



Hireup Response - Fair Work Legislation Amendment (Closing Loopholes) Bill 2023

To the Senate Standing
Committee on Education and
Employment

September 2023

Our purpose

To enable the pursuit of a good life for everyone

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Preamble

At Hireup we wholeheartedly support the government's attempts to improve the Industrial Relations system in Australia via ***the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023***, especially where it deals with the gig economy via 'employee like' reforms.

Our perspective

The gig economy burst into life in Australia over a decade ago. Consumers quickly embraced the technology, the speed and the convenience that app-driven services deliver. But most of those services were delivered by companies engaging workers as *independent contractors* rather than formal *employees*. A myth developed that you can't have one without the other.

Our company, Hireup, proves otherwise. We are an online and platform-based organisation but we also *employ* all 17,000 of our support workers who work via our app each year (they provide support to people with disability and their families).

We're proof you can have the best of both worlds: modern, flexible, efficient technology with full employment rights, entitlements and protections for workers – something most platform organisations say cannot be done.

Modern convenience and flexibility is absolutely compatible within the framework of formal *employee* or *employee-like* legislation. But history has proven that most platform organisations will not come to this conclusion on their own, not when the cheaper and easier contracting alternative exists. Like most things, cheaper and easier does not mean better or safer. And that's why we're so supportive of the government's 'Closing Loopholes' Bill. It will provide clarity and certainty through uniform regulatory standards, allowing all businesses to operate and innovate on a level playing field, while protecting workers' rights, entitlements and dignity.

The gig is up

Regulation in the gig economy is long overdue. For over a decade now, we've all been perfectly aware of the 'big lie' at the heart of the gig economy: The idea that someone driving you across town in a rideshare car is somehow an "*entrepreneur*". Or that the university student providing disability support via an app is running a legitimate "*small business*". Or that the person delivering your pizza on the back of a bicycle is a genuine "*independent contractor*". This is the big lie of the gig economy - and it has been

[thoroughly exposed](#)¹ time and time again. This lie was allowed to grow due to the limitations of our current binary system: if you're not an employee, you must be a contractor. But as new forms of work emerge, the frameworks in which we regulate them must adapt. This is at the heart of what the government's employee-like reforms will achieve – and why they are so important.

Our society has turned a blind eye to the fact that (in the majority of cases) people finding work via online platforms and apps are actually *employee-like* workers who deserve all the same rights, entitlements and protections owed to any other worker, but who have fallen between the cracks of outdated employment law and the rise of technology-powered work.

It is true that when you ask many of these people what they like about their work, they'll tell you that it's about *flexibility* and *autonomy*. Who doesn't want those things in their work? But when you ask about the downsides of the gig economy - the below-award pay rates, missing superannuation, unpaid tax bills, algorithmic management and unfair dismissal, limited insurance and extreme work health and safety (WHS) liability - the enthusiasm fades.

The truth is that we in Australia have accepted this big lie and the associated trade off. We accepted the fact that major gig economy companies will get away with misclassifying the legal status of their workforces so that the rest of us can enjoy the convenience of on-demand access to products and services. But over the years, as the heartbreaking stories have emerged of worker mistreatment, injury and [death](#)², and as we have realised the consumer harms and economic damage this "new economy" has inflicted on us all, the calls for reform have grown.

Australia is not alone in this predicament. In countries all around the world, including [Canada, the UK](#)³, the [European Union](#)⁴ and others - calls for major reform have intensified to a crescendo. The need for reform has been clearly established. The time for change is now, or we risk being left behind. The gig is finally up.

