.

In one example, a group of delivery drivers were engaged as independent contractors, but under the terms of the contract were required to swap shifts with another worker or pay a penalty if they were unable to show up to a rostered shift if they were sick.

Inadequacy of the current dispute pathway

The modern regulatory framework for workers recognises and embeds the dichotomy between employees and independent contractor in work laws.² The current dispute resolution pathways for non-employee workers such as independent contractors are insufficient and no longer fit for purpose.

The *Independent Contractors Act 2006* (Cth) (**IC Act**) was enacted in 2006 to support the policy of the (then) Federal Government that genuine independent contracting relationships ought to be governed by commercial rather than industrial law.³ The principal objects of the IC Act are to:

- protect the freedom of independent contractors to enter into services contracts,
- recognise independent contracting as a legitimate form of work arrangement that is primarily commercial, and

² *Fair Work Act 2009* (Cth); and *Independent Contractors Act 2006* (Cth).

³ Minister for Employment and Workplace Relations, *Commonwealth Parliamentary Debates, House of Representatives*, 22 June 2006. p. 5.

- prevent interference with the terms of genuine independent contracting arrangements.

Non-employee workers may be able to apply for a review of a contract for services on the ground that it is unfair or harsh.⁴ The terms ‘unfair’ or ‘harsh’ have their common law meaning.⁵

An application to review a contract under the IC Act must be made to the FCA or FCFCOA. A proceeding must be instituted during the life of the services contract, or within 12 months of its expiry.⁶ Although, (the court does have the discretion to extend the limitation period in “exceptional circumstances”).⁷

Despite this avenue being in place since 2006, the IC Act does not appear to have been highly utilised or well supported. Only 16 proceedings were filed in court under the IC Act between 2014 to 2019, which suggests that this is a little used jurisdiction that has produced few positive outcomes.⁸ Indeed, of those claims 11 were withdrawn after the applicant lodged a notice of discontinuance, two were dismissed, two were dismissed by consent. In that 5-year period, there were only three cases where the contracts were found to be unfair or positive outcomes obtained for the claimants.⁹

By comparison, the FWC deals with a substantial volume of disputes involving workers. In the same 5-year period, the FWC dealt with:

- 70,976 unfair dismissal applications between 1 July 2014 and 30 June 2019,
- 23,479 general protection claims filed between 1 July 2014 and 30 June 2019, and
- 70 adverse action decisions made just in 2019.¹⁰

Since 2019, the volume of matters heard by the FWC has only increased, with its jurisdiction repeatedly expanding under new legislative changes to meet its statutory function and objectives.¹¹

Considering the above, the FWC is well-placed to administer a new avenue for workers engaged as independent contractors to challenge unfair contract terms. Legal Aid NSW

⁴ *Independent Contractors Act 2006* (Cth) s12(1).

⁵ Explanatory Memorandum, *Independent Contractors Bill 2006* (Cth) 38.

⁶ *Independent Contractors Regulation 2016* (Cth) reg 7.

⁷ *Ibid.*

⁸ *Inquiry into the Victorian On-Demand Workforce* (Final Report, 12 June 2020) 167.

⁹ (*Keldote Pty Ltd & Ors v Riteway Transport Pty Ltd* [2007] FMCA 1701; *Informax International Pty Ltd v Clarius Group Ltd* (No 2) [2011] FCA 934; *JY Smile Centre Pty Ltd & Anor v Idameneo* (No 123) Pty Ltd [2013] FCCA 336).

¹⁰ *Inquiry into the Victorian On-Demand Workforce* (Final Report, 12 June 2020) 167.

¹¹ Fair Work Commission, *Annual Report- Access to Justice* (Report, 2022).

believes that the FWC's flexible and informal approach to dispute resolution has the potential to be more frequently utilised by such workers, provided that the new jurisdiction is adequately resourced to be accessible to workers who are vulnerable to exploitation. This should entail measures, such as:

- producing plain language resources, information and guides to assist workers represent themselves in challenging unfair contract terms
- adopting user-friendly processes and procedures for resolution of matters
- adequately funding the legal assistance sector to provide legal advice, minor assistance and representation services for workers who are vulnerable to exploitation, and.

expanding access to free legal advice through the FWC's Workplace Advice Service (WAS).¹²

Application of the new protections

Legal Aid NSW support the new unfair contracts jurisdiction in the FWC being made available to all independent contractors. However, we consider that as part of its key objectives the new jurisdiction should, at least initially, prioritise:

- workers who are vulnerable to exploitation
- workers in sectors where the demonstrated need is greatest for example those engaged in cleaning, security and road transport
- workers who are low paid, and
- workers who are dependent on a single business for their income.

