Submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

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Introduction

Dear Senators,

Thank you for the opportunity to make a written submission to your inquiry into the proposed amendments to the **Fair Work Legislation Amendment (Closing Loopholes) Bill 2023**.

The Centre for Future Work is a research institute located at the Australia Institute (Australia's leading progressive think tank). We conduct and publish research into a range of labour market, employment, and related issues. We are independent and non-partisan. Please see our website at http://www.futurework.org.au/ to access our full research catalogue.

We have conducted ongoing research for several years addressing the economic and social importance of healthy wage growth, the growing impact of precarious and insecure work in Australia's labour market, and the impact of industrial relations policy settings on Australia's wage trajectory and broader labour market performance.

The proposed *Closing Loopholes* legislation touches on a large number of issues and reforms, some of which extend beyond our expertise. However, we offer perspectives on several aspects of the proposed legislation, drawing on findings from our previous research. Our submission emphasises:

- The importance of limiting insecure employment practices (such as casual employment, labour hire, and platform or 'gig' work), and providing full protections to workers in those arrangements.
- The importance of strong and well-resourced mechanisms to ensure the enforcement of these rules, and timely and effective recompense in cases when they are not.
- The importance of empowering trade unions and their delegates to play their full potential role in enforcing labour standards and ensuring fair compensation and treatment of workers.

We would also like to draw your attention to two recent publications from our Centre, both authored by Dr Macdonald, which also address the risks of non-standard and insecure work, especially in care and support services sectors of the economy. We have appended both reports to this submission for your additional information:

Unacceptable Risks: The Dangers of Gig Models of Care and Support Work, by Fiona Macdonald (Canberra: Centre for Future Work), May 2023, 61 pp., https://futurework.org.au/report/unacceptable-risks/.

Going Backwards: How NDIS workforce arrangements are undermining decent work and gender equality, by Fiona Macdonald (Canberra: Centre for Future Work), September 2023, 28 pp., https://futurework.org.au/report/going-backwards/.

Labour Hire

There can be no doubt of the need for reforms to prevent labour hire arrangements from being used to undercut fair wages and conditions. The government's proposal to amend the Fair Work Act to protect rates in enterprise agreements responds to the evident misuse of labour hire by some employers (including some large, highly profitable companies) to avoid employing workers in accordance with agreements they have made with their workforces.

Under the proposed new Fair Work Act provisions,[1] the Fair Work Commission could require labour hire providers to pay their employees no less than what the employees would be entitled to be paid under the host business' enterprise agreement if the employees were directly employed by the host. In our view this provision is a perfectly reasonable and appropriate response to address practices that appear to be designed to bypass workplace agreements and engage workers on poorer conditions and pay. It will apply equally to the private and public sectors. It recognises there are legitimate uses of labour hire arrangements, it is narrowly targeted, and it provides exemptions for surge and temporary requirements and for training arrangements.

Conceptually, the proposals in the Bill are similar to measures implemented or being developed internationally. In the European Union, a 2008 Directive requires that labour hire workers receive the same 'basic working and employment conditions' as direct employees.[2] So it is not restricted to firms that have collective agreements, whereas the Australian proposal is milder in this respect. In the UK, the obligation on employers is again broader than in the Australian Bill, as the UK test asks, in effect, 'are the labour hire workers being paid the same 'as if' they were direct employees of the firm?'. Neither jurisdiction, to our knowledge, relies on the requirement in proposed Part 2-7A (ss306A to 306E) that labour hire employees or their representatives apply for a regulated labour hire arrangement order before the obligation for equality of treatment is activated. In Japan there is a prohibition on 'unreasonable and discriminatory disparity in treatment between regular and non-regular employees', which includes labour hire workers.

