

# Centre for Future Work

## Submission to the Closing Loopholes Review

March 2026

# Centre for Future Work

## About the Centre for Future Work

**The Centre for Future Work** is an independent research and policy centre that conducts and publishes progressive economic and social research to advance understanding of the issues that affect working people. The Centre also develops timely and practical policy proposals to help make the world of work better. Established in 2016, the Centre has a strong track record of producing high-quality research for policy change to improve work and working lives. The Centre works closely with groups committed to the Centre's vision for better work.

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## About this submission

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# Contents

<b>INTRODUCTION</b>	<b>4</b>
<b>CONTEXT</b>	<b>4</b>
Contractual distancing and precarity	6
Effects of reform on profitability and productivity	9
<b>CASUAL WORKERS</b>	<b>9</b>
Conversion data	9
Changes in casualisation rates	10
Detailed analysis	11
Implications of the data	13
The nature of casual employment	14
Towards genuine national employment standards	16
<b>LABOUR HIRE</b>	<b>17</b>
Impact on pay	17
The mix between labour hire and direct employment	17
Implications	19
<b>REGULATED WORKERS</b>	<b>20</b>
Relationship to Object of the Act	20
Definition of employee-like worker	22
Availability of non-binding guidelines	23
Coverage of topics	24
Contractual chains	24
Workers' compensation	25
<b>DELEGATES' RIGHTS</b>	<b>26</b>
Developments and data	26
Issues with delegates' rights	27
<b>CONCLUSIONS AND RECOMMENDATIONS</b>	<b>28</b>
<b>APPENDIX A: PRODUCTIVITY</b>	<b>31</b>
Introduction	31
Measurement of productivity	31
Trends in productivity	33
Labour market regulation and productivity	34

## Introduction

1. While the Closing Loopholes amendments covered many aspects of the Fair Work Act, the most important ones had a common theme: addressing the imbalance of power that had emerged between workers and businesses in recent decades. Those aspects of Closing Loopholes that are most relevant to this imbalance are the focus of this submission.
2. The ways in which Closing Loopholes sought to redress the imbalance can be categorised according to whether they sought to affect the forces shaping the imbalance. Several sets of amendments (concerning casual employment, labour hire, and regulated workers) address imbalances arising from contractual distancing (explained below) and precarity. Others (especially those concerning delegates' rights) address matters concerning worker organisation. Before considering each of those, however, we first explain a key part of the labour market and economic context that has brought about this imbalance in workplace power.<sup>1</sup>

## Context

3. The last half century has witnessed significant changes in the economy and labour markets in Australia. Three important aspects relevant to this legislation are: the growing concentration of resources in the hands of a small number of firms, giving them growing monopoly and monopsony power; the constant search, by business, for new means of minimising labour costs and avoiding accountability while attempting to maintain control over labour; and the cyclical way in which business goes about this latter process.
4. That growing concentration of resources in the hands of a small number of firms is important for labour. A list of major changes in the economy or the labour market that have affected or reflected the power of workers over the last half century is in Table 1 (taken from previous Centre for Future Work research). Almost all have weakened the power of labour and increased that of business. As business's power has increased, wages have stagnated.

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<sup>1</sup> We do not include in here summaries of what the Closing Loopholes Acts actually do in relation to each topic. We take it that the Review already has access to this information. Further, updates on developments in the Commission in some of these areas can be found in other submissions, such as that by Dr Caleb Goods, Associate Professor Alex Veen & Dr Tom Barratt. Instead we provide background context to the legislative changes, commentary on the provisions mentioned above including, where relevant, official data, and recommendations.

**Table 1 Factors influencing or indicating workers' power in recent decades**

Indicator	Broad movement in indicator (period)	Influence on or indication of workers' power
<b>Collective organisation of workers</b>		
1. Trade union density	Declined (1975-2024) <sup>2</sup>	Reduction in worker power
2. Collective bargaining coverage	Declined (2000-2024) <sup>3</sup>	Reduction in worker power
3. Industrial conflict	Declined (1975-2007), low but broadly stable since then <sup>4</sup>	Reduction in worker power
<b>Contractual distancing and precarity<sup>5</sup></b>		
4. 'Gig' economy	Expanded since 2014 (but still small) <sup>6</sup>	Reduction in worker power
5. Labour hire	Gradually expanded since 1990s <sup>7</sup>	Gradual reduction in worker power since 1990s
6. Casual employment	Significantly increased from 1980s to 2000s, relatively stable since then <sup>8</sup>	Reduction in worker power from 1980s to 2000s
7. Use of contracting out and outsourcing	Increase (mainly qualitative observations) <sup>9</sup>	Reduction in worker power
8. Use of temporary visa holders	Increase <sup>10</sup>	Reduction in worker power
9. Franchising	Small traders increasingly are outlets for products of large (franchisor) firms	Reduction in worker power
<b>Gender</b>		
10. Gender pay gap	Gradual decline (with variation) 1975-2024 <sup>11</sup>	Gradual increase in (female) worker power
<b>Monopsony</b>		
11. Job switching	Gradual decline identified by Treasury to 2020 <sup>12</sup>	Reduction in worker power
12. Impact of concentration amongst employers	Increase <sup>13</sup>	Reduction in worker power

<sup>2</sup> Australian Bureau of Statistics (ABS), Characteristics of Employment, and Trade Union Members.

<sup>3</sup> Department of Employment and Workplace Relations, Trends in Federal Enterprise Bargaining; and ABS Labour Force.

<sup>4</sup> ABS, Industrial Disputes, Australia. <https://www.abs.gov.au/>

<sup>5</sup> See paragraph 8

<sup>6</sup> ABS, Digital platform workers in Australia, <https://www.abs.gov.au/>

<sup>7</sup> Geoff Gilfillan, Use of labour hire and contract workers in Australia, Parliamentary Library, Canberra, 31 May 2024, [https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/9770735/upload\\_binary/9770735.pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/9770735/upload_binary/9770735.pdf)

<sup>8</sup> ABS, Labour Market Statistics and Characteristics of Employment.

<sup>9</sup> e.g. Power Retail and VirtualStaff365, 'Outsourcing Trends 2024', <https://www.virtualstaff365.com.au/>.

<sup>10</sup> Brendan Coates, Trent Wiltshire, and Tyler Reysenbach, Short-changed: How to stop the exploitation of migrant workers in Australia, Grattan Institute, Melbourne, 2023.

<sup>11</sup> Workplace Gender Equity Agency (2025) The ABS data gender pay gap, <https://www.wgea.gov.au/>

<sup>12</sup> ABS, Labour Mobility; Meghan Quinn, What's driving low wages growth in Australia?, speech to Australian Conference of Economists, Melbourne, 16 July 2019.

<sup>13</sup> Hambur, J. (2023), 'Did Labour Market Concentration Lower Wages Growth Pre-COVID?' Australian Treasury Working Paper No 2023-01, Australian Treasury, Canberra.

13. Non-compete clauses	Probably growing <sup>14</sup>	Reduction in worker power
<b>Macroeconomic conditions</b>		
14. Supply of and demand for labour	Unemployment increased from 1975, high (and variable) through to 2010, declined since then <sup>15</sup>	Reduction in worker power for most of the period since 1975, but increase in worker power from 2010 to 2023, slightly decreased 2024-5
<b>Financial and product markets</b>		
15. Share markets	Increased importance of finance capital in corporate decision making from 1980s	Significant reduction in worker power
16. Trade	Increased competition from low-wage imports	Reduction in worker power

Source: Peetz, D, *The Curious Incident of Low Wages Growth*, Centre for Future Work, Canberra, April 2025.

5. As we see from Table 1, in broad terms, almost everything that has happened outside the policy space in the past half century has reduced workers' power. The one major thing that has gone in the opposite direction, but only relatively recently, and somewhat haltingly, has been the reduction in unemployment over the past decade (setting aside the temporary spike in unemployment during the pandemic). Of 16 developments in the labour market in recent times, 14 signalled a deterioration in worker power, one an improvement in power only for female workers, and one an improvement since 2010 (lower unemployment until 2023)
6. Some items on that list are about collective worker agency, such as union organisation or strike action. Some of the things on that list are about the employer search for new forms of numerical flexibility, or exploitation. These two sets of issues are the focus of Closing Loopholes. Gender relations issues also can be addressed through industrial relations legislation, but this mainly happened through the first two tranches of industrial relations reform after 2022, and so is not the subject of Closing Loopholes or this submission — though some aspects of the reforms that were progressed through Closing Loopholes have gender implications, and we address those where relevant.
7. Other matters on the list in Table 1 do not lend themselves well to reform through industrial relations legislation. They are about monopsony in labour markets, or changes in financial or product markets.

### Contractual distancing and precarity

8. One of the major developments in the economy has been the way in which business has sought to distance itself legally from the point of production while trying as much as possible to control the labour that engages in that production. The outcome is that the workers being used are not necessarily the employees of the ultimate corporate beneficiary of the production. One or more

<sup>14</sup> Dan Andrews and Bjorn Jarvis, The ghosts of employers past: how prevalent are non-compete clauses in Australia, 61 MICRO NOTE, e61 Institute, 19 June 2023; Jack Thrower, New data shows many businesses are now using non-compete clauses – and that's bad for workers, Australia Institute, 21 February 2024, <https://australiainstitute.org.au/post/new-data-shows-many-businesses-are-now-using-non-compete-clauses-and-thats-bad-for-workers/>

<sup>15</sup> ABS, Labour Force.

contracts are used to ensure this. This may take the form of a contractual chain between the ultimate beneficiary and the worker, or it may be a straight-out contract for services.

9. The process of deploying contracts to distance the beneficiary from its responsibilities can be called ‘contractual distancing’. In the context of industrial relations, contractual distancing is the use of contracts to distance the beneficiary from the labour used in the production process.<sup>16</sup> The relationship between the ultimate beneficiary and the worker can be referred to as ‘not there employment’ (since the beneficiary of the labour is ‘not there’ in a traditional legal sense, even though they may be the ‘ultimate employer’ of the labour in a practical sense). ‘Not-there employment’ is the pattern of labour relations that exists when large firms (the ‘core’ capital in an industry) avoid employment responsibilities by use of contractual distancing, through contracting out work to individuals, franchises or sub-contracting firms.<sup>17</sup>
10. Other manifestations of this trend include labour hire and casualisation. Through casual employment, a firm has a contract with the employee that removes rights and entitlements of the employee, making dismissal easier. Most casual employees are not used for short-term fluctuations in work; rather, most casuals either have been with the employer for a long period, and/or expect to be with the employer for a long period, and/or have stable hours from week to week.<sup>18</sup> But through the casual employment contract, the employer can avoid obligations that would normally be expected from having potentially long-serving, stable employees,
11. Through labour hire, the firm creates a triangular relationship with the worker, so that they are not even an employee of the firm but usually work for the labour hire company — as an employee. This enables the core firm to pay the worker substantially less than they would if they were its own employee.
12. So, the details and form of contractual distancing vary between industries and institutional frameworks. In retailing or hospitality, ‘core capital’ or an ‘apex firm’ (that is, the ultimate beneficiary) might create a franchise operation, where the franchisees employ the labour. In mining and many parts of manufacturing, labour hire firms provide cheap labour that is still directed by the mining or manufacturing firm’s managers. In apparel manufacture, the labour takes the form of contractors in Australia or, across Asia, employees of firms that are subcontracted to firms that in turn supply well-known label brands in North America and Europe. Contract cleaners are another example, as are food delivery and passenger drivers for Uber, Lyft, Deliveroo and so many others. In road transport, owner drivers are at the bottom of the chain and, as outlined below, the industry represents one of the oldest forms of not-there employment in Australia.
13. Digital platform workers, another example, have very little power compared to the usually large platform businesses that engage them. They therefore have little say over their income or

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<sup>16</sup> Contractual distancing may also be used in other contexts, for different but related purposes. Probably most well-known is the use of contractual distancing for tax avoidance purposes. In both taxation and industrial relations, contractual distancing is used to evade accountability and avoid obligations.

<sup>17</sup> David Peetz, *The Realities and Futures of Work*, The Australian National University Press, Canberra, 2019.