Inevitable pushback

Of course, the vanguard of the gig economy will not accept change quietly. Over the last ten years, beyond the original sin of their big lie, the lengths these companies have gone

¹ <https://www.theguardian.com/news/series/uber-files/all>

² <https://www.theguardian.com/australia-news/2023/jul/24/ubereats-delivery-driver-death-sydney-actu-protections>

³ <https://www.nortonrosefulbright.com/en-au/knowledge/publications/87afaec5/doing-business-in-the-gig-economy-a-global-guide-for-employers>

⁴ <https://www.consilium.europa.eu/en/press/press-releases/2023/06/12/rights-for-platform-workers-council-agrees-its-position/>

to stop sensible reform, [subvert the democratic process](#)⁵ and frighten consumers has been quite astonishing. Beyond the many hundreds of [lawsuits](#)⁶ and tens of millions paid out in settlements, these gig behemoths just keep kicking the can down the road, convinced they will one day be 'too big to fail'.

The most insidious aspect of the platforms which engage workers as "independent contractors" is their ability to privatise profit, but socialise losses to the community. Instead of contributing to workers compensation schemes, worker injury costs are borne by state traffic accident schemes or the public health system. Instead of paying superannuation, governments have higher aged pension costs. Instead of return to work programs, social security has to cover costs. These reforms will go some way in ensuring that the vast majority of Australian taxpayers are not subsidising the profit of a small number of technology platforms - these reforms will genuinely save State & Federal taxpayers tens of millions in higher road registration, and higher taxation.

Australian law makers must not give in to the pressures of tech giants this time round. The government is finally getting on top of the growing gig economy with sensible and decent laws proposed within *The Fair Work Legislation Amendment (Closing Loopholes) Bill 2023*, and for the first time delivering rights and entitlements to hundreds of thousands of exploited workers. The government is saying "*enough is enough*" - this handful of gig economy companies cannot continue to derive their massive revenue and mega profits from the labour of workers while offering little in return.

The time for reform is now

Over the last decade there have been multiple examinations of the problem. There have been select committee hearings on job security, think tank and academic papers, law suits, investigations by the media, and so on. Each briefly shone a light on the gig economy and the big lie at its heart. Each said something similar - highlighting exploitation, decrying the cannibalisation of secure work and responsible employment practices, or telling the sad story of an individual worker. But none had the power to create change. None could, with any authority, say 'the gig is up'. Once their respective lights moved on, nothing changed. The unethical and (in some cases) illegal workforce practices remained and so did the gig economy, quietly but steadily growing.

The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* is different.

It is not just another report, or another examination of a problem without any real authority. It presents an opportunity to disrupt the binary that has trapped gig workers in

⁵ <https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/>

⁶ <https://arashlaw.com/how-many-lawsuits-does-uber-have-against-them/>

a system that was never designed for them. It comes with a moment of decision which - whichever way it goes - will be conclusive.

If the bill *is* passed, the best of the flexible economy will find a home in sustainable and ethical enterprises that balance worker rights with technological advancements. The 'bad old days' of worker exploitation - via obvious loopholes - will become a thing of the past.

Not passing the Closing Loopholes bill would mean the loopholes are – de facto – approved by parliamentarians. They'd be endorsed, all but enshrined in law; no longer loopholes. Not passing the law would tell the leaders of Australia businesses that parliamentarians are happy with the status quo. Indeed, happy for the approach currently adopted by some gig economy outliers to become the norm across the whole economy.

And imagine what that would create.

It wouldn't just preserve the status quo for the outliers. It would accelerate the transition – only minor so far – to a very different economy. As this 'no care, no responsibility' model grows, employers will be unable to compete, and will start to disappear. Ten years from now every worker in the care economy (or broader economy) would be a contractor – in fact, we are already seeing independent contracting arrangements breaching the confines of digital platforms, and into 'traditional' models - where contract workers replace employees at scale. Every supermarket worker would become a contractor. Every driver in every industry would be a contractor.

And that would just be the start.

How do we know? Well, beyond the 250,000 workers in the current Australian gig economy, the broader transition is already happening right in front of our eyes. [Take Coles and Woolworths for example](#)⁷, who are already steadily replacing employed 'personal shoppers' with Uber Eats riders - a move described as 'bringing the gig economy inside the traditional workplace'.

