

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

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I am an Associate Professor at the University of Sydney Business School specialising in industrial relations and labour market regulation, with a particular focus on national industrial relations systems worldwide. I am the author of over 90 academic journal articles and book chapters and co-editor of *International and Comparative Employment Relations*, which is widely recognised as the leading book in its field internationally. I have written research reports for the International Labour Organization, the UK, Dutch, Australian and New South Wales governments, the Lowy Institute, and various trade union and employer organisations. I received my PhD from the University of Cambridge in 2011, am a past recipient of the International Labour and Employment Relations Association's top emerging scholar award, and the Immediate Past President of the Association of Industrial Relations Academics of Australia and New Zealand.

I welcome this opportunity to make a submission to the Senate Education and Employment Legislation Committee's inquiry into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 ('the Closing Loopholes Bill'). My submission focuses on the Closing Loopholes Bill's provisions relating to wage theft, platform or 'gig' work, and labour hire.

The basic task of any system of government regulation is to solve problems, either existing or anticipated ones. Until recently, and to some degree still, the Commonwealth-level framework for regulating employment has been based on an outdated paradigm fixated on solving problems that have diminished or no longer exist, like wage-led price inflation caused by strong, uncoordinated unions.

Despite the changes heralded by the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022, the regulatory framework remains underequipped for addressing patent problems of a very different sort, like low-wage growth, inequality within the labour market, and workforce insecurity, which have contributed to staff shortages.

If the Closing Loopholes Bill is passed, it will help to address the wide cracks in Australia's regulatory framework that have undermined its structural integrity and effectiveness, which have led to these problems of inequality, insecure work, and staff shortages.

There are four main parts to this submission.

Part I discusses a significant overarching flaw with Australia's framework of employment regulation, namely, its focus on the *wrong problems*, and how this came about.

Part II examines academic research on three key aspects of the Closing Loopholes Bill that address urgent problems in the labour market: wage theft, regulation of labour hire, and gig work.

Part III draws on academic research to assess the likely impacts of the Closing Loopholes Bill in terms of two themes that have been the main focus of public debate: productivity and innovation.

Part IV concludes by arguing that the main objectives of the Closing Loopholes Bill are essential ones for addressing the most urgent problems of Australia labour market, and that the Senate Education and Employment Legislation Committee should therefore recommend that the legislation be supported.

I. Australia's employment regulation framework remains focused on solving problems that have diminished or no longer exist

The current employment regulation framework was built on the assumption that the central problem that needs to be addressed is wage-led price inflation. The origins of the current policy framework, and the assumptions that it was built on, go back to the stagflation crisis of the 1970s created, in part, by strong unions whose activities lacked coordination.

From 1983, the Prices and Incomes Accord tried to address the stagflation crisis through its ‘no extra claims’ provision and the suppression of unions who tried to operate outside of the Accord model. Concerns with wage-led price inflation continued under the Keating Labor government’s Industrial Relations Reforms Act 1993 with its enterprise-based focus of bargaining and wage determination, the maintenance of secondary boycotts restrictions, and the abolition of the closed shop – measures that were all designed to limit union power. The Industrial Relations Reforms Act 1993 consciously erected “impediments to multi-employer bargaining and ‘flow-ons’ from market-powerful to market-weak sectors”.¹

This preoccupation was affirmed and deepened by the Howard government through its repeated attempts at legislative change, particularly the Work Choices reforms of 2005. This concern has been maintained under the Fair Work Act 2009 through continued restrictions on union activity, including limitations placed on industrial action and right of entry, underpinned by an assumption that labour is a problem to be dealt with expediently or a cost to be minimised.² This is despite union membership density in Australia declining to record low levels by historic standards,³ and to very low levels by international standards.⁴

II. How the Closing Loopholes Bill seeks to fill cracks in the regulatory framework

It has become increasingly apparent that the main assumption underpinning Australian employment regulation framework is misplaced. The core problem that exists today is no longer wage-led price inflation caused by disorderly workers and unions. The main contemporary problem is that the regulatory framework has not adapted to fundamental changes in the labour market. This has meant that the framework does not serve to protect a large and growing proportion of the workforce, which is creating negative outcomes for the economy and for wider society.

