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Collective Bargaining in Fissured Work Contexts: An Analysis of Core Challenges and Novel Experiments

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Abstract

Facilitating access to effective and meaningful collective bargaining is at the heart of the most recent set of reforms to the *Fair Work Act 2009* (Cth) ('*FW Act*') enacted in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) 2022* (Act). In the shadow of these reforms, this article explores who can engage in collective bargaining in Australia and under what conditions. While there are a range of issues impeding the effectiveness of the collective bargaining system under the *FW Act*, this article focuses on the question of bargaining access under both labour and competition laws and reveals some of the formidable challenges facing employed and non-employed workers alike. It examines how the rise in dependent contractors and the disaggregation of firms—through labour hire, subcontracting, franchising and/or digital platforms—has destabilised the binary conception of employment. The decline in formal employment and the growth of the 'fissured workplace' have not only perpetuated the problem of 'wage theft', they have altered the way in which wages are set in the first place. Moreover, these factors have exposed the tensions that lie between the regulation of mainstream labour markets through worker-orientated labour legislation and the regulation of product markets and business relationships under consumer-orientated competition legislation. The discussion explores the limitations created by the siloing of regulatory approaches to enabling collective bargaining for workers covered by different statutory regimes. We identify that in both labour and competition laws, meaningful access to collective bargaining in fissured work contexts has been frequently stifled by misplaced assumptions about the nature of the regulatory target and the power distribution in business networks. The article contends that a regulatory response to fissuring (or the problem of 'the networked firm') would straddle the labour/competition law divide in various ways, to ensure fissured workers are no longer excluded from exercising collective power by both legal domains.

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I Introduction

The Albanese Labor Government was elected to office in May 2022 partly on the basis of a policy commitment to lift workers' real wages in the context of rapidly rising inflation.[1] Facilitating access to effective and meaningful collective bargaining is at the heart of the most recent set of statutory amendments intended to address this problem.[2] In the shadow of these reforms, this article surveys who can engage in collective bargaining in Australia and under what conditions. While there are a range of issues impeding the effectiveness of the collective bargaining system under the *Fair Work Act 2009* (Cth) ('*FW Act*'),[3] this article focuses on the question of bargaining *access* under both labour and competition laws. This overview reveals some of the formidable challenges facing employed and non-employed workers alike. It examines the way in which the rise in dependent contractors and the disaggregation of firms—through labour hire, subcontracting, franchising and/or digital platforms—has destabilised the binary conception of employment. The decline in formal employment and the growth of the 'fissured workplace' have not only perpetuated the problem of 'wage theft', they have altered the way in which wages are set in the first place.[4] Moreover, these factors have exposed the tensions that lie between the regulation of mainstream labour markets through worker-orientated labour legislation and the regulation of product markets and business relationships under consumer-orientated competition legislation.

We argue that the treatment of self-employed workers can no longer remain outside the scope of labour law scholarship because of the sheer number of workers at the bottom of the labour market who are subject only to competition law regulation. Furthermore, an emerging thread of US scholarship has shown that the fissured workplace has been fostered by competition law which has simultaneously reduced worker power in bargaining and increased the labour market power held by lead firms. The concept of the unitary employer—which underpins traditional forms of collective bargaining—has fallen apart as powerful lead firms seek to shift their core workforce into a network of subordinate, more marginal businesses. From a bargaining perspective, these shifts in business organisation have effectively changed 'a wage-setting problem into a pricing problem'.[5]

These concerns are summarised in Part II of the article which surveys the relevant literature. This is followed by an overview of the key obstacles to collective bargaining faced by employees in the employment law realm (see Part III) and non-employees in the competition law domain (see Part IV). In Part IV, we also touch on the obstacles embedded in the *Independent Contractors Act 2006* (Cth)—which may stymy state-based initiatives designed to facilitate collective activities by self-employed workers. In Part V, we reflect on a range of regulatory and other experiments that have

1. See, eg, Angus Thompson, '"Absolutely": Albanese backs wage growth at rate of inflation', *The Sydney Morning Herald* (online, 10 May 2022) <https://www.smh.com.au/politics/federal/absolutely-albanese-backs-wage-growth-at-rate-of-inflation-20220510-p5ajwv.html>; Paul Karp, 'One in four Australians struggling to make ends meet as inflation strains incomes, study shows', *The Guardian* (online, 3 November 2022) <https://www.theguardian.com/australia-news/2022/nov/03/one-in-four-australians-struggling-to-make-ends-meet-as-inflation-strains-incomes-study-shows>.
2. *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ('*Secure Jobs, Better Pay Act*').
3. See Anthony Forsyth and Shae McCrystal, 'Collective Bargaining and Industrial Action Reform', *Centre for Employment and Labour Relations Law* (Policy Brief, 2022) <https://law.unimelb.edu.au/__data/assets/pdf_file/0006/4275231/Policy-Brief-3_2022.pdf>.
4. David Weil, 'Income Inequality, Wage Determination and the Fissured Workplace' in Heather Boushey, J Bradford DeLong and Marshall Steinbaum (eds), *After Piketty: The Agenda for Economics and Inequality* (Harvard University Press, 2017) 209. See also Timothy Bartkiw, 'Charting a New Course in a Fissured Economy? Employer Concepts and Collective Bargaining in the US and Canada' (2021) 37 *International Journal of Comparative Labour Law and Industrial Relations* 385.
5. Weil (n 4) 211.

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emerged in response to these various challenges. Part V also includes our analysis of the potential limitations of these innovations in delivering greater bargaining power to workers in fissured business structures. In the Conclusion (Part VI), we explore the limitations created by the siloing of regulatory approaches to enabling collective bargaining for workers covered by different statutory regimes. We identify that in both labour and competition laws, meaningful access to collective bargaining in fissured work contexts has been frequently stifled by misplaced assumptions about the nature of the regulatory target and the power distribution in business networks. While we are attentive to the distinct origins and objects of labour and competition laws, we argue that more can, and should, be done to resolve the regulatory tensions that currently exist between these separate statutory frameworks to ensure that access to effective and meaningful collective bargaining does not fall through the cracks created by fissured work contexts.

II Collective Bargaining in a Fissured World of Work

Developments in competition regulation around the mid-twentieth century took the capacity of workers to collectivise in the pursuit of better working conditions to be inherently anti-competitive and unlawful.[6] In response, many common law jurisdictions sought to strike a regulatory compromise between the protective and enabling goals of labour law regulation, and the efficiency and market-based goals of competition regulation via the introduction of an employee exemption from competition prohibitions. 'Dependent' workers in the developed world were mostly regulated by labour laws, remaining relatively insulated from competition law, except in relation to secondary collective bargaining and strike activity.[7] This meant that competition laws were largely free to regulate product markets and business relationships, including the genuinely self-employed, through the pursuit of 'consumer welfare' (ie market-driven prices and enhanced quality of service and goods).

In Australia, this division is currently found in the distinction between the regulation of employed workers under the *FW Act* (and where relevant, State-based industrial regulation) and the regulation of self-employed workers effectively as small businesses subject, for the most part, to the same regulatory arrangements as engaging enterprises. In this respect, access to effective collective bargaining and industrial action, tools necessary to provide workers with the ability to exercise collective voice and improve their working conditions, is provided only to employed workers under the respective State and federal regimes. In the federal context, Part 2-4 of the *FW Act* provides for the making and registration of formal enterprise agreements, setting out requirements relating to the negotiation of those agreements and (in Part 3-3 of the legislation) providing for the capacity to take protected industrial action. This has meant that labour law scholarship in this area has generally been more heavily concentrated on the regulation of collective bargaining by workers under labour law regulatory models.

6. See Sandeep Vaheesan, 'Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages' (2019) 78 *Maryland Law Review* 766. Vaheesan demonstrates that despite the mid-twentieth century shift, the original purposes of competition law enactments were explicitly concerned with checking the power of large businesses and protecting the position of labour. Similarly in Australia, the *Australian Industries Preservation Act 1906–1930* (Cth) expressly sought to regulate 'unfair competition' by businesses which negatively impacted wages or employment.
7. For example, in Australia, the labour exemption from the cartel prohibitions in the relevant competition statutes has almost never applied to secondary strike action in the form of secondary boycotts (discussed in Part IV below). A similar history applies in the US, see Sanjukta Paul and Sandeep Vaheesan, 'American Antitrust Exceptionalism' in Sanjukta Paul, Shae McCrystal and Ewan McGaughey (eds), *Labor in Competition Law* (Cambridge University Press, 2022) 113.

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However, a focus on the regulation of workers and collective bargaining only through the lens of labour law involves a regulatory blind spot—the regulation of employers as enterprises or firms within competition law, and the effect that this has on labour markets, and the regulation of self-employed workers as 'small business' entities. The work of a group of labour and competition scholars, and labour economists, based in the United States ('US'), has highlighted how US competition regulation has facilitated economic consolidation and the accrual of significant labour market power amongst firms, while simultaneously enabling workplace fissuring and the dilution of worker power.[8] Such regulation is not confined to the US, with similar regulatory approaches and outcomes also being seen in Australia, making these observations apposite in the Australian context. In effect, firms have taken advantage of three aspects of competition law regulation to consolidate labour market power, while simultaneously divesting themselves of legal responsibility for the workers on whose services they rely.

First, as Sanjukta Paul has demonstrated, the corporate form itself operates within competition law as an 'exemption' from cartel prohibitions.[9] An enterprise, like Uber or a labour hire company, can provide the services of self-employed workers to a range of consumers at a standard fixed price because of the nature of the enterprise as a single company. However, if those self-employed workers sought to agree on the price they charge for services between themselves, that would attract the attention of competition regulation.[10]

Second, firms have used corporate groups, franchise networks and outsourcing techniques to move the engagement of their non-core workforces to separate corporate entities—so that the legal responsibility for the pay and conditions of those workers rests with those separate entities, and the firms cannot be *legally* responsible for them.