<sup>18</sup> David Peetz & Robyn May, ‘Casual Truths: What do the data on casual employment really mean?’, *Journal of Industrial Relations*, 2022,

conditions. Most are underemployed.<sup>19</sup> They often receive low incomes. Many digital platform workers have incomes that, after expenses are taken into account, are below the relevant award wage they would receive if they were employees. Outside Australia, many receive incomes equivalent to amounts below the minimum wage in the relevant country.<sup>20</sup> They usually have little or no training opportunities.<sup>21</sup>

14. There are also health and safety implications for many gig workers. In food and parcel delivery, several have died on or because of the job.<sup>22</sup> In long distance road transport, the effects for owner-drivers have included: poor driver safety, a high occupational fatality rate; long working hours, low incomes, high debt and insolvencies; and incentives to drive fast, skip breaks, overload and engage in other risk-taking behaviours.<sup>23</sup> This also has damaging effects on other road users.
15. In some industries, the not-there employment model goes back to centuries past. In some, it is a recent phenomenon enabled by new technology. However, it is also not very stable. Like all attempts by firms to cut labour costs and achieve maximum flexibility in its control of labour, it reeks of contradictions. Gig work, casual work, contractor work, and labour hire all achieve savings but undermine control. This is because nothing gives a firm as much control over labour as an employment relationship with a worker whose full-time hours are devoted to it on an ongoing basis. Weakness of control ultimately undermines profitability. Meanwhile, workers resist, through overt or covert conflict. They leave, they organise, they try to strike, their representatives protest or successfully lobby politicians to regulate what business does. So, the firm must always find new forms of flexibility. This dialectic happens in cycles. A new form of risk for workers is created by the firm, that form varies between industries and initially grows rapidly, then hits a roadblock caused by its own contradictions, and as it declines the firm seeks new ways of transferring risk to workers that, again, vary between industries.<sup>24</sup>

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<sup>19</sup> Chartered Institute of Personnel and Development (CIPD), To gig or not to gig? Stories from the modern economy, CIPD (London, March 2017)

<sup>20</sup> e.g. Fiona Macdonald, Unacceptable risk: The dangers of gig models of care and social work, Centre for Future Work (Melbourne, 2023), <https://futurework.org.au/report/unacceptable-risks/>. CIPD, To gig, n19 above. Janine Berg, Income security in the on-demand economy: Findings and policy lessons from a survey of crowdworkers, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, International Labour Office (Geneva, 2016).

<sup>21</sup> Berg, Income security (n20 above); CIPD, To gig (n19 above).

<sup>22</sup> K Palu, "Food delivery rider hit by truck becomes fifth death in three months", Yahoo News Australia, 23 November 2020. Nick Bonyhady, "DoorDash reveals second courier died in two-month span", Sydney Morning Herald, 10 September 2021.

<sup>23</sup> Monash Insurance Work and Health Group, Driving Health Study: Survey of the physical and mental health of Australian professional drivers, Monash University (Melbourne, November 2020). Michael Quinlan, "FactCheck: do better pay rates for truck drivers improve safety?", The Conversation, 13 April 2016, <https://theconversation.com/factcheck-do-better-pay-rates-for-truck-drivers-improve-safety-57639>. Jason R. D. Edwards, Jeremy Davey, and Kerry A. Armstrong, "Profiling contextual factors which influence safety in heavy vehicle industries", Accident Analysis and Prevention 73 (2014), <https://doi.org/10.1016/j.aap.2014.09.003>.

<sup>24</sup> Peetz, D, 'Risk cycles, capitalism and the future of work', Relations Industrielles, 78(4), 2023. <http://doi.org/10.7202/1111508ar>

## Effects of reform on profitability and productivity

16. When they are effective, government responses reduce the profitability of firms using these forms of risk-shifting. After all, firms would not use them in the first place if they did not increase profits. So, naturally enough, firms typically oppose all attempts to limit risk-shifting. However, government responses in this area rarely reduce productivity. Fundamentally, this is because it is the logic of competitive capitalism that promotes ongoing improvements in productivity, not the concentration of power in the hands of capital that does it. Firms seek new technologies to improve productivity so they can out-compete others in their industry; those that are least productive will have the most difficulty attracting customers and will eventually go out of business. Productivity goes up. Improving the productivity of capital by reducing the wages or conditions of employees does not promote productivity. In fact, often it retards it. The incentive to introduce labour-saving technology is reduced if the cost of labour is reduced. A more extensive discussion of the factors driving productivity, and in particular the role of labour regulation, is in Attachment A.
17. We do not offer data on the impact of Closing Loopholes on productivity because there is not enough data available over a long enough period of time to make any sort of assessment. The material contained in Attachment A explains the relevance of this issue. However, past evidence tells us that there would be no reason to expect that there would be any detriment to productivity arising from the policy measures in Closing Loopholes — in matters like regulated workers, casual work and labour hire — where the cost to the firm of shifting risk onto workers has increased. If anything, such policies can be expected to lead to increased, not diminished, productivity (as the incentive to invest in labour-saving technology will increase, and workers will be less inclined to ‘shirk’), though any effect will only be observable in many years’ time.

## Casual Workers

18. Closing Loopholes is the later, and arguably the more important, of two recent changes to the treatment of casual employees. With effect from March 2021, a conversion pathway was created for casual employees, while the definition of casuals was amended. Then, with effect from 26 August 2024, the Closing Loopholes amendments changed again the definition of casual employee and clarified a pathway from casual to permanent employment.

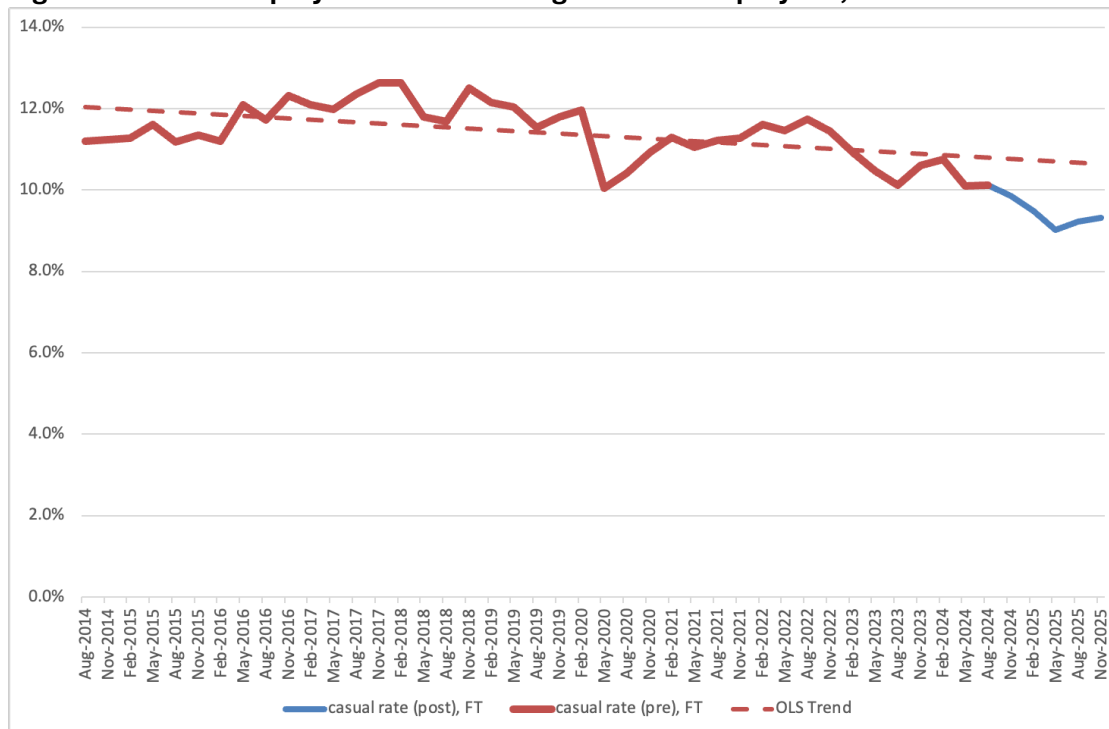
## Conversion data

19. ABS data do not enable us to assess how many workers have sought and achieved casual conversion, as they are incomplete.
20. We recommend that the ABS data relevant to the conversion issue be improved. We had to rely on the aggregate casual employment data because of the incompleteness of the ABS data. While the ABS in 2024 asked casual employees about whether they had had a conversation with their employer about conversion to permanent status, and then about the outcome including whether they had actually converted to permanent, that question was not asked of permanent employees. The only people who said ‘yes’ to conversion were those who had been casuals, had converted to permanent through this process, and were now casuals again (presumably after changing jobs).

So, the data as collected would make it appear as if almost no-one had successfully converted. Better data should be collected, with the question asked of all employees who had been casuals within the previous year.

## Changes in casualisation rates

21. However, we can estimate changes in the casual employment rates ('casualisation rates') before and after the introduction of Closing Loopholes. If employers reduce their reliance on casuals, or casual employees convert to permanent status, we should see some reduction in casual employment rates.
22. In figure 1, such a comparison is made using ABS data from the quarterly labour force survey (which, since 2014, has collected information on casual employment status). For this purpose, 'casual' is defined as an employee who is not entitled to annual or sick leave. Although this is not the same as how casual employees define themselves, it correlates highly with it. (Recall also that most 'casual' employees are not genuinely used flexibly by employers: they are often employed for quite long periods of time, have expectations of ongoing employment, or generally work the same hours from week to week. So, it is dubious as to whether most casuals are in employment arrangements that are genuinely flexible and 'casual'.)
23. Figure 1 compares the estimated rate of casualisation among full-time employees (the blue line) with the trend line that would be extrapolated from the observations during the decade leading up to Closing Loopholes (the dashed red line).
24. The chart suggests that, for full-time employees, the rate of casualisation has fallen below the long-term trend since (and a little before) the casual provisions in Closing Loopholes came into effect. However, it is not obvious from the chart that this is not just random error
25. at work, and that further observations would just see a reversion to the mean. To test whether this is a significant effect, we need to use more sophisticated analysis. We also need to separately account for the impact of the COVID-19 pandemic, which led to a temporary collapse in employment amongst casual employees (as they were the group most easily and quickly laid off at the start of the shutdowns), and see whether the fall is simply due to the earlier, narrower reforms passed in 2021.

**Figure 1: Casual employment rates among full-time employees, 2014-2025**

Source: ABS, Labour Force, Detailed, 6291.0.55.001 – Table EQ04 - Employed persons by Hours actually worked in all jobs, Sex and Status in employment of main job, February 1991 onwards

## Detailed analysis

26. Table 1 performs a controlled analysis, showing the results from ordinary least squared equations. The dependent variables are casual employment rates for all employees, as well as for part-time and for full-time employees (the different columns show the results for different dependent variables). The data come from the quarterly ABS labour force survey, which contains information regarding 'casual' employment status (absence of a leave entitlement) from the third quarter of 2014. The explanatory variables are: (a) a time trend; (b) a dummy variable for the COVID-19 pandemic, covering the period from the closure of borders on 20 March to the end of lockdowns on 21 October 2021; (c) a dummy variable for the reforms that took effect on 27 March 2021, which provided a limited pathway for casual transition to permanent employment; and (d) a dummy variable for the Closing Loopholes reforms, which took effect on 26 August 2024. The two policy variables (for the 2021 reforms and Closing Loopholes) were both lagged one quarter, to allow time for the policies to take effect.<sup>25</sup> This did not render the coefficient on the Closing Loopholes variable non-significant in any equation.<sup>26</sup>

<sup>25</sup> The value of the 2021 reforms variable dummy was 1 from August 2021, and for Closing Loopholes from February 2025.

<sup>26</sup> With no lags, the values (and standard errors) of the coefficients on the Closing Loopholes variable in the three equations would be -1.11\* (0.44), -1.52\*\*\* (0.36) and -0.62 (0.59) respectively.

**Table 1: OLS equations predicting casual employment rates, 2014-2025**

	casual rate — all employees [1]	casual rate — full-time employees [2]	casual rate — part-time employees [3]
Constant	24.99 *** (0.26)	11.93 *** (0.22)	54.05 *** (0.36)
Time (quarters)	-0.036* (0.02)	-0.013 (0.01)	-0.091 *** (0.02)
COVID-19	-1.20 *** (0.31)	-0.53* (0.26)	-2.81 *** (0.44)
2021 reforms	-0.86* (0.41)	-0.55* (0.35)	-0.25 (0.59)
Closing Loopholes	-1.18 *** (0.42)	-1.53 *** (0.36)	-0.75 (0.59)
adjusted r <sup>2</sup>	0.73	0.62	0.78
F significance	<.001	<.001	<.001
N	46	46	46

Standard errors in brackets. Key: \*\*\*significant at 0.1% level;  
\*\* significant at 1% level; \* significant at 5% level;

27. The results in equation 1 show that, over time, the casual rate amongst all employees drops by 0.036 percentage points per quarter (about 0.14 percentage points a year). The COVID-19 pandemic led to an average drop of 1.2 percentage points in the casual rate during the quarters shown (this is only an average effect, as a glance at Figure 1 shows that the drop was much higher at its peak, in May 2020). The 2021 casual reforms were associated with a drop of about 0.9 percentage points in the casual rate. Most importantly, the Closing Loopholes reforms led to a drop of 1.2 percentage points in the casual rate.
28. That 1.2 percentage point drop in the casualisation rate is equivalent to roughly 5% of casuals. Yet ABS data show that 27% of casuals do not prefer casual employment. A valid interpretation is that the Closing Loopholes reforms have not given ‘permanency’ to the majority of those ‘casuals’ who want it. Of course, it is possible (indeed, likely) that the casual rate will drop further over time, and there is still a long way to go. However, the flattening of the decline in the most recent observation seen in Figure 1 does not encourage us to think that the casual rate will drop by 27%.
29. There were important differences between casuals employed full-time and part-time. Equation 2 shows that the effect of Closing Loopholes on the casual rate was strongly significant for full-time employees and double the value of the impact on part-time employees. Indeed, for part-time employees, the impact of Closing Loopholes on the casual rate was non-significant. This does not mean it had no effect on part-timers: the sign on the coefficient was in the right direction, and its effect size was half that of the effect size on full-timers, but more observations would be needed to assess whether the impact on part-time casuals was real. The Closing Loopholes reforms were consistently more important than the 2021 reforms to the casual employment rate.

