

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

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We are four researchers with a longstanding interest and research expertise in the area of digital on-demand 'gig' work in the Australian context. We have been studying different facets of the 'gig' economy since 2016. We have published 6 peer-reviewed journal articles (with 2 more under blind-peer review and others in production), 3 academic book chapters, 11 pieces on 'The Conversation', 3 Op-eds in the Age and Sydney Morning Herald, made multiple submissions to different Commonwealth and State Inquiries, appeared as expert witnesses, and have provided ongoing media commentary. Two of us are also leading Australian Research Council funded Discovery Early Career projects into different facets of the 'gig' economy.

It is within this capacity and expertise that we 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').

For our submission, we draw upon the extensive empirical work that we have conducted. This includes interviews with food-delivery riders (n=60). A survey (n=139) and interviews (n=59) of sub-populations of rideshare drivers including those who have disability, caring responsibility and are older than age 45. A survey of Australian consumers (n=1820) about the working conditions in the 'gig' economy and the entitlements that applied to food-delivery workers. We also draw upon many years of formal and informal discussions with industry stakeholders (platforms, unions, and policymakers).

There are five parts to this submission:

1. Comments on the proposed employee definition
2. Why do 'employee-like' gig workers need the 'regulated worker' protections?
3. The impact of, and societal expectations around, the 'employee-like' reforms
4. Comments on specific aspects of the regulated worker provisions in the Closing Loopholes Bill
5. Enforcement of minimum standards for 'employee-like' workers

1. Comments on the proposed employee definition

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While most of our substantive feedback (below in part 2, 3 and 4) focuses on ‘Part 16—Provisions relating to regulated workers’ of the Closing Loopholes Bill, we wish to start by remarking on ‘Part 15—Definition of employment’.

We support the proposed introduction of a definition of employment into the Bill. The High Court decisions⁵ compelling Courts and Tribunals to prioritise contractual terms over the ‘totality of the relationship’ is problematic considering the inherent power imbalance in most work and employment relationships and how this imbalance in practice translates to contracts of adhesion.⁶ Given the prevalence of contracts of adhesion in the ‘gig’ economy as well as many other low-paid segments of the labour market, a failure to address the overly narrow interpretation of the High Court creates a form of injustice, whereby a person who has to sell their labour to sustain themselves is forced to trade-off entitlements because of the terms set by the party purchasing or intermediating the sale of labour.

2. Why ‘employee-like’ gig workers need regulatory protections?

The term ‘on-demand’ gig economy covers a broad range of economic activities. Some of the forms of work that are facilitated by online labour platforms are entirely digital and can span across borders, others (like care, food-delivery, and ride-share driving) are inherently localised as these platforms are in the business of making and maintaining local marketplaces for services.⁷

As we have argued in the academic literature,⁸ from our perspective, the ‘gig’ economy represents a novel form of work organisation and technological innovation that we believe, as a society, we should harness. At the same time, however, it is important to ensure that those who undertake this work are adequately protected.

We acknowledge that some forms of digital intermediation by platforms allow individuals to build and establish their own businesses or generate income in ways reflective of ‘traditional’ independent contracting arrangements. However, our longstanding concern is with those forms of ‘gig’ work where contracting arrangements are used and where the services are highly prescribed by the platform, where workers have no discernible opportunity to grow their own businesses, when platforms constrain workers’ ability to generate goodwill and/or an independent client base, or when these work arrangements have the potential to undermine or hollow out longstanding minimum protections.

⁵ Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd [2022] HCA 1 and ZG Operations & Anor v Jamsek & Ors [2022] HCA 2.

⁶ Flanagan, F. & Clibborn, S. (2023). Non-Enforcement of Minimum Wage Laws and the Shifting Protective Subject of Labour Law in Australia: A New Province for Law and Order? *The Sydney law review*. 45.

⁷ De Stefano, V. (2015). The rise of the just-in-time workforce: On-demand work, crowdwork, and labor protection in the gig-economy. *Comp. Lab. L. & Pol’y J.*, 37, 471.

