Articles

Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?

Andrew Stewart and Shae McCrystal†*

Most forms of labour regulation operate on the assumption that rights and protections should be accorded to employees, but not the self-employed. The need to question that binary divide is heightened by modern forms of business organisation that seek to separate the performance of work necessary to the business from the business itself. We re-examine the case for either universalism or selectivity in the coverage of labour standards by reference to one of these models, involving the engagement of 'gig' workers through digital labour platforms. After reviewing the common law principles used to determine employment status, we consider how platform workers might be categorised under existing laws. We go on to make three arguments as to the coverage of labour standards. The first is that many (though not all) labour protections can and should apply regardless of work status. The second is that in framing rights or processes analogous but not identical to those enjoyed by employees, it may be appropriate to cover all self-employed workers, not just 'dependent contractors'. The extension of collective bargaining rights to non-employees offers an example of that approach. The third is that the practice of sham contracting is best addressed by an expanded definition of employment that presumes workers to be employees unless they can be shown to be running their own business. This is preferable to creating an intermediate category of 'independent worker', which, as we illustrate by reference to overseas examples, risks a loss of rights and protections for workers who should be treated as employees.

I Introduction

Although much criticised, the binary divide between employment and self-employment is an entrenched feature of most modern labour regulation.[1] Some regulatory regimes effectively ignore it, such as the statutes in most

* John Bray Professor of Law, the University of Adelaide.

† Professor of Labour Law, the University of Sydney Law School. We are grateful to Irene Nikoloudakis and Simon Guthrie for their research assistance, which was undertaken for an Australian Research Council supported project on 'Working the Gig Economy: The Organisation of Digital Platform Work' (DP180101191). We also thank the participants at the Business Models and Labour Law Enforcement Workshop, held at Melbourne Law School on 16 July 2018, for their helpful questions and comments on an earlier draft. The same thanks are due to the anonymous referee chosen by the Journal and the editors of this special issue.

1 See G Davidov, M Freedland and N Kountouris, 'The Subjects of Labour Law: "Employees" and Other Workers', in M W Finkin and G Mundlak (Eds), *Comparative Labor Law*, Edward Elgar, Cheltenham, 2015, p 115.

Australian jurisdictions that adopt the 'model' laws on work health and safety (WHS). But these are the exceptions rather than the rule. Even systems that apply beyond employment often do so on an 'add-on' basis, where the core application is to the category of employment, with protection extended to one or more additional groups of workers.

The reach of labour regulation has come under increasing challenge from modern forms of business organisation that structure their operations and contract models to separate the performance of work necessary to the business from the business itself. Sometimes these leave workers as employees, though not of the lead business for which they are ultimately working. They may involve franchising, labour hire or other kinds of subcontracting or outsourcing. But our particular concern in this article is with arrangements that seek to portray workers as something other than employees. We also want to explore the balance between what Davidov has termed the objectives of 'universalism' and 'selectivity' in the application of labour standards, in determining how to meet that challenge.[2]

In Part II of the article, we review the common law principles used to determine employment status. The principles themselves are settled, but they are being applied by courts and tribunals in at least three different ways. We then go on in Part III to review the status of work organised and performed through digital platforms, one of the new types of business model with which this issue of the Journal is concerned. There is nothing particularly novel (beyond the technology) of the work systems being used in the 'gig economy', as it is often now called. But determining how to classify the relationships involved is presenting a challenge to existing systems of labour regulation.

One possible response, which we consider in Part IV, is to abandon the category of employment and simply confer rights and protections on all workers. Building upon the work of Johnstone and colleagues,[3] we identify a number of rights for which this can and should be done. But for some purposes, there are substantial practical challenges to overcome, as well as a risk of seeing a net reduction in labour protections for the majority who are employed if the rights in question *were* given universal application.

Part V considers what has become a more common proposal, and one that it is easier to imagine a future government seeking to implement: the creation of a new, intermediate category of 'independent worker', on whom something less than the full range of employment rights and protections would be conferred. We review examples of this approach in Australia, Canada, Italy, Spain and the United Kingdom (UK). Overall, we see little merit in the idea of a general intermediate category, not least because it risks encouraging the reclassification of employees into the new category, with a consequent loss of rights and protections. And where the extension of rights beyond employment does seem justified, some of the commonly suggested categories are often a poor fit, in that they may not extend far enough in respect of some workers.

---

2 G Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 *OJLS* 543. Note that in addressing this issue, space constraints preclude us from going on to consider the case for creating specific exceptions or modifications to rights otherwise available to a class of workers, as for instance is done in Australia with casual employees.

3 R Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012, chap 8.

We illustrate that point in Part VI by reference to the potential scope of collective bargaining rights. In Part VII, we conclude by setting out what we regard as a better approach.

II The Scope of Existing Labour Rights in Australia: Who is an Employee?

The Fair Work Act 2009 (Cth) (FW Act) is just one of many labour statutes in Australia which generally operates by reference to the concept of employment.[4] The same is true of legislation dealing with long service leave entitlements,[5] workers' compensation[6] and the superannuation guarantee scheme.[7] Some of these regimes have extensions that enable them to cover non-employees, but employment status remains the main trigger for the legislation.

The FW Act is also typical in not defining 'employment'. That is left to the common law,[8] under which two requirements must be generally met for a worker to be regarded as an employee. The first is that they must be engaged under a valid contract with the alleged employer.[9] The second is that the contract must be characterised as one of service, or employment. This is determined by applying the 'multi-factor' test, endorsed by the High Court in cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd*.[10] A series of questions is asked about aspects of the relationship between the labour engager and worker, such as the degree and nature of control exercised over the worker (or more especially the *right* to exercise such control); the mode of remuneration; responsibility for the provision and maintenance of tools or equipment; the extent of the obligation to work for the organisation; and any capacity for the worker to delegate work to others.[11] There is no set number or combination of factors that will determine whether a worker is an employee or, for example, an independent contractor working under a contract for services. The question is one of overall impression.[12] An adjudicator must balance the indicators that point one way or the other before reaching a decision.

---

4 See A Stewart et al, *Creighton & Stewart's Labour Law*, 6th edn, Federation Press, Sydney, pp 196–8. As to whether a court's assessment of whether a worker is an employee can or should be informed by the particular purposes of the legislation in question, see P Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42 *MULR* (forthcoming).