Third, firms have then taken advantage of regulation of corporations that allows them to be treated as corporate groups for economic and other reasons, along with contract and property rights, to exercise effective vertical controls over the legally separate businesses within those networks.[11] The cumulative effect of these three strategies is that firms retain effective economic control through the laws governing corporations, and those of contract and property,[12] while effectively divesting legal responsibility under labour law regulation for the workers concerned.

Moreover, when it comes to wage-setting, the lead firm effectively devolves the task of employee compensation to a network of smaller providers that must then compete for the work on contract price. The workers engaged by each member of the network are then limited to seeking to bargain with each separate enterprise, effectively diluting their bargaining power. Anner, Fischer-Daly and Maffie view enterprise-level bargaining as a form of 'dispersion bargaining', which frequently results in the target exiting the bargaining relationship.

8. See, eg, Sharon Block and Benjamin H Harris, *Inequality and the Labor Market: The Case for Greater Competition* (Brookings Institute Press, 2021); Eric A Posner, *How Antitrust Failed Workers* (Oxford University Press, 2021); Hiba Hafiz, 'Structural Labor Rights' (2021) 119 *Michigan Labor Review* 651.
9. Sanjukta Paul, 'Antitrust as Allocator of Coordination Rights' (2020) 67 *University of California Law Review* 378.
10. Ibid 395–401.
11. See, eg, Brian Callaci, 'What do Franchisees Do? Vertical Restraints as Workplace Fissuring and Labor Discipline Devices' (2021) 1(3) *Journal of Law & Political Economy* 397; Marshall Steinbaum, 'Monopsony and the Business Model of Gig Economy Platforms' (Roundtable on Competition Issues in Labor Markets, OECD, 5 June 2019); Hiba Hafiz, 'Labor's Antitrust Paradox' (2019) 86 *The University of Chicago Law Review* 381; Ioana Elena Marinescy, 'Fighting Monopsony' in Sharon Block and Benjamin H Harris (eds), *Inequality and the Labor Market: The Case for Greater Competition* (Brookings Institute Press, 2021) 55.
12. These rules include those governing intellectual property which are used to justify the imposition of vertical control over firms through contract arrangements: see Hiba Hafiz, 'The Brand Defense' (2022) 43(1) *Berkeley Journal of Employment and Labor Law* 1.

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They explain that firms use three techniques to evade bargaining and undermine worker power:

1) organisational (ie firms subcontract labour or outsource functions to external businesses);
2) geographic (ie firms move to jurisdictions with reduced labour obligations); and
3) technological (ie firms use new technology to weaken labour's bargaining position).[13]

While lead firms have formally removed themselves from the role of 'employer', they continue to exert indirect control over working conditions within the subordinate firm.[14] This strategy can have positive effects from the point of view of the consumer (in the form of reduced prices), from the perspective of investors (in the form of increased returns) or from the standpoint of executives (in the form of enhanced compensation).[15] However, it has rarely delivered better outcomes for workers.

In short, the combination of these strategies has frequently diminished workers' power in collective bargaining by severing the nexus between control over work conditions and legal responsibility for those same conditions, leaving workers bargaining with effectively powerless firms.[16] Bartkiw argues that, where bargaining only occurs with the subordinate firm, this results in 'a constrained relation, denying workers the opportunity to exert their influence with the lead firm exercising control over the terms and conditions of work'.[17] Moreover, the putative target of bargaining—the subordinate firm—is placed in an invidious position: it must sustain a viable business in the face of intense competitive pressure, while staring down the prospect of being replaced by an alternative supplier at the behest of the lead firm.[18]

Added to this, unions are structured to deal with hierarchically organised management and are not well equipped to engage in bargaining across networks—particularly via formal channels. The splintering of vertically integrated organisations into smaller, marginal firms which are geographically dispersed makes union organising difficult and keeps lead firms at a distance from any

13. Mark Anner, Matthew Fischer-Daly and Michael Maffie, 'Fissured Employment and Network Bargaining: Emerging Employment Relations Dynamics in a Contingent World of Work' (2021) 74(3) *Industrial and Labor Relations Review* 689, 690–1, 698.
14. This can be done through horizontal labour market controls like 'no poaching' and non-compete clauses in worker contracts, which have the effect of increasing firm labour market power: see, eg, Evan Starr, 'Are Noncompetes Holding Down Wages?' in Sharon Block and Benjamin H Harris (eds), *Inequality and the Labor Market: The Case for Greater Competition* (Brookings Institute Press, 2021) 127.
15. Weil (n 4) 223.
16. There are different concepts of 'control' emerging from the literature, including 'bureaucratic' or 'supervisory' control, as well as a broader notion of control involving the power to establish the nature of the working arrangement itself and the terms and conditions of the work-remuneration exchange. See Bartkiw (n 4) 391, citing Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) and Michael Harper, 'Defining the Economics Relationship Appropriate for Collective Bargaining' (1998) 39(2) *Boston College Law Review* 329.
17. Bartkiw (n 4) 396.
18. Ibid 396–7.

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bargaining overtures.[19] As Anner, Fischer-Daly and Maffie explain, 'dispersion' bargaining enables businesses to 'adjust their networks in a manner that penalizes actors who attempt to improve labor conditions', thus enhancing managerial power to obtain concessions from workers.[20]

The other part of this puzzle is the treatment of workers within competition law where they are engaged as self-employed, and the degree to which collective bargaining by those workers is genuinely anti-competitive in nature. This has been prompted by the rise in workers falling outside of labour law regulation. It also reflects increasing recognition that genuinely self-employed workers are protected by the principles of freedom of association under International Labour Organization ('ILO') standards and should not artificially have their rights to collective bargaining abrogated through exclusion from labour laws.[21] This approach engages with competition law on its own terms, to challenge the idea that horizontal co-ordination of workers and small businesses is necessarily anti-competitive, and to demonstrate the potential efficiency gains through reduced transaction costs and information asymmetry, alongside the creation of better contracts by ensuring that all parties to contractual relationships are able to input into the contract terms.[22] Such arguments are also congruent with the idea of the enterprise or firm acting as an aggregator of property, contract and economic rights which generate efficiencies within markets and therefore are familiar to competition law regulators. Some competition law agencies have expressly taken this path, with the Australian regulator, the Australian Competition and Consumer Commission ('ACCC') having pursued greater horizontal co-ordination rights for small businesses over the past decade, leading to the declaration of a small business class exemption for collective bargaining described below.[23] We will now demonstrate how these obstacles to entry to collective bargaining in fissured work contexts manifest within the Australian regulatory models, first for employee workers and then for the self-employed.

19. Union organising is difficult in these contexts because the workforce is generally more precarious and less inclined to unionise and because the employing entity (ie the target of an organising drive) is not always clear: see Anthony Forsyth, *The Future of Unions and Worker Representation: The Digital Picket Line* (Hart Publishing, 2022). In addition, unions face the effects of the three dispersion bargaining strategies identified by Anner, Fischer-Daly and Maffie (n 13), the application of which we explore in the Australian context in Part III below.
20. Anner, Fischer-Daly and Maffie (n 13) 699. It is also notable that in the US it is common for competition agencies to pursue workers for allegedly anti-competitive behaviour, while actions against firms and large businesses remain comparatively rare: see, eg, Sandeep Vaheesan and Matthew Buck, 'How antitrust law can help—Instead of hurt—Workers' in Sharon Block and Benjamin H Harris (eds), *Inequality and the Labor Market: The Case for Greater Competition* (Brookings Institute Press, 2021) 85; Vaheesan (n 6).
21. See, eg, Tonia Novitz, 'Collective Rights for Working People: The Legal Framework Established by the International Labour Organization' in Sanjukta Paul, Shae McCrystal and Ewan McGaughey, *Labor in Competition Law* (Cambridge University Press, 2022); Breen Creighton and Shae McCrystal, 'Who is a Worker in International Law?' (2016) 37(3) *Comparative Labor Law and Policy Journal* 691; Valerio De Stefano, 'Not As Simple As it Seems: The ILO and the Personal Scope of International Labour Standards' (2021) 160(3) *International Labour Review* 387.
22. See, eg, Warren Grimes, 'The *Sherman Act*'s Unintended Bias against Lilliputians: Small Players Collective Action as a Counter to Relational Market Power' (2001) 69(1) *Antitrust Law Journal* 195; Simon Deakin and Frank Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in Hugh Collins, Paul Davies and Roger Rideout (eds), *The Legal Regulation of the Employment Relation* (Kluwer Law, 2000) 29; Karl Klare, 'Countervailing Workers' Power as a Regulatory Strategy' in Hugh Collins, Paul Davies and Roger Rideout (eds), *The Legal Regulation of the Employment Relation* (Kluwer Law, 2000) 63; Sanjukta Paul, 'The Enduring Ambiguities of Antitrust Liability for Worker Collective Action' (2016) 47(3) *Loyola University Chicago Law Journal* 969.
23. See below Part IV.