## Implications of the data

30. The apparent effect on the casual rate amongst full-timers was large enough to be not due to sampling error. The effect amongst part-timers was about half that size, and not large enough for us to be confident it was sustainable. Such a difference makes sense in the context of the quite different labour markets for full-time and part-time casuals. Intuitively, one would expect a full-time casual to be more concerned about converting to permanent employment status (and obtaining, for example, job security and eligibility for home loans) than a part-time casual who may only ever intend to stay part-time. That said, there is also no shortage of evidence about many part-time casuals wanting greater security. There are a lot of workers needing part-time work who are only in casual employment because that is what most part-time jobs are.
31. Note also that, while the casual rate amongst part-timers is in structural decline (by about 0.09 percentage points per quarter), the casual rate amongst full-timers is relatively stable over the long term (declining by only 0.01 points per quarter, a non-significant amount). The decline in part-time casuals can be seen in the aggregate data over at least two decades and probably reflects the shift in employer preference from casual part-time to permanent part-time, as the problems with hiring casuals become apparent to large retailers and other users of part-time labour, and as they can gain flexible, on-demand workforces using part-time employees.<sup>27</sup> Amongst full-time employees, however, the casual rate has probably been held up by the growth of labour hire. It may be difficult to disentangle the effects on full-time employees of the provisions in the Closing Loopholes legislation affecting casual status from those affecting labour hire workers' pay, discussed shortly.
32. Overall, the casual conversion provisions appear to be having the intended effect, at least to the extent that it is leading to a reduction in the rate of casualisation. We recommend their continuation.
33. On the other hand, to the extent that the aim is to reduce job insecurity, it does not appear to be leading to the reduction in the overall casualisation rate that would be hoped, at least not yet, and especially amongst part-time workers. A more ambitious policy would appear to be called for.
34. Australia has one of the lowest rates of leave entitlement coverage in the OECD. At present around 22% of Australian employees do not have leave entitlements. This is a very high number by international standards. In most OECD countries, there is a legislated entitlement to annual ('recreation') leave and/or to sick leave, and typically it is only genuinely temporary workers in quite specific circumstances who do not have access to leave. Globally, most countries (130 out of 163, including 88% of high-income countries) require that temporary workers generally have the same leave entitlements as permanent workers.<sup>28</sup> Such a standard is so common that the OECD does not, as a matter of course, publish comparative data on the proportion of the workforce with leave. Rather, comparative data focus on the number of weeks in that leave entitlement. Amongst OECD countries, the USA and Korea lack a legislated leave standard. Nonetheless, many employers provide some form of leave entitlement anyway. In the USA, for 23% of workers in 2018, the

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<sup>27</sup> Iain Campbell, Fiona Macdonald & Sara Charlesworth. "On-demand work in Australia." In *Zero hours and on-call work in Anglo-Saxon countries*, pp. 67-90. Springer (Singapore, 2019).

<sup>28</sup> Arvo Kuddo, *Labor Regulations throughout the World: An Overview*, World Bank (Washington DC, 2018).

employer did not pay vacation leave (though where they paid leave, it was normally for fewer weeks than Australian employers).<sup>29</sup>

## The nature of casual employment

35. Analysis of the data on casuals shows that the majority of leave-deprived workers have been with their employer for over a year. The majority expect to be with the same employer over a year into the future. Around half have stable hours from one week to the next and are not on standby. The features of leave-deprived employees do not, on the surface, appear to be the characteristics of flexible, casual employment relationships.<sup>30</sup>
36. These workers do have some other characteristics that are relevant. A majority have no guaranteed minimum hours. A majority cannot choose the days on which they work. Only around half of them knowingly receive the casual loading. And all of them, by definition, have no annual or sick leave. The common feature appears to be low power. Employers may have the ability to deploy them in all sorts of flexible ways but often do not need to utilise that flexibility. The low use of these flexibilities is indicated by the seeming stability of employment for many leave-deprived workers, stability which by its nature suits the employer. The implicit threat of having their hours cut, or being dismissed, enhances the potential power of the employer to exercise discipline. So ‘casual’ employment reduces employee power and reduces employee entitlements (often without any offsetting ‘loading’) under the guise of providing necessary flexibility.
37. The data suggest, then, that ‘casual’ employment is something of a chimera. For one thing, only about half of leave-deprived employees, the group popularly depicted as casuals, receive the casual loading. Some may be illegally underpaid by employers — something that evidence from audits and cases undertaken by the Fair Work Ombudsman suggests happens. Even amongst those who do receive the casual loading, an apparent wage penalty for low-paid casuals, identified by Laß and Wooden,<sup>31</sup> suggests that some (perhaps many) casuals are paid less than they otherwise would be if they were not casuals. The casual loading becomes part of their weekly pay that they depend upon and their weekly pay is frequently no higher than the legal minimum. This is not just the case for people in genuinely unpredictable jobs, it is a problem for all leave-deprived employees.
38. In addition, many leave-deprived workers are not ‘genuinely flexible’ casuals, since they have been with the employer for a long period, or expect to be in, or have, regular, predictable work hours that do not suggest anything casual about the relationship with the employer. While casual employees do not receive leave, not all employees without leave are genuinely flexible casuals. At least half of leave-deprived employees have neither variable hours nor a requirement to be on standby. Most leave-deprived employees could choose when they took holidays, though this was 10 percentage

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<sup>29</sup> Adewale Maye, *No-Vacation Nation*, Revised, Center for Economic and Policy Research (Washington, DC, 2019), <https://cepr.net/images/stories/reports/no-vacation-nation-2019-05.pdf>.

<sup>30</sup> David Peetz and Robyn May, "Casual truths: What do the data on casual employment really mean?", *Journal of Industrial Relations* (2022), <https://doi.org/https://doi.org/10.1177/00221856221097474>. This is also the relevant reference for succeeding paragraphs.

<sup>31</sup> Based on the difference between the casual loading and on what initially appears to be a wage premium for low-paid casuals. Inga Laß and Mark Wooden, "The Structure of the Wage Gap for Temporary Workers: Evidence from Australian Panel Data", *British Journal of Industrial Relations* (2019), <https://doi.org/10.1111/bjir.12458>.

points less than leave-entitled employees. It is true that the majority have no control over the days on which they work, but that does seem at odds with the idea that casual work provides flexibility for the employee to work when it suits them. A majority did not have guaranteed minimum hours, reflecting their low power, something associated with their precarity more than any variable hours.

39. Only 6 per cent of leave-deprived workers are workers in ‘unpredictable’ jobs — that is, they have been with their employer for less than a year, expect to be with the employer for less than a year, and have variable hours or are on standby.<sup>32</sup> That thousands of ‘casual’ employees can be with the employer for 5, 10 or 20 years indicates that this is not a casual employment relationship. Less than half of these workers report receiving the casual loading, enabling them to meet the criteria for the ‘most narrowly-defined casuals’ group. However, this would be too strict a definition, as many ‘genuinely flexible’ casuals miss out on the loading simply because of illegal underpayment of entitlements.
40. This does not mean that the employment of leave-deprived employees is secure, or that the problem of precarity in employment is exaggerated by the common labelling of leave-deprived employees as ‘casuals’. Their precarity is real. Most leave-deprived workers are in an employment relationship that can be terminated without notice at the end of a shift. The popular term ‘permanent casual’ — itself an oxymoron — is more accurately phrased as ‘permanently insecure’. Employment in these situations is not ‘casual’ but it is casualised, in that the features of it are shaped to make it look like casual employment. The commonly cited statistic that around 25% of employees are casuals, based on the incidence of leave-deprived employment, is indeed a depiction of the proportion of employees in this form of precarious work, but it is not remotely a depiction of the proportion of employees in genuinely flexible casual employment relationships.
41. Overall, we can picture the group that is normally described as ‘casual’ as having one defining characteristic and two broad elements: they all are deprived of certain core worker entitlements; and for most (especially those on lower incomes), the work is insecure and they lack power. For a small sub-group of that, flexibility in working hours or tenure is a requirement the employer faces (and their power is lower still). But for the majority of leave-deprived workers (popularly described as ‘casuals’), this need for flexibility is more a rationale than a genuine explanation for their status and lack of entitlements.
42. Rather than seeing what is described in Australia as ‘casual’ employment as a source of flexibility for employer and employee, enabling short-term business needs to be met in the most efficient way, it may be more accurate to view it (for the majority of cases) as simply a means of depriving employees of their leave entitlements and promoting precarity and hence dependence on the employer’s prerogative. The high rate of ‘casual’ employment enables Australia to have a level of leave coverage with a magnitude almost as low as that in the USA, a country with no legal obligations on employers to provide leave entitlements.
43. These data have some important policy implications. Establishing or solidifying a right to convert from casual to permanent employment, as per the 2021 legislative changes, is not one of them. For one thing, the stronger the right, the stronger the incentive for employers to cut casuals’ hours, or sack them, before the designated date. This has been evidenced in Korea, where ‘temporary’ and ‘dispatched’ workers (mostly women), who had access to additional rights after twelve

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<sup>32</sup> These are referred to as ‘narrowly defined casuals’ in Peetz & May, *Casual Truths*, n30 above.

months' employment, would often be sacked after eleven months, or swapped between employers. Moreover, and perhaps fearing this fate, some casuals may decide not to take their chances by asking to change status. The concept of 'choice' can be problematic when it is constrained, especially for leave-deprived employees.

44. A third, probably bigger, issue is that many leave-deprived workers become financially dependent on the casual loading (if they get it). This 25 per cent premium on their ordinary pay is intended to compensate for their lack of entitlements or security. When a worker is on a low income, that extra amount can make a large difference. Yet that loading could well be a mirage, given that total pay appears lower, other things being equal, for workers receiving the loading. If total pay (not base pay) is what matters to employers, then it is plausible that the loading would simply allow base wages to be pushed down. As many recipients of the loading are on award rates, it is possible that this constrains the growth of award minimums generally (given the interconnections between Modern Awards). Conversely, it may be that the award system prevents pay for leave-deprived workers being pushed down even further. The two possibilities are not mutually exclusive.
45. The problem for many casuals is twofold. First, the default position is casual employment, and they would be rocking the boat, and potentially risking their relationship with their employer and even job, if they were to seek permanency. Second, many rely on the casual loading financially, to supplement meagre earnings in low-paid jobs. So a solution is needed that would default workers to eligibility for annual leave, and remove the financial incentive to retain casual status, while also minimising the financial incentive on firms to prefer to hire employees as casuals, and still compensating workers for unpredictability in their work and the difficulty this would mean for making any use of the benefits from National Employment Standards.

### Towards genuine national employment standards

46. The aim of policy should be to have all employees entitled to the National Employment Standards (NES), including most people who are presently casuals. The National Employment Standards cannot be considered to be genuinely national if over a fifth of employees are not entitled to them. Very few casuals are in genuinely unpredictable work, that is work so unpredictable it doesn't make sense for them to accrue annual leave etc for such short-term, variable work. Australia should not be behind the rest of the world on this matter.
47. In the end, when all are entitled to the NES, there would be an unpredictability loading for everyone in such unpredictable jobs that they could not benefit from the NES (not much more than 1% of the workforce). The rest would be entitled to the NES and would therefore not receive the casual bonus.
48. The government should state this as the intention of policy and convene a national consultative committee to decide on the best way to transition to this outcome. Options for the consultative committee to consider would include the date of effect of the move, the criteria for the unpredictability loading, the entitlements of existing casuals (do they continue and, if, so, until when?), and the desirability or otherwise of phasing changes to entitlements.

## Labour hire

49. Closing Loopholes enabled the FWC to make orders with the effect of requiring an employer to pay the same wage to labour hire workers as they pay to their own employees through enterprise bargaining agreements (EBAs). This process was known as ‘Same Job, Same Pay’ (SJSP), and came into effect in December 2023, though it took several months for orders to be made.

### Impact on pay

50. The amounts involved in SJSP orders are substantial. In April 2025, the McKell Institute published a study reporting that 1500 workers in mining were expected to receive, or had received, an average pay increase of \$31,300. Many other mines transferred workers from labour hire to direct employment, to avoid the cost and time associated with SJSP orders.<sup>33</sup>

51. While mining has long been recognised as a sector with heavy usage of lower-paid labour hire workers,<sup>34</sup> the report also referred to major increases to workers in other sectors. In aviation, some cabin crew saw their pay increase by \$20,000 per annum and certain casual employees by 32-42%. This was achieved not through SJSP orders but through enterprise bargaining, in which the threat of an SJSP case was an obvious lever. In retailing, one SJSP order delivered increases of 32%. It appears that the value of SJSP orders and pre-emptive pay increases will be considerably greater than had been estimated by the Department of Employment and Workplace Relations before the legislation was passed.<sup>35</sup>

### The mix between labour hire and direct employment

52. With a large gap between the earnings of ordinary employees and the earnings of labour hire workers subject to SJSP orders, we would expect that many employers using labour hire would shift away from labour hire to direct employment, reducing the share of labour hire in the workforce and increasing the share of directly hired employees.