Such workers could be prioritised by imposing an income based jurisdictional limit on access to dispute resolution for independent contractors at the FWC, similar to the high income threshold for unfair dismissal protections under the section 382(b)(iii) of the *Fair Work Act 2009* (Cth) (**FW Act**).

Overall, a focused coverage will ensure that the new jurisdiction adequately complements the minimum standards-setting framework and allows for the FWC to resolve contractual disputes in the absence of minimum standards, whilst providing an effective, accessible dispute resolution pathway for the workers that need it most.

¹² Legal Aid NSW is a partner of WAS.

Recommendation 11

- a) The new jurisdiction of the FWC should be accessible to workers who are vulnerable to exploitation. This should entail measures, such as:
 - i. producing plain language resources, information and guides to assist workers represent themselves in challenging unfair contract terms
 - ii. adopting user-friendly processes and procedures for resolution of matters
 - iii. adequately funding the legal assistance sector to provide legal advice, minor assistance and representation services for workers who are vulnerable to exploitation, and
 - iv. expanding access to free legal advice through the FWC's Workplace Advice Service (WAS).

- b) The new unfair contracts jurisdiction of the FWC should be made available to all independent contractors, with priority given to:
 - i. workers who are vulnerable to exploitation
 - ii. workers in sectors where the demonstrated need is greatest
 - iii. workers who are low paid, and
 - iv. workers who are dependent on a single business for their income.

Q15. What kinds of disputes occur for independent contractors?

Legal Aid NSW clients who are engaged as independent contractors regularly report issues including:

- non-payment of amounts owed for work performed
- delays in being paid, being paid low hourly rates
- not being paid superannuation when they are engaged primarily for their skills and labour
- being treated unfairly, with unrealistic deadlines imposed on them
- being penalised arbitrarily with no recourse for disputation, and
- having their contracts terminated without notice and with limited prospects to dispute the decision.

Our clients typically want to know whether they should be classified as an independent contractor or an employee. This may include a sham arrangement or not.

Many of our clients are often unable to resolve their disputes directly with the businesses or through court as the process is opaque, complex, and protracted. For example, Legal Aid NSW regularly sees workers engaged as independent contractors for short term jobs

in the construction industry, particularly tilers, painters and bricklayers, who are not paid for the last week or two of the engagement or not paid at all. Such workers often require an interpreter or have limited English language skills. They face significant barriers in commencing and running legal proceedings in court as self-represented litigants, even in the more user-friendly small claims divisions. It is usually not economic to hire a lawyer, as the cost to do so, would be more than the amount owing to the worker. While such workers can apply to the NSW Small Business Commissioner for mediation, participation of the principal is voluntary and workers rarely, if ever, achieve positive outcomes through this process.

Additionally, it has become significantly more difficult for an independent contractor to argue that they are an employee after the High Court's decision in *CFMMEU v Personnel Contracting* [2022] HCA 1. This means less workers engaged as independent contractors are able to obtain assistance from the Fair Work Ombudsman or services funded to assist employees in the legal assistance sector. For example, Legal Aid NSW policies provide that only employees are eligible for a grant of legal aid to recover unpaid wages and entitlements. Before the decision in *Personnel Contracting*, an independent contractor could obtain a grant of legal aid if their claim to be an employee under the previous multi-factorial test had merit. Such workers are less likely to be eligible for a grant of legal aid now.

Legal Aid NSW believes that the FWC's new jurisdiction should, at a minimum, allow workers engaged as independent contractors to dispute:

- contract terms that are 'unfair', for example in the way they deal with payment times
- 'unfair' termination of services contracts, especially under circumstances where independent contractors were terminated without adequate notice, right of reply or compensation, and
- contract terms that impose penalties for workers

Legal Aid NSW also believes that the FWC be given the power to make Minimum Entitlements Orders and Independent Contractor Status Orders. This power would enable the FWC to make determinations that:

- certain workers or classes of workers are to be treated as employees
- protections in the FW Act, or an award or enterprise agreement apply, and
- certain workers are to be treated as genuine independent contractors.



© Legal Aid Commission of NSW 2021.

You may copy, print, distribute, download and otherwise freely deal with this work for a non-profit purpose provided that you attribute Legal Aid NSW as the owners. To reproduce or modify the work for any other purpose you need to ask for and be given permission by Legal Aid NSW.