Ten years from now anyone who today works flexibly as a casual employee could, instead, be a gig economy contractor. With parliamentary endorsement, the exploitation of today would be just a foretaste. What we know now as 'the gig economy' would simply become 'the economy'.

That's why we welcome the Closing Loophole bill. If passed, it would create certainty which would shape the economy in a positive way. Every company hiring workers - be

⁷<https://theconversation.com/coles-uber-eats-deal-brings-the-gig-economy-inside-the-traditional-workplace-204353>

those technology platforms or otherwise - would have to play by the same rules and those rules would maintain the fundamentals of employee, or employee-like, rights.

But if not passed, there'd be certainty too: certainty that there'll be no penalty for companies who exploit loopholes in the law. Certainty that every company is free to do whatever they can to outsource employee and worker obligations in a race to the bottom on rights, entitlements and protections.

The importance of Employee-like legislation to the care economy

The employee-like reforms have not been manufactured in a vacuum. They are the product of our shared observations each time tragedy strikes, underpinned by years worth of reports and investigations into the impact of the gig economy in Australia. Time and time again, these reports find the same thing: *the gig economy needs clearer and stronger industrial relations regulation*. Workers are not safe or secure. Platforms are shifting responsibility but retaining profit.

In 2018 the Victorian government launched an [inquiry into the on demand sector](#)⁸ in Victoria. In its final report, the inquiry articulated major concerns about the impact of gig platforms on health and safety, insurance, unpaid work, and workforce sustainability - especially in the care sectors. It found the public interest demands lawful, sustainable, and fair work arrangements on platforms.

Later, in 2021 the [Select Senate Committee on Job Security](#)⁹ released the findings of their interim report, which, after assessing a wealth of evidence, highlighted significant concerns that the gig economy is expanding into sectors beyond rideshare, posing concerns, especially in low-paid, female-dominated sectors like care work. This report called for national regulation, because relying solely on courts and tribunals is insufficient.

The following year, in 2022, the NSW Parliament also entered the debate with their inquiry, [Impact of technological and other change on the future of work and workers in New South Wales](#)¹⁰. While this inquiry was largely focused on the role state governments can play in what is largely a Commonwealth issue, its findings are universal:

'Much of this report has documented the poor outcomes that have flowed from minimal regulation that leaves platform markets to evolve as they wish, and the committee's recommendations thus far have focused on measures to remedy

⁸ <https://engage.vic.gov.au/download/document/7387>

⁹ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Interim_Report

¹⁰ <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=265#tab-reportsandgovernmentresponses>

those poor outcomes. It is critical that government learn from the past and establish a lasting, future-focused perspective on this industry that appreciates the role for greater regulation.'

Towards the middle of 2022, leading public policy think tank Per Capita published their [Contracting Care report](#)¹¹ which drew attention to the ways in which 'digital contractor marketplaces take a cut of the income received by the digital contractor, but without providing any of the legal supports that a traditional employer would provide, such as quality and safety guarantees for either the worker or the NDIS participant. This report recommended an extension to the definitions of 'employment' and 'employee' in the Fair Work Act 2009 to capture new and evolving forms of work.

Around the same time Per Capita was investigating gig work in the NDIS, the Guardian was publishing their global investigation into the illegal practices and rapid rise of Uber called the [Uber Files](#)¹². This investigation noted that regulation in the gig economy is overdue, and globally legislators and regulators are recognising the need for new laws. Its conclusions were – at this point – nothing new. The gig economy has revealed the limitations of relying solely on market competition to regulate tech companies.

"We need leaders bold enough to embrace new technologies, wise enough to see their limitations, creative enough to imagine alternative ways of governing and brave enough to put their foot down."¹³

From 2023, the academic interest in this topic intensified. In May, [Dr Fiona Macdonald](#)¹⁴ of the Centre for Future Work said the gig economy in the care sector was posing an *unacceptable risk* to frontline care and support workers, people receiving support and workforce sustainability. Dr Macdonald called for comprehensive reform.