⁸ Goods, C., Veen, A., & Barratt, T. (2019). “Is your gig any good?” Analysing job quality in the Australian platform-based food-delivery sector. *Journal of Industrial Relations*, 61(4), 502-527.; Veen, A., Barratt, T., & Goods, C. (2020). Platform-capital’s ‘app-etite’ for control: A labour process analysis of food-delivery work in Australia. *Work, Employment and Society*, 34(3), 388-406.; and, Veen, A., Barratt, T., Goods, C., & Baird, M. (2023). Accidental flexicurity or workfare? Navigating ride-share work and Australia’s welfare system. *Economic and Industrial Democracy*, 0143831X231197057.

It is important to recognise the demographics of ‘gig’ workers in Australia. As McDonald et al⁹ found in their report for the Victorian On-Demand Inquiry, workers who are often characterised as facing labour market disadvantage are overrepresented in the ‘gig’ economy. The relatively low entry barriers associated with ‘gig’ work means this work can be an important source of income for individuals from traditionally disadvantaged groups, who often face structural barriers into work and employment including conscious and unconscious biases in recruitment.¹⁰ This may extend to migrant workers, younger workers, workers with disability, workers with caring responsibilities and older workers. From our perspective, the vulnerabilities of these workers are important factors when considering affording additional protections, however such measures should be proportionate and allow for the form of work organisation to continue. The academic literature, including our research, highlights how for many of these workers the ‘gig’ economy has provided an important as well as highly valued source of income.¹¹ For workers with a disability or who have caring responsibilities, for instance, the flexibility in their schedule to accommodate planned and unplanned absences in a way that often unavailable in traditional employment.¹²

From our perspective there are three key reasons why ‘employee-like’ ‘gig’ workers require additional protections.

First, as it stands workers within the ‘gig’ economy are at the mercy of the ‘higgling’ of the market. Given that many platforms operate in relatively low profit margin industries in which labour costs are a major outlay, competition on the price of labour is a genuine or real risk. To avoid a ‘race-to-the-bottom’, it is not only in the interest of workers but also platform firms to have minimum rates that should apply to workers – which the Closing Loopholes Bill will (most likely) achieve. While some may argue that minimum rates will increase the costs of the services, something we will return to below (section 3), it is worth noting that taking labour costs out of competition means that firms will need to compete on the basis of quality and innovation.

Second, ‘gig’ workers have little capacity to challenge their dismissal [‘deactivation’] from a platform, which directly affects their livelihood. The decision to deactivate workers at times is algorithmic,¹³ although can also involve more humans-in-the-loop configurations.¹⁴ A challenge for these workers, as things stand, is that to mount a successful case against a deactivation they commonly will need to incur substantial legal costs. The Closing Loopholes Bill will enable these vulnerable workers to challenge their removal from a platform at the Fair Work Commission and provide them with a low-cost jurisdiction. Moreover, for those regulated workers earning above the ‘high income’ threshold (see also comments below), the amendments of the Independent Contractors Act 2006 will also afford them a greater opportunity to challenge unfair contract terms.

⁹ McDonald, P, Williams, P, Stewart, A, et al. (2019) *Digital platform work in Australia: Preliminary findings from a national survey*. Available at: <https://apo.org.au/node/242706>

¹⁰ Ibid.

¹¹ Goods, C., Veen, A., & Barratt, T. (2019). “Is your gig any good?” Analysing job quality in the Australian platform-based food-delivery sector. *Journal of Industrial Relations*, 61(4), 502–527. <https://doi.org/10.1177/0022185618817069>

¹² Veen, A., Barratt, T., Goods, C., & Baird, M. (2023). Accidental flexicurity or workfare? Navigating ride-share work and Australia’s welfare system. *Economic and Industrial Democracy*, 0(0). <https://doi.org/10.1177/0143831X231197057>

¹³ Veen, A., Barratt, T., & Goods, C. (2020). Platform-Capital’s ‘App-etite’ for Control: A Labour Process Analysis of Food-Delivery Work in Australia. *Work, Employment and Society*, 34(3), 388–406. <https://doi.org/10.1177/0950017019836911>

¹⁴ Adams-Prassl, J., Abraha, H., Kelly-Lyth, A., Silberman, M. S., & Rakshita, S. (2023). Regulating algorithmic management: A blueprint. *European Labour Law Journal*, 14(2), 124-151.