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III Obstacles to Collective Bargaining under the Fair Work Act

When considering the impediments to collective bargaining in fissured work contexts under the *FW Act*, it is necessary to explain the relevant provisions as they applied until the amendments made in late 2022 by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (*'Secure Jobs, Better Pay Act')*, and the amended provisions which seek to overcome some of those barriers. Under the original *FW Act* provisions, collective bargaining was constrained by several related foundational concepts: bargaining could only be engaged in by *employees* with their *employer*, and then (primarily) for an agreement applying to all or part of the employer's *enterprise*. The right to take 'protected' industrial action in support of negotiating claims was similarly confined.[24]

The definitions of 'employee' and 'employer' for these purposes have not been altered by the *Secure Jobs, Better Pay Act* amendments. An 'employee' is 'a person who is usually such an employee' according to the 'ordinary' meaning of that term—that is, based on the common law definition of employee.[25] The principal limitation this imposes is to exclude independent contractors from the capacity to bargain for, or take industrial action in support of demands for, a collective agreement. This includes the large number of workers engaged through digital platforms, most of whom are putatively labelled as contractors, even though many characteristics of their work are broadly consistent with an employment relationship.[26] Further, a recent change in the approach of the High Court to the classification of workers has narrowed the prospect of platform workers being found to be employees under the common law definition.[27] This means that these workers are unlikely to access the collective bargaining provisions of the *FW Act* without statutory change.[28]

The definition of 'employer' for purposes of the *FW Act* is also premised on the common law understanding of that term.[29] In the context of the legislation's scheme for collective bargaining and industrial action, the definition of 'employer'[30] is linked with the concept of the 'enterprise'.[31] Under the original legislative scheme, this mostly confined the permissible scope of

24. Even within these narrow confines, the right to take industrial action has been heavily circumscribed: see Shae McCrystal, 'Why Is It So Hard to Take Lawful Strike Action in Australia?' (2019) 61(1) *Journal of Industrial Relations* 129.
25. See *Fair Work Act 2009* (Cth) (*'FW Act*') ss 12 (definition of 'employee'), 13 ('national system employee'), 15(1); *C v Commonwealth* (2015) FCR 81 at [36]. See also *FW Act* (n 25) ss 170, 172, 407, 409–10.
26. The consequences of misclassification, including underpayment, heightened safety risks and other forms of exploitation of gig workers, are well-documented: see, eg, Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (Report, 2020); Deepa Das Acevedo, *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (Cambridge University Press, 2020); Forsyth (n 19) 146–64.
27. *ZG Operations Pty Ltd v Jamsek* (2022) 96 ALJR 144; *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89. The new High Court approach has been applied by the FWC in *Nawaz v Rasier Pacific Pty Ltd T/A Uber BV* [2022] FWC 1189 and in *Deliveroo Australia Pty Ltd v Franco* [2022] FWCFB 156, where a Full Bench overturned the first instance finding that a Deliveroo rider was an employee who had been unfairly dismissed when disconnected from the app. For discussion of the High Court approach, see Joellen Riley Munton, 'Boundary Disputes: Employment and Independent Contracting in the High Court' (2022) 35(1) *Australian Journal of Labour Law* 79.
28. On possible reforms to address this, see Part V below.
29. See *FW Act* (n 25) ss 12 (definition of 'employer'), 14 ('national system employer'), 15(2). National system employers are those employing entities covered by the *FW Act*, based on the federal Parliament's capacity to regulate labour relations under *The Australian Constitution*: see Andrew Stewart et al, *Creighton and Stewart's Labour Law* (The Federation Press, 6th ed, 2016) 101–14, 127–34.
30. See also *FW Act* (n 25) ss 170, 172, 407.
31. Defined as 'a business, activity, project or undertaking': *FW Act* (n 25) s 12 (definition of 'enterprise').

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agreement-making to the relationship between the direct employing entity and its employees.[32] Following the *Secure Jobs, Better Pay Act*, a wider range of agreement options is now available including the ability of employees to bargain with entities other than the direct employer (in certain limited circumstances).

The bargaining scheme in the *FW Act* (both prior to and following the amendments introduced by the *Secure Jobs, Better Pay Act*) is centred on the making of a 'single-enterprise agreement' between an employer and its employees.[33] A single-enterprise agreement can be made for all or part of a single business (eg an employer could make 'several agreements … covering different locations or operational units within an enterprise').[34] Agreements covering more than one employer were possible under the original *FW Act*, within very tight constraints. We explain each of these options now, outlining how they have been altered by the *Secure Jobs, Better Pay Act*.

First, a single-enterprise agreement could previously be reached between two or more 'single-interest employers' and their employees.[35] This form of bargaining was only available to: joint venture parties; related corporate entities; franchisees who obtained authorisation from the FWC; and employers with a common interest, who obtained a single interest employer declaration from the relevant Minister, and authorisation from the FWC. Single-interest status for employers could not be sought by employees or unions.[36] Following the *Secure Jobs, Better Pay Act*, this type of agreement can still be made by 'related employers', meaning employers who are related entities, or who carry on a joint venture or common enterprise.[37] However, the amendments added a new type of agreement, called a 'single interest employer agreement', which is a form of multi-enterprise agreement that is made where a 'single interest employer authorisation' is in effect before the agreement is made.[38] Notably, authorisation can be sought not only by employers, but also by unions and employees to bargain for an agreement to cover the employees of two or more employers who are either related franchise entities,[39] or who have 'clearly identifiable common interests' determined by reference to factors including: the geographic location of the various employers; the regulatory regime; and the nature of the enterprises to which the agreement will relate and the terms and conditions of employment in those enterprises.[40] Several other requirements also have to be satisfied before the FWC can grant an authorisation for bargaining based on the common interests of the employing enterprises, including the public interest[41] and that the operations and business

32. See Anthony Forsyth, 'The Identity of the "Employer" in Australian Labour Law: Moving Beyond the Unitary Conception of the Employer' (2020) 13(1) *Italian Labour Law e-Journal* 13, 16–17.
33. *FW Act* (n 25) s 172(2)(a). Bargaining for single enterprise agreements remains the Labor Government's preferred option: see Commonwealth, *Parliamentary Debates*, House of Representatives, 27 October 2022, 4 (Tony Burke, Minister for Employment and Industrial Relations) ('Burke Second Reading Speech').
34. Stewart et al (n 29) 359.
35. *FW Act* (n 25) s 172(2)(a), later amended by *Secure Jobs, Better Pay Act* (n 2).
36. See *FW Act* (n 25) ss 172(5)(a), 172(5)(b), 172(5)(c), later amended by *Secure Jobs, Better Pay Act* (n 2). See also *FW Act* (n 25) pt 2-4 div 10. For an example of the granting (and variation to extend the operation of) a single interest employer authorisation, see *Application by Lutheran Church of Australia Queensland District T/A Lutheran Education Queensland* [2021] FWC 778.
37. *FW Act* (n 25) s 172(5A), as amended by *Secure Jobs, Better Pay Act* (n 2) s 627C.
38. *FW Act* s 12 (definition of single interest employer agreement), as amended by *Secure Jobs, Better Pay Act* (n 2) s 627.
39. *FW Act* ss 249(1)(b)(v), (2), as amended by *Secure Jobs, Better Pay Act* (n 2) s 633A.
40. *FW Act* (n 25) ss 249(3)(a), (3A), as amended by *Secure Jobs, Better Pay Act* (n 2) s 634A.
41. *FW Act* (n 25) s 249(3)(b)), as amended by *Secure Jobs, Better Pay Act* (n 2) s 634A.

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activities of the employers are reasonably comparable.[42] In addition, where an employer has not agreed to bargain, the FWC must be satisfied that the threshold size of the enterprise is met[43] and that a majority of employees at each enterprise support bargaining for this kind of agreement.[44] Protected industrial action was available for single interest employer bargaining previously and can be taken in support of the expanded concept of this type of agreement under the recent amendments.

Secondly, the original *FW Act* permitted the making of a 'multi-enterprise agreement' between two or more employers and their employees.[45] Several employers could voluntarily agree to make a multi-employer agreement, but this happened rarely[46] and never on the scale of an entire industry. Protected industrial action was not available to employees and unions to compel this form of bargaining. This remains the case following the *Secure Jobs, Better Pay Act* amendments, which rebadged this as bargaining for a cooperative workplace agreement.[47]

Thirdly, multi-enterprise agreements could previously be made using the dedicated stream of bargaining for low-paid employees.[48] Although specifically intended to stimulate bargaining to move employees off awards in sectors such as aged care, cleaning and security, the low-paid bargaining provisions overwhelmingly failed to do so, with only one successful application in over 13 years.[49] Under the Amendments, this has become the supported bargaining stream, which can be activated upon authorisation by the FWC based on factors such as whether low pay rates prevail in the relevant industry or sector, and the common interests of the various employers (in particular, whether they are funded by federal or state/territory governments).[50] Industrial action could not be taken in the former low-paid bargaining stream, but is available for supported bargaining under the *FW Act* as amended.