5 See, eg, Long Service Leave Act 2018 (Vic) s 6.

6 See, eg, Return to Work Act 2014 (SA) s 7.

7 See Superannuation Guarantee (Administration) Act 1992 (Cth) ss 16–19.

8 See, eg, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346; 321 ALR 404; [2015] FCAFC 37 (*Quest South Perth)* at [173]; *C v Commonwealth* (2015) 234 FCR 81; 327 ALR 195; [2015] FCAFC 113 at [34].

9 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; 187 ALR 92; [2002] HCA 8.

10 (1986) 160 CLR 16 (*Stevens*). See also C Sappideen, P O'Grady and J Riley, *Macken's Law of Employment*, 8th ed, Lawbook, Sydney, 2016, chap 2; M Irving, *The Contract of Employment*, LexisNexis Butterworths, Sydney, 2012, chap 2.

11 The relevant factors or 'indicia' are fully listed in *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215; [2003] AIRC 504 at [34](4).

12 *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448; 268 ALR 232; [2010] FCAFC 52 (*Roy Morgan Research*) at [31].

If we closely examine the recent case law, it is possible to distinguish at least three different ways of applying the multi-factor test.

The first of these, to which many state courts remain attached,[13] involves a *formalistic* approach, which effectively privileges any terms formally agreed and emphasises party autonomy. It is accepted that the parties cannot simply label a contract as being one for services, when the balance of factors point to the relationship being one of employment.[14] But if weight is given to how the parties have 'chosen' to structure their relationship, this will inevitably make it easier for organisations to evade the cost of employment entitlements, by drafting contracts that minimise any appearance of control and emphasise what may in practice be illusory 'freedoms' for the worker.[15] One of those possible freedoms is to delegate or subcontract work to someone else. Traditionally, an unfettered right to do this has been considered inconsistent with the existence of a contract of service.[16] This is on the basis that a contract of service necessarily entails a personal commitment to provide the worker's own labour.[17]

At least in the federal courts, however, respect for contractual terms and party choice has largely given way to a second approach that is more concerned with the practical and functional aspects of the work arrangement in question. This *economic reality* approach can be traced in particular to the High Court's ruling in *Hollis v Vabu Pty Ltd*.[18] There was nothing particularly radical about the decision to attach employment status to a bicycle courier who was paid according to the number of successful deliveries, but who had to wear a company uniform, was told when to work and how much to charge, and did not have to supply expensive equipment. But Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ emphasised the need to look not merely at the terms on which the worker was engaged, but also at 'the system which was operated thereunder and the work practices imposed', as part of examining 'the totality of the relationship between the parties'.[19] This has encouraged later courts to disregard contracts carefully tailored to look like contracts for services, when at odds with the practical reality of the arrangement.[20] Even

13 See, eg, *Australian Air Express Pty Ltd v Langford* (2005) 147 IR 240; [2005] NSWCA 96; *Tobiassen v Reilly* (2009) 178 IR 213; [2009] WASCA 26; *Commissioner of State Revenue v Mortgage Force Australia Pty Ltd* [2009] WASCA 24 (30 January 2009); *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1 (3 July 2012) (*Young*).

14 *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJR 162; *Narich v Commissioner of Pay-roll Tax (NSW)* [1983] 2 NSWLR 597; (1983) 50 ALR 417; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 181 ALR 263; [2001] HCA 44 (*Hollis*) at [58].

15 See A Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *AJLL* 235 at 242–51.

16 *Australian Mutual Provident Society Ltd v Chaplin* (1978) 18 ALR 385 at 391; *Stevens*, above n 10, at 26, 38.

17 *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; [1945] ALR 273; HCA 13.

18 *Hollis*, above n 14. In highlighting the significance of *Hollis*, we do not mean to suggest that its emphasis on economic reality was at all novel. For an earlier and much-cited example, see *Re Porter* (1989) 34 IR 179.

19 *Hollis*, above n 14, at [24]. In *WorkPac Pty Ltd v Skene* (2018) 362 ALR 311; [2018] FCAFC 131 at [180], a Full Court of the Federal Court spoke of assessing 'the real substance, practical reality and true nature' of the relevant relationship.

20 See, eg, *Roy Morgan Research*, above n 12; *ACE Insurance Ltd v Trifunovski* (2013) 209

unlimited powers to delegate work have been discounted in the face of evidence that they were unlikely in practice to be exercised.[21]

The plurality in *Hollis* also endorsed the view that the employee/contractor distinction is 'rooted fundamentally in the difference between a person who serves his [sic] employer in his, the employer's, business, and a person who carries on a trade or business of his own'.[22] That in turn has become the foundation for a third approach, articulated by Bromberg J in *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)*.[23] This centres on the presence or absence of *entrepreneurship*. A worker cannot be regarded as an independent contractor unless they are 'an entrepreneur who owns and operates a business', and who can be shown to be performing the relevant work 'in and for that business as a representative of that business and not of the business receiving the work'.[24] A 'genuine' contractor would usually be:

> autonomous rather than subservient in its decision-making; financially self-reliant rather than economically dependent upon the business of another; and ... chasing profit (that is a return on risk) rather than simply a payment for the time, skill and effort provided ...[25]

This approach has been adopted in a number of later cases.[26] But it has also been questioned by other Federal Court judges, on the basis that '[t]he question is not whether the person is an entrepreneur: it is whether he or she is an employee'.[27] On this contrary view, whether a worker appears to have a business of their own is merely one factor to be taken into account: it cannot be determinative.[28]

As matters stand, employment status is determined by a test that can be applied with varying degrees of attention to the economic reality of an arrangement, and varying degrees of respect for the parties' own characterisation and assumptions. This inevitably increases the grey zone of uncertainty between employment and independent contracting.

FCR 146; 295 ALR 407; [2013] FCAFC 3 (*ACE Insurance*). See also P Bomball, 'Subsequent Conduct, Construction and Characterisation in Employment Contract Law' (2015) 32 *JCL* 149. The approach is similar to that taken by the UK Supreme Court in *Autoclenz Ltd v Belcher* [2011] 4 All ER 745; UKSC 41.

21 See, eg, *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82; 279 ALR 341; [2011] FCA 366 (*On Call Interpreters*).

22 *Hollis*, above n 14, at [40], quoting *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217; [1963] ALR 859; HCA 26.

23 *On Call Interpreters*, above n 21.

24 Ibid, at [208]. The test has similarities to the 'ABC' test now being used by a number of American courts: see, eg, *Dynamex Operations West Inc v Superior Court of Los Angeles County* 4 Cal 5th 903 (2018).