Third, there is strong evidence that gig workers, particularly those undertaking food-delivery work, have high instances of workplace injuries.¹⁵ The unsafe working conditions of food-delivery workers is tragically evidenced by the deaths of thirteen food-delivery workers since 2017.¹⁶ The link between precarity and workplace injuries is well established¹⁷ and therefore the introduction minimum protections should also support a reduction in workplace injuries and deaths.

3. The impact of, and societal expectations around, the 'employee-like' reforms

One argument against the proposed reforms is that the Closing Loopholes Bill will result in increased business costs and possible job losses.

In our research on consumer attitudes towards working rights and entitlements for food-delivery workers, we found that consumers had some, limited, willingness to pay extra to improve working conditions for these workers. Although it should be noted that the extra payment was inferred from responses to hypothetical scenarios rather than from observed behaviour in the market.¹⁸

While increasing prices may somewhat reduce demand, this is not the only factor which needs to be considered. Given that a service like food-delivery is a luxury expense, broader macro-economic trends like inflation and cost-of-living pressures are likely to have a far larger effect on the demand for these services.

In the context of the aged and disability care sector, in turn, demand is unlikely to be affected as care needs will remain. It can be argued whether the reforms will result in increased costs for care-users and platforms. We note that on the one hand the argument is made that there will be a compliance costs as well as the risk of increased labour costs, which would likely be passed on to care-users and may affect the amount of care they can procure.

There are conflicting appraisals about the earning of workers on care platforms. On the one hand, the Productivity Commission finds that workers on these platforms earn above award rates.¹⁹ Similarly, care platforms appear to indicate that workers on their platforms earn above or equivalent to the modern awards.²⁰ Macdonald, in contrast, argues that such assessments often fail to take

¹⁵ Sarkies, M.N., Hemmert, C., Pang, YC. et al. The human impact of commercial delivery cycling injuries: a pilot retrospective cohort study. *Pilot Feasibility Stud* 8, 116 (2022). <https://doi.org/10.1186/s40814-022-01077-1>

¹⁶ Cassidy, C. (2023). "UberEats food-delivery dies in Sydney crash", The Guardian 13 August 20213 <https://www.theguardian.com/australia-news/2023/aug/13/ubereats-food-delivery-driver-dies-in-sydney-crash-gig-economy>

¹⁷ Underhill, E., & Quinlan, M. (2011). How precarious employment affects health and safety at work: the case of temporary agency workers. *Relations industrielles*, 66(3), 397-421.

¹⁸ Smith, B., Goods, C., Barratt, T., & Veen, A. (2021). Consumer 'app-etite' for workers' rights in the Australian 'gig' economy. *Journal of choice modelling*, 38, 100254. <https://doi.org/10.1016/j.jocm.2020.100254>

¹⁹ Productivity Commission. (2022a). Aged Care Employment. Study Report. Canberra: Productivity Commission <https://www.pc.gov.au/inquiries/completed/aged-care-employment/report>

²⁰ Australia. Parliament. Senate. Select Committee on Job Security. (2021). Select Committee on Job Security: First Interim Report: On-demand Platform Work in Australia. Select Committee on Job Security.; Like Family (2023) How much am I paid? <https://help.likefamily.com.au/en/how-much-am-i-paid>; Five Good Friends (2023) Setting your Aged Care Rates – July 2023 https://helper-support.fivegoodfriends.com.au/en_us/setting-your-aged-care-rates-july-2023-By4s8pAUh; Five Good Friends Setting your Helper Rates for NDIS Members 2023 https://helper-support.fivegoodfriends.com.au/en_us/setting-your-helper-rates-for-ndis-members-2023-HyMMNEK_n; Mable (2023) – NDIS General Issues Inquiry - Submission 19 – Supplementary Submission <https://www.apf.gov.au/DocumentStore.ashx?id=54476fd5-bae3-44db-9317-65e072f8ee7e&subId=735427>

account for the appropriate classification level within a modern award based on the type of care that is provided.²¹

If current earnings are indeed at or above minimum award standards, as per the minimum standards objective (563JX(b)(ii) of the Closing Loopholes Bill, any rates set by the Fair Work Commission as part of minimum standards order will therefore most likely simply act as a safety-net and would not have a direct flow on effect. Importantly, however, having minimum rates will reduce the risk of unscrupulous operators entering the market and engaging in a race to the bottom.