The shortcomings of the Australian collective bargaining model under the original *FW Act* were largely attributable to the centring of bargaining obligations and industrial action rights on a 'target' framed around the unitary concept of the employer.[51] As Bartkiw points out, the concept of the employer is a 'key part of the ideational framework determining how worker collective action is bounded and channelled, as they define some combination of persons, property and organisation against which the power of collective worker organisation may somehow be brought to bear'.[52]

The most obvious example of this relates to labour hire arrangements. In this context, employees could only bargain with the agency that employs them and not with the host business where they are

42. *FW Act* (n 25) s 249(1)(b)(vi) as amended by *Secure Jobs, Better Pay Act* (n 2) s 633A.
43. That is, an employer must employ at least 20 employees to be the subject of a single interest employer authorisation which it has not agreed to: *FW Act* s 249(1B)(a), as amended by *Secure Jobs, Better Pay Act* (n 2) s 633A.
44. *FW Act* ss 249(1B)(d), (1C), as amended by *Secure Jobs, Better Pay Act* (n 2) s 633A.
45. *FW Act* (n 25) s 172(3)(a).
46. Productivity Commission, *5-Year Productivity Inquiry: A More Productive Labour Market* (Interim Report No 6 October 2022) 62.
47. *FW Act* ss 12 (definition of 'cooperative workplace agreement') 172(3)(a), as amended by *Secure Jobs, Better Pay Act* (n 2) ss 627B, 642.
48. *FW Act* (n 25) pt 2–4 div 9, as amended by *Secure Jobs, Better Pay Act* (n 2) s 602.
49. *United Voice v Australian Workers' Union of Employees (Qld)* (2011) 207 IR 251. See also Stewart et al (n 29) 912–913.
50. *FW Act* ss 243(1), (2), as amended by *Secure Jobs, Better Pay Act* (n 2) s 611. See also ss 243(2A), (2B), under which the Minister can declare an industry, occupation or sector for purposes of the FWC granting a supported bargaining authorisation.
51. See Part II above and Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29(1) *Australian Journal of Labour Law* 78, 86; Jeremias Prassl, *The Concept of the Employer* (Oxford University Press, 2015) 1, 13.
52. Bartkiw (n 4) 414.

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placed to perform work.[53] In contrast, it has been somewhat more common for groups of franchisees (and/or the franchisor) to use various statutory channels to bargain beyond the direct employment relationship and across the boundaries of an individual enterprise. This has most commonly involved groups of franchisees bargaining with their employees as single-interest employers,[54] or using identical template single enterprise agreements across franchise networks.[55] Franchisors have not generally been part of those arrangements, and employee groups have not been able to bring them to the bargaining table.

The limited statutory framing of the 'target' of bargaining under the *FW Act* has facilitated the exploitation of limitations in the *FW Act* by some employers to avoid having to engage in genuine (or any) collective bargaining with employees. Here, we see on display the dispersion bargaining strategies identified by Anner, Fischer-Daly and Maffie.[56] First, organisational strategies including internal fissuring[57] have been deployed, for example, BHP's creation of a separate entity (BHP Operations Services), effectively an in-house labour hire provider of mining production and maintenance functions for which the company is seeking to establish discrete enterprise agreements.[58] Likewise, Qantas engaged in organisational restructuring, including outsourcing ground services and other functions to external providers,[59] and proposing to move large numbers of agreement-covered staff in back-of-house services onto individual contracts to carve them out of an upcoming agreement renegotiation.[60] Secondly, the national airline also sought to weaken workers' associational power by engaging in the geographic strategies of dispersion bargaining identified by Anner, Fischer-Daly and Maffie.[61] Qantas has splintered its international and domestic operations through the creation of separate entities to service certain routes (such as the NZ-based subsidiary JetConnect) to avoid the application of more robust labour regulation in Australia.[62] Thirdly, dispersion bargaining through technology—the use of algorithmic work systems to impose 'barriers

53. Industrial Relations Victoria, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report* (Final Report, 31 August 2016) 102.
54. See eg *Yum! Restaurants Australia Pty Limited* [2019] FWC 2604.
55. See eg *Application by JCSR Holdings Pty Ltd T/A Grill'd The Junction* [2020] FWCA 6463 and *ALLT Enterprises Pty Ltd T/A Grill'd Shellharbour* [2020] FWCA 6465.
56. Anner, Fischer-Daly and Maffie (n 13).
57. Ibid 699–700.
58. See, eg, 'BHP resumes bid to secure labour hire agreements', *Workplace Express* (online at 18 August 2020) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=2&selkey=59249&hlc=2&hlw=>; 'FWC asked to ignite slow-burning BHP negotiations', *Workplace Express* (online at 5 October 2022) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=61604>.
59. See, eg, 'Qantas a "textbook case" for multi-employer bargaining: Senator', *Workplace Express* (online at 19 September 2022) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=61549>. Note that one of the airline's outsourcing initiatives was found to have been unlawful by the Full Court of the Federal Court in *Qantas Airways Ltd v Transport Workers Union of Australia* (2022) 292 FCR 34; that decision is presently the subject of an appeal before the High Court of Australia.
60. 'Qantas seeking to shift 1000-plus to individual contracts', *Workplace Express* (online at 30 September 2022) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=2&selkey=61597>.
61. Anner, Fischer-Daly and Maffie (n 13) 700-1.
62. See, eg, 'Qantas/JetConnect employment arrangements not a sham: FWA majority', *Workplace Express* (online at 6 September 2011) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=46350>; Stephen Long, Mary Fallon and Stephanie March, 'Qantas staff fear the airline's stellar safety reputation is at risk as pressure from management mounts', *ABC News* (online at 5 September 2022) <https://www.abc.net.au/news/2022-09-05/qantas-staff-far-airlines-reputation-at-risk/101391324>.

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between labor and lead-firm management'—can be seen in the growth of digital platform work in Australia over the last decade.[63]

Overall, the inability (for the most part) of workers and unions to bargain with entities beyond the direct employing enterprise has contributed to the contraction of the incidence of collective bargaining over the last decade,[64] confounding the hopes and intent of the *FW Act*'s framers.[65] The Labor Government's stated intention was that the new options for bargaining in the *Secure Jobs, Better Pay Act* would provide employers and employees 'flexible options for reaching agreements at the multi-employer level' that would enable more workers to obtain access to wage increases.[66] We examine the likely effectiveness of the amendments in overcoming obstacles to collective bargaining in some fissured work contexts in Part V below. In the next Part, the discussion turns to consider the impediments to collective bargaining faced by workers outside the framework of labour law.

IV Obstacles to Collective Bargaining Beyond the Fair Work Act

For workers who operate outside of the protective sphere of the *FW Act*, the regulatory landscape for collective bargaining is complicated. Workers who do not have a contract of employment have many labels, including 'self-employed', 'independent contractors', 'consultants' and 'dependent contractors'. However, for the purposes of legal regulation, they are effectively treated as small businesses.[67] There are two main regulatory contexts that operate as obstacles to collective bargaining beyond the *FW Act*—competition regulation and the *Independent Contractors Act 2006* (Cth) ('*IC Act*').

A *The Competition Law Framework*

Consistent with the earlier discussion regarding the general aversion to economic cooperation between competitor firms, the *Competition and Consumer Act 2010* (Cth) ('*CC Act*') expressly prohibits horizontal economic co-ordination between parties operating within the same market for the sale of goods and services.[68] The forms of conduct prohibited by the cartel provisions include price fixing, bid rigging, territorial allocation, boycotts and 'concerted practices'. Most of these activities are outlawed 'per se' with no evidence required of anti-competitive impact in practice. Collective bargaining by employees is expressly carved out from the cartel prohibitions by virtue of s 51(2)(a) of the *CC Act*. However, this exemption does not extend to secondary boycott conduct (discussed below), nor does it extend to employee conduct which is not related to the remuneration,

63. Anner, Fischer-Daly and Maffie (n 13) 701-2.
64. See, eg, Alison Pennington, 'The Fair Work Act and the Decline of Enterprise Bargaining in Australia's Private Sector' (2020) 33(1) *Australian Journal of Labour Law* 68; Productivity Commission (n 46) 50–2.
65. See Breen Creighton, Anthony Forsyth and Shae McCrystal, 'Evaluating the Australian Experiment in Enterprise Bargaining' in Shae McCrystal, Breen Creighton, Andrew Forsyth (eds), *Collective Bargaining under the Fair Work Act* (The Federation Press, 2018) 1, 22–3.
66. Burke Second Reading Speech (n 33).
67. One notable exception to this position is tax, where self-employed workers may be treated as employees for the purposes of the applicable tax rate through the Personal Services Income Rules in the *Income Tax Assessment Act 1997* (Cth) divs 85, 87. For discussion of the tax implications of the gig economy and the misclassification of workers, see Celeste M Black, 'The Future of Work: The Gig Economy and Pressures on the Tax System' (2020) 68 *Canadian Tax Journal* 69.
68. The cartel provisions are set out in *Competition and Consumer Act 2010* (Cth) ('*CC Act*') pt IV; ss 45, 45AA-AU are the most relevant in the context of this paper.

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conditions of employment, hours of work or working conditions of employees.[69] Most critically, the employee exemption does not cover workers who are not classified as employees at common law.

In relation to non-employed workers, the effect of the cartel provisions is to preclude such workers from engaging in collective activities including information sharing about their work arrangements, acting in concert to seek better work conditions and taking action akin to strike action. These provisions have a chilling effect on forming collectives and inhibiting discussion about working conditions due to genuine fear of inadvertently breaching the rules.[70]

Part IV also contains prohibitions on secondary boycotts when one party acts in concert with another party to engage in conduct that hinders or prevents a third person from supplying or acquiring goods or services from a fourth person, where the fourth person is not an employer of either the first or second person and the intention or likely effect is to cause substantial loss or damage to the fourth person's business.[71] For example, in 2013, the Construction, Forestry, Mining and Energy Union ('CFMEU') acted in concert with shop stewards in Melbourne to prevent the concrete supplier Boral from delivering concrete to 12 construction sites operated by the construction company Grocon.[72] The goal of the secondary boycott was to place pressure on Grocon by blocking its supplies through secondary action.

The secondary boycott provisions effectively outlaw all forms of sympathy strike action by workers. Employees are not exempt from the provisions. Industrial action taken in the context of the *FW Act* bargaining regime can be prosecuted under the *CC Act* if it otherwise breaches s 45D. In a multi-employer bargaining context, the secondary boycott provisions would effectively outlaw any industrial action taken by workers where those workers were attempting to place pressure on businesses that did not directly employ or engage them. In fissured workplaces, the locus of control is often a business that does not directly employ or engage staff, and the capacity to take industrial action to bring pressure to bear on that third party—particularly where it does not have employees or workers of its own who have the capacity to take industrial action—is important. The provision of a meaningful right to strike in the fissured work context would have to grapple with the secondary boycott provisions.