¹ Chris Briggs (2001) Australian exceptionalism: The role of trade unions in the emergence of enterprise bargaining. *Journal of Industrial Relations*, 43(1): 39.

² Chris F. Wright (2023) Addressing problems *for* labour not problems *of* labour: The need for a paradigm shift in work and industrial relations policy. *Labour and Industry*, 33(1): 11-21.

³ Rae Cooper and Bradon Ellem (2020) Australian unions: Crisis, strategy, survival. In *Trade Unions and Labour Movements in the Asia-Pacific Region*, edited by Byoung-Hoon Lee, Ng Sek-Hong, and Russell D. Lansbury, pp. 35-54. London: Routledge.

⁴ Greg J. Bamber, Fang Lee Cooke, Virginia Doellgast, and Chris F. Wright (2021) *International and Comparative Employment Relations: Global Crises and Institutional Responses* (7th edition). London: SAGE.

The findings emerging from a large body of academic research indicate the need for a regulatory framework that promotes better quality and more secure jobs,⁵ and that provides fairer redistribution in wage setting including through the bargaining system.⁶ This body of research also indicates that union power is no longer a significant problem and that, if anything, unions are not strong enough. This is because weak unions and the constraints that the Fair Work Act imposes on the ability of workers to negotiate fairer wages and better working conditions have created major challenges for Australia's labour market.⁷

These constraints have contributed to sluggish wage growth despite a 50-year low in unemployment, the prevalence of workers engaged on insecure contracts, and the extensive underpayment of many workers.⁸ It is no coincidence that industries with these characteristics are among those with the persistently highest job vacancy rates.⁹

The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 will likely help to address some of these problems through its promotion of bargaining and measures to improve gender equality – since women are more likely to work in low-paid and insecure jobs. But it did not go far enough in addressing wide cracks that have undermined the structural integrity and effectiveness of Australia's regulatory framework. The research evidence suggests more needs to be done to ensure that all workers have access to the bargaining provisions of the new laws and to provide checks against businesses who seek to profit through evasion of their obligations to their workforce.

In this respect, the Closing Loopholes Bill addresses several key labour market problems. This submission will focus on three: wage theft, the insecurity of gig work, and the use of labour hire to undercut bargaining.

⁵ Susan Belardi, Angela Knox and Chris F. Wright (2021) 'The circle of life': The role of life course in understanding job quality. *Economic and Industrial Democracy*, 44(1): 47-67; Raymond Markey and Joseph McIvor (2018) Regulating casual employment in Australia. *Journal of Industrial Relations*, 60(5): 593–618.

⁶ Joe Isaac (2018) Why are Australian wages lagging and what can be done about it? *Australian Economic Review*, 51(2): 175–190; Andrew Stewart, Jim Stanford and Tess Hardy (2018) *The Wages Crisis in Australia: What It Is and What to Do about It*. Adelaide: University of Adelaide Press.

⁷ Andrew Stewart, Jim Stanford and Tess Hardy (2018) *The Wages Crisis in Australia: What it is and what to do about it*. Adelaide: University of Adelaide Press.

⁸ Chris F. Wright (2023) Addressing problems *for* labour not problems *of* labour: The need for a paradigm shift in work and industrial relations policy. *Labour and Industry*, 33(1): 11-21.

⁹ Australian Bureau of Statistics (2023) Job Vacancies, Australia, May, <https://www.abs.gov.au/statistics/labour/jobs/job-vacancies-australia/latest-release>.

Among other things, the Closing Loopholes Bill empowers the Fair Work Commission to potentially set minimum standards for contract workers in the gig economy, provides stronger penalties for employers who commit wage theft and stronger protections for worker representatives, and addresses the so-called ‘labour hire loophole’ that can allow employers to use outsourcing to circumvent enterprise bargaining agreements.

It is necessary to provide a reminder of the context for these provisions since these has been overlooked by much of the commentary about the Closing Loopholes Bill.