Considering past workplace relations debates, employers and their associations have for many years argued that reducing penalty rates would result in job growth in sectors like hospitality and retail. Moreover, we have consistently seen these same actors cautioning against increases to minimum and modern awards. The job loss or growth argument in these instances was not born out in the evidence. For instance, the reduction of Sunday penalty rates, in 2017 and 2018, did not lead to a positive increase in employment.²² In reverse, the significant increase to minimum and award wages in 2022 does not appear to have dampened employment levels, with Australia currently experiencing historic low unemployment. If anything, more macro-economic conditions like changes to commodity prices, interest and exchange rates, and trade-terms appear to have a far greater impact on employment levels.²³

Irrespective of the economic outcome, we are firmly of the view that we should not view these workers as a mere economic commodity and their earning (potential) and working conditions must respect their human dignity, a longstanding principle within labour law.²⁴ Moreover, as some of our most recent research reveals, there is broad based support amongst the Australian public to at least have a level of minimum standards and entitlements for vulnerable ‘gig’ workers like food-delivery riders – as reflective by the graph below.²⁵

Australian consumers’ opinions on entitlements for gig-economy workers



²¹ Macdonald, F. (2023) *Unacceptable Risks: The Dangers of Gig Models of Care and Support Work*, <https://australiainstitute.org.au/wp-content/uploads/2023/05/Unacceptable-Risks-WEBr.pdf>, May 2023

²² Markey, R., & O’Brien, M. (2021). Analysing the employment impact of Sunday wage premiums reductions: Implications for minimum wage research. *Journal of Industrial Relations*, 63(5), 728–752. <https://doi.org/10.1177/00221856211021885>

²³ E.g., Productivity Commission (2023) PC Productivity insights, <https://www.pc.gov.au/ongoing/productivity-insights/productivity-growth-wages/productivity-growth-wages.pdf>; Reserve Bank of Australia (2014) Labour Movements during the Resources Boom, <https://www.rba.gov.au/publications/bulletin/2014/dec/2.html>

²⁴ Munton, J. R. (2021). *Labour law: an introduction to the law of work*. Oxford University Press.

²⁵ Goods, C., Veen, A., Barratt, T., & Smith, B. (2023). Power resources for disempowered workers? Re-conceptualizing the power and potential of consumers in app-based food-delivery. *Industrial Relations: A Journal of Economy and Society*. <https://doi.org/10.1111/irel.12340>

4. Comments on specific aspects of the regulated worker provisions in the Closing Loopholes Bill

Turning our attention now to Part 16 Division 3—Provisions of the Closing Loopholes Bill relating to ‘regulated workers’. We wish to make some specific comments on the provisions pertaining to ‘employee-like’ workers.

One cannot escape the observation that the Closing Loopholes Bill is highly prescriptive and complex. On the whole, we are of the view that the introduction of minimum standards for ‘employee-like’ workers is desirable and long overdue. There are, however, opportunities to improve the Bill.

The contractor high income threshold

As things stand, a challenge for ‘employee-like’ workers in the ‘gig’ economy is to seek recourse and redress against their deactivation from a platform. We, therefore, wholly endorse the provisions in the Closing Loopholes Bill that seek to provide these workers with access to the Fair Work Commission to challenge their removal from a platform (Part 3A-3—Unfair deactivation or unfair termination of regulated workers). We note, however, that access to this protection is conditional upon workers not exceeding the ‘contractor high income threshold’ (15C Meaning of contractor high income threshold).