Taken together, the cartel and boycott provisions effectively prohibit almost all forms of collective activity, except the most basic of rights simply to be in association. However, in certain circumstances, conduct can be exempt from these prohibitions. The *CC Act* contains provisions—via 'authorisation' and 'notification' mechanisms—which allows conduct of demonstrable 'public benefit' to proceed even if it would otherwise breach the provisions.[73]

69. This could present difficulties in multi-enterprise bargaining by employees, to the extent that the subject matter of the bargaining relates to changing internal firm dynamics or the scope and operation of the overarching business model. See Shae McCrystal and Phil Syrpis, 'Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union' in Alan Bogg and Tonia Novtiz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 421.
70. In 2019, the ACCC obtained enforceable undertakings from two Sydney roofing companies who had engaged in price discussions on social media. See 'Criminal cartel case against CFMMEU starting in February', *Workplace Express* (online at 20 November 2020) <https://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=59569>. The Australian Medical Association has long argued that the competition rules impede the capacity of self-employed doctors to act collaboratively without first 'consulting lawyers': see, eg, Australian Medical Association, Submission to the Dawson Review of the Competition Provisions of the Trade Practices Act (20 September 2002).
71. *CC Act* (n 68) ss 45D.
72. *ACCC v CFMEU* [2016] FCA 504; 'CFMEU hit with record $1 million secondary boycott penalties', *Workplace Express* (online at 14 February 2018) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=56487>.
73. *CC Act* (n 68) pt VII divs 1, 2.

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Both of these mechanisms require the preparation of a submission to the ACCC to outline how the proposed conduct would be of demonstrable public benefit—that is, where the public benefit to flow from the proposed activity would otherwise outweigh any likely anti-competitive effect.[74] Over time, a body of ACCC decisions developed showing that in almost all cases involving small business actors, including the self-employed, efficiency gains, reduced transaction costs and decreased information asymmetry arising from proposed collective conduct that was entirely voluntary in nature and did not include any potential boycott conduct (either primary or secondary), would outweigh any potential anti-competitive detriment.[75] This led the ACCC to seek the power to make a class exemption for such conduct, avoiding the need for parties to receive the ACCC's prior 'permission' for collective bargaining.[76] In 2017, the *CC Act* was amended to facilitate the creation of a class exemption,[77] and after due consultation by the ACCC, a class exemption came into effect in June 2021.[78] A brief overview of the class exemption mechanism is provided in Part V below. However, it should be noted that the exemption only removes potential liability under the *CC Act*. It does not provide a framework or structure for collective bargaining nor establish any mechanism for the creation of enforceable multi-party agreements. This regulatory gap means that small businesses and self-employed workers can now seek to engage in collective bargaining, but are left to the laws of contract when reaching agreements.[79] This regulatory gap is further reinforced by the *Independent Contractors Act 2006* (Cth) ('*IC Act*'), which may stymy state and territory regulation of self-employed workers.

B *The Independent Contractors Act 2006*

The *IC Act* has not garnered a great deal of attention since its introduction in 2006. It is largely viewed as weak and ineffective, for example, very few claims have been made under its provisions for review of harsh or unfair contracts.[80] However, the rise of the gig economy and the impetus to regulate platforms on the part of some state and territory governments[81] has led to renewed focus on the inhibiting features of the *IC Act*.

The stated objects of the legislation include 'recognis[ing] independent contracting as a legitimate form of work arrangement that is primarily commercial' and 'prevent[ing] interference with the terms of genuine independent contracting arrangements'. Indeed a central, if not predominant, concern of the *IC Act* is to oust the operation of state and territory laws which 'confer or impose rights, entitlements, obligations or liabilities of a kind more commonly associated with

74. See John Duns, 'Competition Law and Public Benefits' (1994) 16 *Adelaide Law Review* 245; Rhonda Smith, 'Authorisation and the Trade Practices Act: More About Public Benefit' (2003) 11 *Competition and Consumer Law Journal* 21; Shae McCrystal, 'Is there a public benefit in improving working conditions for independent contractors? Collective bargaining and the *Trade Practices Act 1974* (Cth)' (2009) 37 *Federal Law Review* 263.
75. For discussion of the ACCC approach, see Shae McCrystal, 'Collective Bargaining by Self-Employed Workers and the Concept of "Public Benefit"' (2021) 42 *Comparative Labor Law and Policy Journal* 101.
76. The history behind the introduction of the class exemption is set out in Tess Hardy and Shae McCrystal, 'Bargaining in a Vacuum? An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses' (2020) 42(3) *Sydney Law Review* 311.
77. *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).
78. Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020, made pursuant to *CC Act* (n 68) s 95AA and *Competition Code* s 95AA.
79. As to the difficulties at common law see Shae McCrystal, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20(1) *Australian Journal of Labour Law* 1.
80. James (n 26) 166–8.
81. See *Independent Contractors Act 2006* (Cth) ('*IC Act*') Part V.

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employment relationships'.[82] It does this through s 7, which expressly excludes the application of any state or territory laws that provide rights or entitlements to parties to services contracts, or which otherwise deem them to be employers or employees, in respect of 'workplace relations matters'.[83] Workplace relations matters for this purpose include agreement-making and strike action.[84] In consequence, any state or territory laws which purport to allow independent contractors to engage in collective agreement-making or take industrial action are of no effect, unless they have been expressly excluded from the operation of the *IC Act*. Two pre-existing state statutory regimes relating to transport owner drivers were excluded from the application of s 7,[85] and s 7(2)(c) allows for future declarations exempting other state and territory laws.[86] The existence of these exemptions for particular State regulation of transport industry workers provides significant scope for State jurisdictions to pursue novel regulation of collective bargaining under those Acts.

V Novel Experiments—Recent and Proposed Responses to the Problems of Collective Bargaining in Fissured Work Contexts

We have seen, in Parts III and IV of this article, how the *FW Act*—and a combination of the *CC Act* and the *IC Act*—have operated to limit the capacity of workers to engage in collective action to improve their working conditions, in a range of fissured work contexts. In this Part, we canvass several novel experiments aimed at overcoming these limits on access to collective bargaining. These include union attempts to engage in collective negotiations with gig economy operators and regulatory initiatives at federal and state level. Throughout this discussion, we provide analysis of the impact (or likely impact) of these approaches.

A *Informal 'Collective Bargaining' Between Unions and Platforms*

Internationally, trade unions and self-organised worker collectives have engaged in efforts to negotiate collectively on behalf of gig workers, despite the constraints imposed by the contractor status of gig workers and by competition laws.[87] In Australia, given the limitations on the capacity of non-employee gig workers (or their unions) to engage in collective bargaining under the *FW Act*,[88] some union bodies have sought to engage in informal bargaining with platforms. In 2017,

82. Ibid s 3(2)(c).
83. The *IC Act* (n 81) applies to contracts for services with a requisite constitutional connection—that at least one party is a constitutional corporation or the Commonwealth, or the work concerned is wholly or principally to be undertaken in a Territory. The only contracts excluded are those that are between natural persons for work to be performed wholly or principally in a state (not a territory).
84. *IC Act* (n 81) s 8 (definition of 'workplace relations matters').
85. *Industrial Relations Act 1996* (NSW) ch 6 (allowing for contract determinations for defined transport workers); *Owner Drivers and Forestry Contractors Act 2005* (Vic) which allows for some protection of transport workers in Victoria and includes collective bargaining provisions. For discussion, see Brendan Johnson, 'Developing Legislative Protection for Owner Drivers in Australia: The Long Road to Regulatory Best Practice' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 121, 131–5.
86. The *Independent Contractors Regulations 2016* cl 6(g) excludes the *Owner Drivers (Contracts and Disputes) Act 2007* (WA) which provides for the regulation of contracts and disputes concerning contracts of carriage entered into by owner drivers in WA.
87. See, eg, Felix Hadwiger, *Realizing the Opportunities of the Platform Economy through Freedom of Association and Collective Bargaining* (ILO Working Paper 80 September 2022); Mariagrazia Lamannis, *Collective Bargaining in the Platform Economy: A Mapping Exercise of Existing Initiatives* (European Trade Union Institute, Brussels, 2023).
88. See *FW Act* (n 25) Part III.