In June, the [Brotherhood of St Laurence](#)¹⁵ called attention to the confusion the gig platforms were causing, finding that *'most workers and people with disability felt they did not understand the implications of having support workers classified as independent contractors'*, and that *'this situation also has implications for workforce sustainability.'* Those workers interviewed for the report were not aware of their obligations as it pertains to safety, and what to do when something went wrong.

A few months later, the [NDIS Quality and Safeguards Commission's Own Motion Inquiry into Platforms](#)¹⁶ found the same thing, and that *'70% of providers (workers) considered they were employees of the Platform Provider they were linked to.'* Their inquiry called for a 'consistent' and 'best practice' approach to safeguarding across all Platforms and more

¹¹ <https://percapita.org.au/wp-content/uploads/2022/06/Contracting-Care-V2.1.pdf>

¹² <https://www.theguardian.com/news/series/uber-files/all>

¹³ <https://www.theguardian.com/commentisfree/2022/jul/12/uber-politicians-tech-capitalism>

¹⁴ <https://futurework.org.au/report/unacceptable-risks/>

¹⁵ <https://www.bsl.org.au/research/publications/support-online-2/>

¹⁶ <https://www.ndiscommission.gov.au/own-motion-inquiry-platformproviders#paragraph-id-6266>

direct regulation of the workforce which the platform provider market has created. This work is progressing, and we are supportive of the Commission's approach.

Finally, in just the past few days Dr Fiona Macdonald released new findings in her [Going Backwards' report](#)¹⁷. Here, Dr Macdonald drew attention to the great contradictions of contracting platforms, and the way in which they 'distance themselves from any liability for the quality of service provision':

'...platforms maintain they are accountable for service quality, but they take no responsibility for workers' employment or working conditions. However, they require workers to provide support in accordance with their policies and to take direction from them. So, workers bear responsibilities, costs and risks as service providers in their own right, while they appear to be treated as quasi employees but without any formal rights or entitlements of an employment relationship.'

In early 2023, South Australia launched their own [Select Committee On The Gig Economy](#)¹⁸. While this Committee is yet to report, there are no prizes for guessing what it too will find - as every enquiry, investigation and research report has found - the need for reform, regulation and improved safety and security will almost certainly feature in their recommendations.

The ten reports highlighted here are just a selection from the growing mountain of independent evidence that supports the need for this Bill.

What we do not see is much independent evidence to the contrary. Those who are against these reforms will usually simply point out that their workers value *flexibility*. We agree, so do ours. Dissenting views for these reforms in the care sector specifically are based on similarly weak arguments, and almost exclusively prosecuted by the platforms themselves, or those on their payroll. In the next section we will address just a few of the arguments head-on.

¹⁷ <https://futurework.org.au/report/going-backwards/>

¹⁸ <https://www.parliament.sa.gov.au/en/News/2023/04/19/05/32/SUBMISSIONS-OPEN---Select-Committee-on-the-GIG-ECONOMY>

Myth busting - Misconceptions about employee-like for the care sector

There are a number of misconceptions about the impact the employee-like reforms will have on the care sector. These misconceptions are being driven by those opposed to the Bill, and who have a vested interest in its failure. They range from drastically overstating the impact of the reforms to outright false statements. Below we address some of the main misconceptions circulating about the care sector.

“The cost of care will increase” - These reforms will set fair minimum standards for all workers in the care sector, including a requirement that workers receive an appropriate wage and superannuation contributions. In the NDIS market government pricing *already* fully accounts for the entitlements and costs of employment, meaning the government will not need to increase the rates for services. In some cases, platforms with lower operating expenses - driven by taking advantage of loopholes - may need to increase their costs. Whether they pass these costs on to participants is a matter for them, but it shouldn't distract from the need for sensible reform.