25 *On Call Interpreters,* above n 21, at [214].

26 See, eg, *Fenwick v World of Maths* [2012] FMCA 131 (2 March 2012); *Quest South Perth*, above n 8, at [178]–[186]; *Fair Work Ombudsman v Grouped Property Services Pty Ltd* (2016) 152 ALD 209; [2016] FCA 1034.

27 *Tattsbet Ltd v Morrow* (2015) 233 FCR 46; 321 ALR 305; [2015] FCAFC 62 (*Tattsbet*) at [61]. See also *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296 (24 March 2016) at [78].

28 See, eg, *Civil and Allied Technical Construction Pty Ltd v A1 Quality Concrete Tanks Pty Ltd* [2018] VSCA 157 (20 June 2018), endorsing a finding that four construction workers were contractors, despite there being little to suggest they had businesses of their own.

III Digital Platform Workers

It is increasingly common for workers to find jobs through a digital platform, such as a website or app, that puts them in touch with clients wishing to use their services. As a briefing paper prepared for the International Labour Organization (ILO) points out, these platforms vary considerably both in their architecture and the extent to which they commodify work. Nevertheless:

> While digital labour platforms present major differences, all of them perform three specific functions: (1) matching workers with demand; (2) providing a common set of tools and services that enable the delivery of work in exchange for compensation; and (3) setting governance rules whereby good actors are rewarded and poor behaviour is discouraged.[29]

This last function often involves systems which allow end users to rate workers' performance, or indeed for workers to rate end users.

It is hard to be sure of how many Australians regularly obtain income for their labour through digital platforms, as part of what is commonly now called the gig economy or — more fancifully — the 'sharing economy'.[30] Estimates of the numbers involved here have often put the figure at less than 1% of the workforce.[31] But as the Productivity Commission has noted, for what is currently perhaps 'a boutique component of labour markets ... the prospect of growth seems strong'.[32] A survey conducted in 14 European Union countries revealed that an average of 5.6% of respondents were making 'significant' use of digital platforms to perform work (that is, working for at least 10 hours per week). The UK recorded the highest figure, at 6.7%. An average of 2.3% earned at least half of their income from such work, with the UK once again higher at 4.3%.[33] It seems reasonable to suppose there may be a similar pattern here. There is no evidence of any recent growth in the proportion of the Australian workforce engaged as contractors in their main job. But the relevant data might be masking a shift into gig work either from other forms of self-employment or as second jobs.[34]

There are many ways in which platforms can be categorised. De Stefano, for example, distinguishes between 'crowdwork' and 'work on demand'

---

29 International Labour Organization, *Job Quality in the Platform Economy*, Issue Brief No 5, 2nd Meeting of the Global Commission on the Future of Work, ILO, Geneva, 15–17 February 2018, at 1, citing S P Choudary, *Do Digital Platforms Empower or Exploit Workers? A Framework*, ILO, Geneva (forthcoming).

30 Cf T Slee, *What's Yours Is Mine: Against the Sharing Economy*, Scribe Publications, Melbourne, 2017.

31 A Stewart and J Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28 *ELRR* 420 at 423.

32 Productivity Commission, *Upskilling and Retraining*, Supporting Paper No 8, Productivity Commission, Canberra, 2017, at 19. But cf J Healy, D Nicholson and A Pekarek, 'Should We Take the Gig Economy Seriously?' (2017) 27 *Lab & Ind* 232 at 238–41, noting various factors that may slow or halt the growth of the gig economy.

33 A Pesole et al, *Platform Workers in Europe*, Technical Report, European Commission Joint Research Centre, Publications Office of the European Union, Luxembourg, 2018.

34 R Wilkins and I Lass, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 16*, Melbourne Institute Applied Economics and Social Research, University of Melbourne, 2018, at 97.

systems.[35] The former usually involves bidding for work that can be completed and delivered online. The latter involve more traditional jobs that are completed in the 'real world', such as driving, cleaning, caring or home maintenance.

The question of whether gig work should be regarded as involving employment under current Australian laws — and if so, with whom — very much depends on the type of platform and what type of business it is effectively running. There are two broad possibilities here.

The first is that the platform is operating simply as an *intermediary* or *matching service* to connect workers and end users through a digital marketplace. Provided that the platform does not seek to exert more than incidental control over how the relevant work is defined or performed, it is difficult to imagine it being considered an employer, even on the broadest view of the common law test. Its role is effectively analogous to a newspaper or website publishing classified advertisements. It is possible, depending on the circumstances, that the contract brokered by the platform might be one of employment by the *end user* — though that would be less likely where the relevant job was performed for an individual consumer, or where the job in question was just one of many performed by the same worker for multiple clients.

The second possibility is that the platform operates as a *vertically-integrated firm*, offering what are in effect *its* clients a service and supplying the labour necessary to achieve that.[36] It is far easier for platforms in this category to be regarded as employers, given the extent to which they tend to stipulate and enforce standards of performance. Firms such as Uber, Deliveroo or Foodora can readily be seen to fit this category — although they invariably insist that they do not employ their drivers or riders. It is no surprise that there has been litigation in many countries over the status of their workers — albeit with mixed outcomes.[37] Much has depended in these cases on how each court or tribunal has been prepared to characterise the relevant relationships, and whether it has been willing to look past the formal terms on which the workers have been engaged.

Drivers with Uber, for example, sign contracts acknowledging they are not working for the 'ridesharing' company. Rather, the firm is providing services to the drivers, in the form of technology that helps them locate and receive payment from passengers. In the British case of *Uber BV v Aslam*[38] it was held that this characterisation was at odds with reality. Uber was found to be

35 V De Stefano, 'The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"' (2016) 37 *Comp Lab L & Pol'y J* 471 at 473–4.

36 See E Menegatti, 'A Fair Wage for Workers On-Demand via App', in E Ales et al (Eds), *Working in Digital and Smart Organizations: Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations*, Palgrave Macmillan, Cham, 2018, p 67 at p 70, citing C Codagnone, F Abadie and F Biagi, *The Future of Work in the 'Sharing Economy': Market Efficiency and Equitable Opportunities or Unfair Precarisation?*, Science for Policy Report, European Commission Joint Research Centre, Publications Office of the European Union, Luxembourg, 2016, at 47–8.

37 See, eg, D Peetz, *The Operation of the Queensland Workers' Compensation Scheme*, Report, May 2018, at 96–7, at <www.worksafe.qld.gov.au/__data/assets/pdf_file/0005/159125/workers-compensation-scheme-5-year-review-report.pdf> (accessed 31 March 2019).