While the level of the threshold is due to be set by regulation (see Explanatory Memorandum), we wish to implore the Senate Committee get more clarity from the government about the operationalisation of this threshold and ensure that is reflective of the nature and earnings of ‘gig’ workers. As an example, our recent work on the experiences of ride-share workers with disability, caring responsibilities, and aged over the age of 45 highlights is that for instance Centrelink’s income reporting requirements are not appropriately configured for the earnings of these workers. Ride-share workers, for example, are required to collect GST as well as incur significant expenses related to their work (vehicle expenses, insurances, etc.). The formula used by Centrelink overestimates these workers’ earnings, which led to income support payment being unfairly cut.²⁶

From our perspective, it would be preferable if the Closing Loopholes Bill spelled out how the ‘high income threshold’ would be operationalised to avoid a situation whereby workers who should be protected by the Bill are excluded due to the income formula used. Based on our work around the interactions of the ‘gig’ economy with the welfare system, we are of the view that the threshold should be based on net rather than gross earnings and would encourage the use of ATO reported income rather than any other variants such as those found for income reporting for Centrelink.

²⁶ Veen, A., Barratt, T., Goods, C., & Baird, M. (2023). Accidental flexicurity or workfare? Navigating ride-share work and Australia’s welfare system. *Economic and Industrial Democracy*, 0143831X231197057.

Digital labour platform deactivation code

In the academic literature, one of the most controversial aspects of the platform business model is the use of so-called ‘algorithmic management’.²⁷ Algorithmic management systems are based on self-learning algorithmic decision-making systems based on ‘big data’ which assume (traditionally human) managerial tasks and make work-related decisions including the directing, monitoring, evaluating, and disciplining of workers.

These systems are used in the ‘gig’ economy to perform different traditional managerial tasks such as matching workers and clients – either through direct allocation of tasks or through the ranking of search results. The technology is further relied upon for the monitoring of workers as they perform their work, is often used for performance appraisal and evaluation, and in the extreme for the deactivation/termination of workers.

The proposed Bill seeks to provide ‘employee-like’ workers with an unfair deactivation (clauses 536LD and 536LE — Protection from unfair deactivation or unfair Termination) protection. A serious question mark over this provision, however, is the delegation of a critical threshold question to a yet to be negotiated Digital Labour Platform Deactivation Code. For workers to claim that they have been unfairly deactivated by a platform, as per clause 536LF (C) they are required to demonstrate that ‘The deactivation was not consistent with the Digital Labour Platform Deactivation Code’.

From our perspective it is undesirable that such a critical issue is delegated to regulation. First, it means that the Senate Committee cannot reasonably ascertain who may or may not be able to make use of this additional protection – from our perspective access to this should be universal for all ‘employee-like’ workers. Second, it leaves it indeterminate at this stage as to whether the Fair Work Commission will have the ability and capability to scrutinize the algorithmic management practices of a platform to determine the appropriateness of a deactivation.

We note that the Closing Loopholes Bill is highly prescriptive on many matters yet is notably silent on the use of algorithmic management. Looking overseas for guidance, we can see that in the context of the European Union debates around the regulation of algorithmic management are much further advanced. The European Union’s General Data Protection Regulation (GDPR)²⁸, for instance, requires companies within the European Union to inform workers when automated processing and profiling methods are used, and gives workers an opportunity to request the data that an organisation has relied upon.

The draft EU Platform Directive,²⁹ in turn, will set parameters around use of algorithmic management and artificial intelligence including prohibiting platform firms from capturing information on workers’ emotional or psychological or capturing background data on workers when

²⁷ See, e.g., Duggan, J., Sherman, U., Carbery, R., & McDonnell, A. (2020). Algorithmic management and app-work in the gig economy: A research agenda for employment relations and HRM. *Human Resource Management Journal*, 30(1), 114-132.; Lee, M. K., Kusbit, D., Metsky, E., & Dabbish, L. (2015, April). Working with machines: The impact of algorithmic and data-driven management on human workers. In Proceedings of the 33rd annual ACM conference on human factors in computing systems (pp. 1603-1612); Rosenblat, A. (2018). *Uberland: How algorithms are rewriting the rules of work*. Univ of California Press;

²⁸ European Union (2016) Consolidated text: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

²⁹ Council of the European Union (2021) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving working conditions in platform work.

they are offline (Article 6, draft Directive). It will further require platforms to have humans-in-the-loop when they are using algorithmic management systems and requires them to pro-actively identify and evaluate work-related accidents, psychosocial and ergonomic risk that arise as a use of the system and force platforms to have designated human resources personnel that can override automated decision (Article 7, draft Directive). The draft Directive will also provide workers with greater informational rights and avenues to challenge automated managerial decisions (Article 8, draft Directive).