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Unions NSW (the peak union organisation in that state) reached an agreement with the home-based task services app Airtasker which was lauded as a 'world first' development in the gig economy.[89] The terms agreed included commitments from the platform to inform users of the app of relevant award minimum wage rates for the various services offered and to work with Unions NSW on the development of safety standards and personal injury insurance coverage for workers.[90]

The Transport Workers Union ('TWU') has negotiated two agreements with food delivery platform DoorDash. The first, struck in mid-2020, was mainly aimed at providing delivery riders with enhanced protections in the context of the onset of the COVID-19 pandemic.[91] These included the provision of basic personal protective equipment and up to two weeks' earnings for riders who were required to self-isolate. The compact also incorporated express recognition by DoorDash of the value of 'collective representation from workers through regular dialogue and engagement with the TWU'.[92] This acceptance of the legitimacy of collective representation was echoed in the second TWU-DoorDash agreement (concluded in May 2022), although with the qualification that given the 'fragmented nature' of gig work: 'the parties acknowledge that a new and effective model of collective participation is needed in order to facilitate and ensure effective representation'.[93] Among the other 'core principles' agreed to by the TWU and DoorDash was the need to ensure 'appropriate work rights and entitlements' for on-demand workers. This required 'mov[ing] beyond the artificial dichotomy' between employment and independent contracting: 'We should recognise the value that workers derive from this new, unique form of work, while creating a portable, proportional and flexible framework that allows app-based workers to maintain their independence while accessing new protections and benefits'.[94] The parties committed to a three-stage process for 'achieving regulation of the on-demand transport industry': moving from the first stage embodied in the May 2022 principles to more detailed implementation through a Memorandum of Understanding which would also provide a basis for developing industry-level standards (second stage); then 'lobbying of government by both parties for the implementation of the framework for regulation' (third stage).[95]

In June 2022, the TWU announced that it had entered into another agreement, this time with rideshare platform Uber (with application also to its food delivery service Uber Eats). Like the DoorDash compacts, the TWU-Uber agreement encompassed 'respect' for the rights of platform workers to be represented by a union and to 'have an effective collective voice'.[96] Aiming 'to improve the quality, safety and security of platform work', the deal also expressed the parties' support for the new federal Labor Government's proposed legislation (see below) to give an independent body powers to 'set minimum and transparent enforceable earnings' for these workers (which should be 'based on the principle of cost recovery, taking into account the nature of the

89. David Taylor, 'Airtasker agrees to minimum working conditions for "gig economy" contractors', *ABC News* (online at 2 May 2017) <https://www.abc.net.au/news/2017-05-01/airtasker-agrees-to-minimum-working-conditions-for-contractors/8484946>.
90. See Kate Minter, 'Negotiating Labour Standards in the Gig Economy: Airtasker and Unions New South Wales' (2017) 28 *The Economic and Labour Relations Review* 438, 446–9.
91. TWU and DoorDash, *TWU-DoorDash COVID-19 Response* (Agreement, 28 July 2020).
92. Ibid.
93. TWU and DoorDash, *Statement of Principles to Ensure Safety and Fairness for Workers in the On-Demand Economy* (9 May 2022).
94. Ibid, further principles agreed to by the parties included transparency for gig workers in respect of the monitoring, control and remuneration of their work, and 'access to dispute resolution' through a 'government established independent body'.
95. TWU and DoorDash (n 91).
96. Uber-TWU, *Statement of Principles and Future Commitments for Workers in the On-Demand Economy* (28 June 2022).

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work').[97] The TWU indicated that the Uber agreement followed months of negotiations and was facilitated by a social dialogue process conducted between Uber and the International Transport Workers' Federation at a global level.[98]

These attempts at collective negotiation on behalf of gig workers are commendable and must be viewed with the constraints inherent in this form of 'bargaining' in mind: it is occurring outside the labour law framework for collective bargaining, without the capacity to bolster negotiating claims through industrial action, and with the only outcome being an unregistered agreement that cannot be enforced.[99] The attempts also occurred outside the framework of the new class exemption process under the *CC Act*, which means that they were necessarily very limited in the scope of what they could achieve without breaching the cartel provisions.

Even so, some critical observations of the agreements can be made. First, the content of these agreements falls well short of substantially improving the working conditions of platform workers. A Unions NSW representative accepted that the Airtasker agreement's recommended minimum pay scales (based on relevant award rates) did not carry the same weight as the more expansive, enforceable labour standards enjoyed by workers in other parts of the economy.[100] The first TWU-DoorDash deal did provide food delivery workers with important safety and income protections during the COVID-19 crisis. However, the second of these agreements—and the union's subsequent accord with Uber—simply carry the promise of new protections that must be shaped to reflect the unique nature of platform work.

This links to a second, more fundamental criticism, which applies particularly to the TWU agreements reached in 2022 — that by accepting the flexible nature of gig work and that it should be regulated differently, the union has accommodated a central narrative adopted by platforms globally to resist effective forms of regulation.[101] National Secretary of the TWU, Michael Kaine, explained that 'collaborating with DoorDash is an important step towards giving gig economy workers the rights and protections they deserve'.[102] It will be critical, though, for the union to ensure that in the detailed implementation of its latest deals with DoorDash and Uber, collaboration does not extend so far as to compromise the rights of workers on these platforms to fair pay and conditions.

Third, the approach adopted by the TWU stands in contrast to the 'network bargaining' strategies identified by Anner, Fischer-Daly and Maffie, which unions and more informal/organic worker groups have deployed globally to counter the dispersion bargaining strategies of businesses. In their analysis, network bargaining involves 'autonomous groups of workers and allies' who coordinate mutual trust-based actions to increase their leverage through 'symbolic power'.[103] This might take the form of 'wildcat strikes and demands to indirect employers' as a supplement to conventional union representation and collective action, or actions aimed at influencing public debate and the

97. Ibid, also including agreement to 'a cost effective and efficient mechanism to resolve disputes such as deactivation of relevant platform worker accounts', and 'appropriate enforcement' processes.
98. 'TWU-Uber Deal as Labor's Regulatory Regime Looms', *Workplace Express* (online, 29 June 2022) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=61290>.
99. See, eg, *Ryan v Textile, Clothing and Footwear Union of Australia* [1996] 2 VR 235; Stewart et al (n 29) 411–4.
100. Minter (n 90) 450.
101. See, eg, Keith Cunningham-Parmenter, 'Gig-Dependence: Finding the Real Independent Contractors of Platform Work' (2019) 39(3) *Northern Illinois university Law Review* 379, 390; Forsyth (n 19) 148–9.
102. TWU, 'DoorDash, TWU Ink New Charter on How to Deliver Rights, Safety to All Transport Workers' (Media Release, 10 May 2022) <https://www.twu.com.au/press/doordash-twu-ink-new-charter-on-how-to-deliver-rights-safety-to-all-transport-workers/>.
103. Anner, Fischer-Daly and Maffie (n 13) 702–3.

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position of the state.[104] These wider associational forms of network bargaining have been a more common (and more confrontational) response to gig work globally, while the TWU-style approach of direct negotiation with platforms has received some criticism as a form of business unionism that could minimise the potential impact of collective representation for these workers.[105]

B *Initiatives at the Federal Level*

1 *Proposed Reform of Gig Work Regulation.* An important aspect of the context for the informal agreements between the TWU and DoorDash/Uber (see above) is that the Albanese Labor Government (elected in May 2022) has pledged to clamp down on what it has described as the 'cancer' of gig work.[106] No doubt the spectre of regulation was a factor in Uber coming to the negotiating table,[107] reversing its position of generally not recognising trade unions.[108] Specifically, the Government intends to extend the powers of the FWC to set minimum standards for those in 'employee-like' forms of work including gig workers. The FWC would be able to 'intervene or inquire into all forms of work and determine what rights and obligations may or may not apply', to ensure that 'a greater number of Australian workers have access to entitlements and protections currently denied to them by existing laws'.[109] According to the Employment and Workplace Relations Minister, these entitlements could include minimum rates of pay, superannuation, workers' compensation and sick leave.[110] The Minister's rationale for this approach is that 'gig platforms can reconfigure their algorithm much faster than we can legislate'.[111] Therefore, the FWC needs to be given maximum flexibility to deal with the platforms' evasion tactics.[112] However, the Government's proposed reform means that gig workers would need to establish employment-like rights before the FWC on a case-by-case basis. This would not fundamentally challenge the platforms' operating model in the same way as would a presumption of employment status in the *FW Act*,[113] and would leave platform workers incapable of engaging in collective bargaining or industrial action.

2 *New Multi-Employer Bargaining Provisions in the Secure Jobs, Better Pay Act.* As discussed in Part III of this article, the Albanese Labor Government has attempted to extend the availability of collective bargaining beyond the narrow confines of the employing enterprise through the *Secure Jobs, Better*

104. Ibid 704–5.
105. See, eg, Forsyth (n 19) 157–8, 191–2, 205, noting several overseas examples of trade unions entering into agreements with platforms including Uber, Lyft and others in the food delivery sector, under which the unions have obtained limited representational rights in exchange for agreeing not to contest the independent contractor status of platform workers; S Butler, 'Deliveroo Accused of "cynical PR move" with Union Deal for Couriers', *The Guardian* (online, 12 May 2022).
106. Nick Bonyhady, '"Gig work … like a cancer": Labor Takes Aim at Gig Economy', *The Age* (online, 25 August 2022) <https://www.smh.com.au/technology/federal-government-takes-aim-at-gig-economy-cancer-20220825-p5bcph.html>.
107. 'TWU-Uber Deal as Labor's Regulatory Regime Looms' (n 98).
108. See Forsyth (n 19) chs 9–10.
109. Australian Labor Party, *Labor's Secure Australian Jobs Plan* (Policy, 2022).
110. 'Redefine "employment" to Protect Gig Workers: Academic', *Workplace Express* (online, 1 July 2022) <https://workplaceexpress.com.au/nl06_news_selected.php?act=2&stream=1&selkey=61298&hlc=2>.
111. Tony Burke, Minister for Employment and Workplace Relations, 'Speech—Australian Industry Group, Canberra' (Speech, 8 August 2022).
112. See 'Design of FWC Gig Power Part of Platform Talks: Burke', *Workplace Express* (online, 26 August 2022) <https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=61487>.
113. See Forsyth (n 19) 219–22.

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Pay Act.[114] In our assessment, the recent amendments offer the potential to overcome barriers to collective bargaining in some—but by no means all—fissured work contexts. The main avenue through which this could occur is the expanded framework for single interest employer bargaining. Much will turn on how the concept of 'clearly identifiable common interests' of the relevant employers is interpreted, for purposes of allowing employees and unions to bargain across multiple employers. As noted earlier, the factors relevant to the assessment of common interests include geographic location, regulatory regime and the nature of the various employing enterprises (including current employment conditions).