38 [2019] IRLR 257; [2018] EWCA Civ 2748 (*Aslam*).

running a transportation business,[39] with the drivers providing the labour through which it delivered its services. The suggestion that the drivers were running their own business was dismissed as fanciful. On that view, they were entitled to minimum wages and other employment benefits. The legal basis for this finding was that they fell within an extended statutory definition of 'worker', under special provisions to which we return in Part V. But the reasoning used could just as easily have supported a finding that they were employees, a point not argued in the case.

In Australia, the Fair Work Commission has twice rejected unfair dismissal claims from Uber drivers, on the basis that they were not employees.[40] But in each instance the drivers were unrepresented and did not challenge Uber's evidence as to its arrangements. By contrast, a similar claim brought by a Foodora rider, with the support of the Transport Workers' Union, was successful.[41] The finding of employment was a relatively straightforward one, especially given that the applicant was rostered to work predetermined shifts and required to use Foodora-branded clothing and equipment when delivering customers' meals. Applying the multi-factor test, Cambridge C concluded that 'the applicant was not carrying on a trade or business of his own'. Rather, his work 'was integrated into the respondent's business and not an independent operation'.[42] Even before the decision was handed down, Foodora had shut down its Australian business, and offered a multimillion dollar settlement in response to potential claims from other riders and drivers, as well as the Australian Taxation Office.[43] It is unlikely that the ruling will have any immediate impact on other food delivery platforms, such as Deliveroo and Uber Eats, given that they operate rather differently to Foodora, but there are clearly more cases to come.

The potential growth of the gig economy has understandably given rise to debates as how best to regulate it from a labour standards perspective. Stewart and Stanford identify five broad options for extending the reach of instrumental state regulation.[44] These are: (1) bringing test cases to enforce existing laws, where it can plausibly be claimed a gig worker is an employee; (2) clarifying or expanding definitions of 'employment'; (3) creating a new

39 This view was accepted in other regulatory contexts by the European Court of Justice: see *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (European Court of Justice, C-434/15, 20 December 2017); *Uber France SAS v Bensalem* (European Court of Justice, C-320/16, 10 April 2018).

40 *Kaseris v Rasier Pacific VOF* (2017) 272 IR 289; [2017] FWC 6610; *Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579 (11 May 2018).

41 *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 (16 November 2018).

42 Ibid, at [102].

43 A Patty, 'Food Delivery Service Foodora to Exit Australia', *Sydney Morning Herald*, 2 August 2018; A Patty, 'Foodora Offers to Pay Less Than Half Amount Claimed by Creditors', *Sydney Morning Herald*, 8 November 2018. The Fair Work Ombudsman has also initiated legal proceedings against Foodora for sham contracting and underpayment of workers: see 'Foodora Still on the Menu: FWO', *Workplace Express*, 30 January 2019.

44 Stewart and Stanford, above n 31, at 429–31. Cf J Prassl and M Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm', in P Meil and V Kirov (Eds), *Policy Implications of Virtual Work*, Springer, Cham, 2017, p 273. See also the rather creative proposal by Peetz to extend workers compensation to anyone engaged (other than as an employee) through an 'agency' of any kind, whether a digital platform or not: Peetz, above n 37, at 105–8.

category of 'independent worker'; (4) creating rights for 'workers', not employees; and (5) reconsidering the concept of an 'employer'.[45] We return to the third and fourth of these options later in the article. For now, we would simply note that the third possibility, as with other proposals aimed specifically at gig workers,[46] tends to assume that they are not employees. That in itself may short change those who *should* be treated as employees. So, for example, creating a minimum wage specifically for on-demand workers, as some have proposed,[47] would in the Australian context potentially mean denying some of those workers access to higher award rates, especially for overtime or work at antisocial hours.

IV Can and Should Labour Rights Have Universal Scope?

Scholars critical of the binary employee/contractor divide have suggested that rights and protections should be attached to a broader category of 'workers',[48] or that the focus for regulation should be on 'personal work contracts'.[49] The practical problem, however, is to determine how to do this for *every* type of labour protection. Some existing regimes would clearly require substantial redesign to apply to every type of worker. This is especially true of those which carry a financial burden, such as contributing to a superannuation scheme, or providing paid leave. It is not impossible to imagine how the relevant regimes might be adapted. But aside from the practicality of convincing a government to take this step, we are concerned about the risk of a net reduction in entitlements if employee rights and protections were converted to more universally applicable norms. For example, it is hard to imagine the elaborate system of base wage rates, pay loadings and controls on working hours established by the award system being extended to the genuinely self-employed. But a campaign to establish a generally applicable minimum wage, or a broad prohibition on excessive or unreasonable hours of work, could readily be used as a pretext for a broader but much shallower floor of entitlements that effectively removed penalty rates, minimum shift lengths and so on. Similarly, a wider entitlement to take paid breaks from work,

45 As to this last, see J Prassl and M Risak, 'Uber, Taskrabbit, and Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37 *Comp Lab L & Pol'y J* 619; and see also J Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy*, Oxford University Press, Oxford, 2018, chap 5.

46 There have, for instance, been proposals in Victoria and New South Wales to extend existing regimes for non-employed owner-drivers to cover gig workers in the transport industry: see Victorian Owner Drivers and Forestry Contractors Amendment Bill 2019 (Vic); 'NSW Opposition Looking to Protect Gig Workers', *Workplace Express*, 27 June 2018. These rely on an exception in s 7(2)(b) of the Independent Contractors Act 2006 (Cth), a statute that otherwise seeks to prevent the states from extending employment-like protections to contractors.

47 See, eg, Menegatti, above n 36.

48 See, eg, R Owens, J Riley and J Murray, *The Law of Work*, 2nd edn, Oxford University Press, Melbourne, 2011, pp 197–207.

49 See, eg, M Freedland and N Kountouris, 'The Legal Characterization of Personal Work Relations and the Idea of Labour Law', in G Davidov and B Langille (Eds), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011, p 179.

funded perhaps by some form of general levy on payments for labour, would be unlikely to preserve the rich array of leave entitlements now enjoyed by non-casual employees.