Much has been made by business lobby groups of the potential costs of the proposed reforms. According to Department of Employment and Workplace Relations (DEWR) estimates, the maximum increase in wages that could be paid as a result of this provision is $510.6 million per year.[3] However, this would only be the case in the highly unlikely event that *all* of the estimated 66,446 eligible labour hire workers were covered by an FWC order in the first year. In a study in Europe (where the obligation is, as mentioned, much broader), only 8% of small and medium businesses considered the obligation particularly burdensome.[4] Moreover, what is seen as a 'cost' to employers, is equally a 'benefit' for

[1] Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, Schedule 1, Part 6. pp. 38-55.
[2] House of Representatives (2023) *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 Explanatory Memorandum*. Annexure B, p. 24 (p. 382 of 561).
[3] Ibid,, p. 14 (p. 372 of 561).
[4] Ibid,, p. 25 (p. 383 of 561).

workers, their families, and indeed the entire economy who have been denied equal remuneration – and payment of fair wages to those workers will support stronger consumer spending and household financial stability. So it is misguided to focus unduly on the costs of the reforms, when these costs comprise wages and benefits that should have been paid to workers who have been short changed by companies that have structured their workforce arrangements to avoid the direct employment and obligations to employees.

Definition of Employee and Employer

We strongly welcome the Bill's provision requiring that 'the ordinary meaning of "employee" and "employer" be determined by reference to the real substance, practical reality and true nature of the relationship between the parties.'[5] This is as an extremely important reform that is necessary to prevent employees being denied employment protections through sham contracting and other engineered forms of insecure work. Without this reform our entire system of labour standards can be undermined.

The present arrangements, in place following a High Court ruling in February 2022 (the Jamsek ruling), give primacy to what is in each written employment contract, regardless of the actual work arrangements prevailing in the workplace. In the wake of that ruling, it is essentially the case that, if a contract says a worker is an independent contractor then they are one, regardless of the real nature of the work relationship. This enables and potentially encourages sham contracting: any job can be a casual or contract position, if the employer defines it as such. Relying solely on the wording of an employment contract, without reference to the reality of work practices, ignores the unequal standing of employers and workers in the course of defining and agreeing to those written contracts; workers are often driven by economic compulsion to accept contracts. This one-sided approach to defining the status of employment provides employers with undue power and leeway to expand insecure forms of employment in any position, no matter how standard, predictable, or permanent the job is in day-to-day practice.

These proposed reforms would return arrangements to something more like the situation that existed before the recent High Court Jamsek ruling, however we consider the legislation could be strengthened. Before the Jamsek ruling, the determination of whether a worker was an employee or independent contractor was usually made with reference to a set of indicia determining whether a person works for an employer or works for themselves. Those indicia included, for example, what control the parties had over how, where and when the work was performed; which party provided and maintained equipment used in performing the work; whether the worker could subcontract their work; and a number of other factors. This list did not necessarily keep pace with modern developments in business behaviour. In particular, at times it has relied in part on an assessment of employer control of working time, which is not always present, especially in many digital platform and 'gig'

[5] Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, Schedule 1, Part 15.

arrangements. Thus one court has observed that 'novel form[s] of business that did not exist at all ten years ago… may give rise to new conceptions of employment status.'[6] The proposed legislation does not include an explicit set of indicia. Rather, it relies on an interpretive principle whereby the totality of the relationship must be considered with regard, not only to the terms of the contract, but also to other factors, including how the relationship is performed in practice. A definition that includes specific indicia (similar to tests prescribed in other jurisdictions) would strengthen this definition to minimise ambiguity and opportunity for misclassification of employment relationships, but it must be up-to-date and reflect the contemporary reality of employment relationships. This is critical if the reform is to ensure our system of employment regulation is not undermined by continuing misclassification of employees.

The misclassification of employees as contractors, including through sham contracting (the intentional manipulation to characterise employment relationships as contracting relationships), is known to have been a growing problem in the Australian labour market since the 1990s. While the prevalence of misclassification is unknown, the problem is evident in many different occupations and industries including where vulnerable and low-paid workers are present; most recently, in the low-paid care and support sectors.[7]

Sham Contracting

Also very important for tackling sham contracting are the Bill's proposed changes to Subsection 357(1) of the Fair Work Act. These would prohibit an employer from misrepresenting an employment contract as an independent contracting arrangement. Currently, as a defence to sham contracting, an employer needs only to argue they did not know and were not reckless as to whether the contract was an employment contract rather than a contract for service. The proposed reform would require that the employer reasonably believed that the contract was a contract for services rather than an employment relationship. The proposed change, in narrowing the defence for sham contracting, responds appropriately to long-standing concerns that the current provisions are not effective in deterring sham contracting, and to recommendations of numerous legislative reviews and inquiries, as noted in the Explanatory Memorandum to the Bill.[8] We strongly support this provision.