Applying these criteria to some of the examples of 'dispersion bargaining' adopted by Australian businesses (which we noted in Part III), it may be possible for a union to obtain an authorisation to bargain for a single interest employer agreement covering BHP and the separate entity to which it has outsourced mining functions. The FWC could take the view that effectively the same kind of work is being performed at sites operated by BHP and the in-house labour provider, albeit on different terms and conditions. Second, a proposed single interest employer agreement covering Qantas and the various external companies to which it has outsourced cleaning, baggage handling and other ground services could meet the common interests test. However, this result would likely follow only if Qantas continued to also have some direct employees performing the same kinds of work. If the functions have been totally rather than partially outsourced, there is less prospect that the common interests test would be satisfied.

Looking beyond these examples, the new provisions could be utilised by a union seeking a single interest employer agreement with the multiple employers in a fast food chain (including brand-owned and franchised stores)—but probably not across a logistics and distribution network like Amazon's (including the labour hire agencies the company uses to staff its Australian warehouses, Amazon Flex through which it engages delivery drivers and so on).

The new supported bargaining stream introduced by the *Secure Jobs, Better Pay Act* will assist employees and unions to obtain multi-employer agreements predominantly in government-funded services, such as aged care and childcare. The arrangements for making cooperative workplace agreements are unlikely to make significant inroads into the problem of fissuring, given that this form of bargaining is entirely voluntary.

Overall, the new options made available by the *Secure Jobs, Better Pay Act* to bargain across multiple employers represent an important attempt by policy-makers to grapple with the limitations on access to collective bargaining arising from fissured business structures. However, the strictures of the common interests test for accessing single interest employer bargaining, the exclusion of businesses with less than 20 employees from these agreements and the requirement that a majority of employees at each enterprise must support this form of bargaining will likely curtail its effectiveness in practice.[115]

3 *ACCC Class Exemption.* Outside of the *FW Act*, self-employed workers and their representatives, including those in the gig economy, can now utilise the ACCC class exemption to seek to engage in

114. As to comparable overseas developments see *Fair Pay Agreements Act 2022* (NZ) which enables the making of sector-wide instruments regulating pay and conditions; and the *California Assembly Bill 257—Fast Food Accountability and Standards Recovery Act* which enables the creation of sector-wide minimum standards including on pay, working time, and health and safety.

115. See *Secure Jobs Better Pay Act* (n 2) Part III above.

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forms of collective bargaining.[116] Eligible small businesses (eg franchisees, fuel retailers or those with an aggregated turnover of less than $10 million in the preceding year) can form a bargaining group and negotiate with suppliers or customers in respect of the supply or acquisition of goods or services, without breaching the majority of the cartel provisions.[117] However, the exemption does not include either primary or secondary boycotts in the scope of conduct permitted by the exemption, and while the ACCC has increasingly indicated that it might be willing to authorise primary boycotts at a future point in limited circumstances, it has not done so yet.[118] While secondary boycotts are also capable of authorisation, no authorisation has ever been made and there is nothing to indicate that the ACCC would authorise such conduct.

This all means that small businesses can try to bargain with a nominated target business but cannot utilise the tools of economic coercion to bring those targets to the bargaining table or to influence the outcome. Collective outcomes can only be reached voluntarily—if potential targets do not want to bargain, then the small business collective is left with few options. In practical terms, the group is unlikely to refuse to contract with the target or otherwise interfere with any existing contractual arrangements (ie by taking action akin to a strike). Further, as mentioned in Part IV above, the exemption contains no architecture for navigating collective bargaining and creating enforceable agreements, leaving parties to navigate the difficulties of implementing multi-party agreements through the law of contract. However, despite these limitations, the class exemption has the potential to facilitate the types of high-level agreements between unions and labour platforms described above. It also has the potential to facilitate meaningful changes to standard form contracts commonly used by platforms.

C *State-Level Initiatives in Australia*

1 *Victorian Fair Conduct and Accountability Standards.* In 2018, the Victorian Government established an independent Inquiry into the On-Demand Workforce. The Final Report of the Inquiry (released in mid-2020)[119] included a recommendation that the Victorian Government implement 'Fair Conduct and Accountability Standards': a framework of principles to 'provide greater transparency and fairness for workers', to address the Inquiry's finding that platforms do not have to meet minimum standards of conduct or working conditions for their non-employee workforces and to counter the general opacity of any systems that platforms may have put in place.[120] In May 2021, the Government announced its commitment to implementing the recommendations of the Inquiry (including that relating to development of the Standards) and later that year released a Consultation Article on the proposed Standards, seeking input from stakeholders.[121] The proposed Standards

116. See ibid Part IV; see also the recent European Commission exemption for collective bargaining by 'solo self-employed workers' in *Guidelines on the Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-employed Persons* [2022] OJ C 374/02.
117. *CC Act* (n 68) s 95AA; and *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020*.
118. The ACCC's position on collective boycotts is discussed in Hardy and McCrystal (n 76) at 326–8.
119. James (n 26).
120. Ibid 199, 200. See also ibid 201 (Recommendations 13, 14).
121. Department of Premier and Cabinet, Victoria, 'Backing Workers In Our Gig Economy Every Step Of The Way' (Media Release, 13 May 2021); Industrial Relations Victoria, 'Fair Conduct and Accountability Standards for the Victorian On-Demand Workforce' (Consultation Paper, 2021). See also Nick Bonyhady, 'Uber, Airtasker face new worker protection rules as Victoria overhauls gig economy', *The Sydney Morning Herald* (online, 18 January 2022) <https://www.smh.com.au/technology/uber-airtasker-face-new-worker-protection-rules-as-victoria-overhauls-gig-economy-20220113-p59o47.html>.

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would require platforms to take action in six areas: negotiating with non-employee on-demand workers about their work status and contract terms; discussion of factors such as fairness and bargaining power; dispute resolution processes enabling workers to challenge unfair contracts or suspension/deactivation from platforms; removing discriminatory algorithms and other unfair practices; systems, policies and training to improve safety; and recognition of collective representation.[122] The Government made clear that in framing the Standards, it would carefully consider the costs and benefits of this voluntary approach to regulation including the 'ability of platforms to remain competitive and to provide work for many Victorians'.[123]

In October 2022, the Government released the final *Voluntary Fair Conduct and Accountability Standards for Platforms* (essentially reflecting the proposed Standards), to be followed in early 2023 with the establishment of a Gig Worker Support Service to provide advice and education about the Standards.[124] The most relevant of the Standards for present purposes is Standard 5, which relates to 'non-employee on-demand worker representation'.[125] The Government's Consultation Article observed that while employees are able to obtain improved outcomes through collective representation under the *FW Act*, and to some extent under State OHS legislation: '[n]ot all of these rights and entitlements extend to non-employee on-demand workers'.[126] Further, these workers face competition law barriers to collective negotiation.[127] In the draft Standards, proposed Standard 5 was intended to support:

> the establishment of processes for non-employee on-demand workers to voice concerns about their working arrangements and seek better terms and conditions relating to their work. This standard seeks to encourage platforms to collectively bargain with [these] workers, *when lawfully possible*.[128]

However, the final version of Standard 5 includes a shift in emphasis, stating that platforms should 'not inhibit' (rather than 'allow' as stated in the proposed Standards) non-employee on demand workers from freely associating to pursue improved conditions and collectively discussing or advocating such improvements (where permitted by law).[129] In addition to this weakening of what is to be expected of platforms, it must be considered that the Standards are *voluntary* in nature, reflecting the constitutional limits on the Victorian Parliament's power to legislate in the sphere of private sector employment relationships and limits on regulating independent contractors imposed by the *IC Act*.[130] The Government has indicated that 'the strongest possible enforcement model' will form part of the second phase of implementation of the Standards in early 2023, while in the meantime, it encourages platforms to comply with them.[131] The option of overcoming the legal constraints on collective bargaining by independent contractors through the ACCC class exemption

122. Industrial Relations Victoria, 'Voluntary Fair Conduct and Accountability Standards for Platforms' (Standards, October 2022) 18–38.
123. Ibid 14.
124. Ibid 5.
125. Ibid 15.
126. Ibid 31–2. See also *Secure Jobs Better Pay Act* (n 2) Part III above.
127. Industrial Relations Victoria (n 122) 32. See also *Secure Jobs Better Pay Act* (n 2) Part IV above.
128. Ibid 33 (emphasis added).
129. Ibid 15.
130. See *Secure Jobs Better Pay Act* (n 2) Part IV; James (n 26) ch 6, 100–1, 166–7, 179 and ch 7, 189, 197–8.
131. Industrial Relations Victoria (n 122) 5, 10. More robust compliance options including business licensing and public procurement guidelines linked to the Standards could be considered: see Tess Hardy, Anthony Forsyth and Shae McCrystal, 'Regulating Gig Work in Australia: The Role of Competition Regulation and Voluntary Industry Standards', *Competition Policy International* (Article, 20 July 2022) 6–7.

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was considered in the development of the Standards, although with the important qualification that the exemption simply permits—rather than *requires*—such bargaining to occur.[132] Yet the implementation of the Standards opens up a constructive role for the Victorian Government to play in providing gig workers and unions with information and resources to make maximum effective use of the ACCC class exemption process. Given that the class exemption has not yet been used by gig economy workers, this role could be vital in educating and encouraging at the very least collective negotiations in that sector.