While we appreciate that some of these matters may be dealt with in future regulatory reforms (e.g., around privacy laws,) and that the Department of Employment and Workplace Relations is doing some preliminary scoping work around this, given the instrumental role that these systems play in the functioning of platforms, we see it as a missed opportunity to not more explicitly engage with this inherent technological feature of the work.

While we are cognisant about the intellectual property surrounding algorithmic management systems, it would be our view that the Fair Work Commission should have the ability to scrutinize these systems if it is deemed relevant to determine the appropriateness of a deactivation decision, rather than (possibly) being restricted by a yet to be released Digital Labour Platform Deactivation Code. Moreover, the Fair Work Commission should also be provided with the requisite capabilities to undertake this way including technical literacy skills.

Difference of minimum standards orders and guidelines

From our perspective the Bill reflects somewhat of schism with the ‘employee-like’ protections in that it contains elements of both voluntaristic and prescriptive practices. The Closing Loopholes Bill will empower the Fair Work Commission to issue both minimum stand orders (MSO) as well as minimum standard guidelines (MSG).

Given the voluntaristic nature of the MSG, it is surprising that throughout most of the Closing Loopholes Bill the MSGs are discussed after the MSOs. One would expect the Bill to adopt a cascading logic in terms of the interventions of the Fair Work Commission in ‘employee-like’ work. It is not clear from either the Closing Loopholes Bill or the explanatory memorandum why such an approach doesn’t appear in place.

Given the relatively the relatively narrow confines and non-binding nature of MSGs (536KX and 536KY) it is not clear to us how the MSG will raise standards. Hence, we are unsure about the purpose and merits of the inclusion of the MSG in the Closing Loopholes Bill.

Collective agreements

Besides the MSOs and MSGs, the Closing Loopholes Bill will also allow digital platforms to make collective agreements with organisations that are entitled to represent the industrial interest of one or more regulated workers. We note that the Closing Loopholes Bill is silent on which organisations can represent the interest of regulated workers, but the explanatory memorandum (at 111) makes it clear that these are registered employee organisations.

To an extent, the proposed collective bargaining stream for ‘employee-like’ workers seems to mimic the enterprise bargaining system. We note, however, that there are a couple of notable deviations from this system that warrant discussion.

First, unlike the enterprise bargaining system, it is unclear whether regulated workers will be able to appoint their bargaining representatives. The Bill appears to privilege registered organisations. We

question whether this is entirely appropriate. How many ‘employee-like’ workers are members of registered organisations? Like employees, from our perspective, regulated workers should have a direct say in who represents their industrial futures.

Second, given the introduction of different forms of multi-employer bargaining with the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, we note that the collective bargaining stream for regulated workers appears to only facilitate a single enterprise bargaining model. Yet, the MSOs and MSGs can apply to multiple digital platforms.

Our concern with this approach is that the MSO are likely to become a de facto quasi-award system. We would caution against the MSOs and MSGs seeking to replicate existing award structures and recognise that for instance in the care space, workers may work across traditional award demarcations on a single platform.

Given the narrow confines of the MSOs (536KL and 536KM) there is the real risk that the Bill is replicating existing problems in the modern award system, in that there will be limited incentives for digital platforms to engage in collective negotiations.³⁰ While in theory it is desirable for industrial actors to determine their own industrial futures, the real risk with the proposed jurisdiction is that any collective bargaining efforts may be undone by the existence of the MSOs. Why would digital platforms invest the time, energy and organisational resources into establishing a collective agreement when MSOs prevail (563JN(4))?

Given the relatively low-paid status of ‘employee-like’ workers like food-delivery workers, industry and sectoral approaches would be preferable as such an approach would take wages out of competition. Given the inherently localised and service nature of the work this will likely have a negligible impact on Australia’s global competitive standing.