Right of Entry: Exemption Certificates for Suspected Underpayment

The Bill's proposed reform to union entry rights is a small but very important amendment which, along with the other proposals in the Bill, aims to address the widespread problem of wage theft in Australia. The proposed change to union entry rights would provide an additional ground on which unions can apply for an exemption to the 24 hour-notice period

[6] Razak v. Uber Technologies Inc., U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:16-cv-00573, pp27-8.
[7] For care and support workers see Senate Select Committee on Job Security (2021) and Macdonald (2023).
[8] *Explanatory Memorandum,* p. 132, para 781.

for entry to a workplace. Unions could apply to the FWC to enter a workplace to inspect records without any notice where they reasonably suspect a member has been or is being underpaid. In earlier times, when unions had a deeply institutionalised role in the system, part of that was a role in enforcement, facilitated by unions' wide coverage and more abundant resources. The reshaping of the system has not been (and cannot be) accompanied by an increase in resourcing of the labour inspectorate that offsets the loss of inspection capacity arising from the withdrawal of unions.

The proposal in the Closing Loopholes bill is a very small change to the existing right of entry provisions in the Fair Work Act. It does not change in any significant way the limited rights union officials have to enter workplaces for purposes other than promoting compliance with employer obligations under labour law. However, it recognises the important role unions can continue to play in enforcing workplace rights, and it responds to the known problem of employers failing to produce accurate and timely records where underpayments are suspected.[9]

Regulated Workers

Part 16 of the Bill deals with regulated workers, including road transport owner-drivers and digital platform workers. These two types of workers are both types of 'gig workers', as their work is characterised by the engagement of workers in a series of predominantly short-term paid tasks, as opposed to regular or long term on-going traditional work arrangements. Some aspects of Part 16 apply to both, and some are specifically directed at one or the other. The propositions we present in this section are expanded upon in the separate submission of Professor Emeritus David Peetz to the Inquiry.

Part 16 of the Loopholes Bill satisfies many criteria for effective regulation of gig workers. Importantly, it focuses on vulnerable workers. This is shown in the way that, according to the Bill, proposed s15P(1)(e) of FW Act says such standards can only be established where the workers have low bargaining power, are being paid less than equivalent employees or have little authority over their work. The Bill details consultation processes the FWC must engage in for regulated workers before finalising a decision. Proposed ss40H and 40J improve on Chapter 6 of the NSW Industrial Relations Act in enabling the FWC to make orders regarding participants in road transport 'contractual chains'. Proposed Chapter 3A in the FW Act allows for collective agreements covering regulated worker. Like s310A of Chapter 6 of the *Industrial Relations Act 1996 (NSW)*, proposed s536JT provides exemptions from Commonwealth competition law for matters relating to orders or collective agreements.

Proposed s40D and s536JX instruct the FWC to avoid unreasonable adverse impacts upon industry participants, including impacts on sustainable competition, business viability, innovation and productivity. This will no doubt lead to considerable argument in

[9] See Senate Economics References Committee (2022).

proceedings. Inevitably, bringing the self-employment model up to the remuneration level of equivalent employees would increase costs in these businesses. Beneficiaries of the gig economy would argue this would adversely affect innovation and competition. However, if so-called 'innovation' is focused primarily on cutting workers' pay, and associated competition merely privileges sub-award operators at the expense of those living up to community standards (as codified in the Award), then it would arguably not be unreasonable to challenge these practices.

Under proposed s536JX(a)(vi) and (vii), the FWC should tailor regulation to the circumstances of workers and their industry, and (under proposed s536JX(a)(v)) it should not give preference to one business model over another. In other words, once costs are taken into account (as per Proposed s536JX(b)(i)), regulated workers should receive similar pay to award-based employees performing similar work (proposed s536JX(b)(ii)). A corollary is that the starting point for regulation of vulnerable gig workers should be the standards that apply for relevant employees.

The approach taken in the Bill also enables the FWC to respond to changing circumstances. For example, there is a strong chance that use of gig workers in the care sector will increase substantially over coming years (as our past research has documented; see Macdonald 2023). In the absence of the Bill, it is likely that future growth of contractors and gig employment models would accelerate, and the role of traditional employment models further reduced, than if the Bill were passed. The provisions of the Bill enable the FWC to tailor regulation of gig workers (including in the care sector) to the circumstances of those workers, their clients and the industry as a whole, while being financially agnostic about the precise business model used in providing the needs of carers and those in need of care were met.