53. Accurately estimating the number of labour hire workers is one of the most difficult things for the ABS to do in the labour area. This is because ‘people who work for a labour hire firm are likely to incorrectly identify their employer and the activity undertaken at their workplace as the business they are providing labour to (rather than who they are actually employed and paid by - the labour hire firm)’.<sup>36</sup> Accordingly, the ABS relies on several data sources to estimate labour hire numbers. The most recent issue of the *Labour Hire Workers* publication was published in April 2025 and contains data up to December 2024. Figure 2 shows estimated employment in labour hire taken from that publication.

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<sup>33</sup> Ed Cavanough & Max Douglass, *Closing Loopholes, Opening Opportunities*, McKell Institute, Melbourne, April 2025, p17.

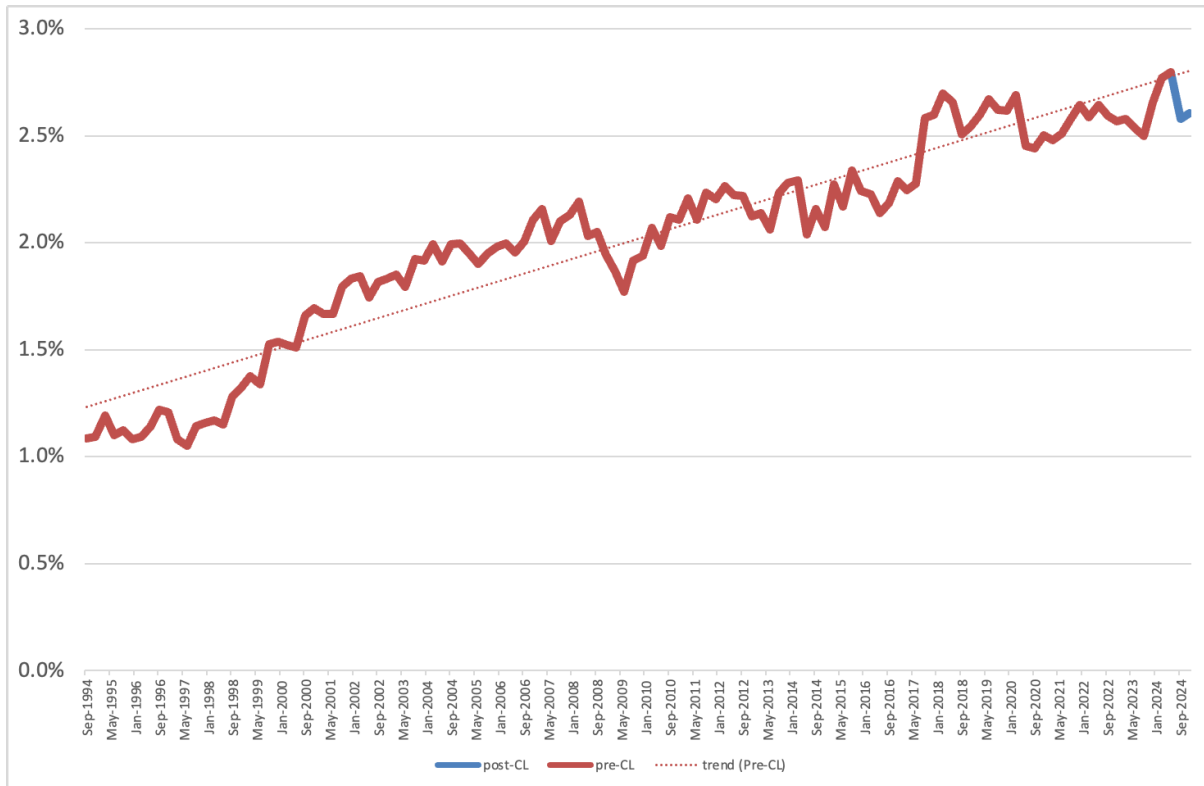
<sup>34</sup> Stephen Whelan, *Wage Cutting Strategies in the Mining Sector*, McKell Institute, Sydney, May 2022.

<sup>35</sup> Cavanough & Douglass, *Closing Loopholes*, n33 above.

<sup>36</sup> ABS, *Industry employment guide: Guide to labour statistics*, Canberra, 7 November 2022,

<https://www.abs.gov.au/statistics/understanding-statistics/guide-labour-statistics/industry-employment-guide>.

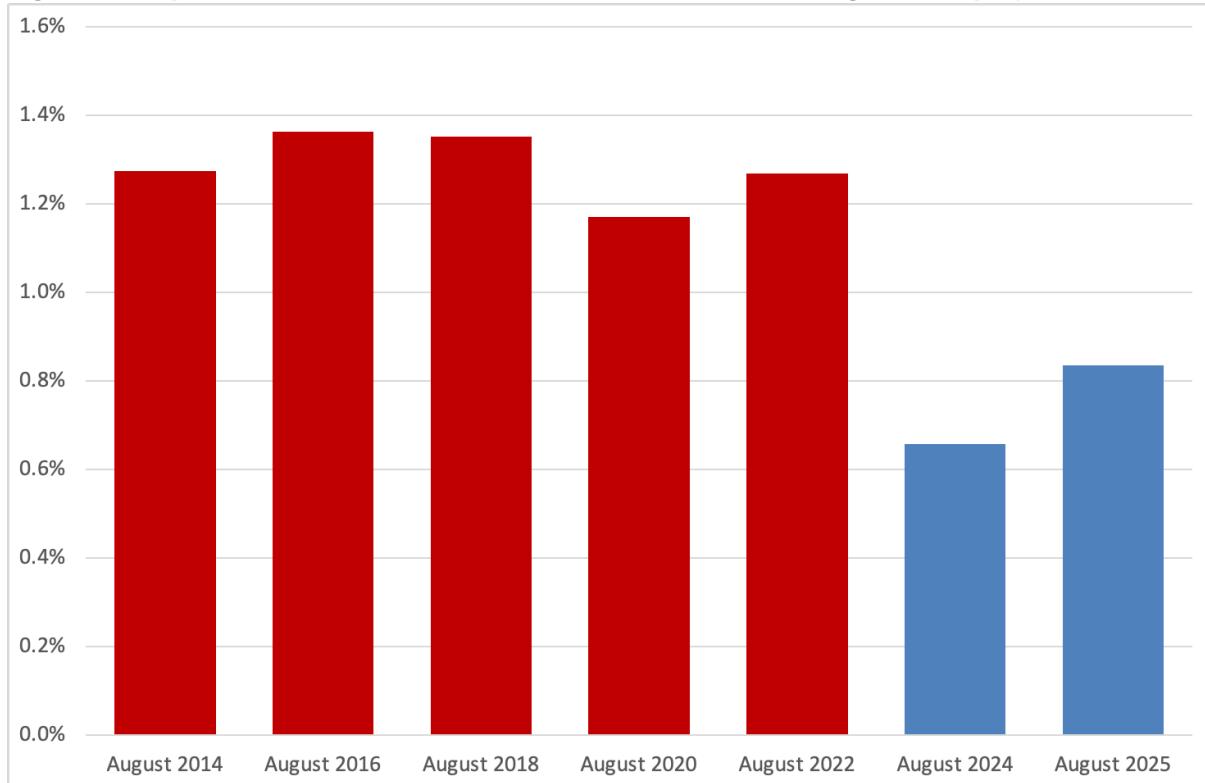
**Figure 2: Share of all people employed in Labour supply services, 1994-2024**



Source: ABS, Labour Hire Workers, Canberra, 2024, <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/labour-hire-workers/latest-release>

54. It can be seen from Figure 2 that the number of people employed in labour supply services (the red unbroken line) grew fairly consistently from 1994 to early 2024 — to be 2½ times the share of the labour force in mid 2024 than it had been in 1994. It then appeared to fall (the blue line) in the last two quarters of 2024, to end up 7% below the level immediately beforehand. This fall took it well below the trend (the red dotted line) that had been established over the previous three decades. But this was only two observations below the trend, the last of which was November 2024, so it is a bit hard to be definitive that there has been a sustainable fall.
55. Fortunately, the ABS also collects data, once every two years, on whether employed people describe themselves as being ‘paid by a labour hire firm or employment agency’ and hence as ‘employed as a labour hire workers’ in their main job. (Also fortunately, they collected that information both in 2024 and 2025). Although not as comprehensive as the data in Figure 2, the numbers are considerably more recent. The results are shown in Figure 3.

**Figure 3: Proportion of self-described labour hire workers amongst all employees, 2014-2025.**



Source: ABS Characteristics of Employment, via TableBuilder

56. Figure 3 shows a marked decline in the number of people paid by a labour hire agency by August 2024, with only a partial recovery by August 2025. All up, by August 2025 the number of labour hire workers, by this measure, was a third less than in August 2022.

## Implications

57. The data suggest that the SJSP provisions in Closing Loopholes are having their intended effect, in increasing the pay of labour hire workers who are paid less than their equivalents in direct employment, and very likely changing the mix of employment between labour hire and directly employed workers. What is difficult to know is exactly what portions of the declining share of full-time employment occupied by casuals, and the declining share of employment occupied by labour hire workers, are due to the casual employment law changes versus to the SJSP provisions in Closing Loopholes. Regardless, they both appear to be working well together, and we recommend the continuation of the SJSP provisions.

## Regulated workers

58. The provisions regarding regulated workers are yet to lead to a minimum standards order, as the procedures set up through Closing Loopholes take considerable time. Progress in them is mostly addressed elsewhere.<sup>37</sup> The ‘unfair deactivation’ provisions have already led to outcomes (reactivations) for several workers, and changes in procedures by several gig firms. Nonetheless, there are several important matters that warrant drawing to the attention of the Review.

### Relationship to Object of the Act

59. The National Employment Standards were written at a time when the Fair Work Act only covered employees. More recently, the coverage of the Fair Work Act has extended to ‘employee-like’ workers and other ‘regulated workers’. This is a recognition of the fact that many workers, formally classed as ‘self-employed’, in practice have many of the characteristics of employees, in terms of their vulnerability, especially in relation to large organisations that make use of them. They thus warrant protection under the Fair Work Act.
60. Legislators have restricted the coverage of the ‘regulated worker’ provisions to particular workers who are considered vulnerable. The provisions in the Fair Work Act affecting ‘regulated workers’ also instruct the FWC to tailor regulation to the circumstances of the workers and their industry,<sup>38</sup> and not give preference to one business model over another.<sup>39</sup> A corollary of the latter is that the starting point for regulation of vulnerable employee-like workers should be the standards that apply for relevant employees.
61. The Act does **not** redefine any regulated workers as employees. Indeed, it prevents the FWC from doing this through the regulated worker processes.<sup>40</sup> This is consistent with the fact that many vulnerable, self-employed workers still want to remain self-employed, even though they seek protection from exploitation by large organisations.
62. It was clearly the intention of Parliament that employee-like and other regulated workers be afforded protections similar, but not identical to, those for equivalent employees. The wording of the Fair Work Act mentioned above suggests that, once costs and other factors are taken into account,<sup>41</sup> regulated workers should receive similar minimum earnings to award-based employees performing similar work.<sup>42</sup>
63. But of course, employee-like and other regulated workers are not paid time-rates — they are not paid an hourly wage or a monthly salary. They are commonly paid some type of piece-rate for the job done. So it would not always be appropriate for the FWC to set minimum hourly payments for regulated workers: sometimes it might, but at other times it would be more appropriate for the FWC to find piece-rates, or combinations of piece-rates, allowances and even time-rates, that

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<sup>37</sup> Submission by Woods, Veen and Barratt, n1 above.

<sup>38</sup> s536JX(a)(vi) and (vii)

<sup>39</sup> s536JX(a)(v)

<sup>40</sup> s536JX(a)(iv) and s536JX(b)(iii)

<sup>41</sup> s536JX(b)(i)

<sup>42</sup> s536JX(b)(ii)

provide similar outcomes for those workers as for equivalent employees. Those employees are subject to the minimum rates and conditions set out in awards, agreements and the National Employment Standards.