An alternative to raising standards in the ‘gig’ economy could also be achieved by reworking the Closing Loopholes Bill to facilitate more sectoral/industry dialogue, with the seeds for such an opportunity evident in segments like ride-share driving and food-delivery, as evidenced by the memoranda of understanding between digital platforms and a registered organisation like the Transport Workers’ Union.³¹

Rather than making the Fair Work Commission the main driver of setting minimum standards through MSOs, by reworking the proposed provisions, industry could be prompted to lead such discussions and the Fair Work Commission would take a more background and facilitative role. Within the template of the Closing Loopholes Bill, effectively it would encourage digital platforms to engage in collective bargaining at the sectoral/industry level, and the Commission would ratify such agreements when concluded by a majority of platforms and workers through an MSO (thereby capturing any entities which are deliberately withholding from the process). MSOs would only be set

³⁰ For discussion about issues with modern award systems see Veen, A., Clibborn, S., & Mclvor, J. (2022). Termination of enterprise agreements under the Fair Work Act: A systematic document analysis. *The Australian Journal of Labour Law*.

³¹ Menulog – Transport Workers’ Union of Australia (2023) Charter of Principles and Ongoing Commitments to Ensure Safety and Fairness for On-Demand Delivery Couriers <https://www.twu.com.au/wp-content/uploads/2023/03/Charter-of-Principles-TWU-Menulog-signed.pdf>, March 2023; UBER – TRANSPORT WORKERS’ UNION OF AUSTRALIA (2022), Statement of Principles and Future Commitments for Workers in the On-Demand Economy, <https://www.twu.com.au/wp-content/uploads/2022/06/Statement-of-Principles-28-June-2022.pdf>, 28 June 2022; TWU (2022) DoorDash and TWU sign landmark agreement on gig workers’ rights, <https://www.twu.com.au/general/door-dash-and-twu-sign-landmark-agreement-on-gig-workers-rights>

by the Fair Work Commission in rare occasions where the parties cannot resolve the issues. At first instance, however, the Fair Work Commission would mediate and facilitate voluntary regulation.

Such an approach may also involve industry initiated and managed accreditation for digital platforms. In contrast to a government created, funded, and managed institution such as the Victorian Labour Hire authority, such an alternative vision would encourage industry to set and maintain appropriate standards and safeguards. In such a framework, the Fair Work Ombudsman could be given help industry to set reporting practices based on standards like, for instance, the *Fairwork* principles — an international NGO that seeks to highlight the best and worst practices of ‘gig’ platforms focussing on the issues of fair pay, fair conditions, fair contracts, fair management, and fair representation.³²

5. Enforcement of minimum standards for ‘employee-like’ workers

Finally, we note that the Closing Loopholes Bill is also increasing the ordinary civil pecuniary penalties for the specified civil remedy provisions including the introduction of a new criminal offence for wage theft (‘Part 11—Penalties for civil remedy provisions’). We note that via provision 272, the current and expended enforcement regime will also apply to contraventions of the minimum standards orders and collective agreements.

Given overseas experiences with regulating the ‘gig’ economy, if a more voluntarist approach is not adopted, we believe it is appropriate that a sufficiently empowered enforcement replace is in place to deter non-compliance. In Spain, for example, food-delivery platforms have openly defied and operated in breach of the Spanish Rider Law, resulting in the introduction of a more stringent enforcement regime including potential criminal penalties.³³

³² Fairwork (2023) Principles <https://fair.work/en/fw/principles> Oxford Internet Institute

³³ See Todolí-Signes A (2021) Spanish riders law and the right to be informed about the algorithm. *European Labour Law Journal* 12(3): 399-402; Waeyaert, W., Lenaerts, K., & Gillis, D. (2022). Spain: The ‘Riders’ Law’, new regulation on digital platform work. *Policy case study*; Wired (2023) Spain’s Elections Pit Gig Workers Against the Far Right, <https://www.wired.com/story/spain-elections-gig-workers-far-right>, 20 July 2023