Some rights, however, clearly can and should have universal application.[50] The ILO Declaration on Fundamental Principles and Rights at Work 1998 identifies four such core standards applicable to workers without distinction: freedom of association, freedom from forced labour, the abolition of child labour and the elimination of discrimination in respect of employment or occupation.[51] In their book *Beyond Employment*, Richard Johnstone and colleagues nominated further rights that workers generally should enjoy: a work environment free from risks to health and safety, fair dealing, income security, collective bargaining, and dispute resolution.[52] For ourselves, we are not convinced that some of these can feasibly be framed as universal entitlements. But, universality can be achieved in other ways — for example through the use of differing regulatory schemes. It may be, for instance, that income security for the genuinely self-employed is better delivered through social security entitlements,[53] rather than a minimum wage. Similarly, while we agree with the idea of collective bargaining rights being available to non-employees, we do not necessarily see an extended system as needing to have the same architecture and concepts as that established for employees — a point to which we return in Part V.

Fair dealing, by contrast, is a concept that *could* have universal application, at least to some degree. There is no reason in principle why a general duty of good faith could not be recognised for *all* types of contract, not just those involving employment.[54] It would also be possible to create a more general power to seek the adjustment of unfair contractual terms. This is currently available to contractors under Part 3 of the Independent Contractors Act 2006 (Cth) or Part 2-3 of the Australian Consumer Law, though *not* to employees. But it is harder to see how a statutory right to complain of unfair termination for *all* contracts involving the provision of labour might be created, without severely disrupting commerce. Contractors can already, in any event, challenge the fairness of particular terms that operate harshly or unfairly in

50 The discussion below is oriented primarily to paid workers, though in principle most of the rights we identify for universal coverage could equally apply to unpaid volunteers or interns. For further discussion of such workers, see J Murray, 'The Legal Regulation of Volunteer Work', in C Arup et al (Eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets*, Federation Press, Sydney, 2006, p 696; A Stewart et al, 'The Regulation of Internships: A Comparative Study', Working Paper No 240, Employment Policy Department, ILO, Geneva, 2018.

51 Certain other ILO instruments also apply to 'workers' generally and not to the narrower category of employee: see B Creighton and S McCrystal, 'Who is a "Worker" in International Law?' (2016) 37 *Comp Lab L & Pol'y J* 691 at 717–22.

52 Johnstone et al, above n 3, at p 196.

53 Eg, the Paid Parental Leave Act 2010 (Cth) provides a safety net wage replacement for all workers with responsibility for the primary care of a young child, including the genuinely self-employed, funded through the social security system: see E McCarthy, E Jenkin and A Stewart, *Parental Leave: A User-Friendly Guide*, Lawbook, Sydney, 2011, pp 79–84, 101–17.

54 As to the existing position at common law, see Stewart et al, *Creighton & Stewart's Labour Law*, above n 4, at pp 528–31.

relation to the termination of their engagement.[55]

We would also agree that access to swift and affordable dispute resolution is an entitlement that can and should be extended to all types of workers, regardless of the basis of their engagement. WHS is already a matter dealt with on that basis, especially under the model legislation in force in all jurisdictions except Victoria and (for now) Western Australia.[56] But we would go further and argue for at least three other rights to apply universally. These are the right to seek redress for discrimination or harassment, for invasion of privacy, or for retribution against whistleblowers.

The first of these is presently covered by anti-discrimination or equal opportunity legislation that, while operating fairly broadly, has gaps in protection. These arise because most jurisdictions separately regulate employment, contracts for services, and so on.[57] It is hard to see why the relevant prohibitions should not simply apply in relation to any type of arrangement for the performance of work.[58] The same should apply to privacy rights, including protection against unwarranted or intrusive surveillance. The Privacy Act 1988 (Cth) currently applies (with certain exceptions) only to larger organisations — and because of its 'employee record' exception in s 7B(3), confers fewer protections on employees than other types of worker.[59] Conversely, statutes such as the Workplace Surveillance Act 2005 (NSW) generally apply only to employees.

As for whistleblowing protections, there is no reason why they too should not be conferred broadly on anyone who seeks to disclose information about illegality, corruption or maladministration, without reference to their work status. Of existing laws, South Australia's Whistleblowers Protection Act 1993 (SA) comes closest to that ideal, in that it applies to any person with relevant information to disclose (though in the case of the private sector, the information must generally show illegal conduct). This can be contrasted with the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act

---

55 See, eg, *Fabsert Pty Ltd v ABB Warehousing (NSW) Pty Ltd* (2008) 176 IR 169; [2008] FMCA 1198. This case was brought under Independent Contractors Act 2006 (Cth) Part 3, which applies to some but not all contractors: see Stewart et al, *Creighton & Stewart's Labour Law*, above n 4, at pp 697–8. By contrast, Part 2–3 of the Australian Consumer Law (Competition and Consumer Act 2010 (Cth) sch 2) has a broader application, since being amended with effect from November 2016 to cover 'small business' transactions: see Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth).

56 See the article by Richard Johnstone in this collection.

57 Eg, under the Sex Discrimination Act 1984 (Cth), the term employee is defined to include a contract for services, and there are separate express protections for 'contract workers'. A similar approach is taken in the Disability Discrimination Act 1992 (Cth) and the Age Discrimination Act 2004 (Cth). Cf Anti-Discrimination Act 1991 (Qld) Part 4 Div 2, which prohibits discrimination in relation to 'work and work-related areas'. See further N Rees, S Rice and D Allen, *Australian Anti-Discrimination & Equal Opportunity Law*, 3rd edn, Federation Press, Sydney, 2018, pp 567–9.

58 This suggestion is also canvassed in A Blackham, '"We Are All Entrepreneurs Now": Options and New Approaches for Adapting Equality Law for the "Gig Economy"' (2018) 34 *Int'l J Comp Lab L & IR* 413 at 431.

59 Cf Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108, Vol 2, ALRC, Sydney, 2008, at [40.121], recommending the abolition of the exemption. It also proposed that the Act apply to organisations of all sizes: chap 39.

2019 (Cth), which expands existing prohibitions in statutes such as the Corporations Act 2001 (Cth) to include a wider range of disclosures in the corporate, financial and credit sectors. Its protection will apply not just to employees of 'regulated entities', but to suppliers of services. But again, the specificity of the protected categories means that some types of worker may be excluded.

V Intermediate Categories of Worker

One proposal recently made in the UK by the Taylor Review,[60] and by some American and Australian commentators,[61] is to create a category of 'independent worker' applicable to those labouring in the gig economy. The solution is an old one, which has been used in a number of regulatory regimes to 'fix' the problem of 'employee-like' workers, with varying degrees of success.