Wage theft

The Closing Loopholes Bill’s provisions for stronger penalties against employers who commit wage theft and stronger protections for worker representatives need to be seen in the following context: wage theft did not used to be a problem for Australia’s labour market because the regulatory framework prevented it from occurring on a major scale. There were very few reported cases of wage theft in the 1980s and 1990s because of the effective role that trade unions played as de facto agents of enforcement. This role was the product of minimal barriers for union officials to enter workplaces and to hold non-compliant employers to account.¹⁰

The emergence of cracks in the regulatory framework has led wage theft to become a very serious problem for the Australian labour market. My research with Stephen Clibborn documented the steady rise in reported cases of wage theft in the 2000s and their explosion in the 2010s. The imposition of legal restrictions on unions’ workplace access since the 1990s has directly contributed to the significant rise in wage theft. Wage theft is clearly a serious problem now and is one that has led large numbers of workers to be denied their lawful wages. It has placed businesses who do the right thing by their workforce by complying with their legal obligations at a competitive disadvantage compared to non-compliant employers. This scenario encourages businesses to compete on the basis of undercutting rather than through product or process innovation or by being more productive.¹¹

¹⁰ Tess Hardy and John Howe (2009) Partners in enforcement? The new balance between government and trade union enforcement of employment standards in Australia. *Australian Journal of Labour Law*, 22(3): 306-336.

¹¹ Stephen Clibborn and Chris F. Wright (2018) Employer theft of temporary migrant workers’ wages in Australia: Why has the state failed to act? *Economic and Labour Relations Review*, 29(2): 207-227.

The Closing Loopholes Bill proposes to increase protections for union workplace delegates and to allow paid union officials to enter workplaces to inspect company pay records without notice in cases of suspected wage theft. Given legal restrictions on union activity has directly contributed to the rise in reported cases of wage theft, restoring union rights will likely help to address this significant and increasing urgent problem for the Australian labour market.

Gig work

In relation to gig work, the Closing Loopholes Bill proposes to allow the Fair Work Commission to make minimum standards for low-paid gig workers who have little bargaining power and little control over their work, even if they do not meet the legal definition of an employee. On this issue, I simply wish to highlight the persuasive case made by Alex Veen, Tom Barratt, Caleb Goods and Brett Smith, who are leading experts on gig work, that:

“Gig workers’ operate in highly precarious and insecure job environments [and] need better legislative protection... The unsafe working conditions of food delivery workers has been tragically demonstrated by the deaths of thirteen food delivery workers since 2017... The legislative changes provide some long overdue safeguards for vulnerable gig workers ... [and] is a positive step forward to protecting some of the most vulnerable workers in the community and it is unlikely it will result in the large-scale job destruction some predict”.¹²

Labour hire

The Closing Loopholes Bill also proposes to empower the Fair Work Commission to require the employees of labour hire operators to be paid in line with a host company’s enterprise agreement. It is important to emphasise that labour hire has a legitimate role in helping to supply workers during peaks in demand. However, it has been used by some employers to undermine bargaining and to undercut existing standards.

¹² Alex Veen, Tom Barratt, Caleb Goods and Brett Smith (2023) Australian consumers support better protections for gig workers. *Sydney Business Insights*. <https://sbi.sydney.edu.au/australian-consumers-support-better-protections-for-gig-workers/>.

To take one widely referenced example: when Australia’s enterprise bargaining system was first created in the early 1990s, Qantas had five agreements for each of its subsidiary companies that broadly provided parity.¹³ By 2022, Qantas had 56 enterprise agreements.¹⁴ In an article published in 2015, Troy Sarina and I found that Qantas had fragmented:

“... its organisational structures through outsourcing and [labour hire] ... Enterprise bargaining provided a vehicle for management to fragment industrial negotiations across the workforce and pursue different strategies among different work groups... Disparities in pay and conditions have contributed to low morale [across the] workforce, declining trust in management and an increasingly insecure working environment”.¹⁵

When enterprise bargaining was first introduced, this type of fragmentation of workplaces into legally distinct enterprises to undercut the power of workers and to undermine the integrity of the bargaining system was not envisaged, nor even was the very existence of the gig economy. The social license of labour hire and the gig economy is contingent on them not undermining the regulatory framework including the integrity of the bargaining system. As the structure of business and the labour market evolves, it is necessary for the regulatory framework to evolve with it. In this respect, the Closing Loopholes Bill’s gig economy and labour hire provisions are necessary for instituting protections that account for the emergence of the gig economy and the growth in business engagement of labour hire operators, and for allowing these new and evolving forms of business to maintain their social license to operate.