64. So, what is being sought through this submission is a more explicit direction to ensure what could best be called ‘comparable’ protection for employees and for the vulnerable non-employees who are covered by the regulated worker provisions. ‘Comparable’ does not mean ‘equal’, but in this context it means protection that, after taking account of differences in costs (such as equipment, maintenance, fuel, insurance and so on) and other relevant factors, the protections are of broadly similar value to employees and to the vulnerable non-employees. It is unlikely that an exact matching of values could ever be achieved, as the monetary equivalent of some considerations is likely too difficult to calculate; the important thing is that the Commission does its best to bring about broad equivalence.<sup>43</sup>
65. This is a fine principle and one worth following. However, it is also the case that insufficient guidance is presently provided to the FWC to ensure that this principle must be followed. It is implied, but not adequately explicit, in the legislation.
66. The Act should therefore be amended to guide the FWC, when assessing the appropriate remuneration for regulated workers, to ensure that the net benefits of its decisions for non-employees, covered by the ‘regulated workers’ provisions, are, to the maximum extent possible, equivalent to the net benefits to employees also covered by the Act.
67. This equivalence could only be established after taking account of all the costs faced by self-employed workers that are not faced by employees. So they could only be established on an industry-by-industry, case-by-case basis. Thus it would not, for example, be appropriate to set an hourly minimum wage for all regulated workers. But it would be appropriate to ensure that, when regulation through the Fair Work Act comes to affect particular classes of regulated workers, that those workers are all protected by a minimum standards orders that leave them with an expected income equivalent to that minimum wage.
68. By its nature, such a form of minimum-wage-equivalent regulation would not apply to self-employed workers who did not fall under the ‘regulated worker’ provisions of the Fair Work Act. That is, the provisions would only apply to a (small) minority of the self-employed.
69. It is also important to recognise that it is not just the National Minimum Wage that is relevant to the ‘regulated worker’ provisions of the Act. While an issue facing some digital platform workers (‘employee-like’ workers) is whether they are receiving something equivalent to a minimum wage,<sup>44</sup>

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<sup>43</sup> An example of how overseas jurisdictions can deal with the complexities of finding equivalence is included in David Peetz, ‘Institutional experimentation, directed devolution and the search for policy innovation’, *Relations Industrielles/Industrial Relations*, 76(1), 2021, 69-89.

<sup>44</sup> For example, two British studies suggested that many ‘gig economy’ workers were receiving incomes that were equivalent to hourly pay below the minimum wage: Chartered Institute of Personnel and Development. *To Gig or Not to Gig? Stories from the Modern Economy*. London: CIPD, 2017; Katriina Lapanjuuri, Robert Wishart, and Peter Cornick. *The Characteristics of Those in the Gig Economy*. London: Department for Business, Energy & Industrial Strategy, 2018. The earnings of Uber drivers in Australia were also estimated to be below Australia’s then minimum wage: Jim Stanford, *Subsidising Billionaires: Simulating the Net Incomes of UberX Drivers in Australia*, Melbourne: Centre for Future Work, March 2018.

the issue facing another group of regulated workers, regulated road transport contractors, is about equivalence to a considerably higher rate.

70. Few if any employee truck drivers receive only the minimum wage; most would be on award rates of pay that are much higher. This reflects the higher level of skill embodied in such work, and perhaps also compensates workers for the higher level of danger in the road transport industry — danger that is often exacerbated by the piece-rate nature of the payment systems and the constrained earnings arising from the operation of contractual chains in that sector.
71. If ‘not giving preference to one business model over another’ means, for *some* digital platform workers, that everyone doing that work is entitled to the equivalent of the minimum wage, then ‘not giving preference to one business model over another’ means, for road transport workers, that everyone doing that work is entitled to the equivalent of a much higher award rate. It is not up to the Review to decide which award classification is relevant to particular regulated workers; that is a matter for the FWC. But the law should make allowance for the fact that the regulated worker provisions are, in part, intended to provide protection above that in the National Minimum Wage.
72. One way to be explicit about the need to provide ‘comparable’ protection for employee and regulated workers<sup>45</sup> would be to amend the Object of the Act<sup>46</sup> to include the following:
- (h) providing comparable protection for employees covered by the National Employment Standards and Modern Awards, and for regulated workers.

73. This would also likely require a definition, in the dictionary of the Act<sup>47</sup>

***comparable protection:*** protection that, after taking account of differences in costs (such as equipment, costs maintenance, fuel, insurance and other relevant factors), the protections are of broadly similar value (to employees and to regulated workers).

74. A provision that only required minimum standards for ‘regulated workers’ would mean that, rightly, most self-employed people would continue to still not be encompassed by Fair Work regulation.

### Definition of employee-like worker

75. Many amendments were passed in order to ensure passage of the Closing Loopholes legislation. One of the most important, relevant to this issue, concerned the definition of ‘employee-like’ worker. In the original form of the Bill, under proposed s15P(1)(e), to be treated as an employee-like worker, a worker would need to satisfy *one* of the following four criteria. This was amended to a requirement that *two* criteria be satisfied. The four criteria are:

- (i) the person has low bargaining power in negotiations in relation to the services contract under which the work is performed;

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<sup>45</sup> The theoretical rationale for this approach is provided in Peetz, ‘Institutional experimentation’, n. 43 above. It explains the concept of ‘directed devolution’, of which this proposal is an example.

<sup>46</sup> s3

<sup>47</sup> s12

- (ii) the person receives remuneration at or below the rate of an employee performing comparable work;
- (iii) the person has a low degree of authority over the performance of the work;
- (iv) the person has such other characteristics as are prescribed by the regulations.

76. This should be reverted to a need to satisfy just *one* criterion. Each of these appears to be adequate justification on their own. It is questionable as to whether even the other category of regulated worker, that is owner-drivers of trucks, would satisfy two criteria. They would arguably meet criterion (i) but much evidence might need to be provided in order to demonstrate either of criteria (ii) or (iii).

77. Contractors outside the digital platform economy are not covered by the employee-like definition.<sup>48</sup> Yet the Closing Loopholes and earlier reforms recognise the vulnerability of some contractors, especially when their market situation is constrained by contractual distancing and contractual chains.

78. While many forms of contractual distancing involve employees (not contractors) at the ‘bottom’ of the chain, some involve contractors. So it would be wise to extend the coverage of s15P to encompass other forms of (non-digital) gig work where contractors are vulnerable. As discussed in the introduction, there is a constant search by business to find new ways of minimising costs, and often this is through some form of contractual distancing. It is difficult for policy makers and Reviewers to anticipate what future particular forms this will take, but it is possible to build into public policy the flexibility to respond to such challenges when they happen. One way is to allow the exercise of Ministerial discretion, through the enactment of regulations, to allow new types of work to be encompassed by the employee-like provisions of the Act.

79. The best way to do this would be by allowing greater flexibility in the legislative definition of ‘employee-like’ worker. This could be achieved by amending s15P(1)(c). Existing s15P defines an ‘employee-like-worker by reference to five requirements. One of those requirements, in paragraph (c), specifies that an employee-like worker must perform a ‘digital platform work’ (a term defined elsewhere in that Part of the Act). That paragraph should be amended by adding ‘or work prescribed by the regulations for the purposes of this paragraph’.

### Availability of non-binding guidelines

80. The FWC can issue non-binding ‘guidelines’ as an alternative to enforceable standards.<sup>49</sup> Yet Modern Awards are not able to be treated as guidelines and nor are other aspects of labour standards regulation.

81. This ability of the FWC to issue non-binding ‘guidelines’ could dilute regulation, providing an ‘easy way out’ if a tribunal member is inclined to look for one as, for example, a form of compromise. Voluntarism should not be allowed any more than it is for Awards.

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<sup>48</sup> ss15G, 15P, 15Q

<sup>49</sup> Part 3A-2, Division 4, i.e. ss536KR to 536KU

82. Either the possibility of non-binding guidelines should be removed, or the scope for non-binding guidelines be very narrowly defined and time-limited.

### Coverage of topics

83. Closing Loopholes does not allow the new minimum standards to cover several matters, including: overtime pay, rostering, purely commercial issues, health and safety matters covered by other laws, or other topics prescribed by regulation.<sup>50</sup>
84. The exclusion of some of these matters, such as overtime pay, reduces the flexibility of the FWC to find the best solution to the issues it encounters. Although it would be reasonable to envisage that the dominant forms of regulation, aside from straight out compensation for expenses, would be through piece-rates rather than time rates (as occurs, for example, in New York’s minimum standards for Uber drivers), we should not rule out the possibility that overtime regulation would have a role.
85. Certainly, when matters are best covered by other laws (such as for aspects of health and safety) or are unrelated to labour income (such as purely commercial issues), it is appropriate to exclude the FWC from second-guessing other regulators. But on matters where the FWC has been the traditional regulator and has expertise in the area, it should not be precluded from using that part of its repertoire.

### Contractual chains

86. The provisions regarding ‘contractual chains’ in road transport are an important innovation in labour law and reflect the fact that many decisions affecting the pay of owner-drivers are made further up the contractual chain. At present, hearings before the FWC in relation to contractual chain orders are considering such matters as: a proposed requirement for payment within 30 days; rate reviews; and the question as to whether certain payment terms pressure operators into lowering costs over the duration of a contract.
87. However, the new road transport contractual chain provisions are not the only aspects of the FW Act to deal with contractual chain issues. In particular, sub-section 558B(1) of the existing FW Act holds a franchisor responsible for certain acts that occur within their contractual chain, even if they are not the formal employer of the workers involved, while sub-section 558B(2) makes a holding company accountable for certain acts that occur within their contractual chain, again even if they are not the formal employer of the workers involved. These provisions were introduced in 2017 by Minister Cash.<sup>51</sup>
88. While the wording of s15RA (about the meaning of a road transport contractual chain) and chapter 3B (ss536NL to 536QX, about minimum standards for people in a road transport contractual chain) is not (and cannot be) identical to s558B, it builds on the concepts embodied in s558B: that entities who control conditions of work should not be exempted from

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<sup>50</sup> s536KM

<sup>51</sup> via the Fair Work (Protecting Vulnerable Workers) Act 2017 (Cth).

accountability, simply by virtue of contractual arrangements that mean they are not the direct employers of the workers concerned.

89. Contractual chains designed to minimise costs take many forms, such as franchising, holding companies, use of labour hire and sub-contracting.<sup>52</sup> Road transport is thus one of many areas where contractual chains of various types are used to minimise costs. Others include cleaning, petrol and food retailing, hospitality and mining.
90. The FWC should have the power to make orders in any ‘contractual chains’, not just in road transport, where decisions within those contractual chains adversely and unreasonably affect the ability of employers to meet their obligations under the Fair Work Act. This capacity would benefit both workers and employers further down the contractual chains, just as the contractual chain provisions regarding road transport contractors in Chapter 3B can benefit both workers and employers.

### Workers’ compensation

91. A final, inherent limitation of the Regulated Workers part of the Act concerns its coverage of topics — most obviously, the (unsurprising) absence of workers compensation and rehabilitation (WCR) from its reach. That is considered a matter for State parliaments. If gig economy workers are sufficiently ‘employee-like’ to warrant protection through minimum standards established by the FWC, they are certainly also deserving of coverage by workers compensation systems.
92. While the Act empowers the FWC to include terms about insurance in a minimum standards order, it is inconceivable that the FWC would go into the level of detail in any order about workers compensation insurance that could substitute for inclusion of those workers in the State WCR schemes. After all, the FWC is not empowered to force State parliaments to legislate the inclusion of gig workers in their own schemes, and any FWC-imposed bespoke scheme for insurance cover of a group of gig workers would likely have higher premiums and/or lower benefits, in particular less emphasis on rehabilitation, than can be provided by the State WCR schemes.
93. This Review should encourage State parliaments to amend WCR laws to ensure that all gig workers are covered by their legislation. In that context, the way forward requires a workers’ compensation and ‘gig’ workers summit, involving all governments, as well as representatives of key stakeholders, to make binding decisions about how WCR systems will deal with ‘gig’ workers. It should be possible for all jurisdictions to agree that the *coverage of workers compensation and occupational health and safety (OHS) laws should be aligned*, and that workers compensation obligations should apply to persons conducting a business or undertaking in the same way that OHS laws do.

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<sup>52</sup> David Peetz, *Realities and Futures of Work*, Australian National University Press, Canberra, 2019.

## Delegates' Rights

94. The Closing Loopholes changes regarding rights in awards and agreements took effect on 1 July 2024. These rights operate at several levels. Some rights for union delegates are specified in the Fair Work Act itself. Workplace delegates are entitled to represent the interests of their union's members, and any other non-members eligible to be members. They are entitled to reasonable communication with union members and eligible non-members, and to reasonable access to the workplace and its facilities. They can communicate with employees during or outside working hours. In firms above a minimum size, delegates are also entitled to reasonable access to paid time off for union training, during normal working hours.

### Developments and data

95. The details of these rights were all to be clarified in modern awards, and the FWC issued a model clause for inclusion in awards elaborating upon these rights.<sup>53</sup> It was successfully challenged in the Federal Court on the basis that it was more restrictive than permitted by the legislation,<sup>54</sup> and a new model clause was subsequently issued by the FWC.<sup>55</sup> A Centre for Future Work report summarises the new provisions and the first model clause, the history behind them, and their implications.<sup>56</sup>

96. The FWC had been due to undertake a review of delegates' rights provisions in July 2025, but this was delayed as there was little data and only limited experience on which a review could be based. Indeed, data on delegates in Australia is sparse. The last occasion when there was authoritative, representative data on union delegates was the two Australian Workplace Industrial Relations Surveys in 1990 and 1995, over thirty years ago.<sup>57</sup> Since then there have been episodic surveys of delegates in selected unions, but nothing comprehensive.<sup>58</sup>

97. Workplace delegates are often recognised in industrial relations research as being critical in determining the power of unions,<sup>59</sup> and union renewal strategies have often focused on improving workplace representation, including through the training of workplace delegates.<sup>60</sup> Improving the rights of delegates is part of redressing the imbalance mentioned earlier, and

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<sup>53</sup> [2024] FWC 1699

<sup>54</sup> *Construction, Forestry and Maritime Employees Union v Australian Industry Group* [2025] FCAFC 187

<sup>55</sup> [2026] FWCFB 5, Attachment 3

<sup>56</sup> David Peetz, *Employee voice and new rights for workplace union delegates: Impacts on wages, productivity, cooperation and union training*, Centre for Future Work, Canberra, July 2024,

<sup>57</sup> Ron Callus et al., *Industrial Relations at Work: The Australian Workplace Industrial Relations Survey* (Canberra: AGPS, 1991); Alison Morehead et al., *Changes at Work: The 1995 Australian Workplace Industrial Relations Survey* (South Melbourne: Longman, 1997).