Where proposals call for an 'intermediate' category of worker, the logical next step is to identify the rights and obligations that apply within the intermediate zone. Because the categorisation assumes the workers concerned are *not* employees, they cannot receive the full benefit of the protections available to employees. However, as they have been deemed worthy of some protection, they cannot be left wholly in the legal space occupied by the self-employed — a middle space has to be found. A set of rights and obligations must then be identified that are suitable for the intermediate category, but not the genuinely self-employed, and legal definitions have to be developed to establish and delineate those boundary lines.

The exercise of establishing and defining an intermediate category of workers creates additional opportunities for labour engagers to manipulate their contract arrangements to fall within their preferred layer of regulation, and to challenge classifications before the courts. It also creates opportunities for judicial creativity, as those called upon to interpret the new category must find examples of work contracts that fall within each of them — because otherwise why would they exist? These forces may have a tendency in practice to narrow the category of employee so that a suitable range of work contracts can be identified which fall outside of employment but are distinguishable from the self-employed.

---

60 M Taylor, *Good Work: The Taylor Review of Modern Working Practices*, Report, July 2017, at 35–6, at <www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices> (accessed 31 March 2019). For critical analysis of this Review, see K Bales, A Bogg and T Novitz, '"Voice" and "Choice" in Modern Working Practices: Problems with the Taylor Review' (2018) 47 *ILJ* 46.

61 See, eg, S D Harris and A B Krueger, 'A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"', Discussion Paper No 2015-10, The Hamilton Project, December 2015; S D Harris, 'Workers, Protections, and Benefits in the US Gig Economy', 12 July 2018, at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198170> (accessed 31 March 2019); A Stemler, 'Betwixt and Between: Regulating the Shared Economy' (2016) 43 *Fordham Urb LJ* 31; M Rawling and S Kaine, *A New Definition of 'Worker' Could Protect Many from Exploitation*, The Conversation, 14 February 2018, at <https://theconversation.com/a-new-definition-of-worker-could-protect-many-from-exploitation-91083> (accessed 1 May 2019). A similar suggestion has been raised in China: H Yu, 'The Destiny of Web Platform Workers in China: Employees, Nothing or a "Third Option"?' (2018) 2(8) *Jap Lab Issues* 92.

Australian regulators have generally avoided creating an intermediate category of worker, opting instead for a more piecemeal regulatory approach. In relation to issues such as WHS and paid parental leave, broad definitions have been employed for the purpose of coverage, regulating instead on the basis of human interactions with businesses or undertakings (WHS),[62] or on the basis of labour market attachment (paid parental leave).[63] Where the object has not been to create universal rights, regulators have used deeming models or industry specific schemes to overcome the shortcomings of a narrow application of the common law.[64] For example, textile clothing and footwear 'outworkers' are deemed to be employees for the purposes of certain provisions of the FW Act and the protections contained therein, even when they are not engaged under employment contracts.[65] Deeming provisions are especially common in workers' compensation statutes, although the details vary widely between jurisdictions.[66]

One Australian example of an intermediate category comes from the superannuation guarantee scheme, which requires contributions to be made on behalf of any person who 'works under a contract that is wholly or principally for the labour of the person'.[67] This category may appear to cover all types of worker. But in practice labour engagers have often been able to avoid the application of provisions like this. It has been held, for instance, that a contract for services is not caught if its principal aim is to 'produce a given result' (such as the provision of legal, medical or other professional services), or if it permits the contractor to delegate performance to someone else, even if this is not done in practice.[68] While some recent cases have taken a much broader view of the provision, in these cases the relevant workers had already been held to be employees, so that any 'extension' was not strictly necessary.[69]

The intermediate category has been used more often in overseas jurisdictions, and with varying degrees of success. Prominent examples can be found in Canada, Italy, Spain and the UK.

The collective bargaining statutes applicable within many Canadian jurisdictions were extended in the late 1960s to cover 'dependent contractors'. These are workers who are economically dependent on a single labour engager, but legally considered to be self-employed due to other factors of their work that indicate independence.[70] Unsurprisingly, this approach has

62 See, eg, Work Health and Safety Act 2011 (NSW) s 7.

63 An entitlement to a payment under the Paid Parental Leave Act 2010 (Cth) s 35 depends on the claimant having engaged in a sufficient quantity of paid work prior to taking the leave 'whether as an employee, a contractor or otherwise' for themselves or for another entity.

64 See A Clayton and R Mitchell, *Study on Employment Situations and Worker Protection in Australia: A Report to the International Labour Office*, Centre for Employment and Labour Relations Law, University of Melbourne, September 1999.

65 FW Act ss 789BA–789BC.

66 See Peetz, above n 37, Appendix 3.

67 Superannuation Guarantee (Administration) Act 1992 (Cth) s 12(3).

68 See, eg, *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419; [1955] ALR 426; HCA 18; *World Book (Australia) Pty Ltd v Commissioner of Taxation* (1992) 27 NSWLR 377; 108 ALR 510; *Vabu Pty Ltd v Commissioner of Taxation* (1996) 81 IR 150.

69 See, eg, *Roy Morgan Research*, above n 12; *On Call Interpreters*, above n 21.

70 See, eg, Labour Relations Act 1995 (Ont) s 1; Trade Union Act 1978 (Sask) s 2(f)(iii); Labour Relations Act 1987 (Man) s 1. See also J Fudge, E Tucker and L Vosko, 'Employee

given rise to extensive case law on the dividing line between dependent and independent contractors.[71] It is notable that while collective bargaining rights have been extended to this group, minimum standards have not. In consequence, dependent contractors, some of whom arguably should be protected by the same floor of conditions as employees, engage in collective bargaining without the safety net or minimum standards against which to bargain or set a benchmark.[72]

In Italy, an intermediate category of workers, known as 'quasi-subordinate' workers, was created in 1973 to provide access to some labour rights for those providing personal services to a business in circumstances involving collaboration, a lengthy relationship and functional coordination.[73] However, as outlined by Cherry and Aloisi, this new category became a 'discounted alternative' to a standard employment contract, leading to litigation around the categorisation of workers and a significant increase of precarious and non-standard work.[74] Instead of extending rights to self-employed workers, the intermediate category functioned in practice to decrease the rights of workers who would otherwise have been classified as employees.[75] In 2015 this problem was remedied when the intermediate category was effectively repealed. Instead, all labour law protections have been extended to workers who collaboratively provide personal services to businesses, where the business principal organises the method of work.[76] The efficacy of this approach, which does not involve an 'intermediate' category but an extension of the coverage of labour laws to a wider group, is yet to be established.