¹³ Mark Bray (1996) The limits of enterprise autonomy: Enterprise bargaining in the Australian domestic airline industry. *Economic and Labour Relations Review*, 7(1): 132-164.

¹⁴ QANTAS Airways Limited (2022) Submission to the Senate Education and Employment Legislation Committee Inquiry, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, Submission #59, Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/SecureJobsBetterPay/Submissions.

¹⁵ Troy Sarina and Chris F. Wright (2015) Mutual gains or mutual losses? Organisational fragmentation and employment relations outcomes at Qantas Group. *Journal of Industrial Relations*, 57(5): 686-706.

III. Research evidence on the Closing Loopholes Bill's likely impacts

Much of the critical commentary about the Closing Loopholes Bill as reported in the media has failed to recognise the necessity of the Commonwealth-level framework for regulating employment to adapt to the changing structure of businesses and the labour market.

Unfortunately, much of this critical commentary has been misleading, self-serving, and evidence-free. Perhaps this is unsurprising given that the same groups who claimed that the multi-employer bargaining reforms in the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 were too ambiguous are now saying the provisions of Closing Loopholes Bill are too complex. This suggests the arguments being made by some of the critics of the Closing Loopholes Bill are opportunistic and contradictory. These criticisms, which have generally lacked supporting evidence, have largely focused on the potential impacts on productivity and innovation. This section examines the academic research evidence on these themes.

Productivity

One claim made by critics of the Closing Loopholes Bill is that it will undermine productivity. The argument that providing workers with more security is bad for productivity is not supported by the research evidence. This reflects a major, longstanding deficiency in the public debate over employment regulation and productivity in Australia, which is the widespread assumption that employment laws, particularly their regulation of bargaining, are a key driver of productivity.¹⁶

The research evidence does not support this assumption. As various studies have highlighted, productivity is driven to a greater extent by other factors, including capital investment, investment in and utilisation of new technology, research and development, employees' education and skills, management capability, and the efficient organisation of work and production systems.¹⁷

¹⁶ Bradon Ellem (2021) Labour and megaprojects: Rethinking productivity and industrial relations policy. *Economic and Labour Relations Review*, 32(3): 399-416; David Peetz (2021) Is industrial relations reform the road to recovery in monopsonistic labour markets? *Economic and Labour Relations Review*, 32(3): 417-436.

¹⁷ David Peetz (2012) Does industrial relations policy affect productivity? *Australian Bulletin of Labour*, 38(4): 268-292; David Peetz (2015) Labour Productivity and Industrial Relations, Invited Paper for the Fair Work

Improving productivity is indeed a vital goal for Australia's future prosperity. Critics of the Closing Loopholes Bill who express deep concern with Australia's productivity performance should consider putting more of their energies to agitate for reform of these other policy areas – like improving research and development, fixing the major deficiencies with the education and training system, and improving Australia's relatively poor track record on management capability – since the evidence suggests these are more important drivers of productivity than reform of employment regulation.