<sup>58</sup> Mostly summarised in David Peetz and Michael Alexander, "A synthesis of research on training of union delegates", *Industrial Relations Journal* 44, no. 4 (2013).

<sup>59</sup> e.g. David Peetz and Barbara Pocock, "An analysis of workplace representatives, union power and democracy in Australia", *British Journal of Industrial Relations* 47, no. 4 (December 2009).

<sup>60</sup> Christian Lévesque and Gregor Murray, "Understanding union power: resources and capabilities for renewing union capacity", *Transfer – European Review of Labour and Research* 16, no. 3 (2010).

there has possibly been a small increase in union density since they took effect,<sup>61</sup> though it is unclear whether that increase will be sustained or indeed whether it had anything to do with the delegates' rights provisions.

98. Improving delegates' rights can be seen as providing a proper basis for the exercise of basic rights for employees. It can also be seen as a mechanism for improving co-operation, communication and the introduction of productivity-enhancing technology, depending on the approach of management.<sup>62</sup>

### Issues with delegates' rights

99. The main weaknesses in the rights for union delegates appear twofold. Both of these weaknesses arise from implementation by the FWC. First, while comparisons are difficult, the five days minimum entitlement provided in the FWC's model award clause (for the first year) appears in line with common practice in agreements and old awards, but the provision of only one day paid leave per year in the second and subsequent years does not.

100. Second, a restriction of one delegate entitled to paid training leave per 50 eligible employees in the first model award provision (amended to 50 eligible *workers* after the Federal Court decision) appears likely to fail to account for the number, possibly high, of establishments that have more than one delegate per fifty members and potential members.

101. Hence the model award provisions are likely to mostly only affect employees in workplaces without enterprise agreements. Few of those would have union delegates.

102. While these are limitations, it is not clear that this requires legislative action at this stage. There are limits to the level of detail that can realistically be contained in legislation. That said, the effects of the provisions should be monitored. In the first instance, it would be up to the FWC to respond to any developments in implementation. However, it needs data to respond to, and aside from the submissions that parties would make, there will not be much around unless special efforts are made to collect some.

103. Accordingly, it would be appropriate for the Review to recommend that the Government (via DEWR) and the FWC co-operate to finance research into the ongoing impact of the delegates' rights provisions on delegates, members and employers.

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<sup>61</sup> ABS, Trade Union Membership, Australia, August 2024, Canberra, published 9 December 2024, <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/trade-union-membership/latest-release>

<sup>62</sup> See research quoted in Peetz, Employee voice and new rights, n56 above.

## Conclusions and recommendations

104. The Closing Loopholes Review is required to: consider whether the operation of the amendments is appropriate and effective; identify any unintended consequences of the amendments; and consider whether further amendments to the Fair Work Act 2009, or any other legislation, are necessary to improve the operation of the amendments or rectify any unintended consequences that are identified.

105. Our assessment is that, overall, the operation of the amendments is appropriate and effective, but that further amendments are necessary to ensure that the intent of the legislation is achieved. Closing Loopholes is succeeding in reducing the imbalance, but there are some inadequacies in the approach. The casual employment and labour hire provisions appear to be reducing insecurity, by reducing the incidence of casual employment and lower-paying labour hire work, but it seems likely that many casuals who want permanency will still lack it and that too many Australian workers will continue to be unable to access leave entitlements. The guidance to the FWC needs to be more precise in ensuring that there are comparable protections for employees and for employee-like workers. Too many vulnerable workers may be excluded from the protections afforded through the employee-like provisions of Closing Loopholes. All employees, not just workers in road transport, need to be able to be protected from decisions elsewhere in contractual chains that put unfair pressures on their employers to cut conditions and prevent them from meeting their obligations under industrial instruments. The information available to decision makers in some areas is deficient and needs to be improved. And there are some problems arising from the logic of Closing Loopholes that are outside of the capacity of federal industrial relations legislation to solve — in particular, in the area of workers' compensation.

106. Accordingly, we recommend the following.

### Recommendation 1

that the Review recommend amendment to the Object and Dictionary of the Act by

(i) including within the Object of the Act<sup>63</sup> the following:

"providing comparable protection for employees covered by the National Employment Standards and Modern Awards, and for regulated workers."

(ii) including within the dictionary of the Act<sup>64</sup> the following definition:

**"comparable protection:** protection that, after taking account of differences in costs (such as equipment, costs maintenance, fuel, insurance and other relevant factors), the protections are of broadly similar value (to employees and to regulated workers)."

<sup>63</sup> s3

<sup>64</sup> s12

**Recommendation 2**

that the Review recommend the continuation of the provisions regarding casual workers, same job same pay, and delegate rights

**Recommendation 3**

that the Review recommend the Government :

- (i) legislate to create a default entitlement to the National Employment Standards for all employees, even casuals, after a defined period of employment, from a date to be proclaimed;
- (ii) state that it is its intention that there be an unpredictability bonus for everyone in genuinely unpredictable, while the rest would be entitled to the NES and would therefore not receive the casual bonus; and
- (iii) convene a national consultative committee to decide on the best way to transition to this outcome. Options for the consultative committee to consider would include the date of effect of the move, the criteria for the unpredictability loading, the entitlements of existing casuals, and the desirability or otherwise of phasing changes to entitlements.

**Recommendation 4**

the Review recommend that the Act be amended to:

- (i) enable the FWC to make orders in any ‘contractual chains’, not just in road transport, where decisions within those contractual chains adversely and unreasonably affect the ability of employers to meet their obligations under the Fair Work Act.
- (ii) tightly contain or remove the circumstances in which non-binding ‘guidelines’ can be issued;<sup>65</sup>
- (iii) amend the definition of employee-like worker by
  - (a) changing s15P(1)(e), to require that only one (rather than two) listed criteria be met in order to enable a worker to be defined as ‘employee-like’; and

<sup>65</sup> Part 3A-2, Division 4, ie ss536KR to 536KU.

- (b) allowing greater flexibility in the legislative definition of ‘employee-like’ worker by adding ‘or work prescribed by the regulations for the purposes of this paragraph’ at the end of s15P(1)(c); and
- (iv) reduce or remove industrial relations restrictions on the matters on which the FWC can make orders.<sup>66</sup>

#### **Recommendation 5**

that the Review recommend that information available to decision makers be improved by

- (i) the Government (via DEWR) and the FWC co-operating to finance research into the ongoing impact of the delegates rights provisions on delegates, members and employers; and
- (ii) the ABS improve the data relevant to the conversion issue, by asking the relevant questions of all employees who had been casuals within the previous year.

#### **Recommendation 6**

that the Review encourage State parliaments to amend workers compensation laws to ensure that all digital platform workers are covered by their legislation and encourage all governments to hold a summit on the common treatment of digital platform workers for workers’ compensation purposes.

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<sup>66</sup> s536KM

## APPENDIX A: PRODUCTIVITY

### Introduction

It is far too early to quantitatively assess the impact of Closing Loopholes on productivity. For one thing, as explained below, measured productivity is simply too variable to enable useful comparisons over time to be made, especially as no growth cycle encompassing the Closing Loopholes reforms has passed. However, some general observations have been made. This is because critiques of labour market policies, that affect the balance of power one way or another, are frequently based on the proposition that productivity is harmed by policies that shift the balance towards workers, or benefited by policies that shift the balance towards business (though often they are not expressed in those terms). This Appendix considers such concerns. Before doing that, however, it comments on the measurement of productivity, and the trends that can be observed in it.

### Measurement of productivity

Productivity is about quantities, not costs. Productivity 'measures how good we are at producing output'.<sup>67</sup> To put it colloquially, it is about answering 'how many workers does it take to make how many widgets?' The limited evidence available suggests that most Australian workplace managers do not know how to measure productivity correctly<sup>68</sup>, and often think of it in terms of prices or wages, not quantities.

As the Productivity Commission says, it 'is calculated as the ratio of the value of output produced to the quantity of inputs used'.<sup>69</sup> Sounds simple, though measurement gets more imprecise, the more complex it becomes. Quantifying labour productivity – output per unit of labour input – is fairly straightforward if there is a single output that is sold in a free market, and the focus is on a single input (labour). It is not hard to measure, or describe, the number of cars produced per worker in a week. It becomes very tricky when looking at multi-factor productivity (output per unit of, say, labour-and-capital input).<sup>70</sup> That is typically estimated as a residual.<sup>71</sup> Economists cannot even describe the denominator (for example, what even is a unit of 'labour-and-capital'?), so what is measured is expressed as an index (giving it a value of 100 in a base year). Many bold assumptions come to be made, including about how to translate a unit of capital into a unit of labour in each industry.

Even more creative assumptions are made when attempts are made to measure productivity in the public sector, when the market is not the aim. By the logic above, productivity is higher in classrooms

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<sup>67</sup> Productivity Commission, "What is productivity?", Productivity Commission, 2025, <https://www.pc.gov.au/what-is-productivity#>.

<sup>68</sup> Morehead et al., Changes at work.

<sup>69</sup> "What is productivity?". n67 above.

<sup>70</sup> Australian Bureau of Statistics, "Estimates of Industry Multifactor Productivity methodology", 2023, <https://www.abs.gov.au/methodologies/estimates-industry-multifactor-productivity-methodology/2022-23#>.

<sup>71</sup> Julián Messina, Oskar Nordström Skans, and Mikael Carlsson, "Firms' productivity and workers' wages: Swedish evidence", VOXEU: CEPR Policy Portal (London), 23 October 2016, <https://cepr.org/voxeu/columns/firms-productivity-and-workers-wages-swedish-evidence>.

when there are fewer teachers per student. Students will tell you the opposite. The same problem applies in other service industries, especially outside the market sector. Productivity is higher where there are fewer nurses per bed? Patients and bureaucrats will have very differing views on the meaning of labour productivity.

Quite simply, it is not possible to persuasively measure productivity in the non-market sector. Even if 'productivity' was lower because of something like fewer beds per nurse, it would be a plus, not a minus, for living standards. If productivity in higher education is improved by increasing class sizes or shifting from face-to-face to entirely online teaching, it may improve the financial performance of the university and the bonuses of senior management, but the achievement of the aims of higher education might be compromised. The ABS correctly observed that 'comparing market sector productivity to its non-market counterpart is...not an exercise in comparing like with like'.<sup>72</sup>

When assessing national productivity, it is best to ignore measured productivity growth in the non-market sector, and just focus on the market sector. The differences between the two sectors are too great and fundamentally irreconcilable. Productivity measurement across the non-market sector is meaningless, as the differences within the non-market sector are also too great (beds per nurse cannot be compared to students per teacher). Productivity measures in each part of the non-market sector need to be designed for measuring the factors that matter in that particular industry, and reflect the benefit to users, not the simple cost of production.

The ABS measures outputs, not outcomes, in the non-market sector. That is, outcomes such as waiting times for surgery, patient recovery rates, life expectancy, patient quality of life, and the rate of surgical failures are not part of the productivity equation in health; instead it is only the numbers of such things as hospital treatments and medical consultations that are counted.<sup>73</sup> In collectively consumed outputs such as defence, public policy making and security services, production is measured as labour input and so measured productivity growth is inherently zero. In the rest of the non-market sector, the ABS notes that 'attempts to improve the quality of non-market services will show up, at least in the short term, as an increase in hours worked but not an increase in output, thus biasing productivity estimates downward'.<sup>74</sup>

A further point is worth noting: at an aggregated level, productivity growth is very erratic, and is best measured over growth cycles. In the short run, labour productivity is very sensitive to movements in cyclical conditions.<sup>75</sup> When economic activity starts to decline, firms tend to hoard labour, reducing labour productivity. This is because there are high costs involved in retrenching and rehiring and firms do not want to lose skilled employees.<sup>76</sup> Productivity growth is so erratic, that you can tell very little from one quarter's figures. 'Revise, revise and revise again', as the Productivity Commission said.<sup>77</sup> The best thing to do, as the Australian Bureau of Statistics recognised long ago, is to average

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<sup>72</sup> Australian Bureau of Statistics, "A primer on labour productivity", updated 3 September, 2025, <https://www.abs.gov.au/articles/primer-labour-productivity#a-primer-on-labour-productivity>. n73.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Hagedorny, M & Manovskiiz, I (2011) 'Productivity and the Labor Market: Co-Movement over the Business Cycle' International Economic Review, 52 (3) pp. 603-619.

<sup>76</sup> Ljungqvist, L (2002) 'How Do Lay-off Costs Affect Employment?' The Economic Journal, 112 (482) pp. 829-853.