What the Bill does ***not*** do is redefine any regulated workers as employees. Indeed, proposed s536JX(a)(iv) and s536JX(b)(iii) prevent the FWC from doing this through the Part 16 processes. Elsewhere — in Part 15 (proposed s15AA), as described in an earlier part of this submission — the Bill attempts to revert to an 'old' definition of employee — one that preceded the High Court's ruling that it's whatever the contract says, not what actually happens, that is important to a worker's status. This reform is an important step forward for some gig workers, but with limitations. While the situation that existed before recent High Court decisions was more favourable to the possibility of some gig workers being defined as employees, it still left many outside of employee status, and led to complaints about the inadequacy and uncertainty of the law regarding the treatment of gig workers. As presently drafted Part 15 might not make much difference to many platform workers, who tended to be treated as contractors anyway under the old definition. Nevertheless, the Part 16 gig worker provisions provide a greater certainty of process for many gig workers as self-employed workers, that is currently unavailable to those gig workers who do not become defined as employees.

The way that the Bill is drafted does not appear to prevent a gig worker who is immediately classed as a regulated worker under Part 16 from being subsequently defined as an employee through the Part 15 process. However, to avoid doubt, the Bill should explicitly state that this is the case.

This is not to deny the existence of some weaknesses in the approach in Part 16. For example, the ability of the FWC to issue non-binding 'guidelines', as an alternative to enforceable standards (proposed ss536KR to 536KU), could dilute regulation, providing an 'easy way out' if the tribunal is inclined to look for one. Conversely, the exclusion of some matters (proposed s536KM) reduces the flexibility of the FWC to find the best solution to the issues it encounters. The Bill would benefit from greater clarity regarding the alignment of award and contractor pay rates. Perhaps most importantly, contractors outside the digital platform economy (aside from those involved in road transport) are not covered. Yet the same challenges in protecting workers from exploitation exist in other forms of insecure contract work.

Overall, the provisions in Part 16 of the Bill represent a sensible approach to the regulation of gig work, including digital platform work, although they would benefit from the improvements recommended above.

Union Delegates

Our comments on the provisions of Part 7 of the Bill, regarding delegates' rights, focus on the context in which it is proposed they be introduced. These provisions need to be considered in light of:

- the shift in the focus of wage-setting from the award level to the workplace level;
- the low rate of nominal wage growth and, in recent years, real wage declines; and
- Australia's obligations under international treaties.

Prior to the 1990s, the industrial relations system was focused on awards, and legislation reflected this. Wage increases, and improvements in conditions, were largely determined through the award system, having been argued by paid union officials and formalised or rejected by members of arbitral tribunals. The incorporation of union officials into the system was such that some writers considered unions had become an arm of the state.[10] It was not workplace unionism that mattered to the operation of the system, it was the articulation of union interests in tribunal settings. Tribunal members, and before them paid union officials, constituted the primary pathway by which the interests of employees were translated into outcomes.

Since then, the focus of the determination of actual pay and conditions has shifted from the tribunal to the workplace. Yet in a vastly different economic environment, legislation

[10] Howard (1977).

governing the system's treatment of union delegates has barely altered. Today, unpaid union delegates are the primary mechanism by which the interests of employees are meant to be translated into outcomes through enterprise bargaining. Unions have shifted from a model in which the servicing of members' interests by paid union officials, after advocacy to the employer or a tribunal, was the main *modus operandi*, to a model where union delegates, not paid officials, are the key actor that influences whether and how members' interests are advanced. Workplace delegates need capabilities that were considered superfluous or, more likely, not considered at all in the days when awards ruled the way wages and conditions were set.

The failure of this aspect of legislation to keep up with the shift in the wage fixing system has had particularly serious consequences, given the decline in union representation and workers' bargaining power.