In Spain, by contrast, the creation in 2007 of an intermediate category of worker, known as 'TRADE',[77] set the bar for inclusion in the intermediate category so high that few self-employed workers fall under the regime at all.[78] In particular, this resulted from the inclusion of a requirement that, to be

---

or Independent Contractor?: Charting the Legal Significance of the Distinction in Canada' (2003) 10 *Can Lab & Empl LJ* 193; H W Arthurs, 'The Dependent Contractor: A Study of the Legal Problems of Countervailing Power' (1965) 16 *UTLJ* 89.

71 In *Algonquin Tavern v Canada Labour Congress* [1981] 3 Can LRBR 337, the Ontario labour board developed a list of 11 indicative criteria to distinguish a 'dependent' contractor from an independent one. See also B A Langille and G Davidov, 'Between Employees and Independent Contractors: A View from Canada' (1999) 21 *Comp Lab L & Pol'y J* 6 at 26.

72 S McCrystal, 'Collective Bargaining Beyond the Boundaries of Employment: A Comparative Analysis' (2014) 37 *MULR* 662 at 675.

73 M A Cherry and A Aloisi, '"Dependent Contractors" in the Gig Economy: A Comparative Approach' (2017) 66 *Am U L Rev* 635 at 660.

74 Ibid, at 666.

75 Ibid; De Stefano, above n 35, at 496.

76 M Del Conte and E Gramano, 'Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under the Italian Legal System' (2018) 39 *Comp Lab L & Pol'y J* 579 at 590; E Ales, 'The Concept of "Employee": The Position in Italy', in B Waas and G Heerma van Voss (Eds), *Restatement of Labour Law in Europe — Volume 1: The Concept of Employee*, Hart Publishing, Oxford, 2017, p 351 at pp 371–4.

77 See J Landa Zapirain, 'Regulation of Dependent Self-Employed Workers in Spain: A Regulatory Framework for Informal Work?', in J Fudge, S McCrystal and K Sankaran (Eds), *Challenging the Legal Boundaries of Work Regulation*, Hart Publishing, Oxford, 2012, p 155; E Sanchez Torres, 'The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labor Law' (2010) 31 *Comp Lab L & Pol'y J* 231.

78 Cherry and Aloisi, above n 73, at 674.

covered, a worker must derive at least 75% of their income from services provided to a single client.[79]

In the UK, a number of statutory protections are extended to 'workers', a term typically defined to cover both employees in the common law sense and a wider group.[80] Section 230(3) of the Employment Rights Act 1996 (UK) provides a typical definition:

> (3) In this Act 'worker' ... means an individual who has entered into or works under (or, where the employment has ceased, worked under) —
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.[81]

The leading case on the distinction between the two 'limbs' of the definition is the decision of the Employment Appeal Tribunal (EAT) in *Byrne Brothers (Formwork) Ltd v Baird*.[82] The case concerned carpenters who had been hired under a subcontracting arrangement. They were offered work from time to time and had to pay for their own travel expenses and supply their own equipment. At first instance they were held not to be employees, because their agreement contained no 'mutuality of obligation' and permitted the use of substitute workers. Yet they did fall within limb (b), because in practice they had to perform the work personally, and it was not done for a business of their own.

The second of these conclusions was challenged on appeal, though not the first. In upholding the Employment Appeal Tribunal's ruling, the EAT adopted a purposive view of the limb (b) definition, considering that it was intended to 'extend protection to workers who are, substantively and economically, in the same position' as employees.[83] It spoke about needing to draw a line between 'workers whose degree of dependence is essentially the same as that of employees' and 'contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves', and added:

> Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services — but with the boundary pushed further in the putative worker's favour. ... The basic effect of limb (b) is, so to speak, to lower the

79 Ibid.

80 A useful table in respect of which rights are extended to workers and the self-employed in the UK is set out in B Jones and J Prassl, 'The Concept of "Employee": The Position in the UK', in B Waas and G Heerma van Voss (Eds), *Restatement of Labour Law in Europe — Volume 1: The Concept of Employee*, Hart Publishing, Oxford. 2017, p 747 at pp 768–9.

81 See also National Minimum Wage Act 1998 (UK) s 54(3); Working Time Regulations 1998 (UK) reg 2.

82 [2002] ICR 667; [2001] UKEAT 542_01_1809.

83 Ibid, at 677.

> pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.[84]

What is striking about the decision, however, is that the very factors used to conclude that the carpenters were workers could so easily have made them employees. Indeed, as Albin and Prassl observe, it may well be that if the limb (b) definition had not been added, the EAT might have reached that conclusion.[85]

The same point can be made about both the decision to find Uber drivers to be workers in *Aslam*,[86] and the recent decision by the UK Supreme Court to make a similar finding about a plumbing and heating engineer in *Pimlico Plumbers Ltd v Smith*.[87] In this last case, the claimant had to perform work personally for the firm that engaged him, worked for 40 hours a week, had to use a van with the firm's logo and was supplied with a mobile phone. The Court had no difficulty whatsoever in concluding that he was not running a business. The firm was said to have 'a grip on his economy inconsistent with his being a truly independent contractor'.[88] Yet by the time the case reached the court, any suggestion of the engineer being an employee had been abandoned, no doubt for strategic reasons.

Strikingly, we have been able to find no decision in the higher UK courts in which a claimant was definitely found (rather than assumed or conceded) not to be employee, yet *was* a limb (b) worker. Limb (b) can be seen to provide an easy way out for both workers and adjudicators. Yet its application also carries the inference that those workers are *not* entitled to the rights and protections reserved for employees, in relation to matters such as unfair dismissal.

Overall, these examples of the implementation of an intermediate approach suggest that creating a 'new' category of worker is not the best way forward, particularly in jurisdictions with a strong existing floor of minimum labour standards. The consequences of such an approach may be to disenfranchise existing employees through reclassification or manipulation of their legal status, as happened in the case of Italy (and may arguably be the case for some workers in the UK as well). The object here has never been to *reduce* the pool of employees covered by standard labour laws. A further consequence evident in the examples under discussion has been greater adversarialism, complicating worker classification and leading to increased litigation at the margins of both employment and the intermediate category.[89] This has been true even with the dependent contractor category in Canada.