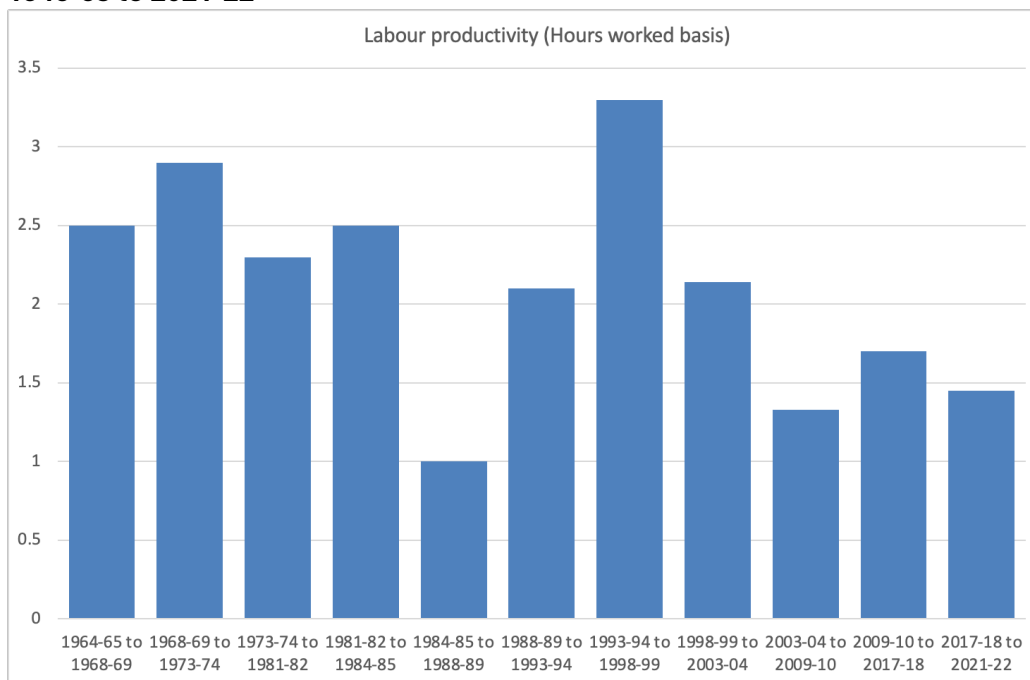
<sup>77</sup> Quarterly productivity bulletin – September 2024, Productivity Commission (Canberra, 2024), <https://www.pc.gov.au/ongoing/productivity-insights/bulletins/quarterly-bulletin-september-2024/bulletin-september-2024.pdf>.

productivity growth over the whole of a ‘growth cycle’, between one peak of growth and the next. The trouble is, growth cycles (comparable to economic growth cycles) vary in length, and the end point is not easy to pick when it happens, only later. If it is not possible to measure over growth cycles, then growth averaged over a long period is a lot more meaningful than growth measured over a short period.

## Trends in productivity

Figure A1 shows average annual labour productivity growth in the market sector in Australia (calculated on an hours worked basis) over each of the growth cycles since 1964-65. Note that the lengths of the growth cycles vary, so distances along the x-axis are not proportionate. The data only go back to 1964-65, as that is the earliest time for which the ABS calculated growth cycles. However, it is noteworthy that productivity growth through the 1950s and 1960s averaged between 2.2 and 2.4% per annum,<sup>78</sup> similar to the first four growth cycles shown in figure A1. The current growth cycle is not shown, as it is not possible to know when a growth cycle has ended until after the event, and until we know its end point, we cannot know average productivity growth throughout the cycle.

**Figure A1: Average annual hourly labour productivity, growth, market sector, growth cycles, 1946-65 to 2021-22**



Source: Calculations from ABS, Australian National Accounts, annual, various years.

Labour productivity growth was highest in the pre-1984-85 decades, and in the 1993-94 to 1998-99 growth cycle. There is contention as to the causes of the seeming spike in that latter growth cycle (was it microeconomic reforms — if so, which ones? was it increased work intensity?) but whatever the cause, it was clearly unsustainable, given the failure of productivity growth to approach that level again. A view at the time, associated with the Productivity Commission, was that microeconomic

<sup>78</sup> See Figure 2 (page 30) of Jim Stanford, *Productivity on the Real World: What it is, what it isn't, and how to make it work better for workers*, Centre for Future Work, July 2025, which draws upon RBA 'Australian Economic Statistics 1949-1950 to 1996-1997,' Occasional Paper #8, June 1996.

reforms were a key driver of that surge.<sup>79</sup> After that, however, productivity growth slowed substantially, suggesting the reforms provided no permanent impetus to productivity growth. John Quiggin argued that the higher productivity growth rate achieved in Australia in just one growth cycle was probably a statistical illusion anyway. That is, it was not a signal that reforms had delivered a ‘new economy’ that could produce permanently higher productivity growth rates, but rather, a blip caused by overestimation and, most importantly, an unsustainable increase in work intensity that was subsequently wound back, at least partly.<sup>80</sup> None of the economic reforms of the 1980s and 1990s, or any combination of them, led to a sustainable increase in labour productivity growth. Instead, labour productivity growth has declined over the long term. If the reforms of the 1990s had a long-term impact on productivity growth, it was the wrong one.

The experience described above is consistent with the international experience: despite the world-wide adoption of ‘neoliberal’ reforms,<sup>81</sup> productivity growth across industrialised countries has unevenly but gradually declined since the 1950s and 1960s.<sup>82</sup> Whatever ‘neoliberal’ reforms achieved, they did not improve long-term productivity, but they did have distributional effects. In five major anglophone countries studied (UK, USA, Canada, New Zealand and Australia), the move to ‘neoliberalism’ saw a *reduction* in average incomes growth among the bottom 90% of the population, consistent with a decline in productivity growth, but an *increase* in income growth for the top 1%.<sup>83</sup>

The long-run slowdown in productivity growth is not unique to Australia. Nevertheless, in international perspective Australia’s slowdown has been relatively severe. Australia’s average productivity growth in the ten years from 2013 to 2023, a period that includes pre-pandemic and pandemic years) was 0.39%, ranking Australia 29<sup>th</sup> out of the 37 OECD countries reporting data.

## Labour market regulation and productivity

By some arguments, labour market policy settings that favour labour over capital retard productivity growth, by reducing the availability of resources for investment. At an aggregate level, these arguments do not appear to have much merit. Certainly, labour productivity is influenced by the relative costs of labour and capital. If labour is relatively cheap compared to capital, then firms are more likely to employ labour than capital. This will impede labour productivity growth. Countries with low wages have low labour productivity,<sup>84</sup> and as their wages rise with economic development, labour productivity must rise in response, which may lead more labour-intensive industries to relocate to

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<sup>79</sup> Banks G (2002) ‘The drivers of Australia’s productivity surge’, paper presented at Outlook 2002 conference, Department of Industry, Tourism and Resources and the Australian Bureau of Agriculture and Resource Economics, National Convention Centre, Canberra, 7 March; Parham, D (2002) ‘Microeconomic reforms and the revival in Australia’s growth in productivity and living standards’, Paper presented to the Conference of Economists, Adelaide, 1 October.

<sup>80</sup> Quiggin, J (2006) ‘Stories about productivity’ Australian Bulletin of Labour, 32 (1) p.18.

<sup>81</sup> Liz Manning, “Neoliberalism: What It Is, With Examples and Pros and Cons”, Investopedia, updated 2 July, 2024, <https://www.investopedia.com/terms/n/neoliberalism.asp>.

<sup>82</sup> Georg Erber, Ulrich Fritsche, and Patrick Christian Harms, “The Global Productivity Slowdown: Diagnosis, Causes and Remedies”, *Intereconomics* 52, no. 1 (2017).

<sup>83</sup> David Peetz and Georgina Murray, “How Economic Paradigms Shape Income Growth for the Rich and the Rest in Liberal Market Economies”, *Journal of Australian Political Economy* 87 (2021).

<sup>84</sup> Krugman, P J, Obstfeld, M & Melitz, M (2006) *International Economics: Theory and Policy*, 9th Edition, Upper Saddle River NJ, Prentice Hall, p38.

lower cost countries. Further, in an Australian context, when the centralised prices and incomes Accord of the 1980s caused a drop in real award wages, there was a sharp drop-off in labour productivity growth.<sup>85</sup>

Low minimum wages may allow inefficient employers to remain in business and facilitate a ‘low cost, low skill ‘equilibrium’.<sup>86</sup> In the short to medium term, how much higher minimum wages would lead to higher productivity might be constrained by how much low-wage employers are willing to invest in training and technology,<sup>87</sup> a result of a ‘free rider’ problem in coordination of training.<sup>88</sup> There is some evidence that wage compression increases training<sup>89</sup> and that the introduction of the UK national minimum wage may have increased (or at least not decreased) training.<sup>90</sup>

High wages can encourage firms to introduce new technology that improves productivity.<sup>91</sup> If labour becomes more expensive, it may be more profitable for firms to invest in labour-saving technology. With low wages, firms face a disincentive against introducing new technology, as it is more likely that profits could be enhanced by paying for the cost of more cheap workers than by paying for the cost of the new machinery. Without new technology, productivity will remain low.

The exception to the pressure from higher wages to higher productivity occurs if higher wages also reduce, by a large enough amount, the capacity for firms to finance this investment — that is, if the surplus generated by firms and used for investment is reduced by higher wages. However, that argument is only relevant if that surplus is primarily used for investment in new technology. In reality, the surplus generated by firms can be used either for investment or for increasing profits, shareholder returns and senior executive compensation.

Moreover, the amount of surplus directed to profits has increased, while the amount of surplus directed to investment and innovation has declined. There is a global trend towards the increased use of surplus funds for share buy-backs, which increase the value of shareholder returns and senior executive remuneration: their use by the world’s largest 1200 corporations trebled over the decade to

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<sup>85</sup> Peetz, D (2012) 'Does Industrial Relations Policy Affect Productivity?' Australian Bulletin of Labour, 38 (4) pp. 268-292.

<sup>86</sup> Rasmussen, E, Foster, B & Murrie, J (2012) The decline in collectivism and employer attitudes and behaviours: facilitating a high-skill, knowledge economy? Proceedings of the 16th ILERA World Congress, Philadelphia, PA, 16th International Labour and Employment Relations Association World Congress. Burgess, J, Rasmussen, E & Connell, J (2004) Temporary agency work in Australia and New Zealand: Out of sight and outside the regulatory net. New Economies: New Industrial Relations, Noosa, Association of Industrial Relations Academics of Australia and New Zealand.; Salter, W E G (1969) Productivity and Technical Change, Cambridge University Press, Cambridge.

<sup>87</sup> McLaughlin, C (2006) 'Achieving labour market equity and efficiency in low-paid sectors: The minimum wage and sectoral collective bargaining.'. International Industrial Relations Association Conference, Lima.

<sup>88</sup> Buchanan, J & Evesson, J (2004) Creating markets or decent jobs? Group training and the future of work, National Centre for Vocational Education Research, Adelaide.

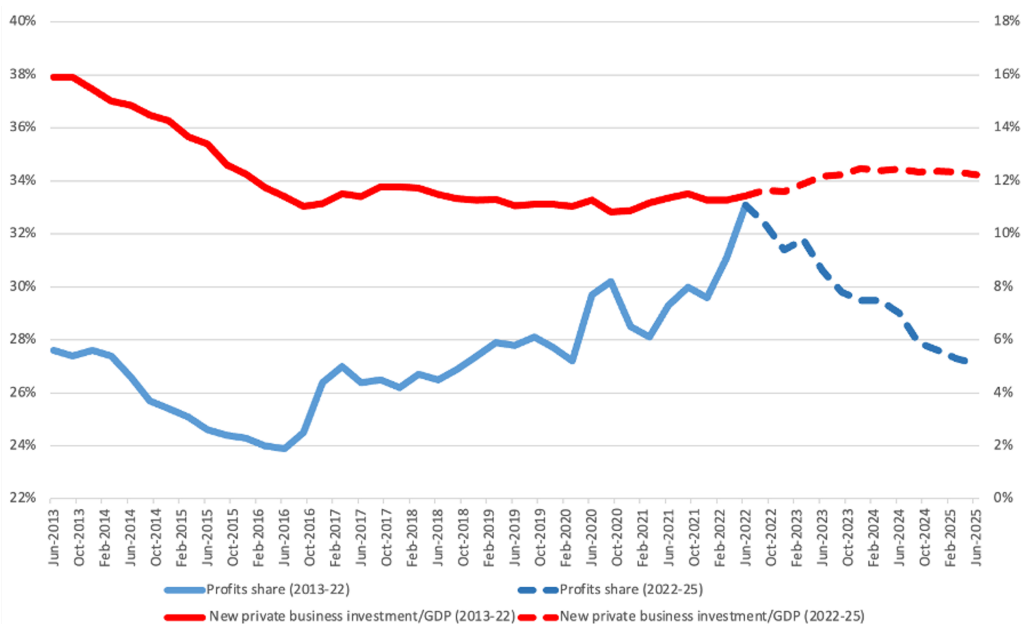
<sup>89</sup> Brunello, G (2002) 'Is training more frequent when wage compression is higher? Evidence from 11 European countries', Munich, Center for Economic Studies & Ifo Institute for Economic Research, CESifo Working Paper No. 637 (4), [http://www.cesifo-group.de/portal/page/portal/DocBase\\_Content/WP/WP-CESifo\\_Working\\_Papers/wp-cesifo-2002/wp-cesifo-2002-01/637.PDF](http://www.cesifo-group.de/portal/page/portal/DocBase_Content/WP/WP-CESifo_Working_Papers/wp-cesifo-2002/wp-cesifo-2002-01/637.PDF)

<sup>90</sup> Arulampalam, W, Booth, A L & Bryan, M L (2004), 'Training and the new minimum wage', Economic Journal, 114(494), C87-C94.