Wages growth for Australian workers has been among the worst in the industrialised world. From 2013 to 2018, for example, between 30% and 40% of all jobs on individual arrangements had their wages frozen for at least a year. Low wage growth is a problem in most industrialised countries, but since 2013 Australia's nominal wage growth has been less than half the OECD average.[11] "The erosion of workers' rights is the most consequential, and actionable, factor behind the stagnation of wages in Australia."[12] The decline in union density is not the only issue. Changes to industrial relations laws have also made it harder for unions to obtain wage increases. International research points to local labour markets being increasingly dominated by a small number of employers.[13] The US National Bureau of Economic Research suggests wages in more concentrated labour markets are 17% lower than wages in less concentrated labour markets.[14] Tacit or explicit agreements between employers to not poach workers, and "non-compete" clauses being forced on even low-skilled workers, also shift power from employees to employers.[15] As the late Princeton University economist Alan Krueger pointed out last year, monopsony power – the power of buyers (employers) when there are only a few – has probably always existed in labour markets "but the forces that traditionally counterbalanced monopsony power and boosted worker bargaining power have eroded in recent decades."[16]

Union delegates tend to be the part of the union that members have the most contact with, and members are most satisfied with the part of the union closest to them.[17] In one

[11] See Stewart et al. (2022) and Macdonald et al. (2022) for more detail on Australia's weak wage growth in international comparison.
[12] From the Kinsella and Howe chapter in that book.
[13] https://www.nber.org/papers/w23108.pdf
[14] https://www.nber.org/papers/w24147.pdf
[15] https://www.theamericanconservative.com/articles/the-case-against-non-competes/
[16] https://www.kansascityfed.org/~/media/files/publicat/sympos/2018/papersandhandouts/824180824kruegerremarks.pdf?la=en
[17] Guest and Dewe, 1991; and Simey et al., 1954.

Australian study, members were nearly 1½ times more likely to be satisfied with their delegates than with union officials and leaders.[18]

Maintaining the status quo also has the effect, perhaps counterintuitively, of reducing the likelihood of cooperative workplace relations. The people who have objectively greater interest in promoting workplace cooperation are not the union officials but the members themselves. There is survey evidence showing that union members want their union to be more cooperative with management.[19] Not only do employees see that the union needs to behave cooperatively; they also expect management to reciprocate, by cooperating with the union to solve workplace problems. Detailed questioning has revealed that, to workers, cooperation means management sharing power and authority with unions, not just management leading and the union following. Overall, the meaning of 'cooperation' is quite complex, and a long way from 'acquiescence'. Efforts to undermine or remove union delegates undermine a basic institution through which cooperative voice can be expressed.

In the long run, improved delegate rights will lead to increased co-operation between unions and management. We support an enhanced role for union delegates as proposed in this legislation.

Wage Theft

The Closing Loopholes Bill's provisions regarding criminalisation of serious instances of wage theft (the withholding from workers of contractually and/or legally required wages or other entitlements), and the specification of penalties for these violations, represent an important step forward in trying to rid Australia's labour market of this unfortunately common, exploitive practice.

We would like to see these provisions expanded to specify an accessible and timely process through which victims of wage theft could promptly recover monies illegally denied to them. It is also important that the legislation include superannuation entitlements that are also often denied to workers.

Family and Domestic Violence Protections

The Closing Loopholes bill would make being subject to family and domestic violence a protected attribute under the Fair Work Act. This is a timely and important reform, that will add to the statutory protections for victims of FDV, and we support this measure wholeheartedly. The legislation would also require the Fair Work Commission to also prevent and eliminate workplace discrimination on the basis of subjection to FDV, reinforcing the importance with which this issue must be treated in all aspects of employment and industrial practice.

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[18] Peetz, 1998.

[19] Peetz and Frost, 2007.

Conclusion

In summary, the suite of reforms proposed in this legislation constitutes a welcome and overdue effort to address many of the wide-ranging consequences arising from the unrestrained use of non-standard, contingent, insecure employment models by Australian businesses across numerous sectors of the economy. The expanded use of these insecure employment models (from mis-use of casual employment, to sham contracting, to 'gig' platforms) has undermined fairness, living standards, accountability, and productivity. The measures contained in this legislation constitute important first steps in limiting those practices, and closing gaps in our existing framework of industrial and labour laws that have allowed employers to take advantage of workers in non-standard roles. In some cases, as we have suggested in this submission, those measures need to be expanded and strengthened.

We would be glad to provide any additional information that would be helpful to your deliberations. Thank you again for the opportunity to participate in this important inquiry.

Sincerely,

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