A final problem with the use of intermediate categories is that they may not go far enough in extending certain rights to all the self-employed who would benefit from those rights. Rights to freedom of association and collective bargaining are the clearest exemplar of this problem.

---

84 Ibid, at 677–8.

85 E Albin and J Prassl, 'Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion', in M Freedland et al (Eds), *The Contract of Employment*, Oxford University Press, Oxford, 2016, p 209 at p 225.

86 *Aslam*, above n 38.

87 [2018] 4 All ER 641; [2018] UKSC 29.

88 Ibid, at [48].

89 De Stefano, above n 35, at 496.

VI The Scope of Collective Bargaining Rights

There are emerging signs of organisation and collective action by platform workers, both in Australia and overseas.[90] To the extent that some of these workers are self-employed, however, the question arises of whether and how to accommodate the desire to engage in collective bargaining with either the platforms through which they operate or the end users of their services.

The right to organise and act collectively is one that extends, in international law, to the self-employed and not just to those who are economically dependent on one main client for their livelihood.[91] The threat posed by competition laws in many jurisdictions to active collaboration with 'competitor' businesses requires legislative intervention to enable such benefits to be realised.[92] But extension of bargaining rights only to those who meet the constraints of an 'intermediate' category will leave genuinely self-employed workers without access to the potential benefits of collective bargaining.

A better approach would be to enact a more comprehensive definition of employee which moved the boundary of employment to encompass intermediate workers, with appropriate legislation to give separate access to a workable system of collective bargaining for the self-employed. Simply adopting the employee model of collective bargaining for the genuinely self-employed would not be appropriate here as the two groups (employees, including all those in the 'intermediate category'; and the genuinely self-employed) have divergent needs.[93] For the self-employed, for example, without a specific 'target' employer, there is less need for predetermined and contestable bargaining groups. Further, rather than establishing a binding collective contract with a single target, the focus of collective action for self-employed workers may be to produce model or standard contracts for use across a broader client base. In particular, they may seek to establish reasonable minimum engagement conditions, or to engage collectively with regulators or major players in an industry, or overcome the information asymmetries and prohibitive costs of legal advice involved in operating a genuinely independent business.

The Canadian experience provides a useful example. In Canada, legislatures have established sector-specific bargaining regimes to provide collective bargaining rights for home childcare workers and self-employed

90 See, eg, K Minter, 'Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales' (2017) 28 *ELRR* 438; 'TWU Begins Fight for Food Delivery Riders' Rights', *Workforce*, 31 January 2018; 'Uber Hit with "Wildcat Strike" as 15,000 Drivers Switch off App', *Workforce*, 8 August 2018; H Johnston and C Land-Kazlauskas, 'Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy', Working Paper, International Labour Office, 2018; K Vandaele, 'Will Trade Unions Survive in the Platform Economy? Emerging Patterns of Platform Workers' Collective Voice and Representation in Europe', Working Paper No 2018.05, European Trade Union Institute, Brussels, 2018.

91 Creighton and McCrystal, above n 51, at 694–704.

92 See, eg, Johnstone et al, above n 3, at pp 140–7.

93 C J Cranford et al, *Self-Employed Workers Organize: Law, Policy, and Unions*, McGill-Queen's University Press, Montreal, 2005, p 184; S McCrystal, 'Designing Collective Bargaining Frameworks for Self-Employed Workers: Lessons from Australia and Canada' (2014) 30 *Int'l J Comp Lab L & IR* 217.

artists.[94] However, under an expanded definition of 'employee', home childcare workers could reasonably be found to be employees of the regulatory agencies responsible for licensing providers, given the high degree of control of pricing, environment and work involved in the scheme.[95] This would bring them within standard labour law protections, enable them to deal with the licencing agency as an employer, and provide access to minimum standards.

By contrast, the second group, self-employed artists, would be unlikely to fall within a broad definition of employee were one to be adopted. This group more clearly resembles the genuinely self-employed, choosing to invest in their own creative talents, selling the products of their labour to a variety of purchasers, or providing their services to a diverse range of clients. For this group, the capacity to share information, negotiate with government agencies over intellectual property rights, establish minimum standards and pool advice may be of significant value — but a collective regime to do this would not resemble the one provided for dependent employees. In this context, the Canadian Parliament has passed sector-specific legislation which creates a collective bargaining system that is more tailored to the needs of these workers.[96] But it could just as easily have implemented collective bargaining rights for the self-employed more generally.

VII Conclusion

Our preferred approach to the coverage of labour protections is three-pronged. The first task should be to identify those protections that can and should operate on a universal or near-universal basis. As noted earlier, we would identify work health and safety, redress for discrimination or harassment, privacy, access to cheap and effective dispute resolution, whistleblower protection and general obligations of fair dealing as appropriate subjects for broadly framed standards.

Second, where there is a case for creating rights or processes for the self-employed that are analogous but not identical to those enjoyed by employees, the extension should be framed by reference to the purposes and practical operation of the regime in question, rather than assuming it is only for employee-like workers. Collective bargaining rights provide an example here, given that an argument can be made for extending them not just to 'dependent contractors', but to the genuinely self-employed.

Third, the issue of sham contracting, or misclassification of workers, can best be tackled by clarifying and expanding the category of employment, in particular by presuming workers to be employees unless they can be shown to

94 Status of the Artist Act 1992 (Can); Act Respecting the Representation of Certain Home Childcare Providers and the Negotiation Process for Their Group Agreements 2009 (Queb).

95 See S Bernstein, 'Sector-Based Collective Bargaining Regimes and Gender Segregation: A Case Study of Self-Employed Home Childcare Workers in Quebec', in J Fudge, S McCrystal and K Sankaran (Eds), *Challenging the Legal Boundaries of Work Regulation*, Hart Publishing, Oxford, 2012, p 213.

96 See E MacPherson, 'Collective Bargaining for Independent Contractors: Is the Status of the Artist Act a Model for Other Industrial Sectors?' (1999) 7 *Can Lab & Emp LJ* 355. Earlier legislation to similar effect was passed in Quebec: see Cranford et al, above n 93, chap 4.

running their own business.[97] This, we suggest, is the best way to deal with the grey area created by the inconsistent and unpredictable application of judicially-developed tests of employment status. It will never be possible to avoid boundary problems in relation to the scope of labour standards. But a broader and legislatively enshrined definition of employment should be sufficient to negate any case for intermediate categories which carry the clear danger of reducing rather than expanding labour rights and protections.

97 For one proposal, see C Roles and A Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *AJLL* 258 at 279–80.