“It will be too hard for gig platforms to implement” - This is not true. Hireup's very existence proves that this is not the case. Technology can absolutely facilitate the provision of minimum standards whilst maintaining choice, control and flexibility for consumers - as we demonstrate. For those platforms or Members who are concerned, they shouldn't be. These reforms are modest and completely manageable, especially relative to employment conditions managed by others.

“These reforms will increase the cost of the NDIS” - This is false. As demonstrated in official documents including the NDIS Disability Support Worker Cost Model 2022-23¹⁹, the government price guide for NDIS services is based on the assumption of *employment* and the costs of associated entitlements. The difference this legislation will bring is that the onus will be put on the platforms to ensure workers actually receive them.

“It will negatively impact workforce participation” - Many workers choose to provide services via a platform and cite flexibility as one of the key reasons for this choice. The introduction of fair minimum standards will not diminish the flexibility enjoyed by workers, nor drive them out of the sector. It is more likely the presence of employee-like minimum standards will have a positive impact on workforce participation, providing workers with fairer conditions and encouraging them to remain part of the care sector workforce. Indeed Hireup is an example that providing workers the full benefits of employment and technological flexibility does not drive workers out of the sector.

¹⁹<https://www.ndis.gov.au/providers/pricing-arrangements>

Other elements of the Bill

Beyond the 'employee like' reforms contained within the Bill, we are also highly supportive of all elements of the Bill that will aid in the retention and growth of the care sector workforce to meet Australia's future needs. This includes;

- **Defining casual employment** - The Bill's proposed amendment to the definition of *casual* work has the potential to promote and encourage a more permanent care sector workforce, this will be crucial for meeting Australia's future needs. Hireup sees great alignment between this proposed reform and the reform needed to create a more stable and permanent workforce. As an employer in the care sector Hireup has been proactively promoting opportunities for our casual employees to convert, we welcome the positive impacts that will flow from this reform.
- **Updated definition of employer and employee** - The proposed definition of *employee* and *employer* clarifies the relevance of post-contractual conduct. This has great applicability for the care sector where we see a number of workers treated like employees but without the benefits as they are legally engaged as contractors. Taking into account the full nature of the working relationship will result in a more accurate picture of the work taking place, seeing more workers gain important protections. This again is crucial in the care sector to promote a more stable and permanent workforce.
- **Criminalising wage theft** - While the majority of employers seek to do the right thing and pay workers correctly, we acknowledge there are a small portion who knowingly do the wrong thing. We support the Bill's efforts to criminalise this behaviour and the deterrent it creates. The issue of workers stealing from a business is already dealt with in law, so it is only fair the issue of employers stealing from workers pockets is dealt with in a similar manner.
- **Addressing the labour hire loophole** - While there is a place for the use of labour hire workers to address things such as short term worker shortages, sickness and seasonal fluctuations. Across some industries the practice of outsourcing the workforce via labour hire to undercut the entitlements of directly employed workers has grown. We support the Bill's efforts to address this concerning trend, while still acknowledging there is a need for labour hire workers across industry.

We believe all these elements of the Bill will work together to create a much more 'fit for purpose' industrial relations system for the ever changing Australian economy, and we support the Bill in its entirety.

Conclusion

Hireup expresses appreciation for the opportunity to share our insights and feedback on the Bill. The reforms contained in this Bill will help address some of the key challenges facing the organisation of work in the care sector. The employee-like reforms come at a critical juncture for the care sector workforce. Parliament is presented with a choice of ensuring fair minimum standards for gig workers, serving to better protect both consumers and workers. Or continuing with the status quo that creates two distinct sets of workers, those with rights and those without. While the impact of the employee-like reforms will differ across the gig economy, the impact on the care sector will be overwhelmingly positive.

Hireup welcomes the opportunity to provide additional evidence to the Committee as part of the Committee's consideration of this Bill.

End