<sup>91</sup> Coviello, D., Deserranno, E. & Persico, N. 2022. 'What Happens to Worker Productivity after a Minimum Wage Increase?'. Kellogg Insight, December.

2022, compared to a 54% increase in dividends. There is ‘strong evidence that share buybacks are suppressing corporate innovation’.<sup>92</sup> Despite the theoretical availability of more funds due to greater restraints on wages, private expenditure on new fixed capital investment in Australia has been unimpressive in recent years. Over the decade from March quarter 2015, the profit share of national factor incomes in Australia rose by 2.8 percentage points but gross fixed capital formation (new private business investment) as a share of GDP fell by 1.4 percentage points (Figure A2).<sup>93</sup> Regulation of share buy-backs might be more relevant to innovation and productivity than regulation of employment relations.

**Figure A2: Profits and new private business investment, Australia, 2013-2025**



Source: ABS, Australian National Accounts, quarterly, Cat No 5206.0.

In modern labour markets, firms exercise discretion over the wages that they pay workers. Despite seemingly tight labour markets<sup>94</sup> with allegedly high levels of labour shortages, firms have increasingly chosen low wage strategies, with the effect that real wages have barely grown in recent years. These low wages do not appear to have been used to increase investment (and hence productivity) but instead to release funds for raising returns to shareholders and senior executives.

The sluggish performance of wages in recent years has also undermined the incentive for employers to enhance labour productivity. The advent of various non-standard and insecure forms of employment (including irregular, temporary, agency, and contract labour) allows employers to access labour while offloading the risks and costs associated with fluctuating business conditions. Again, when contingent

<sup>92</sup> Swift, T. 2022. ‘Do Stock Buybacks Suppress Corporate Innovation?’. *International Journal of Innovation Management*, 26. <https://doi.org/10.1142/S1363919622500372>

<sup>93</sup> Australian Bureau of Statistics, "Australian National Accounts: National Income, Expenditure and Product, Table 24: Selected Analytical Series", in Cat No 5206.0 (Canberra, 2025).

<sup>94</sup> Ai Group, "Deep dive: Solving the skills shortage crisis", Australian Industry Group, 2023, <https://www.aigroup.com.au/resourcecentre/research-economics/economics-intelligence/2023/solving-the-skills-shortage-crisis/>.

labour is readily and inexpensively available, employers can organise business models around its continued use. At the extreme, platform models of employment (such as gig-based passenger, food, and package delivery systems) allow employers to maintain ready supplies of contingent labour at no cost. Since the time workers spend waiting for an incoming job is usually not compensated, businesses like Uber and Lyft have no incentive to try to use their workers' time more efficiently. Is it to the firms' advantage, in fact, to have thousands of underemployed drivers waiting idly, unpaid – to facilitate faster service when new tasks are assigned.

Moreover, while poor technology is the most obvious way in which low wages are linked to low productivity, low wages also adversely affect the extent to which employees work productively. Wolfers and Zilinsky analysed 20 studies and showed that higher wages 'motivate employees to work harder...attract more capable and productive workers...lead to lower turnover... enhance quality and customer service... reduce disciplinary problems and absenteeism', and reduce supervision costs.<sup>95</sup>

In Australia, a major test of the impact of changes to labour market regulatory regimes on productivity took place with the 'WorkChoices' legislation, characterised by the closest period Australia has experienced to a reliance on individual contracting in wage fixing. Although advocated with the promise of increased prosperity, the years of the WorkChoices legislation featured low productivity, at 1.2% per annum, around half the long-term average productivity growth rate in Australia up to then. Productivity growth improved afterwards, under the Fair Work Act, to a level close to that long term average. WorkChoices was not the only factor influencing productivity in this cycle, if it had any influence at all, but it certainly provided no impetus for an acceleration of productivity growth. Indeed, in the whole Workplace Relations Act period (which included the WorkChoices period), labour productivity growth averaged 2.5% annually, representing no tangible improvement on the 2.4% a year averaged during the traditional award system of the 1960s and 1970s. This is not to say that the Fair Work Act necessarily delivered a markedly better outcome. It suggests, though, that industrial relations policy has made little difference to productivity growth. Reinforcing that conclusion, but from a different angle, Hancock, analysing productivity growth across industries as well as nationally, found no evidence of any effect from enterprise bargaining.<sup>96</sup>

Since the turn of the century, productivity growth has averaged less than half as fast as what it was during the boom from the 1950s through to after the end of the 1970s. Yet days lost to industrial disputes are down by over 90% (as a share of all days worked). The 'bite' of Australia's minimum wage (measured relative to median wages) has fallen by one third. Union density has declined by over half. By any measure, Australia's labour market is a more deregulated, employer-friendly arena than during the postwar expansion. Yet despite this – or perhaps because of it – productivity growth has never been worse.

If there is one area of labour market policy where more could be done to improve productivity, it may be in ensuring that workers have a voice at work. Productivity *tends* to be higher where employees have a voice in the workplace. But they often do not get the chance. In one study, 'When employees were asked why they were not given a fair say in workplace change, most pointed to the practices of

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<sup>95</sup> Justin Wolfers and Jan Zilinsky, "Higher Wages for Low--Income Workers Lead to Higher Productivity", Real Time Economic Issues Watch, Peterson Institute for International Economics, updated 13 January, 2015, <https://www.piie.com/blogs/realtime-economic-issues-watch/higher-wages-low-income-workers-lead-higher-productivity>.

<sup>96</sup> Keith Hancock, "Enterprise bargaining and productivity", *Labour & Industry: a journal of the social and economic relations of work* 22, no. 3 (2012).

their managers'.<sup>97</sup> Employees are more welcoming of something when they have a voice in it. New technology such as artificial intelligence meets lower resistance from employees when they are consulted over its introduction.<sup>98</sup> One recent study showed that 'poor or procedural consultation' leads to 'resistance, anxiety & delays'.<sup>99</sup> Workers know it is not generally in their interests to block the introduction of new technology, provided they have a say — as that technology gives their firm a competitive edge and improves their employment and pay prospects. It would make sense for management to wisely use the knowledge of those employees who actually operate the technology.

Indeed, for much of the past half century, considerable public policy effort seems to have been put into reducing the efficacy of the most formalised form of worker voice, trade unions, and their local manifestation, union delegates. There are few studies on the specific impact of workplace delegates (rather than unions) on productivity, but one recent Portuguese survey using matched employee-employer records found that a one percentage point increase in the proportion of members who were union representatives increased firm performance by at least 7%.<sup>100</sup> The author suggested that the result was likely driven by increased training investments by employers in such firms, as 'workers' voice is potentially made more cohesive through the intermediation of union reps and the resulting dialogue with employers can become more effective'.<sup>101</sup>

More research has been conducted into the more general link between unionisation and productivity, but it, too, fails to show the negative relationship that would justify interventions to discourage unionism. Evidence from empirical studies of the relationship between unionism and productivity shows that productivity is, on average, at least as high in unionised as in non-union workplaces, despite any purported potential for 'featherbedding' or union restrictions on use of technology.<sup>102</sup> This is mostly because such negative effects are frequently outweighed by the potential positive impacts of worker voice on productivity, for example, by encouraging employees to identify better ways of doing things, or motivating them to optimise their effort. The net impact, it appears, depends on circumstances.<sup>103</sup> As Appelbaum, Gittel & Leana found in a 2011 study, 'neither highly adversarial battles over union organizing nor ongoing adversarial labor-management relations are conducive to... achieving positive results'. They added that:

Labor-management partnerships based on mutual respect for worker, union, and employer rights and responsibilities have been shown to achieve high performance by

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<sup>97</sup> Chris Briggs and John Buchanan. 2000. Australian Labour Market Deregulation. Commonwealth Parliamentary Library (Canberra). They were referring to the WBS95 study.

<sup>98</sup> Sandrine Cazes. 2023. 'Social dialogue and collective bargaining in the age of artificial intelligence.' OECD Employment Outlook 2023

<sup>99</sup> Kehinde Aluko & John Burgess, 'Negotiating the Future', paper presented to AIRAANZ 2026 conference, Sydney.

<sup>100</sup> Pedro S. Martins, 'The Microeconomic Impacts of Employee Representatives: Evidence from Membership Thresholds,' *Industrial Relations* 58, no. 4 (2019).

<sup>101</sup> *Ibid.*

<sup>102</sup> J. Addison and C. Belfield, 'Union Voice,' *Journal of Labor Research* 25 (2004); B.T. Hirsch, 'What do unions do for economic performance?,' *Journal of Labor Research* 25, no. 3 (2004); Freeman, Richard B. 'What Do Unions Do ? The 2004 M-Brane Stringtwister Edition'. *Journal of Labor Research* 26, no. 4 (Fall 2005): 642–687; Bruce E Kaufman, 'What do unions do?—Evaluation and commentary,' *Journal of Labor Research* 26, no. 4 (2005).

<sup>103</sup> Sandra E. Black and Lisa M. Lynch, 'How to compete: the impact of workplace practices and information technology on productivity,' *The Review of Economics and Statistics* 83, no. 3 (2001).

facilitating employee participation and related high-performance work practices and by creating social networks within and across organizations'.<sup>104</sup>

The other likely factor, at least in Australia, explaining the absence of a strong net negative effect of unions on productivity is that much, probably most, 'featherbedding' was removed by the wage reforms of the 1980s (including the 'two tier' wage system) and 1990s (through the early rounds of enterprise bargaining). More generally, it is not normally in the interests of the workers concerned to prevent the introduction of new technology, as such technology gives their firm a competitive edge which improves their employment and pay prospects. Hence the literature is replete with examples of 'dual commitment' by employees to both management and unions,<sup>105</sup> and employees in several countries, including Australia, report that they desire a cooperative relationship between the union and management at the workplace.<sup>106</sup>

Economists and advocates have advanced numerous theories about the reasons for slower productivity growth in recent years. There is little reason to believe that it has much, if anything, to do with industrial relations policy. Instead, attention would sensibly be focused on a range of issues that include:

- weak capital investment;
- a falling capital-labour ratio;
- weak business innovation and a low level of investment in research and development;
- falling investment, especially at the workplace level, in training and skills;
- excessive dependence on the extraction and export of unprocessed natural resources; and
- outdated infrastructure and low levels of public investment.

These issues, that have been examined in more detail in a separate Centre for Future Work publication,<sup>107</sup> relate one way or another to the capability and foresight of business and managers, at the workplace and organisational levels.

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<sup>104</sup> Eileen Appelbaum, Jody Hoffer Gittel, and Carrie Leana, 'High-Performance Work Practices and Sustainable Economic Growth,' (memo to Obama Administration, Brandeis University, 20 March 2011).

<sup>105</sup> L R Dean, 'Union activity and dual loyalty,' *Industrial & Labor Relations Review* 7, no. 4 (July 1954); T V Purcell, 'Dual allegiance to company and union: Packinghouse workers,' *Personnel Psychology* 7 (1954); Daniel G Gallagher, 'The relationship between organizational and union commitment among federal government employees,' *Academy of Management Proceedings* 44 (1984); Cynthia V. Fukami and Erik W. Larson, 'Commitment to company and union: Parallel models,' *Journal of Applied Psychology* 69, no. 3 (Aug 1984 1984); Harold L. Angle and James L. Perry, 'Dual commitment and labor-management relationship climates,' *Academy of Management Journal* 29, no. 1 (Mar 1986 1986); John M. Magenau, James E. Martin, and Melanie M. Peterson, 'Dual and Unilateral Commitment Among Stewards and Rank-and-file Union Members,' *Academy of Management Journal* 31 (1988); P A Bamberger, A N Kluger, and R Suchard, 'The antecedents and consequences of union commitment: A meta-analysis,' *Academy of Management Journal* 42, no. 3 (June 1999); Ed Snape and Andy W Chan, 'Commitment to company and union: Evidence from Hong Kong,' *Industrial Relations* 39, no. 3 (July 2000).

<sup>106</sup> Richard B. Freeman, Peter Boxall, and Peter Haynes, eds., *What Workers Say: Employee Voice in the Anglo-American World* (Ithaca NY: ILR Press, 2007); David Peetz, 'Workplace cooperation, conflict, influence and union membership,' in *Contemporary Research on Unions: Theory, Membership, Organisation and Non-standard Employment*, ed. G Griffin, Monograph No 8 (Melbourne: National Key Centre in Industrial Relations, 1996).

<sup>107</sup> Centre for Future Work, Submission to Senate Select Committee on Productivity in Australia, Canberra, February 2026.