2 *Queensland Legislation—Collective Bargaining for Independent Couriers.* Legislation recently passed in Queensland includes provisions enabling the Queensland Industrial Relations Commission ('QIRC') to set minimum standards for independent couriers including those engaged by platforms; to oversee collective bargaining between such workers and the businesses that engage them; and to review courier service contracts on unfairness grounds.[133] Chapter 10A of the *Industrial Relations Act 2016* (Qld) is modelled on a similar scheme operating under NSW legislation (and which operates under an express exemption from the *IC Act*).[134] 'Independent couriers' are defined for purposes of Part 10A to include persons providing transportation of goods using a courier vehicle which is only driven by an individual; a partner in a partnership; or an executive officer of a corporation (or a member of that officer's family).[135] 'Principal contractors' are persons who carry on a business that involves arranging for goods to be transported by independent couriers, where two or more couriers are used for such purposes.[136] The QIRC is given powers over two types of 'contract instruments' between independent couriers and principal contractors: contract determinations and negotiated agreements. Contract determinations may be made to fix the minimum remuneration and working conditions of independent couriers under a class (or different classes) of courier service contracts.[137] Bargaining for a negotiated agreement (an agreement about the remuneration and working conditions of a class of independent couriers) can be initiated by a proposer,[138] who may be a principal contractor or a relevant employee organisation (ie a State or federal union that will be covered by the agreement and is entitled to represent the industrial interests of the independent couriers), giving 14 days' notice to the other party.[139] Parties to the negotiations must bargain in good faith,[140] and any party may ask the QIRC to assist with the negotiations through conciliation, followed by arbitration.[141] A negotiated agreement must be submitted to the relevant independent couriers for approval,[142] and then must be certified by the QIRC.[143]

The Queensland Government indicated that Chapter 10A is not intended to redefine independent couriers as employees, but rather to address the situation of insecure work commonly encountered

132. Industrial Relations Victoria (n 122) 32–3.
133. *Industrial Relations and Other Legislation Amendment Act 2022* (Qld). Under div 3 pt 2 s 2 will commence upon a day to be fixed by proclamation. At the time, this paper was written no proclamation had yet been made.
134. *Industrial Relations Act 1996* (NSW) ch 6; see Explanatory Notes, Industrial Relations and Other Legislation Amendment Bill 2022 (Qld) 11–12.
135. *Industrial Relations Act 2016* (Qld) s 406B(1) ('*IR Act Qld*').
136. Ibid s 406C.
137. Ibid s 406N(1). Courier service contracts do not include an employment contract but may include a franchise arrangement: s 406D.
138. Ibid s 406V(1).
139. Ibid s 406W; on the parties to negotiated agreements, see s 406V.
140. Ibid s 406Z.
141. Ibid s 406ZA.
142. Ibid s 406Y.
143. Ibid ss 406ZC–406ZQ.

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by these drivers, with potential (although not specific) application to gig or platform-based work.[144] Further, the QIRC is required, when exercising its functions under Chapter 10A, to ensure that contract instruments set fair and just pay and conditions which are comparable to those of employees performing similar work, and generally reflect prevailing minimum standards.[145] Relevant factors here include whether the remuneration enables fair recovery of the independent courier's costs and a fair return for their work and capital investment, the market for the transportation services, the level of financial risk assumed by the courier and the certainty and security of the services they are required to provide.[146] The QIRC is therefore able to inquire into the reality of the commercial relationships entered into by independent couriers when setting minimum standards or assisting in the making of agreements (including through arbitration). The new provisions clearly open up the ability for certain platform workers to engage in collective bargaining, overcoming some of the constraints examined in this article and certainly offering a more substantive basis to contest the problems arising from gig work than the Victorian Standards.

The Queensland legislation also deals with the competition law restrictions that would otherwise preclude collective negotiation by non-employee couriers. A specific provision was added enabling the new minimum standard-setting and collective agreement provisions of Chapter 10A to operate without independent couriers (or other parties) offending the anti-competitive conduct prohibitions in Part IV of the *CC Act*.[147] This is an important recognition of the need to consider the interaction between labour and competition laws in establishing collective rights for workers in the context of fissured work. However, until the new provisions commence operation, these benefits are yet to be realised. The delay relates to the interaction between new Chapter 10A and the *IC Act*. The Queensland Government asked the former Coalition Federal Government for an exemption from the application of the *IC Act* (which would otherwise exclusively regulate services contracts including those entered into by independent couriers) to enable the new provisions to operate consistently with the *IC Act*.[148] However, at the time of writing, no such exemption had been granted and the provisions remain inoperable.[149] This further highlights how the *IC Act* acts as a barrier to innovative State-based regulation aimed at providing collective action rights for non-employee workers.

VI Conclusion

This article has provided an exploratory overview of who has access to collective bargaining, and the opportunities and constraints under the *FW Act*, the *CC Act* and the *IC Act* that face workers seeking to take collective action. While collective bargaining was originally devised to address

144. Queensland, *Parliamentary Debates*, Legislative Assembly, 28 October 2022, 3094 (Grace Grace, Minister for Industrial Relations).
145. *IR Act Qld* (n 135) s 406F(1).
146. Ibid sub-s (2).
147. See Explanatory Notes, *Industrial Relations and Other Legislation Amendment Bill 2022* (Qld) 2–3; the relevant amendment inserted a specific reference to the *CC Act* to attract the operation of the exception provision in s 51 of that legislation for actions authorised by another law (including a State law).
148. See Part IV above, and Explanatory Notes, *Industrial Relations and Other Legislation Amendment Bill 2022* (Qld) 11.
149. In any case, it is likely that the Queensland Government is now engaging with the federal Labor Government about the potential impact of its proposed reforms giving the FWC powers in relation to employee-like workers (see n 109 above) which may also encompass amendments to the *IC Act*.

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inequality of bargaining power between employers and employees and to increase the labour share of corporate income, these processes are now failing.[150] The rise of the fissured workplace has revealed that traditional bargaining structures—which are premised on a binary employment relationship and a clear distinction between markets and hierarchies—are ill-equipped to deal with the fact that power is now 'asymmetrically distributed within [business] networks, creating dynamics *between* firms that influence how work is governed'.[151] In the gig economy, putative classification of workers as self-employed (exacerbated by recent High Court decisions in Australia) places them outside the ambit of collective bargaining under labour law—and at risk of breaching competition law if they seek to negotiate and take action collectively. The continuing presence of the *IC Act* acts as a bar to State-based initiatives that seek to extend collective bargaining rights to gig workers and other categories of self-employed workers.

The discussion has considered a range of initiatives that challenge many of the traditional assumptions that underpin collective bargaining and which provide opportunities for workers to start to bargain with the entity holding the reins within fissured work contexts.

The most promising change in this respect are the Amendments to the *FW Act* in the *Secure Jobs, Better Pay Act*. These changes create the possibility of collective bargaining across networked firms in certain limited circumstances. However, the restrictions on access to single-interest employer authorisations, particularly the tightly drawn concept of 'common interests' of the relevant employers (along with the exclusion of small businesses and the requirement to demonstrate majority support at each enterprise) may limit the impact of the amendments to areas which are already well organised by trade unions. There is also the potential for the scheme to be limited by restrictive statutory interpretation, the fate which befell the low-paid bargaining stream under the original *FW Act* regime.

In the gig economy context, the TWU has actively engaged with platform businesses to reach in principle arrangements to work to improve their working conditions. These are important first steps, but to have meaningful impact, unions will need to engage with the class exemption process, something which may risk the platforms or other targets of bargaining withdrawing their participation. The class exemption itself is also an important development for the gig economy and the self-employed generally. However, the voluntary nature of this scheme, the lack of access to strike action, and the failure of this exemption to provide structural support for either bargaining or agreement outcomes means the practical impact of the exemption will be limited. Significantly, the States (particularly Queensland) are developing some novel statutory responses to these limitations, but the efficacy of these approaches is hindered by the *IC Act*, which will block novel reforms until further exemptions are granted or the *IC Act* is repealed.

Overall, the gaps we have identified in access to collective bargaining in fissured work contexts are in large part a product of the siloed approach to regulation across the different regulatory domains under discussion. To ensure that workers are able to bargain with those who hold the power and make the key decisions that impact their working lives, a more considered approach to the development of policy and regulatory solutions is needed. This approach must be mindful of the respective roles and purposes of labour and competition laws, with particular attention to how they could better complement each other.

For example, the new single-interest employer provisions in the *FW Act* likely cast the ability to access the provisions too narrowly. In contrast, the small business class exemption provides wider

150. Erik Wright, 'Working Class Power, Capitalist-Class Interests, and Class Compromise' (2000) 105(4) *American Journal of Sociology* 957.

151. Anner, Fischer-Daly and Maffie (n 13).

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access to collective bargaining, including the potential to enable small businesses to engage with lead firms in collective negotiations, but only on a voluntary basis and without scope for collective pressure in support of demands or to create legally enforceable agreements (like we would see in labour law).

Equally, improvements in both labour and competition regulation designed to give workers access to collective bargaining in fissured work arrangements must address the fundamental problem that neither regulatory domain adequately deals with the target of bargaining. To empower workers to engage directly with the entity that has both the power and the control over their working conditions, we need to embrace a wider concept, 'the networked firm', as the target of both labour and competition regulation.

What ultimately emerges from this analysis is the need for a regulatory equivalent to the concept of 'network bargaining' as a response to the problems created by the networked firm (including the organisational, geographic and technological strategies of businesses to distance themselves from workers and collective bargaining). The network bargaining response of workers and unions globally through looser, associational coalitions and strategies has been effective in challenging the power of networked firms. A regulatory response to the networked firm would straddle the labour/competition law divide to ensure fissured workers are no longer excluded from exercising collective power by both legal domains.

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