While the research evidence suggests that the link at all between employment regulation and productivity growth is tenuous, various studies have found that, if anything, productivity performance is worse under systems that enable flexibility *for* employers by, for example, erecting barriers to bargaining and to secure employment. According to David Peetz, who has perhaps written more on this topic than anyone else in Australia, regulatory systems promoting flexibility *for* employers may lead to cost reductions and higher profits, but they are unlikely to lead to higher productivity.¹⁸

The Closing Loopholes Bill's critics have claimed its provisions to strengthen union rights will hinder productivity growth. However, international research evidence indicates that provisions to promote unions can enhance productivity. According to the OECD, unions can contribute to “lower turnover and longer tenure [which] can reduce hiring and training costs and increase productivity”.¹⁹ This is because workers who are represented by unions are more likely to feel fairly treated and are therefore more likely to be satisfied and less likely to leave their employer. Staff retention can be good for productivity given the time and resources it takes to recruit and train new employees, which can be a drain on productivity. In many European countries, such as Denmark, strong rights and protections for union delegates are recognised as essential ingredients for cooperative and productive workplaces.²⁰

Commission Workplace Relations Education Series; Keith Hancock (2012) Enterprise bargaining and productivity. *Labour and Industry*, 22(3): 289-301.

¹⁸ David Peetz (2006) Hollow shells: The alleged link between individual contracting and productivity growth. *Journal of Australian Political Economy*, 56: 32-55.

¹⁹ OECD (2019) *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work*. Paris: OECD, p. 70.

²⁰ For example, Dansk Industri and CO-industri, Industrial Agreement 2023-2025, <https://www.danskindustri.dk/vi-radgiver-dig/di-dokumenter-for-personale/personalejuras-dokumenter/overenskomster/industrial-agreement/>.

Innovation

According to recent research by Alex Bryson at University College London, countries with comprehensive regulatory frameworks that cover a high proportion of the workforce – for example, through collective bargaining supported by unions and by discouraging outsourcing to undercut standards – can spur innovation. This is because comprehensive frameworks provide “a level playing-field between competing employers in terms of pay, [thus] permitting them to focus on other managerial priorities such as competing through product and process innovations”.²¹

Nevertheless, critics of the Closing Loopholes Bill have claimed that its provisions will stifle innovation, including in the gig economy because, according to one recent news report, this is an industry harnessing people’s desire to “work in a really different way”.²² That might be the case for some workers in the gig economy. But studies have found that many gig workers work in these arrangements because they have no other options, which is often the case for temporary residents who form a significant share of food delivery riders.²³

The businesses that the Closing Loopholes Bill is seeking to target are not agents of innovation, but rather of employment regulation subversion. A marginal increase in the cost of a meal delivered by a food delivery worker is surely a price worth paying if it helps to seal an increasingly wide hole in the regulatory framework, the effectiveness of which is critical for a dynamic labour market, a competitive economy, and a fair and cohesive society.²⁴

²¹ Alex Bryson (2023) Collective Bargaining in the UK: The Key to ‘Levelling Up’, 21 August, <https://unions21.org/ideas/collective-bargaining-in-the-uk-the-key-to-levelling-up>.

²² Jessica Yun (2023) Why Labor’s \$1 billion gig work, labour-hire reforms have been shelved. *Sydney Morning Herald*, 9 September.

²³ Tom Barratt, Caleb Goods and Alex Veen (2020) ‘I’m my own boss...’: Active intermediation and ‘entrepreneurial’ worker agency in the Australian gig-economy. *Environment and Planning A: Economy and Space*, 52(8): 1643-1661.

²⁴ OECD (2019) *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work*. Paris: OECD.

IV. Conclusion

The research evidence presented in this submission suggests the Closing Loopholes Bill's provisions on wage theft, gig work and labour hire are unlikely to stifle productivity and innovation. Instead, the evidence suggests its provisions have the potential to replace poor-quality jobs with good-quality jobs, and to reduce the scope for businesses to compete by undercutting rather than by being more productive and innovative.

The Closing Loopholes Bill's objectives are essential ones for fixing cracks in the employment regulation framework that have undermined its structural integrity and effectiveness. This is a critical task for ensuring the most urgent problems of Australia labour market are addressed – making insecure work more secure, addressing the scourge of wage theft, and restoring integrity to the bargaining system and, by extension, to the competitive playing field and social safety net.

Achieving these outcomes is integral for encouraging businesses and industries to compete in the race to the top that Australia's continued and future prosperity hinges on, rather than engaging a futile race to the bottom that Australia can never win.

For these reasons, I urge the Senate Education and Employment Legislation Committee to recommend support for the Closing Loopholes Bill.